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Consumer Provisions in Revised Article 9

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CONSUMER PROVISIONS IN REVISED ARTICLE 9

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INTRODUCTION

A. Scope of This Article

This article discusses the provisions of Revised Article 9 that apply to consumer-debtor secured transactions. It will not recount in detail the various interim positions taken by the Drafting Committee during the drafting process nor will it describe in detail the process by which the Committee decided to include the consumer provisions that are discussed here. However, it begins with a brief description of the process used by the Committee in considering consumer issues.

B. Brief Description of the Process Used To Develop Consumer Debtor Provisions in Revised Article 9

The question of how to deal with consumer transactions was one of the major concerns in the revision of Article 9. The reasons for the concern were both substantive and political. As a substantive matter, many consumers are ill-equipped to understand, or to bargain about, provisions in contracts, including security agreements, that may adversely affect them. Similarly, defaulting consumers may need

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1. Revised Article 9 adopts new terminology to describe the parties to a secured transaction. The person who is obligated on the debt is termed the “obligor”; the person who grants a security interest in the collateral is termed the “debtor.” See R. § 9-102(a)(28), (59). Of course, in most cases, the same person will owe the debt and give the interest in the collateral and so will be both obligor and debtor. In this article I will use the term debtor to describe both.

2. Revised section 9-102(26) defines a consumer transaction as follows: “‘Consumer transaction’ means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions."
more information and more protection from possible debtor overreaching than commercial borrowers. Therefore, as a policy matter, additional or different rules especially protective of consumers may be justified. As a political matter, recent experience with Article 2A and with Revised Articles 3 and 4 of the Uniform Commercial Code ("UCC") indicates that significant consumer group opposition to proposed UCC changes may delay or prevent enactment. At the same time, it was understood that securing uniform adoption of a Revised Article 9 with substantial additional special consumer provisions would be difficult. The initial report of the Article 9 Consumer Subcommittee4 issued in 1996 put the problem as follows:

An important fact in regard to consumer provisions is that the Conference [the National Conference of Commissioners on Uniform State Laws (the "National Conference")] has not been particularly successful in securing adoptions of the Uniform Consumer Credit Code which contains many consumer protective provisions similar to those being proposed by consumer groups for Article 9. The experience with the Consumer Credit Code teaches us that it is very difficult to reach a national consensus on consumer issues which is acceptable in the various states. The differences in social, economic, and political conditions in the states are sufficiently great that rules that in one state are seen as insufficiently protective of consumer interests are seen in another as unjustified interference with market forces. Therefore, the drafting participants must recognize that the question of coverage of consumer issues in Article 9 involves not only a judgment as to the best substantive rule, but also a judgment regarding whether there is sufficient consensus on the appropriate substantive rule outside the Conference and the American Law Institute (ALI) that a decision made by the Conference and the ALI would be acceptable. Therefore, provisions which the sponsoring organizations believe substantively desirable might nevertheless not be included in Article 9 because of enactability concerns.5

The concerns expressed by the Consumer Subcommittee were particularly important because Article 9 has been adopted in all

4. Creation of the Consumer Issues Subcommittee is discussed infra at text accompanying note 7. Members of the Subcommittee were Henry Kittleson (Commissioner from Florida), Sandra Stern (Commissioner from New York), Neil Cohen (American Law Institute), and Marion Benfield (Chair, Commissioner from North Carolina).
jurisdictions and Revised Article 9, it is hoped, will be quickly and uniformly adopted in all jurisdictions. A move from the present near-total uniformity to lack of uniformity would be unfortunate.

The Chair of the Drafting Committee, William Burke, wanted to get the best possible input in developing consumer proposals for Revised Article 9. He therefore wanted strong consumer debtor and consumer creditor representation in the groups that advised the Drafting Committee. Early in the process he appointed a Consumer Issues Task Force, which he hoped would lead to jointly supported recommendations.\(^6\) That Task Force met a number of times between 1993 and 1995. The Task Force discussed various proposals, but never reached agreement on a joint position. Therefore, in 1995 a Consumer Subcommittee of the full Drafting Committee was appointed by the Executive Committee of the Conference to work with Task Force members in an attempt to achieve a set of proposals that made sense economically and socially and with which both sides could agree.\(^7\)

The Consumer Subcommittee found that the consumer and creditor representatives were far apart in their views as to desirable consumer provisions in Article 9. Consumer representatives made a number of proposals for additional consumer protections in Article 9; particularly for additional consumer rights during the Article 9 foreclosure process, and for additional remedies when a creditor fails to comply with Article 9 foreclosure requirements. Among their major requests were (1) attorneys' fees for consumer plaintiffs who prevail on a claim that a creditor failed to comply with Article 9 foreclosure requirements, (2) an absolute-bar rule prohibiting recovery of any deficiency if the creditor fails to comply with the foreclosure requirements, (3) a right to reinstate the debt after repossession by making past due payments, and (4) a post sale notice of the debt, the proceeds of the sale, the costs of sale, and the resulting deficiency or surplus.

At the same time, consumer creditor representatives strongly argued against additional consumer rights or remedies in Article 9

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6. The Task Force included consumer members from Consumer's Uniform, Legal Services organizations in West Virginia and Missouri, a private practitioner with experience representing consumers in foreclosure matters, and law professors with special interest in the area. Creditor representatives included members from the three major automobile manufacturer credit arms, a representative of independent finance companies, and a representative of the California Banker's Association.

7. See Miller, supra note 3, at 200-02.
and, to the contrary, argued that the present statutory damages provisions for creditor failures in the consumer debtor foreclosure process had little relationship either to actual harm to the consumer or to reprehensibleness or willfulness of the creditor conduct. They suggested no, or reduced, statutory damages, and a good faith defense to any statutory damages. The consumer creditors (largely automobile finance creditors) also made the point that while other creditor groups might stand to gain from the changes being made by the revision of Article 9, they were happy with Current Article 9 and saw no off-setting gain to them in Revised Article 9 to counter-balance additional burdens imposed on them in consumer transactions.

Even though creditors objected to some of the consumer provisions of Current Article 9, they had in practice accepted them and there had been no strong outcry against them from trade groups. Therefore, the Consumer Subcommittee adopted as a basic guideline that Revised Article 9 should not diminish present consumer rights and remedies. The issue, therefore, was how many, if any, additional consumer protection provisions should be added to Article 9. Consumer creditors, of course, saw the initial decision not to lessen present existing consumer provisions of Article 9 as tilting the playing field in favor of consumers. Creditors were left to fight against changes urged by consumers while consumers did not have the burden of fighting to preserve the pro-consumer provisions already in the Code.

The Consumer Subcommittee, after a number of meetings with creditor and consumer representatives, presented a number of proposed new provisions giving special treatment to consumer transactions. The most important of those provisions were a reciprocal attorney’s fee provision giving a consumer who established that a creditor had violated Article 9 requirements attorney’s fees if the security agreement provided attorney’s fees for the creditor; a provision for reinstatement of the debt after repossession by making past due payments and an additional deposit; and a provision leaving to the courts the issue whether denial of a deficiency was an appropriate remedy for a creditor failure to comply with the foreclosure rules of Article 9.8 The Subcommittee also made a

number of other less important proposals.\textsuperscript{9} All proposals made by the Consumer Subcommittee were essentially accepted by the Drafting Committee, the American Law Institute ("ALI"), and the National Conference at their annual meetings in 1996.

Creditor representatives strongly objected to the pro-consumer provisions that were adopted by the National Conference and the ALI. It appeared that, if those provisions remained in the revision, there would be strong opposition from consumer creditors in the enactment process. Therefore, the Drafting Committee and the sponsoring organizations, particularly the National Conference, concluded that a new effort should be made to produce a set of Article 9 consumer provisions that would be acceptable to both consumer and creditor representatives. Therefore, that effort got under way and after a series of intensive meetings, in some of which Consumer Subcommittee representatives met separately with the consumer and the creditor groups, a final set of proposals was agreed to by both parties. It is fair to say that neither group was happy with the proposals, but both believed that the proposals agreed to were such that neither group would oppose adoption of Revised Article 9 and the Drafting Committee and sponsoring organizations believed that the proposals that finally emerged were acceptable on public policy grounds.

A significant factor in the decision to accept a set of proposals less far reaching than the Drafting Committee and sponsoring organizations had accepted at one time was the historical difficulty of securing wide-spread state enactment of consumer credit legislation. The National Conference's major effort in this area was the Uniform Consumer Credit Code, which was promulgated in 1968 with an amended version promulgated in 1974.\textsuperscript{10} That act contains a number of provisions similar to those that consumer representatives asked to be included in Revised Article 9. However, the Consumer Credit Code has been adopted in only eleven jurisdictions and, even in those jurisdictions, often with substantial changes.\textsuperscript{11} Therefore, there was doubt that similar provisions would be acceptable in most states as part of Revised Article 9.

\textsuperscript{9} See generally id. at 332.


\textsuperscript{11} The states are Colorado, Indiana, Oklahoma, South Carolina, Wisconsin, Utah, and Wyoming (1968 act); and Idaho, Iowa, Kansas, and Maine (1974 act).
I. TRANSACTIONS THAT ARE SUBJECT TO THE CONSUMER RULES OF REVISED ARTICLE 9

Current Article 9 does not define "consumer" or "consumer transaction." It does define "consumer goods" as goods that are used or bought for use primarily for personal, family, or household use, and there are some special consumer protection rules in Current Article 9 which apply to transactions in which the collateral is consumer goods. Under Current Article 9, the purpose of the extension of credit is irrelevant. Therefore, a business purpose credit is subject to the consumer rules if the collateral is consumer goods.

Revised Article 9 has a more complex set of consumer rules. Under the new act, there are three different categories of transactions: "consumer transactions," "consumer goods transactions," and other transactions in which the collateral is "consumer goods." A "consumer transaction" is one in which the credit secured is for a personal, family, or household purpose, and the collateral is personal, family, or household collateral. The collateral can be an intangible, such as an interest in a mutual fund, so long as the interest is held for personal, family, or household purposes. A "consumer goods transaction" is a transaction in which the credit secured is for a personal, family, or household purpose and the collateral is consumer goods. Finally, some provisions of Revised Article 9 apply to transactions entered into for business purposes if the collateral is consumer goods.

12. "Goods are (1) 'consumer goods' if they are used or bought primarily for personal, family, or household purposes." U.C.C. § 9-109(1).
13. See, e.g., id. §§ 9-204(2) (limitation on effectiveness of after-acquired property clause), 9-507 (statutory damages for failure to follow required foreclosure procedures).
15. "'Consumer transaction' means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions." Id. § 9-102(a)(26).
16. See id. The last sentence of section 9-102(a)(26) implies that transactions secured by consumer intangibles fall within the definition. There are substantive provisions that apply to consumer intangible secured transactions.
17. "'Consumer goods' means goods that are used or bought for use primarily for personal, family, or household purposes" Id. § 9-102(a)(23). "'Consumer-goods transaction' means a transaction in which: (A) an individual incurs an obligation primarily for personal, family, or household purposes; and (B) a security interest in consumer goods secures the obligation." Id. § 9-102(a)(24).
18. For example, the statutory damages imposed by Revised section 9-625(c) for failure to comply with the foreclosure requirements of Revised Article 9 apply to a transaction in which the collateral is consumer goods. Its application is not limited to transactions in which the credit
In the substantive sections of Revised Article 9, the terms "consumer transaction" and "consumer-goods transaction" are always used in their defined sense. Therefore, when a section applies a special rule to a "consumer transaction," the section covers consumer purpose credit secured by consumer collateral, including consumer intangible collateral. If a section covers a "consumer-goods transaction," it covers consumer purpose credit secured by consumer goods but not consumer purpose credit which is secured only by consumer intangibles. If a section covers situations in which the collateral is "consumer goods," it applies to any transaction whether or not the credit was extended for consumer purposes, if the collateral is consumer goods. Therefore, the reader must carefully note the particular phrase used in the section to determine its coverage. Similarly, in this article, the terms will be used in their defined sense and will not always call the reader's attention to the specific meaning of the term used.

Providing different rules for debts secured by consumer intangibles than for debts secured by non-consumer intangibles presents a new interpretive difficulty in Article 9, particularly for investment property held by owners of individual proprietorships. In one sense, all the property of most sole proprietorships is held for personal, family, or household purposes because the purpose of the business is to produce income for the proprietor or her family. However, that interpretation of "personal, family, or household use" would largely obliterate the distinction consumer and non-consumer debt of individuals. Credit extended for the operation of a business is not consumer debt and even consumer goods or consumer intangibles taken as security would not make the transaction a consumer transaction (though as noted above, some provisions of Revised Article 9 apply to transactions secured by consumer goods even though the credit was not for consumer purposes).

However, in cases where the debt is for a consumer purpose, there can be difficulty in deciding whether particular intangibles are held for personal, family, or household purposes. Presumably, if a sole proprietor has a separate checking account for the business, the checking account is not held for personal, family, or household purposes. But if the checking account is used for both business and personal, family, or household purposes, the test becomes whether was extended for a consumer purpose.
the account is used primarily for consumer purposes. Similarly, a
money market account with a mutual fund, for example, might be
either for business purposes, or for personal, family, or household
purposes.

However, if the employed family members are wage earners, not
business owners, perhaps all investment, savings, and bank accounts
that are used as parking places for money until it is used, even though
the use is to be in distant retirement years, should be treated as
personal, family, or household accounts. But it is arguable that active
brokerage accounts, in which the investor tries to profit from trading
activity, are held for business purposes, just as much as the assets of a
sole proprietorship. Drawing distinctions between investments based
on the way in which the investment is managed is difficult, however,
and it is hard to predict whether courts will be willing to undertake to
draw such distinctions. A court might conclude that individual trading
accounts are always consumer intangibles.

Some persons in the drafting process suggested that a dollar limit
be set above which intangible collateral would not be treated as
consumer collateral. Such a dollar limitation would have largely
solved the line drawing problem just discussed. The dollar limitation
was not adopted because of the difficulty in deciding just where such
a line should be drawn and in structuring an inflation adjustment
factor.

II. CONSUMER FORECLOSURE ISSUES

A. Introduction

Default and foreclosure matters were of greatest concern to
consumer representatives in the drafting process. Among the issues
considered were: (1) penalties for failure of the creditor to have a
commercially reasonable sale or to give proper notice of a pending
sale; (2) required notice of a pending sale; (3) low price as evidence of
a commercially unreasonable sale; (4) protections against low price
sales to parties related to the creditor or parties against whom the

19. Revised Article 9 will govern security interests in non-consumer deposit accounts, but
not security interests in consumer deposit accounts. See infra notes 35-39 and accompanying
text.

20. An account with a mutual fund is not a "deposit account" under Revised Article 9 even
though checks may be drawn against the account. See discussion infra notes 35-39 and
accompanying text.
creditor has a right of recourse; (5) conditions to the ability of a creditor to take property in satisfaction of the debt thereby avoiding the necessity of a foreclosure sale; (6) obligation of creditors to give debtors a post-sale notice of the way in which a deficiency was calculated; and (7) conditions to the ability of consumer-debtors to waive their statutory rights. These issues will be discussed below.

B. Penalties for Failure To Hold a Commercially Reasonable Sale or Failure To Give Proper Notice of a Pending Sale

1. Statutory Damages

Current section 9-507 provides that a secured party who fails to comply with the provisions of Part 5 of Article 9 (which deals with repossession and sale on default) is liable for any actual damage caused. But, 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 10 per cent of the cash price."²¹ During the drafting process, consumer representatives argued that in addition to statutory damages, a prevailing consumer should be entitled to attorney's fees. On the other hand, creditor representatives argued that the statutory damages have no relationship either to actual harm caused the consumer debtor or to the egregiousness of the creditor conduct and should be deleted or reduced except for serious misconduct. At one point in the drafting process, the Drafting Committee approved a reciprocal attorney's fee provision under which a prevailing consumer could recover attorney's fees if the security agreement provided for attorney's fees for the creditor. However, the drafters ultimately decided to make no change in the statutory damages provision and did not add a reciprocal attorney's fee provision.²² Current Article 9 applies the statutory damages rule when the collateral is consumer goods; the purpose of the debt is not relevant. The revision also applies to any transaction in which the collateral is consumer goods, thereby exactly preserving the present rule.²³

The present statutory damages, which can be quite high,
particularly in automobile financing, to some extent create a fund from which attorney's fees can be paid. However, both Current and Revised Article 9 can be read to require that actual damages be offset against statutory damages. However, a court applying the absolute bar rule might conclude that in addition to denying any deficiency, the debtor is entitled to recover the statutory damages. If the theory supporting no recovery of a deficiency after a foreclosure sale that did not comply with Article 9 requirements is that the creditor is estopped from asserting that the collateral was worth less than the debt, there would be no offsetting deficiency to reduce the statutory damages. Also, a court might conclude that the statute should be read to allow statutory damages in addition to actual damages.

There do not seem to be any cases presently allowing actual damages plus statutory damages except in the context of applying an absolute bar rule. However, Comment 3 to Revised section 9-625

24. If the debtor buys a $17,000 automobile and finances $15,000 of the purchase price over four years at nine percent interest, the finance charge will be approximately $2700. The statutory damages will be either $4400 or $4200 depending on whether the seller took back a security agreement or a third party lender loaned the consumer the $15,000. (The statutory formulation, in the revised language version, is that the consumer may recover for failure to comply with the foreclosure rules "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 10 per cent of the cash price." U.C.C. § 9-507(1).)

25. Current section 9-507(1) in pertinent part gives a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price.

Revised section 9-625(b) and (c) in pertinent part reads:

[A] person is liable for damages in the amount of any loss caused by a failure to comply with this article.

If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price.

That language suggests that statutory damages go to offset actual damages. Therefore, as actual damages approach or exceed statutory damages, there is less or no surplus to pay attorney's fees. See Conti Causeway Ford v. Jarossy, 276 A.2d 402, 407 (N.J. Ocean County Ct. 1971) (applying the setoff rule), aff'd, 288 A.2d 872 (N.J. Super. Ct. App. Div. 1972).

26. See infra note 28 and accompanying text.


states that "the statute is silent as to whether a double recovery or other over-compensation is possible in a consumer transaction." That comment invites a court to consider whether statutory damages might be awarded in addition to actual damages. If statutory damages are viewed as a substitute for a statutory attorney's fee provision, such a "double recovery" might be justified even if the court does not apply an absolute bar rule.

In situations where the debtor and the obligor are not the same person, a court might be convinced to award the statutory damages to each of them, thereby doubling the secured party's liability. However, that possibility is negated by Revised section 9-628(e). Also, the section negates dual liability in cases where the secured party is guilty of multiple violations of the foreclosure rules in Part 6. That section provides that the creditor is liable for the statutory damages only once.30

2. Possible Bar of Recovery of Deficiency

Current Article 9 does not specifically address the effect of failure to comply with the foreclosure rules of Article 9 on the ability of the secured party to recover a deficiency judgment. However, because Current section 9-507 provides that the debtor can recover any damages caused by the failure to comply with the foreclosure requirements, a logical conclusion is that the secured creditor can recover a deficiency based on the difference between the price received on the sale and the debt unless the debtor proves that a sale conducted in accordance with the requirements of Article 9 would have produced a higher price. That is, the debtor must prove damages caused by the failure to comply.31 If the debtor makes that showing, then the deficiency recovery would be based on the amount that would have been received had the creditor complied with the statutory requirements. However, only a minority of courts have reached that result.32 Most courts have applied a "rebuttable presumption" rule under which the court presumes that a sale

29. See supra note 1.

30. Revised section 9-628(e) reads: "A secured party is not liable under Section 9-625(c)(2) more than once with respect to any one secured transaction."

31. Of course, damages might include other injuries such as that caused by loss of the right to redeem if the secured party fails to give notice of the foreclosure sale.

32. See CLARK, supra note 28, ¶ 4.12[5][c], at 4-223 n.774 (listing only Alabama, Arizona, and Oklahoma as requiring debtor to prove the amount of harm caused by the failure to comply with the Article 9 foreclosure requirements).
conducted in accordance with Article 9 would have brought enough to pay the debt in full.\textsuperscript{33} Therefore, the creditor loses its ability to recover a deficiency unless it proves that a properly conducted sale would have satisfied less than the full debt. A third position adopted by some courts is the "absolute bar" rule: a creditor who fails to comply with the Article 9 foreclosure rules cannot recover a deficiency at all.\textsuperscript{34}

The drafters of Revised Article 9 concluded that the present majority rule, rebuttable presumption, rather than either of the other two rules, should be adopted in Revised Article 9.\textsuperscript{35} However, even though courts had not distinguished between consumer transactions and commercial transactions in determining which of the three rules they would apply,\textsuperscript{36} consumer advocates argued that the absolute bar rule should be adopted in consumer transactions. They argued that, even though the rebuttable presumption rule puts the burden on the secured creditor to prove that the value of the collateral is less than the debt, the usual consumer debtor is not equipped to effectively counter evidence offered by the creditor. The drafters, however, were unwilling to adopt the absolute bar rule for consumer transactions. The compromise reached in the drafting process was to limit the statutory application of the rebuttable presumption rule to non-consumer transactions.\textsuperscript{37} The statute states no rule for consumer

\begin{itemize}
\item \textsuperscript{33} See id. ¶ 4.12[5][b], at 4-220 n.764 (stating that 28 states clearly follow the rebuttable presumption rule).
\item \textsuperscript{34} See id. ¶ 4.12[5][a], at 4-217 n.760 (listing nine jurisdictions that apply the absolute bar rule: Arkansas, Delaware, District of Columbia, Maine, Maryland, Montana, Texas, Vermont, and Wyoming). Clark also notes that intermediate appellate courts in Michigan apply the absolute bar rule and that the intermediate appellate courts in Missouri and Virginia are split on whether to do so. See id.
\item \textsuperscript{35} Revised section 9-626(a)(3)-(4) reads:
\begin{itemize}
\item (3) Except as otherwise provided in Section 9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:
\begin{itemize}
\item (A) the proceeds of the collection, enforcement, disposition, or acceptance; or
\item (B) the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.
\end{itemize}
\item (4) For purposes of paragraph (3)(B), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum.
\end{itemize}
\item \textsuperscript{36} See CLARK, supra note 28, ¶ 4.12[5][a], at 4-217.
\item \textsuperscript{37} See R. § 9-626(b).
\end{itemize}
Revised section 9-626(b) provides that the intention of the drafters is to leave to the courts the determination of the proper rule in consumer transactions and that the court may not infer from the limitation of the rebuttable presumption rule to non-consumer transactions "the nature of the proper rule in consumer transactions and may continue to apply established approaches." Therefore, courts are left free to apply any of the three existing rules, or perhaps a judicially created variation, to failures of a creditor to comply with the Article 9 foreclosure rules in a consumer transaction.

The hope of consumers is that courts that presently apply the rebuttable presumption rule will continue to do so in consumer transactions even though Revised Article 9 tells them they should not do so in commercial transactions. Presumably it is very unlikely that a court that previously put the burden on the debtor to prove the harm caused by a failure to comply with the foreclosure rules of Article 9 would continue to apply that rule to consumers under Revised Article 9 while applying the rebuttable presumption rule to commercial debtors. Therefore, consumer debtors run little risk that the three or so states that use such a rule will continue to apply it to consumers.

It is difficult to know how courts will react to the separation of consumer and commercial transactions with respect to deficiency judgments. Perhaps courts that presently use the absolute bar rule will continue to apply that rule to consumers and some courts that now apply the rebuttable presumption rule to all deficiency actions will shift to an absolute bar rule for consumer transactions in spite of the fact that the statutory language clearly shows that the drafters are expressing no preference for an absolute bar rule. On the other hand, the clear statement of the drafters that the absolute bar rule is being rejected in commercial transactions might lead present absolute bar courts to adopt the rebuttable presumption rule for consumer transactions also. In a word, we will have to wait and see how courts react to the somewhat unusual compromise reached in the drafting process.

38. See id. § 9-626. The exclusion is for "consumer transactions." Therefore, the exclusion applies if the debt is incurred for personal, family, or household purposes, and the collateral, which may include intangibles, is held primarily for personal, family, or household purposes.

39. See Ruden v. Citizens Bank & Trust Co., 638 A.2d 1225 (Md. Ct. Spec. App. 1994) (holding that the absolute bar rule should apply to failure to give notice of the sale, but that the rebuttable presumption rule should apply to failure to have a commercially reasonable sale).
C. Required Notice of Pending Foreclosure Sale

1. Current Article 9

Current Article 9 succinctly addresses the duty of a creditor to give notice to the debtor prior to holding an Article 9 foreclosure sale:

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 to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.\(^4\)

This one sentence encompasses both elements of the notice requirement: the time the notice is sent, and the content of the notice; both must be "reasonable." There is no specific time of notice requirement, and there is no requirement regarding the specific contents of the notice.

2. Form of Notice in Revised Article 9

Revised Article 9 specifies a number of matters that must be disclosed in the notice of sale, all of them intended to make the debtor better able to understand the situation she finds herself in. The following information must be disclosed to all debtors, both commercial and consumer: the name of the debtor and the secured party; the collateral that is to be sold; the method of intended disposition; that the debtor is entitled to an accounting of the unpaid indebtedness and the charge, if any, for an accounting; and the time and place of a public (auction) sale or the time after which a private sale will take place.\(^4\)\(^1\) In addition, a notice to a debtor in a consumer-goods transaction must contain: (1) a description of any liability for a deficiency of the person to whom the notice is sent; (2) a telephone number from which the amount required to redeem the collateral may be secured; and (3) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured may be obtained.\(^4\)\(^2\) Neither the information required to be given to all debtors nor the additional information

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40. U.C.C. § 9-504(3).
41. See R. § 9-613(1).
42. See id. § 9-614(1).
required to be given to debtors in consumer-goods transactions has to be in any particular phrasing. However, the statute provides "safe harbor" statutory forms for both commercial and consumer-goods transactions. The consumer-goods safe harbor form is sufficiently specific and complex that it will probably be used by all well informed debtors.

Revised Article 9 provides that the notice of sale sent to commercial debtors is sufficient even though it contains "minor errors

43. See id. §§ 9-613(4), 9-614(2).
44. Revised section 9-613(5) contains the safe harbor form for non-consumer goods transactions; section 9-614(3) contains the safe harbor form for consumer goods transactions.
45. Revised section 9-614(3) provides:
The following form of notification, when completed, contains sufficient information:

[Name and address of secured party]
[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY
[Name and address of any obligor who is also a debtor]
Subject: [Identification of transaction]

We have your [describe collateral], because you broke promises in our agreement.

[For a public disposition:]
We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: ____________
Time: ____________
Place: ____________

You may attend the sale and bring bidders if you want.

[For a private disposition:]
We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments) including our expenses. To learn the exact amount you must pay, call us at [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] [or write us at [secured party's address]] and request a written explanation. [We will charge you $______ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at [telephone number] [or write us at [secured party's address]].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:
[Names of all other debtors and obligors, if any].
that are not seriously misleading." However, there is no similar provision for notice to consumer-goods debtors. Rather, the statute provides that (1) the statutory form is sufficient even if additional information appears at the end of the form; (2) the statutory form is sufficient even though it contains errors in information not required by the form, unless the error is misleading with respect to rights arising under Article 9; and (3) if a notification does not use the statutory form, other law determines the effect of including information not required by the statute.

The failure to include a minor-errors protection for the consumer-goods notice suggests that any error, no matter how slight, will make the notice inadequate and subject the creditor to substantial statutory damages recoverable for failure to comply with the Article 9 foreclosure rules even in the absence of actual harm. Whether such a result is justifiable is questionable. Errors might occur as to any of the required information: the collateral may be misdescribed (for example, 1999 automobile described as 1998); debtor's or creditor's address may be misstated; the time of a public sale may be misstated; or the telephone number of the creditor may be misstated. If the model year of a repossessed automobile is misstated in the notice of sale, it is very unlikely than any harm will be caused by that alone. The debtor will almost certainly know that there has been a mistake. Similarly, suppose a person preparing the notice improperly enters the debtor's address as 11 Overlook Circle, when the correct address is 9 Overlook Circle, but the post office employee delivers the notice to the correct address. Here, also, there seems to be no harm at all. Similarly, if the notice spells the debtor's name as John when it is Johan there would seem to be no damage at all except possibly to the debtor's sensibility.

No doubt the absence from section 9-614 of the minor-errors-not-seriously-misleading defense suggests that courts should read the statutory requirements for the consumer-goods notice more strictly than they read the statutory requirements for the non-consumer-goods notice. Also, there is no statement here, as there is in the

46. R. § 9-613(3)(B).
47. See id. § 9-614(4)-(6).
48. See supra notes 21-30 and accompanying text.
49. If an advertised notice of sale misstates the model year of an automobile being sold, it is quite likely that a court would conclude that there had not been a commercially reasonable sale.
sections dealing with the absolute bar rule\textsuperscript{50} or the purchase money rules\textsuperscript{51} that by silence Article 9 intends neutrality on the issue whether a minor-errors-not-seriously-misleading defense is available for errors in the consumer-goods notice. However, neither of those considerations need lead courts to the conclusion that every error, no matter how trivial, leads to liability. Surely there must be some de minimus standard below which there is no violation even though a technical error has occurred.

The application of a de minimus standard would still leave room for a difference in result for failures in a non-consumer goods notice and failures in a consumer-goods notice. Suppose, for example, that a notice of sale states that an auction will be held at 2 p.m. but advertised notices state that the sale will be held at 3 p.m. and it is actually held at 3 p.m. In a commercial context, a court could conclude that the error in the notice as to time of sale was minor and not seriously misleading unless the debtor shows some actual prejudice from the mistaken notice. In the consumer-goods context, however, a court might conclude that the notice was inadequate without imposing any duty on the consumer debtor to prove harm because it is conceivable that harm might result, if, for example, a prospective bidder alerted by the debtor arrived at the sale location at 2 p.m. and decided not to stay an hour to be present at 3 p.m. or left assuming that the sale had been canceled. If so, the consumer could recover the substantial statutory damages available for violations of Part 6 by creditors.\textsuperscript{52}

The notice of sale is not required to state the amount of the debt nor the amount required to redeem.\textsuperscript{53} Therefore, there is no risk of incurring the substantial statutory penalties because of mistakes in the amount of the debt or the amount required to redeem. However, if a creditor voluntarily states the dollar amount of the debt or the amount needed to redeem in the notice the creditor might be subject to damages for violation of Part 6 if the amount is misstated. The misstatement might be an error "misleading with respect to rights under this article," which would make the notice insufficient,\textsuperscript{54} presumably thereby triggering statutory damages. Therefore,

\textsuperscript{50} See supra notes 35-39 and accompanying text.
\textsuperscript{51} See infra text following note 142.
\textsuperscript{52} See supra notes 21-34 and accompanying text.
\textsuperscript{53} See form set out in supra note 45.
\textsuperscript{54} See R. § 9-614(5).
creditors would be ill advised to include any dollar amounts in the notice of pending sale.

As noted above, the statute provides that the statutory notice in consumer-goods transactions is sufficient even if additional information appears at the end of the form. Does the existence of that provision create an inference that if the additional information appears at the beginning of the form, or interspersed with the required information, the notification is not sufficient? An argument can be made that the statute is merely silent concerning whether additional information at any place other than the end affects the sufficiency of the form and that the issue must be determined by a court case to case. On the other hand, presumably the protection for additional information only if it is at the end of the form is based on the belief that the statutorily required information ought to appear first, not obscured by other information. That line of reasoning suggests that additional information at any place other than the end of the form would make the form insufficient. In any event, any well-informed creditor which uses the statutory form will put additional information only at the end of the form.

Revised section 9-614(6) provides that if the consumer-goods notice of sale is not in the statutory form, “law other than this article determines the effect of including information not required [by this section].” The intent of this provision is not clear. It is unlikely that there is “other law” that in any direct sense covers the issue. Perhaps the reference is to more general rules like estoppel, misrepresentation, or fraud, which conceivably might have application to some situations. If so, however, it seems that a creditor might be treated more leniently with respect to the location of additional information if the statutory form is not used than if it is. Even if the statutory language merely intends to say that the court can determine whether the location of additional information in a notice not in the statutory format makes the notice insufficient, the result is still likely to be more lenient treatment of variations in the location of additional information than if the statutory form is used. But, if use of the statutory form becomes standard, the issue will seldom arise.

3. Time of Notice in Revised Article 9

As noted above, Current Article 9 requires that reasonable notice of the pending foreclosure sale be given. Secured creditors
wishing to remove some of the uncertainty as to whether the statutory requirements for foreclosure are being complied with, asked for a bright-line rule for time of notice. Presently, many security agreements provide that a notice sent ten days before a sale is sufficient, and courts have sustained those provisions.\(^5\) Therefore, the drafters of Revised Article 9 proposed that the statute state that a notice given ten days before the time of disposition is "reasonable."

However, consumer representatives believed that sometimes ten days would be too short a notice in consumer transactions. At one point, consumer representatives argued for a twenty-one-day notice requirement. However, the drafters rejected that proposal because there are significant costs to forced delays in foreclosure. Each day the sale is delayed is a day when interest is lost on sale proceeds and a day in which costs of holding the goods are being incurred. Therefore, the drafters believed that a forced twenty-one-day delay in sale would harm many consumers by increasing the costs of the sale and the size of a deficiency.

The drafters, however, acceded to the consumer position to some extent. Under the revision, in other than consumer transactions, a notice sent ten days before the earliest time of disposition set forth in the notice "is sent within a reasonable time."\(^5\) But in consumer transactions, whether a notice is sent within a reasonable time is a question of fact, and no safe-harbor time is stated in the statute.\(^5\) The failure of the statute to give approval to a ten-day notice in consumer transactions might lead courts to find that a contracted for ten-day period is manifestly unreasonable and not effective to fix time of notice: at least the failure to give statutory approval to a ten-day notice invites such an argument on behalf of a consumer debtor. Also, it should be noted that there is no provision here, as there is elsewhere in the statute, that courts should not draw any inferences as

\(^{55}\) See Aetna Fin. Co. v. Culpepper, 320 S.E.2d 228 (Ga. Ct. App. 1984) (approving a security agreement provision fixing a ten-day notice); CLARK, supra note 28, ¶ 4.08[7][c], 4-138 (asserting that no court has invalidated a ten-day notice provision). Current section 9-501(3) permits parties to fix standards for the performance of their obligations including the obligation to give reasonable notice, if the standards are not manifestly unreasonable. Revised section 9-603(a) continues the right to fix standards if they are not manifestly unreasonable.

\(^{56}\) R. § 9-612(b).

\(^{57}\) See id. § 9-612(a). The exclusion from the ten-day safe harbor is for consumer transactions, not just consumer-goods transactions. Therefore, the exclusion is broader than the additional notice provisions of Revised section 9-614 that apply only to consumer-goods transactions.

\(^{58}\) See id. § 9-612(b).
to the proper rule in consumer transactions from the limitation of the
ten-day safe-harbor provision to commercial transactions. Therefore,
it may be risky for the creditor to contract for, or to give, only a ten-
day notice of sale in consumer transactions.

D. Post-Sale Notice in Revised Article 9

Probably most foreclosure sales do not produce a price high
enough to discharge the debt. In those cases, the debtor will still owe
the remainder of the debt (the "deficiency"). At present there is no
requirement that the creditor, when demanding that the debtor pay
the deficiency, give any accounting showing how the deficiency was
calculated. Consumer representatives in the drafting process argued
that creditors sometimes fail to properly rebate unearned finance
charges or refunds of insurance premiums when making a claim for
deficiency. They believed that requiring an accounting to the debtor
after foreclosure would make creditors more careful about giving
rebates and refunds. Also, they argued that a notice showing the price
received at the sale could alert consumers to possible problems with
the sale itself. Creditors, on the other hand, believed that consumers
would not gain enough from an automatic post-sale disclosure to
justify the additional expense to creditors (and thus to borrowers) or
to justify an additional statutory requirement for which there would
be statutory penalties for failure to comply. Creditors noted that
under Current section 9-208 a debtor can demand an accounting\(^\text{59}\) and
that they would not object to having to provide post-sale information
on demand. Creditors were also concerned about the practical
problems of being sure that they could comply with a statutory
requirement that a post-sale notice be sent before collection efforts to
recover a deficiency begin.

The drafters decided to include a post-sale notice requirement
for consumer-goods transactions but, in a concession to creditor
concerns, provided only minimum penalties for creditor failures
regarding the notice.\(^\text{60}\) The notice is required if the consumer-goods
debtor is entitled to a surplus or is liable for a deficiency.\(^\text{61}\) The notice

\(^{59}\) Current section 9-208 does not fit the post-sale case well. It requires that the debtor
sign a statement indicating the amount the debtor believes is due and send it to the creditor. The
creditor then has an obligation to approve or correct the statement. In the post-sale case, the
debtor would have little basis on which to state an amount due.

\(^{60}\) See infra notes 66-69 and accompanying text.

\(^{61}\) See R. § 9-616(b).
must be sent: (1) before or at the time the creditor pays over any surplus or makes written demand for payment of the deficiency or (2) within fourteen days after receiving a request for the notice from the debtor or consumer obligor.\textsuperscript{62}

Consumer representatives asserted that there is some practice, particularly in automobile finance, of the creditor always bidding in at the amount of the debt and expenses and then reselling the car. In that case, a notice might alert a debtor that the collateral had been bought by the creditor at a such a low price that it suggests that the sale was not commercially reasonable. However, the statute does not require an accounting if there is neither a deficiency nor a surplus; there is not even a right to request an accounting.\textsuperscript{63} Also, there is no obligation to give the notice if the creditor waives the right to a deficiency in a record.\textsuperscript{64}

The post-sale notice must state the aggregate debt secured by the security interest, the price received at the sale, and must disclose rebates or credits by type and the various expenses of repossession and sale by type, though in both cases, the dollar amount can be broken down by type of credit or expense or aggregated as a single amount.\textsuperscript{65}

\textsuperscript{62} See id.
\textsuperscript{63} See id.
\textsuperscript{64} See id.
\textsuperscript{65} Revised section 9-616(c) reads:
\begin{itemize}
\item[(c)] [The post-sale notice] must provide the following information in the following order:
\begin{enumerate}
\item the aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:
\begin{enumerate}
\item if the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or
\item if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before disposition;
\end{enumerate}
\item the amount of proceeds of the disposition;
\item the aggregate amount of the obligations after deducting the amount of proceeds;
\item the amount, in the aggregate, or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;
\item the amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1); and
\item the amount of the surplus or deficiency.
\end{enumerate}
\end{itemize}
The burden on creditors imposed by the requirement is lessened by two things. First, an explanation that substantially complies with the statutory requirements is sufficient even though it contains minor errors if those errors are not seriously misleading. Second, a secured party who fails to give a proper notice is not liable for statutory damages of the finance charge plus ten percent of the principal, which is applicable to most failures to comply with Part 6. Rather, statutory damages are limited to $500 and those damages are recoverable only if the secured party fails to give the notice after a demand has been made or if the failure is "part of a pattern, or consistent with a practice, of noncompliance." Presumably, the "consistent with a practice" provision is intended to reduce the burden of proof imposed on the consumer who did not make a demand but claims the $500 damages. Even though the consumer can only show what happened in the particular case, a finder of fact might decide that the conduct in that case was "consistent with a practice" of not sending the required notices.

The debtor or consumer obligor can also recover any actual damages suffered in addition to the $500 statutory damages. In order to recover actual damages, the consumer needs merely to show that Revised section 9-616 was not complied with; he does not have to show that he made a demand for the notice or that the failure to comply with the statute was consistent with a practice of failure to comply. However, it is not easy to visualize what actual damages might arise from failure to send the notice in addition to damages that may arise from failure to have a commercially reasonable sale.

E. Foreclosure Sales to Related Parties or Parties Liable to the Secured Party Under a Guarantee or Repurchase Agreement

1. Current Article 9—Purchase at Foreclosure Sale by Secured Party

Under Current Article 9, a secured party cannot buy the

66. See R. § 9-616(d).
67. Id. § 9-625(e).
68. See id. Revised section 9-625(c)(2) read literally would also give statutory damages of the finance charge plus 10% of the principal debt for a failure to give the post-default notice as required by section 9-616 because it awards those damages for any failure to "comply with this part." However, section 9-628(d) provides that a secured party is not liable to any party under section 9-625(c)(2) for failure to comply with section 9-616.
69. See id. § 9-625(b).
collateral at a private sale, but may do so at a public sale.\textsuperscript{70} The reason for the restriction is that if the secured party could buy at a private sale, it could sell to itself at below a fair foreclosure price, seek a deficiency based on the low price, and then resell the collateral for a profit. If the private sale is to a third party, the secured party has no incentive to sell at below a fair price because any excess in value of the collateral above the foreclosure sale price goes to the third party rather than to the secured party. In the public sale case, it is assumed that the presence of third-party bidders at the sale will prevent the secured party from being able to buy the collateral for less than fair foreclosure value.

2. Current Article 9—Purchase at Foreclosure Sale by Related Party

If the sale is at auction, parties related to the secured party, such as a parent or subsidiary corporation, should be able to buy just as the creditor itself can buy. If, however, the sale is a private sale, a creditor may have an incentive to sell to a related party at a low price and let the related party capture the excess value in the same way that the creditor could capture the excess value in a sale to itself. In spite of the lack of incentive to sell at the best possible price, Current Article 9 does not prohibit private sales to related parties. However, a court might find that a sale to a related party is in fact a sale to the secured party itself and, therefore, a violation of Article 9 if the sale is a private sale. A Georgia court did so hold in 1974.\textsuperscript{71}

3. Current Law—Purchase at Foreclosure Sale by Recourse Party

Many sellers who sell on credit, taking a security interest in the item sold, then assign the security interest and debt to a finance company or bank. It is common for such an assignment transaction to include a recourse agreement under which, upon the debtor's default, the seller (recourse party) will buy back the security interest at the amount of the debt still owed. If the seller buys back the security interest, it will then hold an Article 9 foreclosure sale to realize on the collateral. Other recourse parties, such as co-makers on secured

\textsuperscript{70} See U.C.C. § 9-504(3). The secured party may buy at a private sale "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." \textit{Id.}

\textsuperscript{71} See Luxurest Furniture Mfg. Co. v. Furniture Warehouse Sales, Inc. 209 S.E.2d 63 (Ga. Ct. App. 1974) (private sale to corporation owned by creditor's wife and managed by creditor violated the prohibition against private sales to the creditor).
notes, or guarantors of debtors, on default of the debtor, whether or not obligated to do so, may pay off the debt and take an assignment of the creditor’s rights under the security agreement.

However, sometimes rather than assigning the security interest to the recourse party, the holder of the security interest will conduct an Article 9 sale at which the recourse party may buy. That sale might either be an auction sale or a private sale. Because the secured party can buy at its own auction sale, the recourse party should also be able to buy at such a sale. On the other hand, because the secured party cannot buy at its own private sale, there is reason to deny a recourse party the right to buy at such a sale.

If the secured party has a recourse agreement with a third party under which the third party is liable for any deficiency, the creditor does not have an incentive to get the best price. Therefore, the secured party may allow the recourse party to “buy” the collateral at a low price because the price received by the secured party is meaningless to it. It will be paid the full debt by the recourse party in any event. The only economic effect of the sale to the recourse party is to fix the amount of the deficiency, which, if collected, will inure to the benefit of the recourse party.

In that context, the meaning of Current section 9-504(5) is unclear. That section reads:

A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Does section 9-504(5) merely record the obvious fact that a security interest can be assigned to a recourse party, or does it go

72. A mathematical example may help. Suppose creditor, who has a full recourse agreement with a dealer, repossesses an automobile when the unpaid debt is $10,000. Dealer will be obligated to pay creditor any deficiency after the automobile is sold, but dealer will be able also to assert a deficiency claim against the buyer of the automobile as assignee of, or by subrogation to, the rights of the secured party. The reasonable foreclosure value of the automobile is $7,000. In a private sale, dealer buys the automobile for $5,000. He pays the creditor another $5,000 (the deficiency) for a total of $10,000. Dealer then asserts a deficiency claim against the buyer for $5,000. If dealer had bid fair closure value, $7,000, he would have paid the deficiency of $3,000. But, if he had bid fair foreclosure value, he would have only has a $3000 deficiency claim against the buyer. As the example shows, the only effect of the foreclosure price when the sale is to a recourse party is to fix the deficiency owed from the debtor. The price has no effect on the recourse party’s liability, which is always to pay the full debt.
further and say that a purported sale to a recourse party is not an effective foreclosure sale? It is certainly true that any foreclosure sale involves a "transfer of the collateral"; therefore, the purpose of 9-504(5) may be to turn any purported sale into merely an assignment to the recourse party who must then conduct a sale. However, nothing in the comments suggests that result and some commentators have thought that the section refers only to cases in which the recourse party takes back the security interest intending then to hold a foreclosure sale. The courts have been divided, but a substantial number have held that the section denies effectiveness to a purported foreclosure sale if the sale is to a recourse party. There are cases, however, holding that section 9-504(5) does not prohibit foreclosure sales to related parties.

If a purported sale to a recourse party is not an effective foreclosure sale, a number of consequences follow: (1) the price received at the sale cannot be used to measure a deficiency, (2) the recourse party must now hold a foreclosure sale, and a subsequent sale by the recourse party will fix the deficiency, (3) any defects in the first sale or in notice of that sale will be irrelevant because that was not an Article 9 sale, and (4) the recourse party is required to comply with the Article 9 notice and sale requirements when it disposes of the collateral.

4. Treatment of Sales to Related Parties and Recourse Parties in Revised Article 9

Consumer representatives in the drafting process argued that Current section 9-504(5) should be read to deny foreclosure sale status to any sale, either private or at auction, to a recourse party and that such an interpretation of the provision should be made explicit in Revised Article 9. Therefore, in all sales to recourse parties, the recourse party would be required to conduct an Article 9 foreclosure sale by which any deficiency would be measured.

74. See CLARK, supra note 28, ¶ 4.08[8][c], at 4-168.
77. See generally id.
78. See Stoppi v. Wilmington Trust Co., 518 A.2d 82, 84 (Del. 1986).
The drafters, however, rejected a prohibition of sales to related parties or to recourse parties. Revised section 9-610(c) continues the present prohibition on a secured party's buying at his own private sale, but there is no restriction on purchases by recourse parties or related parties. Current section 9-504(5), which, as noted above, many courts construed as prohibiting foreclosure sales to recourse parties, is rephrased in Revised section 9-618 to make clear that foreclosure sale purchases by recourse parties are not covered by the section. Comment 3 to Revised section 9-618 notes that a recourse party may buy at the secured party's foreclosure sale. The comment also says that the contrary reading of Current section 9-504(5) is "unreasonable" because the secured party itself can buy at a public sale, and there is no reason for giving lesser rights to a recourse party. (The comment neglects to say that because the secured party cannot buy at its own private sale, there is no reason to give a recourse party greater rights.)

Instead of a prohibition on sales to related or recourse parties, Revised Article 9 subjects such sales to a special scrutiny, which, like "strict scrutiny" in constitutional law jurisprudence, may be difficult to apply to specific cases. Revised section 9-615(f) reads:

The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor, if:

(1) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

80. Revised section 9-618 reads (emphasis added):

(a) A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

(1) receives an assignment of a secured obligation from the secured party;

(2) receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or

(3) is subrogated to the rights of a secured party with respect to collateral.

Subsection (b) states that transactions described in subsection (a) are not foreclosure sales but do relieve the secured party of further duties under Article 9. See R. § 9-618(b).

81. See id. § 9-618 cmt. 3.

82. See, for example, the discussion in Laurence H. Tribe, American Constitutional Law 1451-54 (2d. ed. 1988).

83. Revised section 9-102(62) and (63) define related parties:

(62) "Person related to," with respect to an individual, means:

(A) the spouse of the individual;

(B) a brother, brother-in-law, sister, or sister-in-law of the individual;
(2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

The section’s specific treatment of low price sales to related parties seems to so undercut holdings under Current Article 9 that a court may find that a private sale to a related party is, in effect, a sale to the secured party itself and is not a proper sale (Revised Article 9 continues to prohibit purchase at a private sale by the secured party itself). However, the section also applies to a purchase by the secured creditor itself at auction sale, at which it can buy. Therefore, if the secured party advertises an auction sale and bids in itself, it will be subject to a claim that the price paid was significantly below the range of prices which an unrelated bidder would have paid. The risk of an adverse finding on that issue is not great if other bidders were present, but if the advertised auction is not attended by other bidders and the secured party buys in, there is a risk of an adverse finding.

While the new provision injects an additional element of risk to purchases by the secured party, a related party, or a recourse party, it also rejects the idea that an unjustifiably low price in a sale to any of those parties is necessarily a commercially unreasonable sale subjecting the secured party to the statutory damages that are

(C) an ancestor or lineal descendant of the individual or the individual’s spouse; or
(D) any other relative, by blood or marriage, of the individual or the individual’s spouse who shares the same home with the individual.

(63) "Person related to," with respect to an organization, means:
(A) a person directly or indirectly controlling, controlled by, or under common control with the organization;
(B) an officer or director of, or a person performing similar functions with respect to, the organization;
(C) an officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A);
(D) the spouse of an individual described in subparagraph (A), (B), or (C); or
(E) an individual who is related by blood or marriage to an individual described in subparagraphs (A), (B), (C), or (D) and shares the same home with the individual.

84. "Secondary obligor" means an obligor to the extent that:
(A) the obligor’s obligation is secondary; or
(B) the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

R. § 9-102(71). Recourse parties, co-makers and other guarantors fit within this definition. Revised section 9-618, which replaces Current section 9-504(5), refers to "secondary obligors" rather than describing types of secondary obligors.

85. See supra note 71 and accompanying text.
imposed in favor of consumer debtors. However, as is the case generally, a low price may suggest that the other aspects of the sale should be carefully examined to determine whether the sale was commercially reasonable.

Presumably, in a case in which Revised section 9-615(f) comes into issue, the debtor will allege that the sale was not commercially reasonable and, further, that even if it was commercially reasonable, the price received was significantly below the range of prices that a sale to a nonrelated party would have brought. In a nonconsumer case, the debtor's remedy will be essentially the same if either of the debtor's contentions is found to be true. In either case, the deficiency or surplus will be determined by the price that would have been received in a hypothetical sale: either a sale conducted in accordance with the Article 9 requirements if the sale was not commercially reasonable, or a sale complying with the Article 9 requirements to a disinterested third party, if the sale was commercially reasonable but produced a price significantly below what a sale to a disinterested third party would have brought. However, in a transaction in which the collateral is consumer goods, the secured party will not be liable for statutory damages based merely on the fact that the price received was significantly below the price that would have been received in a sale to an unrelated party, but will be liable for the statutory damages if the court finds that the sale was not commercially reasonable. Therefore, in a transaction secured by consumer goods, the debtor will have an incentive to show not merely that the sale to a related party was below the reasonable range of prices that a sale to a nonrelated party would have produced, but also that the sale was not commercially reasonable. That incentive may be encouraged by the burden of proof rules, which are discussed next.

F. Burden of Proof When a Deficiency Is Sought

Revised section 9-626(a) deals with burden of proof issues when a deficiency is sought or the debtor claims that a surplus is too low and with the amount of debtor's damages if the Article 9 foreclosure

86. [*See R. § 9-615 cmt. 6.*]
87. "[A] low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." [*See id. § 9-627 cmt. 2.*]
88. [*See id. § 9-626(a)(3).*]
89. [*See id. § 9-615(f).*]
CONSUMER PROVISIONS IN REVISED ARTICLE 9

rules have not been complied with.\textsuperscript{90} Those rules, however, apply only to nonconsumer transactions. Under those rules, the secured party must prove compliance with the Article 9 foreclosure rules if the debtor raises the issue.\textsuperscript{91} If the sale was to a person described in Revised section 9-615(f)\textsuperscript{92} and the debtor claims that the price was too low under that section, the debtor must prove that the price received was significantly below the range of prices that would have been received on a sale to a disinterested third party.\textsuperscript{93} If that is proven, the statute does not address the issue of who has the burden of proving the amount that would have been received on a complying sale to a disinterested party.\textsuperscript{94} Perhaps the assumption is that the deficiency or surplus should be calculated based on the lowest price within the “range of prices” that a disposition to a disinterested party would have brought. As noted above, the likely scenario is that the debtor will allege that the sale was commercially unreasonable and, if the sale was to a person described in section 9-615(f), that, in any event, the price received was significantly below the range of prices that would have been received from an unrelated party. In such a case, the creditor has the burden of proof on the first issue and the debtor has the burden as to the second issue.

As noted above, the burden of proof rules just discussed do not apply to consumer transactions. The statute states that the limitation of the rules of the section to nonconsumer transactions “is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.”\textsuperscript{95} The primary purpose of the language just quoted is to leave to the courts the issue of whether the “rebuttable presumption rule” or the “absolute bar rule” should apply to consumer transactions. However, the exclusion of consumer transactions from the rules of the section also has the effect of excluding those transactions from the rule that the secured party has the burden of proving that a commercially reasonable sale was held

\textsuperscript{90} See supra notes 21-36 and accompanying text (regarding damages for failure of the secured creditor to comply with the Article 9 foreclosure rules).
\textsuperscript{91} See R. § 9-626(a)(1), (2).
\textsuperscript{92} Under this section, a person is the secured party, a related party, or a recourse party.
\textsuperscript{93} See R. § 9-626(a)(5).
\textsuperscript{94} See id. §§ 9-615(f), 9-626.
\textsuperscript{95} Id. § 9-626(b).
and from the rule that the debtor has the burden of proving that a sale to the secured party, a related party, or a recourse party, was significantly below the range of prices that would have been received from an unrelated party.

It is unlikely that a court would place a higher burden on a consumer debtor than the statute imposes on a commercial debtor. Therefore, where this section places the burden on the secured party, a court will almost certainly place it there in a consumer transaction. However, the section places the burden on a commercial debtor to prove that the price on a foreclosure sale to the secured party, a related party, or a recourse party was significantly below the range of prices that would have been received on a sale to an unrelated party. It is quite possible that courts will place the burden as to that issue on the secured party in a consumer transaction. Placing the burden on the secured party would be reasonable because it is much more likely to know, or have access to the relevant facts, than a consumer debtor. If so, secured parties need to be prepared to address that issue in consumer transactions if the sale is to the secured party, a related party, or recourse party. If the court places the burden on the secured party, the issue is likely to be raised by the consumer debtor in every litigated case involving a sale to a related or recourse party.96

G. Consumer Debtor Waiver of Rights Under Part 6

Generally, debtors, including consumer debtors, cannot waive the provisions in either Current or Revised Article 9 that require the secured creditor to proceed in a certain manner on debtor’s default. However, under Current Article 9, a debtor can waive the right to notification of the time of sale by “signing after default a statement renouncing or modifying” the right to notice97 and can waive the right to redeem by agreement “in writing after default.”98 Also, under Current Article 9, a debtor can waive the requirement of section 9-505(1), which requires sale within ninety days after taking

96. Comment 5 to Revised section 9-626 reads:
In a non-consumer transaction, subsection(a)(5) imposes upon a debtor or obligor the burden of proving that the proceeds of a disposition are so low that, under Section 9-615(f), the actual proceeds should not serve as the basis upon which a deficiency or surplus is calculated. Were the burden placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor.

97. U.C.C. § 9-504(5).
98. Id. § 9-506.
possession of the collateral if a consumer has paid sixty percent of the obligation,\(^9\) by signing "after default a statement renouncing or modifying his rights under this Part."\(^{10}\)

Under Revised Article 9, a consumer debtor cannot waive the right to redeem in a consumer-goods transaction\(^{101}\) but can waive the right if the collateral is consumer intangibles.\(^{102}\) Revised Article 9 continues to permit consumer debtors to waive the right to notification of the time of planned disposition of collateral.\(^{103}\) It also permits a debtor to waive the right to require sale within ninety days after repossession if sixty percent of the debt has been paid if the collateral is consumer goods.\(^{104}\) In all three cases in which a consumer debtor may waive rights under Revised Article 9, the waiver must be by "an agreement to that effect entered into and authenticated after default."\(^{105}\) Current Article 9 allows waiver of notification and of the right to require sale within ninety days by signing a "statement" after default.\(^{106}\) However, waiver of the right to redeem requires that the debtor agree "in writing after default."\(^{107}\)

The requirement of Revised section 9-624 that a waiver be by "an agreement [emphasis added] to that effect entered into and authenticated after default" is intended to direct the court’s attention to the fact that papers signed by a debtor after default may contain "waivers" to which the debtor has not actually "agreed." The idea is that the creditor trying to claim protection for its conduct, based upon

\(^{9}\) See id. The obligation arises if the debtor has paid 60\% of the cash price in a credit sale or 60\% of the loan if the transaction was a loan. See id. § 9-506(1).

\(^{10}\) Id. § 9-505(1).

\(^{101}\) Revised section 9-602 says that "[e]xcept as otherwise provided in Section 9-624, . . . the debtor or obligor may not waive or vary the rules stated in . . . (11) Section 9-623, which deals with redemption of collateral." Section 9-624(c) reads: "Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under Section 9-623 only by an agreement to that effect entered into and authenticated after default." Section 9-624(c) looked at alone could be read as allowing waiver in consumer transactions without any restriction. However, it must be read together with section 9-602 which says that except as provided in section 9-624 the right of redemption cannot be waived. Because section 9-624(c) does not apply to consumer goods transactions, the non-waiver rules are left in place.

\(^{102}\) See R. § 9-624(c).

\(^{103}\) See id. § 9-624(a).

\(^{104}\) The provision requiring disposition is in Revised section 9-620(e). That section continues the rules of Current section 9-506. Revised section 9-624(b) states the waiver rule. In addition to section 9-624(b), section 9-620(f) allows the creditor to delay foreclosure beyond 90 days to "any longer period to which the debtor and all secondary parties have agreed in an agreement to that effect entered into and authenticated after default."

\(^{105}\) R. § 9-624.

\(^{106}\) See U.C.C. §§ 9-504(5), 9-505(1).

\(^{107}\) Id. § 9-506.
a waiver by the debtor, must show agreement by the debtor in the same sense that a party claiming under a contract has to prove that the other party has entered into the agreement. Consumer representatives in the drafting process suggested that often on repossession the debtor is asked to sign a number of papers or a single paper with many provisions that may include a waiver. Sometimes the debtor will sign not being aware that by signing she is waiving rights. The use of the word "agreement" in the Revised sections may somewhat more clearly address that problem than does the reference to signed "statements" in Current Article 9. As Comment 5 to Revised section 9-602 says:

Under Section 1-201, an "'agreement' means the bargain of the parties in fact." In considering waivers under Section 9-624 and analogous agreements in other contexts, courts should carefully scrutinize putative agreements that appear in records that also address many additional or unrelated matters.

H. Partial Strict Foreclosure

"Strict foreclosure" is the name given to an agreement between the secured party and the debtor that the secured party will accept the collateral in full satisfaction of the debt, thereby avoiding the necessity of a foreclosure sale. Partial strict foreclosure is an agreement that the secured party may forego foreclosure and take the collateral in partial satisfaction of the debt, with the debtor remaining liable for the remainder. Current section 9-505(2), which deals with strict foreclosure, does not specifically refer to taking the collateral in partial satisfaction of the debt, but courts have held that such an agreement is permissible as a modification of the debtor's rights that is permitted by Current section 9-505.108

Revised section 9-620, which deals with strict foreclosure, however, prohibits partial strict foreclosure in consumer transactions. The reason for the prohibition is the fear that consumers, particularly in automobile transactions, will not be good judges of value of the collateral and, therefore, can be taken advantage of by creditors. The restriction, however, is not limited to consumer goods transactions. Therefore, if the collateral is consumer investment property and the transaction is for personal, family, or household purposes, the secured

creditor could not propose to take the collateral in partial satisfaction of the debt. That seems somewhat perverse if the investment property has a clear market value as would be the case for most investment property. However, the inefficiency of requiring a sale in such a case is not great because the secured party can buy at its own private sale.\textsuperscript{109} Therefore, the only inconvenience is having to give notice of the pending sale and being certain to buy in at the market price. But notice of sale can be waived in essentially the same way that consent to a partial strict foreclosure could be agreed to,\textsuperscript{110} so the end result is that standard price securities can be purchased by the secured party in a transaction which is indistinguishable in result from partial strict foreclosure.

However, a secured creditor in a consumer (or nonconsumer) transaction could propose to take investment property in full satisfaction of the debt, and under the statute, it is not necessary that the debtor indicate agreement by signing a record. Rather, the creditor can send the debtor a proposal to keep the collateral in satisfaction of the debt and, if the secured party does not receive notification of objection "authenticated by the debtor within 20 days after the proposal is sent," the secured party may keep the collateral in satisfaction of the debt.\textsuperscript{111} That scheme presents obvious possibilities for overreaching by the creditor in consumer (and non-consumer) transactions. However, the good faith requirement of Current section 1-203\textsuperscript{112} should prevent a creditor from effectively taking securities worth more than the debt without any obligation to account for the surplus.\textsuperscript{113} Also, a bad faith attempt to take collateral

\textsuperscript{109} Under Revised section 9-610 (as under Current section 9-504) the secured party can buy at its own private foreclosure sale if the "collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations." A sale to the secured party, or anyone else, at a price different than what would be received on the "recognized market" or at the standard price quotations would, no doubt, be commercially unreasonable.

\textsuperscript{110} See supra text accompanying note 97 (discussing waiver of notice of the sale). Revised section 9-620(c)(1), which permits partial strict foreclosure in commercial transactions, requires that the debtor "agree to the terms of the [partial strict foreclosure] in a record authenticated after default."

\textsuperscript{111} See R. § 9-620(c)(2).

\textsuperscript{112} Section 1-203 reads: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

\textsuperscript{113} Comment 11 to Revised section 9-620 states that the good faith obligation in the Code would apply to proposals to take collateral in satisfaction of the debt and then says: "For example, a secured party's proposal to accept marketable securities worth $1,000 in full satisfaction of indebtedness in the amount of $100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith."
of a value clearly in excess of the debt in satisfaction of the debt would probably be a violation of the creditor's duties under Part 6 and would, therefore, subject the creditor to the statutory damages imposed by Part 6 for such violations in consumer transactions.\footnote{114}

\section*{Protection for Creditor Who Relies on Debtor Representation That the Transaction Is Not a Consumer Transaction}

Revised section 9-628(c) provides a slight bit of solace for secured creditors who face additional requirements and restrictions in dealing with consumer debtors under Revised Article 9. That section reads:

A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer-goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:

(1) a debtor's representation concerning the purpose for which collateral was to be used, acquired, or held; or

(2) an obligor's representation concerning the purpose for which a secured obligation was incurred.

That subsection will give some protection to creditors, primarily with respect to the foreclosure rules just discussed.

Under the quoted section, any of the representations referred to would prevent the transaction from being subject to the consumer rules just referred to.\footnote{115} Therefore, the secured party would avoid liability for statutory damages for violation of these requirements and probably also liability for any actual damages that the consumer debtor claimed as a result of such violations.

It is not clear whether the subsection will apply to nonforeclosure situations in which Article 9 applies a different rule to consumer transactions than to nonconsumer transactions. Revised Article 9 permits an Article 9 security interest in deposit accounts other than personal, family, or household accounts. Similarly, Revised Article 9 generally permits the secured party to take an interest in the debtor's after-acquired property, but limits that right as to consumer goods. Would reasonable reliance on the debtor's representation concerning

\footnote{114}{See supra notes 21-38 and accompanying text.}

\footnote{115}{See supra text accompanying notes 12-20.}
the use of a deposit account or of goods permit the secured party to have an Article 9 security interest in a deposit account or in after-acquired consumer goods? If the subsection does not apply, a creditor might be liable for conversion if it repossesses after-acquired consumer goods or if a court determines that on common law principles it did not have a security interest in a consumer deposit account even though it reasonably relied on a debtor's representation as to the character of the collateral or the transaction.

The provision is not limited to acts or omissions in the foreclosure process; therefore, it may be intended to apply to acts that in connection with the taking of the security interest would not be permissible if the transaction were a consumer transaction.

The provision provides protection for "any act or omission arising out of the secured party's reasonable belief that the transaction is not" one of the transactions described for which there are special rules. The obligation to give notice before a foreclosure sale is held and to hold a commercially reasonable sale does not depend on whether the transaction is or is not one of the transactions described. Therefore, a creditor cannot argue that it failed to hold a commercially reasonable sale or failed to give a notice of sale because it reasonably relied on the debtor's representation that the transaction was not a consumer transaction. In such a case, therefore, it would seem that if the creditor failed to have a commercially reasonable sale and the transaction was in fact a consumer transaction, the creditor would be liable for the statutory penalties imposed for failure to comply with the foreclosure requirements. Also, if the state has adopted an absolute bar for consumer transactions, that rule would apply to the transaction even though the creditor reasonably relied on the debtor's representation that the transaction was not a consumer transaction.

However, comment 2 to Revised section 9-628 reads:

If a secured party reasonably, but mistakenly, believes that a consumer transaction or consumer-goods transaction is a non-consumer transaction or a non-consumer-goods transaction, and if the secured party's belief is based on its reasonable reliance on a representation of the type specified in subsection (c)(1) or (c)(2), then this Article should be applied as if the facts reasonably believed were true. For example, if a secured party reasonably believed that a transaction was a non-consumer transaction and its belief was based on reasonable reliance on the debtor's misrepresentation that the collateral secured an obligation incurred for business purposes, the rebuttable presumption rule would apply under 9-626(b).
The comment seems to ignore the language of the subsection that refers to acts or omissions based on the reasonable belief. As a policy matter, there might be some justification for limiting liability for wrongful conduct to the liability that would attach if the transaction were as represented by the debtor if the secured party reasonably relied on that representation. Perhaps a creditor's willingness to enter into the transaction, or the price at which it enters it, is to some extent based on assumptions about its liability if it fails to comply with statutory requirements in the transaction. However, it is doubtful that the statutory language supports that result.

III. NON-FORECLOSURE ISSUES

A. Status of Purchase Money Interest After Refinancing or Consolidation

Both Current and Revised Article 9 accord special status to "purchase money" security interests. Purchase money security interests are security interests given in purchased collateral to secure the debtor's repayment of value given to enable the debtor to acquire the collateral. Under both versions of Article 9, a purchase money interest in certain consumer goods is perfected without filing. Also, both Current and Revised Article 9 allow purchase-money secured creditors to get priority over earlier filed security interests attaching to the purchased goods under an after-acquired property clause in the earlier security agreement. However, both versions of Article 9 make invalid a security interest attaching to consumer goods as additional collateral under an after-acquired property clause unless the debtor acquires the goods within ten days after the creditor gives value. However, the invalidity applies only if the after-acquired goods are given as additional security. If, for example, a creditor lends a consumer $9,000 and takes a security interest in a boat that the

116. See U.C.C. § 9-107; R. § 9-103(a)-(b). Both sellers who take a security interest in the sold goods to secure the unpaid portion of their price and lenders who provide funds used by the buyer to acquire the goods and take a security interest in the goods have purchase money interests.

117. See U.C.C. § 9-302(1)(d) (filing is necessary for motor vehicles required to be registered); R. § 9-309(a)(1) (filing is necessary for goods subject to certificate of title acts). However, unless the purchase money security interest holder files a financing statement, the security interest is subordinate to the rights of a consumer purchaser who buys without knowledge of the security interest. See U.C.C. § 9-307(2); R. § 9-320(b).

118. See U.C.C. § 9-312(3)-(4); R. § 9-324.

119. See U.C.C. § 9-204(2); R. § 9-204(b).
consumer intends to acquire and takes no other collateral, the security interest would attach to the boat even though it is not acquired within the ten-day period. Therefore, there is some slight reason for protecting consumer purchase money interests against earlier secured parties with an after-acquired property clause. (However, the Federal Trade Commission has made it an unfair trade practice for a creditor to take a security interest, other than a purchase money interest, in certain household goods.120)

The Bankruptcy Code also recognizes the special importance of purchase-money financing for consumers by allowing a purchase money security interest to survive bankruptcy in situations where a nonpurchase money interest would be voided. Section 522 of the Bankruptcy Code provides that certain "exempt" property of individual debtors cannot be reached by the trustee to satisfy creditors.121 Exempt property is that which is specified under the Bankruptcy Code itself or, if states have chosen to opt out of the bankruptcy exemption system, property which is specified by the state exemption statutes.122 The exemption applies to such things as household goods, furniture, clothes, automobiles, personal jewelry, and so on.123 The debtor can, therefore, retain such property after the bankruptcy proceeding is completed even though creditors remain unpaid.

The Bankruptcy Code goes further in protecting the debtor's interest in particular kinds of exempt property; it permits the debtor to avoid nonpossessory, nonpurchase money interests in that property to the extent that the security interest impairs an exemption to which the debtor would be entitled under the Bankruptcy Code.124 The collateral in which a nonpurchase money security interest may be avoided includes (1) household furnishings, household goods, clothes, appliances, books, animals, crops, musical instruments, and jewelry held for personal, family, or household use; (2) implements,

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120. See 16 C.F.R. § 444.2 (1998). The goods in which the FTC prohibits the taking of a nonpurchase money security interest are clothing, furniture, appliances, one television and one radio, linens, china, crockery, kitchenware, and personal effects, but do not include works of art, other electronic entertainment equipment, items acquired as antiques (items over 100 years old), and jewelry (except wedding rings).

121. See Bankruptcy Code § 522(b) (1998).

122. See id.

123. See the listing in Bankruptcy Code, section 522(d). The bankruptcy exemptions are limited in dollar amount in each category. Many states similarly have dollar amount limitations.

124. See Bankruptcy Code § 522(b).
professional books, or tools of the trade of the debtor or a dependent of the debtor; and (3) professionally prescribed health aids for the debtor or a dependent of the debtor.125

Therefore, it is often important to the individual bankrupt and her secured creditor whether a particular security interest in any of the items just mentioned is a "purchase money interest." Bankruptcy courts have generally concluded that whether a security interest is a purchase money interest for bankruptcy purposes is determined by state law,126 which is Article 9 of the UCC. As pointed out above, whether a security interest is initially a purchase money interest is relatively straightforward. The interest is a purchase money interest if it is given in return for value that enables the debtor to acquire the property.127 However, events subsequent to the taking of the purchase money security interest may affect its status.

Some bankruptcy courts have held that under Current section 9-107, a security interest that was originally a purchase money interest loses that status entirely if the debt is restructured and an additional nonpurchase money advance is made,128 if a later purchase money security interest transaction is consolidated with an earlier one,129 or if the purchase money debt is refinanced to extend the term.130 If the security interest loses its purchase-money status, the interest is subject to avoidance if the collateral is exempt property under the Bankruptcy Code. Further, if the creditor, relying on the Code’s automatic perfection rule for consumer goods,131 has not filed a financing statement, the security interest will become unperfected if it is no longer a purchase money interest. Therefore, the security party will lose to the trustee in bankruptcy even as to nonexempt property.132

125. See id. § 522(f)(1)(B).
127. See U.C.C. § 9-107; R. § 9-103(a), (b). Both sellers who take a security interest in the sold goods to secure the unpaid part of their price and lenders who provide funds used by the buyer to acquire the goods and take a security interest therein have purchase money interests.
129. See, e.g., Roberts Furniture Co. v. Pierce (In re Manuel), 507 F.2d 990 (5th Cir. 1975).
130. See, for example, In re Gillie, 96 B.R. at 689, 692, and the cases cited therein.
131. Under both Current and Revised Article 9, a security interest in consumer goods other than collateral is subject to a certificate of title law, which requires notation of a security interest on the title. See U.C.C. § 9-302(1)(d); R. § 9-309(1).
132. See In re Manuel, 507 F.2d at 993.
Courts that find that subsequent events completely terminate purchase money status are said to apply a “transformation” rule because the subsequent event transforms a purchase money interest into a nonpurchase money one. Other courts, however, have held that none of these subsequent events terminates purchase money status and that the debt remaining after the subsequent event retains its purchase money status to the extent that a part of the debt that was incurred to acquire the goods remains unpaid. Courts that reach this result are said to apply a “dual-status” rule.

Courts that hold that a consolidation of two purchase money interests or a consolidation of a purchase money interest with a non-purchase money interest completely terminate the purchase money character of the security interest do so on either or both of two related reasons. First, say the courts, if the security interest in an item secures anything other than that item’s price, the interest cannot be a purchase money interest, and, after a consolidation, the security interest in the purchase money collateral secures both debts. Second, after a consolidation, it cannot be determined which debt is being paid, so the court cannot determine how much of the remaining debt is purchase money secured debt. The rationale for holding that a refinancing, whether or not any additional credit is being advanced, terminates the purchase money status of the security interest is that the refinancing pays off the purchase money debt by a new loan or a novation, which is not purchase money.

Current Article 9 has no clear indication whether the “transformation” or the “dual status” rule was intended by the drafters. But Current section 9-107 gives support to the dual-status position because it states that a security interest is a purchase money interest “to the extent that” it is given to enable the debtor to acquire the goods. That language suggests that a single security interest might be part purchase money and part nonpurchase money.

The drafters concluded that Revised Article 9 should clearly adopt the dual-status rule. Revised Article 9 addresses the first


134. See In re Manuel, 507 F.2d at 992-93.


transformation rationale directly by providing that a purchase money interest does not lose its status even though the purchase money collateral also secures a nonpurchase money obligation or collateral that is not purchase money also secures the purchase money obligation.\footnote{137} Revised Article 9 deals with the problem of how to apply payments after a consolidation of debts by providing a statutory rule for the allocation of payments.\footnote{138} Also, Revised section 9-103 provides that renewal, refinancing, consolidation, or restructuring does not terminate purchase-money status.\footnote{139}

However, the drafters, following the general position that Revised Article 9 should not change present rules, which are seen as protective of consumers, excluded consumer-goods transactions from its new rules that none of the three events that courts had held to cause a purchase-money interest to lose that status has that effect.\footnote{140} However, as not all courts have applied the transformation rules, the drafters were not willing to state affirmatively that the transformation rules should apply in consumer-goods transactions. Therefore, Revised section 9-103(h) provides that the limitation of the “dual-status” rules to non-consumer collateral is “intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature

\footnote{137} See R. § 9-103(f)(1)-(2).
\footnote{138} Revised section 9-103(e) reads:

In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) in accordance with any reasonable method of application to which the parties agree;

(2) in the absence of the parties’ agreement to a reasonable method, in accordance with the intention of the obligor manifested at or before the time of payment; or

(3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor’s intention, in the following order:

(A) to obligations that are not secured; and

(B) if more than one obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

\footnote{139} See R. § 9-103(f)(3).
\footnote{140} Revised section 9-103(f) reads:

In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(1) the purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) the purchase-money obligation has been renewed, refinanced, consolidated, or restructured.
of the proper rule in consumer-goods transactions and may continue to apply established approaches."

To the extent that a bankruptcy court relies on the inability to allocate payments after a consolidation of several purchase money debts or a combination of a purchase money debt with a nonpurchase money debt, there are several ways in which that inability to allocate can be overcome: (1) the consolidation contract can specify the allocation method;\(^1\)\(^1\) (2) a statute can give a statutory allocation method; (3) the court can itself determine an allocation formulation, such as first in-first out;\(^1\)\(^2\) or (4) purchase-sales act or similar acts can provide the allocation method.\(^1\)\(^3\) Therefore, as noted above, if another statute provides an allocation formula or if the credit contract itself provides an allocation formula, the inability-to-allocate reason for terminating purchase money status does not exist, independently of Article 9.\(^1\)\(^4\) Therefore, that ground for voiding purchase money interests may gradually disappear in any event.

\(^1\)\(^4\) In *Bond's Jewelers, Inc. v. Linklater (In re Linklater)*, 48 B.R. 916, 919 (Bankr. D. Nev. 1985), the court applied the contract provision under which payments were first applied to the oldest debts (first in, first out).

\(^1\)\(^2\) Under a first in, first out method of allocation, payments after a consolidation would be applied to the first debt, and only after it had been paid off and the related security interest discharged, would any payments be applied to the second debt. *See In re Linklater*, 48 B.R. at 919.

\(^1\)\(^3\) *See In re Gibson*, 16 B.R. 257, 268 (Bankr. D. Kan. 1981) ("Absent statutory or contractual methods of [allocation], this Court can provide a judicial method of determining how much of the debt is purchase money and how much is not.").

\(^1\)\(^4\) Also, it should be noticed, if an allocation formula is used, the argument that the purchase money collateral is also securing nonpurchase money debt is not available when two purchase money obligations are combined. The reason for allocation formulas is to show how much of each subsequent payment is being applied to the individual purchase money secured debt. Therefore, even though only a portion of the payment is discharging purchase money debt, it is incorrect to conclude that the purchase-money collateral is securing nonpurchase money debt. In the consolidation example given above, the $500 balance of a purchase money secured debt in a television set is consolidated with a new purchase money secured debt of $800 in a refrigerator. The new monthly payment in the consolidated contract is $50.00. Suppose that an applicable state statute or the credit contract provides that the monthly payment on the consolidated debt will be applied in the ratio that each debt existing at the time of consolidation bears to the total debt. If so, the new monthly payment of $50.00 will be applied 5/13ths ($19.23) to the security interest in the television set and 8/13ths ($30.77) to the security interest in the refrigerator. Under this system, the security interest in the television set will not be entirely discharged until the entire debt is paid. Even so, it is incorrect to conclude that the security interest in the television set also secures the security interest in the refrigerator. If bankruptcy occurs with five payments remaining on the consolidated debt, the creditor has a purchase money security interest of $96.15 in the television set and of $153.85 in the refrigerator. The bankrupt, therefore, could discharge the security interest in the television set by paying the $96.15 to the creditor. Of course, a purchase money lender who is already owed another debt might provide that the security interest in the collateral being purchased also secures the previous nonpurchase money debt, or on a refinancing that includes an additional nonpurchase money advance, that the purchase money collateral also secures the additional advance.
Hence, under Revised Article 9, courts may apply either the dual-status or the transformation rule to consumer purchase money interests after a refinancing or consolidation. However, courts are not compelled to follow their present decisions on the matter; rather, they "may continue to apply established approaches." It is difficult to predict whether the courts that presently use the transformation rule in bankruptcy will continue to do so. There are respectable policy arguments that the transformation rule, while it protects the bankrupt individual, is harmful to consumers generally because it reduces the willingness of sellers or lenders to provide purchase money credit.

On the other hand, it is understandable that a bankruptcy judge, faced with the choice of allowing a secured credit to repossess household goods that will have little resale value or allowing the bankrupt to keep the goods that he would otherwise find difficult to replace, may wish to continue to apply a transformation rule.

B. Description of Collateral in Consumer Transactions

Current section 9-110 provides that "any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." Revised section 9-108 continues that provision, but imposes some limitations on the effectiveness of general descriptions. The first limitation is that such descriptions "as 'all the debtor's assets' or 'all the debtors personal property' or [similar formulations] does not reasonably identify the collateral" in the security agreement. Such formulations, however, are sufficient in the financing statement. These rules concerning "all assets" descriptions are not limited to consumer transactions. Presumably, the reason for prohibition of such "supergeneric" descriptions is that it is seldom that such a board reach is actually intended, and such language is likely to appear in boilerplate language that is unread by the debtor.

Revised section 9-108 specifically provides that descriptions by "category," or by "type of collateral defined in the [Uniform Commercial Code]" are sufficient. However, in a consumer

146. See R. § 9-108(a).
147. Id. § 9-108(c).
148. See id. § 9-504.
149. See id. § 9-108(b)(2)-(3) (brackets in original). Revised section 9-105(d), somewhat
transaction, description of the collateral as "consumer goods," "security entitlements," "securities accounts," or "commodity accounts" is not effective. The statute does not specifically prohibit the use of an "investment property" description in consumer transactions. But "investment property" is a defined term that includes the term "securities entitlements," "securities accounts," and "commodity accounts," which are ineffective in consumer transactions. Therefore, there should be no doubt that the use of "investment property" is also ineffective in consumer transactions.

However, except as to the terms just discussed, there is no limitation on the use of a description by "category" in consumer transactions. Therefore, a description such as "all household furniture," "all jewelry," or "all my mutual funds" may be by "category" and therefore sufficient. However, an argument can be made that such descriptions are too much like the prohibited descriptions to be effective. Also, Revised Article 9 continues the current prohibition of security interests in after acquired consumer goods. Therefore, collateral covered by a general description, like "all my jewelry," may be uncertain, and ineffective, if some of the apparent collateral was after-acquired property subject to the prohibition.

C. Assignees Subject to Defenses—Absence of the FTC Legend

The Federal Trade Commission has made it an unfair trade practice in sales or leases to consumers for a seller or lessor to fail to include in the consumer credit contract the following legend:

redundantly, states that a description of a security entitlement, securities account, or commodity account is sufficient if it uses those terms or the term "investment property." Those terms are defined terms in the Code. See id. § 9-102(a)(14), (49); U.C.C. §§ 8-501, 8-102.

150. See R. § 9-108(e)(2).

151. Revised section 9-204(b) reads: "A security interest does not attach under a term constituting an after-acquired property clause to: (1) consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value." Current section 9-204(2) contains the same rule in slightly different words.

152. See In re Johnson, 13 UCC Rep. 953 (Callaghan) (Bankr. D. Neb. 1973), in which the Referee held that a security agreement claiming an interest in a debtor's acquired consumer goods was invalid because it claimed property that the debtor would acquire more than ten days after the security interest was taken. The Referee held the clause unconscionable because it might mislead an unknowing consumer.

153. Under the FTC rule, a consumer is a "natural person who seeks or acquires goods or services for personal, family, or household use." 16 C.F.R. § 433.1(b).
NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.154

There is also a prohibition against the seller or lessor accepting as full or part payment of the purchase price money from a related lender155 under a loan agreement with the consumer which fails to contain a similar legend.

Under the FTC rule, if the consumer credit contract does not contain the legend and is represented by a negotiable note or by a contract that contains a waiver of defenses clause, an assignee from a seller, lessor, or related lender who extended the credit might be able to assert that it does take free of defenses or claims of the buyer or lessor under the holder in due course rules of UCC Article 3 or the waiver of defense rules of Article 9.156 Revised sections 9-403(d) and 9-404(d) close that possible loophole by providing that if the FTC rule requires that a writing contain the FTC legend but the writing does not do so, the writing has the same effect as if the legend were included, and the debtor can assert against the assignee those claims and defenses that would have been available had the writing included the legend.157

154. Id. § 433.2(a).
155. A related lender is one to whom the seller refers consumers, or one who "is affiliated with the creditor by common control, contract, or business arrangement." Id. § 433.1(d); see also id. § 433.1(f)-(g).
156. If the transferee knows that it is receiving consumer paper that fails to include the required legend, it is probably not in good faith if it tries to collect free of claims or defenses. If it is not in good faith, then it would be subject to defenses in the law of negotiable instruments or under the provisions of Current Article 9 (9-206). But if the assignee is not aware that the paper is consumer paper, it might be able to enforce a waiver of defenses clause or assert its right as holder in due course of a negotiable instrument to enforce the instrument free of the debtor's claims or defenses. See the good short discussion in JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 17-9 (4th ed. 1995).
157. Revised section 9-403(d) reads:
In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:
(1) the record has the same effect as if the record included such a statement; and
(2) the account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.
Revised section 9-404(d) repeats the provision in slightly different words.
Under the usual rule applied by courts, an assignee, even if subject to claims or defenses, does not have to return payments already received; the debtor can assert the claim or defense only to avoid making further payments.\textsuperscript{158} Revised Article 9 codifies this rule in section 9-404(b).\textsuperscript{159} However, the FTC required legend may give the buyer or lessor greater rights. The relevant language in the required legend is: "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." The language does not say directly that the debtor can recover amounts paid, but only that the recovery cannot exceed amounts paid. Therefore, a holder could argue that the actual recovery is governed by applicable state law, which in the Article 9 context would be the rule of Revised section 9-404(b) mentioned above. If that argument is accepted, the presence of the FTC legend would not give rise to a right to an affirmative recovery back of payments already made to the seller, assignee, or lender, and similarly, if the legend should be in the agreement but is missing, the Article 9 rule would apply.

However, the FTC in the proceedings leading to promulgation of the rule expressly rejected a creditor proposal that the right given by the FTC required legend be limited to asserting a defense to a suit by the assignee.\textsuperscript{160} In its comments accompanying the promulgation of the rule, the FTC stated that consumers "will not be in a position to obtain an affirmative recovery from a creditor unless they have actually commenced payments and received little or nothing of value from the seller."\textsuperscript{161} Therefore, it is clear that the FTC intended that, in at least some circumstances, the consumer be able to recover back payments made to the assignee.

It is doubtful that the FTC has the power to change state law to give a contracting party greater substantive rights than it would have

\textsuperscript{158} A few courts have held that payments made by a debtor to an assignee can be recovered back on mistake theory, the mistake being that the debtor believed that the payment was owed. However, the \textit{Restatement of the Law of Restitution} § 14(2) (1937) provides that a payment cannot be recovered from an assignee if the assignee took for value, made no misrepresentation, and had no notice of the defense. \textit{See} Marion W. Benfield, Jr., \textit{The New Payments Code and the Abolition of Holder in Due Course Status as to Consumer Checks}, 40 \textit{WASH. & LEE L. REV.} 11, 20-21 (1983).

\textsuperscript{159} The provision reads: "Subject to subsection (c) and except as otherwise provided in subsection (d), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes."


\textsuperscript{161} \textit{See} 40 Fed. Reg. at 53,527.
under state law, and in promulgation of the rule, the FTC stated that it did not intend to change state law. Perhaps the FTC lawyers believed that state law already gave such a right if there had been a material failure of performance by the seller. Even if state law does not give such a right and the FTC did not intend to, or does not have the power to, change state law in that way, it can be argued that the legend amounts to a contractually binding promise by an assignee to return payments received if there is a breach of contract by the seller giving rise to a claim by the consumer-buyer.

If there is a right to an affirmative recovery, there seems no reason of logic or policy to limit the affirmative recovery to essentially complete failure of performance by the seller. Suppose, for example, that a breach of warranty is discovered that causes the buyer damages of $3,000 at a time when $8,000 has already been paid to the assignee and only $2,000 remains to be paid. Should the buyer be denied an affirmative recover of $1,000 because there has not been a complete failure of performance?

Nevertheless, the few courts addressing the issue, without serious examination of the issues raised above, have interpreted the effect of the FTC legend in the way suggested by the FTC; they have allowed a recovery back if there has been a material breach, but denied a recovery back of payments made if the breach has been minor. In any event, whatever the rules of recovery are under the FTC legend, those rules will apply to transactions in which the paper should have carried the legend, even though the legend does not appear. Because Revised Article 9 applies to security interests in, and sales of, accounts, instruments, or chattel paper, and because all the transactions subject to the FTC rule will be either accounts, instruments, or chattel paper under the Revised Article 9 definition of those terms, all cases involving missing FTC required legends will be within Article 9.

162. See White & Summers, supra note 156, § 17-9.
163. The FTC, interpreting the rule, stated that it did not intend to change substantive state law. See 41 Fed. Reg. at 20,023-20,024.
165. See R. § 9-109(a)(1), (3). (Certain special situation assignments are not subject to Revised Article 9. See id. § 9-109(d).)
166. The FTC rule applies to credit extended for sales or leases of goods. The Code definition of accounts includes debts arising out of the sale or lease of goods except debts evidenced by chattel paper or an instrument. See id § 9-102(2). "Chattel paper" is a record or records that evidences a monetary obligation and a security interest in, or lease of, specific
D. When Does Consumer Buyer Have Rights as Buyer in Ordinary Course?

Under Revised section 9-320(a)\textsuperscript{167} and Current section 9-307(1),\textsuperscript{168} a buyer in ordinary course takes free of a prior perfected security interest in the goods. A person is a buyer in ordinary course if she buys in good faith, in the ordinary course of the seller's business, and without knowledge that the sale is in violation of the rights of others.\textsuperscript{169} However, under Current Article 9, neither section 9-307(1) nor the definition of buyer in ordinary course\textsuperscript{170} indicates whether a buyer becomes such when the goods are identified to the contract,\textsuperscript{171} when title passes to the buyer,\textsuperscript{172} or as soon as the sales contract is made if the goods can later be identified to the contract. Presently there is case law support for each of the three positions.\textsuperscript{173}

Revised Article 9 and Revised Article 2\textsuperscript{174} clarify the point at which a buyer becomes a buyer in ordinary course and state different rules for consumers than for commercial buyers. Revised section 1-201(9) (revised in connection with the Article 9 revisions) provides that "Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business." Two sections of Article 2 enable a buyer to get goods from a seller. Section 2-716 allows the buyer to get specific performance if the "goods are unique or in other proper circumstances" and allows replevin of goods identified to the contract goods. See id. § 9-102(11).

\textsuperscript{167} Revised section 9-320 reads:

Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

\textsuperscript{168} Current section 9-307(1) is in substance the same as Revised section 9-320.

\textsuperscript{169} See U.C.C. § 1-201(9) (defining "buyer in ordinary course").

\textsuperscript{170} See id.

\textsuperscript{171} Under Current section 2-501, a buyer acquires a "special property" in goods on their identification to the contract. Identification is the designation of particular goods to be delivered under the contract and can be made by either the seller or the buyer.

\textsuperscript{172} Under Current section 2-401, title ordinarily passes to the buyer when the seller completes its performance with reference to the physical delivery of the goods.

\textsuperscript{173} See, e.g., Wilson v. M & W Gear, 442 N.E.2d 670 (Ill. App. Ct. 1982) (when the contract is made if the goods to be delivered can later be identified); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 487 A.2d 953 (Pa. Super. Ct. 1985) (identification); Chrysler Corp. v. Adamatic, Inc., 208 N.W.2d 97 (Wis. 1973) (title). Most courts hold that the buyer becomes a buyer in the ordinary course when the goods are identified to the contract. See M & W Gear, 442 N.E.2d at 678-79 (Heiple, J., dissenting); CLARK, supra note 28, § 304[1].

\textsuperscript{174} A Revised Article 2 is nearing completion.
if the buyer is unable to acquire substitute goods. Revised section 2-502 permits a buyer for personal, family, or household purposes to recover the goods from the seller if the goods are identified to the contract, the buyer has paid part of the price, and the seller repudiates or fails to deliver as required by the contract. Therefore, under Revised Article 9 and Revised 2-502, if a consumer buyer has made a down payment and goods have been identified to the contract, the buyer will be able to get the goods from a secured party who repossesses them from the seller before they are delivered to the consumer buyer.

Under the present Code, the definition of buyer in ordinary course states that buying may be on secured or unsecured credit. Therefore, a buyer can be a buyer in ordinary course even though no part of the price has yet been paid. The new requirement that a consumer buyer must have paid a part of the price to be a buyer in

175. Section 2-716. BUYER'S RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN.
(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

176. Section 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S REPUDIATION, FAILURE TO DELIVER, OR INSOLVENCY.
(1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:
(a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or
(b) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.
(2) The buyer's right to recover the goods under subsection (1)(a) vests upon acquisition of a special property, even if the seller has not then repudiated or failed to deliver.
(3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

Under section 2-501, a buyer has a special property in goods once they have been identified by the seller or the buyer as the specific goods to be delivered under the contract.

177. "Buying' may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents under a pre-existing contract for sale." U.C.C. § 1-201(9).
ordinary course, therefore, cuts back the rights of consumer buyers from dealers.\textsuperscript{178} However, because if the buyer has paid no part of the price, the secured party will ordinarily be happy to sell to the buyer at the price previously agreed to between the buyer and seller, but (with the delays incident to a foreclosure sale) there may be little change in fact in the ability of a consumer-buyer who has paid no part of the price to get the goods at the contract price.\textsuperscript{179} There is also the possibility that a consumer buyer could get specific performance if the buyer is unable to get the goods elsewhere under section 2-716 even though no part of the price has been paid. If so, she could be a buyer in ordinary course and take free of security interests under the buyer in ordinary course rules. Of course, often a buyer who has paid no part of the price will not want to get goods from a seller who has gone into default under a security agreement.

In at least one case under Current section 9-307(1), a farmer-buyer was given buyer in ordinary course status as against a farm implement dealer’s secured creditor even though there had been no identification of a specific item to the farmer’s contract.\textsuperscript{180} That result seems attractive to me, but might be somewhat difficult to square with the new specific requirement that the goods be identified to the contract for a consumer buyer to recover the goods under UCC section 2-502. Perhaps a court could find a constructive identification where the dealer has a number of identical items and it is clear that the dealer intended to deliver one of them to the buyer. Alternatively, a court might conclude that having paid a part of the price to a seller who is in default on a security agreement is a reason for granting specific performance of the contract under Article 2.\textsuperscript{181} A


\textsuperscript{179} The greater change in the law is as to commercial buyers. They will be buyers in ordinary course only if the seller became insolvent within ten days after receipt of the first installment on the price of the goods or if they can replevy the goods under section 2-716. See R. § 2-502. However, the March 1, 1999, draft of proposed Revised Article 2 (section 2-824) gives the same right to commercial buyers as the Article 9 revision of section 2-502 gives to consumer buyers.

\textsuperscript{180} The dealer contracted to sell a grain drill to the farmer. Dealer had several identical drills in stock, one of which he intended to deliver to the farmer. However, before dealer selected one to be delivered, his secured party took possession of the drills. The court held that the farmer (who apparently had already paid the price) was entitled to one of the drills free of a security interest created by the dealer. See Wilson v. M & W Gear, 442 N.E.2d 670, 671-73 (Ill. App. Ct. 1982).

\textsuperscript{181} Section 2-716 provides: “(1) specific performance may be decreed where the goods are unique or on other proper circumstances.”
court can order specific performance even though the goods have not been identified; the seller can be required to identify the goods and deliver them.\textsuperscript{182}

E. Deferral to Other State Consumer Law on Contract Modification Between Assignor and Assignee and on Requirements for Notation to Pay to Assignee

Current section 9-318(2) permits a debtor and creditor-assignor to make modifications to the contract that are effective against the assignee if the modifications are in good faith and in accordance with reasonable commercial standards. Revised section 9-405 continues a similar rule but requires only that the modification be in good faith.\textsuperscript{183} Revised section 9-405, however, contains a provision that the section is subject to any other law that establishes a different rule for a consumer obligor.\textsuperscript{184} The writer knows of no other law that would state a different rule for consumers and is not sure of the purpose of the rule. Because the consumer-debtor is the obligor and because Revised section 9-318(2) permits the obligor and the assignor (usually a seller in a consumer transaction) to modify the contract without the consent of the assignee if in good faith, the rule is favorable to consumers. It is hard to believe that there is any state law which is more favorable to consumers: surely a bad faith modification could not be effective against the assignee. It is possible that persons asking for an exception for consumer transactions misunderstood the effect of the provision.\textsuperscript{185}

Revised section 9-406 sets out the requirements for a notification of an assignment that obligates an account debtor to make payment to the assignee.\textsuperscript{186} The section also renders ineffective contractual restrictions on the ability to assign the rights of an obligee against the

\textsuperscript{182} Section 2-716 did not continue the Uniform Sales Act requirement that for specific performance the goods must be “specific or ascertained.” See Uniform Sales Act § 68. See \textit{Laclede Gas Co. v. Amoco Oil Co.}, 522 F.2d 33, 38-40 (8th Cir.), rev’d on other grounds, 531 F.2d 942 (8th Cir. 1975); and \textit{Stephan’s Mach. & Tool, Inc. v. D & H Mach. Consultants, Inc.}, 417 N.E.2d 579, 583 (Ohio Ct. App. 1979) in which the courts ordered specific performance, which required the seller to deliver goods that were not identified at the time of suit.

\textsuperscript{183} \textit{See} R. § 9-405(a).

\textsuperscript{184} \textit{See id.} § 9-405(c).

\textsuperscript{185} It is the writer's recollection that the exception was requested by consumer representatives.

\textsuperscript{186} \textit{See} R. § 9-405(a)-(c).
account debtor. This section also is subject to any other law that establishes a different rule for a consumer account debtor.

F. Consumer Deposit Accounts

Assignments of deposit accounts are excluded from Current Article 9 except as proceeds. Assignments of deposit accounts as security are brought into Revised Article 9, but not if the assignment is part of a consumer transaction. Revised Article 9 limits “deposit accounts” to accounts maintained with a bank. Therefore, accounts held with nonbanks, such as mutual fund companies or brokerage houses, are not deposit accounts for purposes of the consumer exclusion even though the consumer can make deposits and withdrawals in the same way as she could with a bank checking account. Such accounts are within Revised Article 9 as either investment property or general intangibles. Therefore, the use of a money-market mutual fund as collateral in a consumer transaction is covered by Revised Article 9 even though the consumer can draw checks on the fund.

One reason for not extending the exclusion beyond accounts maintained with banks is the difficulty of drawing a line between excluded and included transactions based on some other test. Also,

187. See id. § 9-405(d).
188. See id. § 9-406(g).
189. Deposit account is defined as “a demand, time, savings, passbook or like account maintained with a bank, saving and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit.” U.C.C. § 9-105(1)(e).
190. See id. § 9-104(f).
191. The relevant parts of Revised section 9-109 are:
   (a) Except as otherwise provided in subsections (c) and (d), this article applies to:
      (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
   (d) This article does not apply to:
      (13) an assignment of a deposit account in a consumer transaction, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.
192. See R. § 9-102(29) ("Deposit account’ means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument"). "Bank" is defined as "an organization that is engaged in the business of banking." Id. § 9-102(8).
193. "The term 'deposit account' does not include 'investment property,' such as securities and security entitlements. Thus, the term also does not include shares in a money-market mutual fund, even if the shares are redeemable by check." Id. § 9-102 cmt. 12.
194. See id. § 9-102(49).
195. See id. § 9-102(42).
excluding bank accounts will cover most situations in which consumers representatives were concerned about creation of security interests that might deprive consumers of the wherewithal for daily expenses. It should be noted, however, that Article 9 does not prohibit taking of security interests in consumer deposit accounts; it merely excludes such transactions from Article 9. Therefore, on common law principles, it may be possible to take a security interest in a consumer bank account. However, as a practical matter, because if the uncertainties as to method of perfection of the interest, exclusion of consumer deposits from Article 9 may preclude their use as collateral.

G. New Protection for Consumer Consignors

Current Article 2 section 9-326 provides that goods consigned to a consignee for sale are subject to the claims of consignee's creditors while in possession of the consignee if the consignee has a place of business at which the consignee sells goods of the kind being consigned unless the consignor complies with a state sign posting law, shows that the consignee is generally known to his creditors to be substantially engaged in the business of selling the goods of others, or the consignor files a financing statement under Article 9 and complies with the additional notices required of a purchase money financer of inventory under Article 9. Consumers often consign goods, particularly such things as automobiles, boats, and travel trailers or motor homes to dealers for sale.

The dealer does not buy the goods itself; it takes possession of them to sell for the account of the consumer. Under UCC section 2-326, a consigning consumer could lose her goods to the creditors of the consignee.

A number of states, believing that consumer-consignors should not run such a risk, have excepted consumer consignors from the provisions of UCC section 2-326. Revised Article 9, to which the

198. See U.C.C. §§ 2-326, 9-114. (The consignor is also protected if the consignee is doing business in the name of the consignor. See id. § 2-326.)
consignment rules presently in section 2-326 have been moved, exempts consumer-consignors from the claims of a consignee’s creditors. If section 2-326 does not apply, then the consignor is protected by the usual common law rule that a bailee’s creditors get no rights in bailor’s goods held by the bailee.

H. State Law Limiting the Effect of Waivers of Defenses by Consumers

Revised section 9-403(e) continues the rule of Current section 9-206 that the provisions of Article 9 authorizing waivers of defenses are subject to other laws of the state establishing a different rule for consumers.

CONCLUSION

The Drafting Committee and the sponsoring organizations faced a difficult problem in crafting consumer provisions that made policy sense and would lead to support of, or at least lack of opposition to, Revised Article 9 by both consumer and creditor groups. The provisions ultimately agreed to are less than consumer representatives wanted and more than creditors initially believed they could agree to. Both groups showed statesmanship and willingness to compromise in the course of the discussions on consumer issues. If each group at times believed that the other group was woefully wrong as to the appropriate policy, they nevertheless almost always listened with respect. Not always, because at times tempers were frayed. But the end result is, this writer believes, a credit to hard efforts made by both consumers and creditors to produce a mutually acceptable set of proposals.

The effect of new legislation is always somewhat doubtful. That is true of the consumer provisions discussed here. The policy argument for imposing additional restrictions on creditor behavior is that consumers would be willing to bargain for and pay for the cost of such restrictions if they had adequate knowledge and bargaining was relatively cost free. But, of course, consumers usually do not have adequate knowledge, and bargaining is costly. The provisions are, therefore, a sort of insurance, paid for by all consumers with Article 9

201. Revised section 9-403(e) reads: “This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.”
secured debt, that on default provides them some additional rights and protections.

Whether the new consumer provisions provide benefits commensurate with their cost remains to be seen. However, the additional protections given consumer debtors are modest; it is perhaps more likely that additional protections, such as attorneys' fees for prevailing consumers, would be cost effective than that the new consumer provisions actually included in Revised Article 9 will not be cost effective.