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Commercially Unreasonable Repossession Sales in Oklahoma: Wilkerson Motor Co. v. Johnson

COMMERCIALLY UNREASONABLE REPOSSESSION SALES IN OKLAHOMA: *WILKERSON MOTOR CO. V. JOHNSON*

I. INTRODUCTION

In *Wilkerson Motor Co. v. Johnson*,[1] the Oklahoma Supreme Court dealt directly with the issue of how much advertising a secured creditor must do in announcing a public sale of repossessed goods in order to meet the standard of "commercial reasonableness" set out in section 9-504(3) of the Uniform Commercial Code (U.C.C.).[2] The court clearly indicated that a creditor will not be safe in relying on the procedures mandated by pre-Code law for conducting a foreclosure sale.[3] But a possibly more significant aspect of the decision is that *Wilkerson* appears to be the first reported case that allows the debtor simultaneously to use the secured creditor's failure to comply with U.C.C. section 9-504 both as a sword to collect damages under U.C.C. section 9-507(1) and as a shield to defend against a deficiency judgment under section 9-504(2).

II. STATEMENT OF THE CASE

The *Wilkerson* case started out following a very familiar deficiency judgment format. The defendant-debtor bought an automobile from the plaintiff-secured creditor. The debtor signed a retail installment sales contract for $3,800 and gave a security interest back to the seller. The debtor later defaulted. The creditor repossessed the car and notified the debtor that it would be sold at public auction and that the debtor would be held liable for any resulting deficiency. The parties stipulated that the repossession and notice to the debtor were

1. 580 P.2d 505 (Okla. 1978).

2. Uniform Commercial Code (1962 version) [hereinafter U.C.C.]. In Oklahoma, OKLA. STAT. tit. 12A, §§ 1-101—10-104 (1971 & Supp. 1977).

3. OKLA. STAT. ANN. tit. 46, §§ 51-75 (1963). (repealed 1961). *See particularly* § 54: Posting and Mailing Notice.—"Such notice shall be posted in three public places in the county where the property is to be sold at least 10 days before the time therein specified for such sale and one notice shall be mailed to the mortgagor at his last known address by registered mail on the day of posting."

proper and complied with the relevant provisions of the U.C.C.[4] The controversy arose over the manner in which the creditor advertised the auction to the public. The creditor's only advertising was the posting of three notices in downtown Tulsa. There were no newspaper ads, and the creditor did not notify any other car dealers of the impending auction. Predictably, no one came to the auction except the creditor, who bought the car for $2,000. (At that point it has a "blue book" or wholesale value of $2.575.)[5]

The creditor added the $2,000 to the amount the debtor had already paid and sued for the remaining deficiency of approximately $850. The debtor responded with a counterclaim for $982.82 in damages resulting from the improper sale of the collateral.[6] Both sides sought attorney fees.

The case went to the jury under an instruction which the Oklahoma Supreme Court said "denied [the creditor] the flexibility afforded it as a secured party under the UCC, and was inapplicable to the facts of the case at bar."[7] The jury both denied the creditor a deficiency judgment *and* awarded the debtor the full amount on his counterclaim.

The supreme court addressed itself primarily to the issue of the commercial reasonableness of the public sale. They held that although the jury instruction on commercial reasonableness was erroneous, there was no reversible error because the creditor's conduct was so far short of the appropriate standard that it could be held to be commercially unreasonable as a matter of law.[8] On the issue of whether or not the creditor's conduct can be both a defense to a deficiency and an affirmative cause of action, the result is less clear. The court said:

> Appellant's [the creditor] second proposition was that the trial court should have sustained its motion for a directed verdict on its petition for a deficiency judgment. This argument is predicated on an asserted absence of evidence to support recovery by the appellee on his cross-petition. As illustrated by the foregoing discussions, [indicating that the sale was unreasonable as a matter of law,] the contention is without merit.[9]

4. 580 P.2d at 506. The relevant Code sections are U.C.C. § 9-503 (repossesion) and U.C.C. § 9-504(3) (notice).
5. *Id.* at 506.
6. *Id. See id.* at 506 n.2.
7. *Id.* at 507.
8. *Id.* at 509.
9. *Id.*

The court then affirmed the trial court's judgment.

The purpose of this note is to examine the impact of the *Wilkerson* decision on the definition of commercial reasonableness in Oklahoma and the effect of a finding that a secured creditor has failed to meet this standard.

III. A BRIEF FLOW CHART OF ARTICLE NINE, PART FIVE

A secured creditor's rights upon a debtor's default are set forth in U.C.C. section 9-501, which provides that the secured creditor may either sue on the underlying debt, reducing it to a judgment, and allow the sheriff to sell whatever property is levied upon in execution of the judgment, or that the secured party may repossess the collateral directly, or both.[10] If he repossesses, he may still have a choice to make. If the debtor has paid less than sixty percent of the contract price or has elected not to require a sale of the collateral,[11] the creditor may either retain the collateral in satisfaction of the debt, or he may dispose of the collateral and hold the debtor responsible for any difference between the proceeds of the disposition and the secured debt. If the creditor elects to retain the goods, his rights are governed by U.C.C. section 9-505. This section basically provides that the secured party must dispose of the collateral if the debtor has paid sixty percent or more of the cash price. If the debtor has paid less than this amount, the creditor has the option of retaining the collateral in satisfaction of the remainder of the obligation, absent objection from the creditor.[12]

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10. U.C.C. § 9-501 provides in pertinent part:

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part. . . . He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. . . . The rights and remedies referred to in this subsection are cumulative.

. . . .

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Article.

11. U.C.C. § 9-505. *See* note 12 *infra* for the text thereof.

12. The Oklahoma version of U.C.C. § 9-505 provides in pertinent part:

(1) If the debtor has paid sixty per cent of the cash price. . .and has not signed after default a statement renouncing or modifying his rights under this Part a secured party who has taken possession of collateral must dispose of it under Section 9-504. . . .

(2) In any other case. . .a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor and. . .to any other secured party. . .who has duly filed a financing statement. . .in this state. . . . If the debtor or other person entitled to receive

If the creditor either elects to dispose of the collateral or is required to do so by section 9-505, his rights and duties are governed by section 9-504, which provides that the proceeds of any disposition of the collateral shall be applied to defray costs, the remainder of the debt, and the amount owed to subordinate creditors, if any. This section also states that any surplus must be repaid to the debtor, and conversely, that any deficiency remaining must be made up by the debtor.[13]

The court in *Wilkerson* recognized, as have other courts and commentators, that the commercial reasonableness standard is at best elusive.[14] The only guidelines found in the Code are in section 9-507(2) which states:

> (2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially

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notification objects in writing within thirty days after the secured party obtains possession, the secured party must dispose of the collateral under Section 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

OKLA. STAT. tit. 12A, § 9-505 (1971).

13. U.C.C. § 9-504 provides in part:

> (1) A secured party after default may sell, lease or other wise dispose of any or all of the collateral. . . . The proceeds of disposition shall be applied in the following order to
>
> (a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
>
> (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
>
> (c) the satisfaction of indebtedness secured by any subordinate security interest. . . .
>
> (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. . . .
>
> (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. . . . The secured party may buy at any public sale. . . .

14. 580 P.2d at 508. *See* Hall v. Owen Street Bank, 370 N.E.2d 918, 929 (Ind. Ct. App. 1977); *In re* Zsa Zsa, Ltd., 352 F. Supp. 665, 669-70 (E.D.N.Y. 1972); Graham v. Northwestern Bank, 16 N.C. App. 287, 289, 192 S.E.2d 109, 111 (1972); 1 COOGAN, HOGAN, & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, § 804(2)(a) (1968); Siegel, *The Commercially Reasonable Disposition of Collateral*, 80 COM. L.J. 67 (1975).

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

One can hardly fault a creditor who is not certain what standards the Code requires for a commercially reasonable resale of the collateral. Uncertainty notwithstanding, it is critically important that he meet those standards. Should he fail, the Code provides that the debtor may recover damages, and if the collateral was consumer goods, the Code provides for minimum damages "not less than . . . the time price differential plus 10 per cent of the cash price."[15]

Other than affording the debtor the right to collect damages, the Code does not say what the effect of the creditor's failure to sell in a commercially reasonable manner is, and the jurisdictions are not at all in agreement on the point. The *Wilkerson* decision implies that Oklahoma has taken a position in this controversy and has added some clarification to the term "commercial reasonableness." This article will deal with those two aspects of the case in reverse order.

IV. COMMERCIAL REASONABLENESS AND ADVERTISING THE RESALE

The creditor in *Wilkerson* elected to dispose of the collateral by conducting a public sale or auction. He was therefore faced with the problem of determining what a commercially reasonable public sale was. More specifically, he was confronted with a problem in deciding how extensively to advertise the sale. Certainly some notice to the public is and always has been an element of a "public" sale.[16] However, if the seller goes overboard in his advertising, he may be accused of inflating the cost of the resale for which the debtor will be responsible.[17] Similarly, the seller must be concerned with the fact that the debtor who was unable to pay his debt in the first place may not be able to pay the costs of the resale and that the creditor may be spending his

15. U.C.C. § 9-507(1).

16. Cases which have arisen under the U.C.C. include: Koubuk Eng'r & Contracting Serv., Inc. v. Superior Tank & Constr., 568 P.2d 1007 (Alaska 1977), Levers v. Rio King Land & Inv. Co., 560 P.2d 917 (Nev. 1977); Foster v. Knutson, 84 Wash. 2d 538, 527 P.2d 1108 (1974). For a collection of pre-Code cases see Annot., 4 A.L.R.2d 575 (1949).

17. Davis v. Small Business Inv. Co., 535 S.W.2d 740, 744 (Tex. Ct. App. 1976). *See also* II G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 42.5 at 1138 (1965).

own advertising dollars for someone else's benefit with no hope of recouping his loss.

Wilkerson Motor Co. however did not go overboard in advertising for this sale. The secured creditor there posted three public notices along the streets of downtown Tulsa.[18] This choice of advertising methods was not accidental. It was precisely the method of advertising a public sale that was required by pre-Code Oklahoma law,[19] the Uniform Conditional Sales Act,[20] and it has been the traditional method of publicizing distress sales.[21] Additionally, the legislature of North Carolina, recognizing the uncertainty of the Code's standards, added an additional part to Article Nine which sets minimum standards for a repossession sale that would conclusively be commercially reasonable.[22] The standard chosen by the North Carolina legislature was one notice posted on a bulletin board provided at the county courthouse.[23] Thus, Wilkerson Motor Co. might well have been more than just a little surprised to hear the Oklahoma Supreme Court say that no reasonable jury could believe that their method of advertising was commercially reasonable. This is particularly true when one considers the language of the Oklahoma U.C.C. comments[24] (cited in the court's opinion)[25] which state that the purpose of the Code's standard is to allow the seller more flexibility in disposing of the collateral.

This should not be taken to mean, however, that the court reached the wrong conclusion. Although this appears to be the first reported case where a court has held that compliance with the pre-Code formula was not commercially reasonable, there are a number of decisions which deal with deficient advertising. As mentioned earlier, where there was no advertising of the sale whatsoever, the sale could be challenged as not being a "public" sale at all,[26] or alternatively, as a com-

18. 580 P.2d at 506 n.1.

19. OKLA. STAT. ANN. tit. 46, § 54 (1954) (repealed 1961). *See* note 3 *supra* for the text thereof.

20. Uniform Conditional Sales Act § 19. The act did require publication in a general circulation newspaper if the collateral was worth $500. In saying that these ads complied with the statute, inflation must be considered. A used car during the time of the Conditional Sales Act generally would not have cost more than $500. One should also note that county legal bulletins have been held to be general circulation newspapers so that the level of protection thus afforded was not very significant. *See* Bulldog Concrete Form Sales Corp. v. Taylor, 94 F. Supp. 328, 331 (D. Ind. 1949), *aff'd*, 195 F.2d 417 (7th Cir. 1952).

21. Valley Nat'l Bank v. Brooks, 3 Ariz. App. 340, 414 P.2d 189 (1966).

22. N.C. GEN. STAT. §§ 25-9-601 through 25-9-607 (Supp. 1977).

23. N.C. GEN. STAT. § 25-9-603 (SUPP. 1977).

24. OKLA. STAT. ANN. tit. 12A, § 9-504 (1963), OKLAHOMA COMMENT 3.

25. 580 P.2d at 507.

26. Koubuk Eng'r. & Contracting Serv., Inc. v. Superior Tank & Constr., 568 P.2d 1007

mercially unreasonable sale.[27] Similarly there are cases that indicate the standard has not been met when the notices were either inaccurate[28] or incomplete.[29] The modern cases clearly indicate that the measure of the sufficiency of the resale's publicity is not how many bidders came[30] or how much they bid,[31] but rather, whether or not the seller used due diligence in acquiring the best price for the mutual benefit of both the debtor and creditor.[32] Thus, the Oklahoma decision is clearly in line with the national trend of requiring the secured party to protect both parties' interests rather than requiring the debtor to insure that a fair price was received at the auction. A number of pre-Code cases had indicated that the debtor's primary protection was the requirement that the creditor give the debtor sufficient advance notice of the sale to allow him either to publicize the sale or to attend and bring his own buyers.[33] Judicial unhappiness with this approach caused pre-Code courts to scrutinize these sales more closely, particularly when the secured party himself was the buyer,[34] or when there was other evidence of collusion or self-dealing,[35] and caused at least one commentator to call for the abolition of such practices in the case of consumer sales.[36] Even in North Carolina, where the legislature adopted presumptively reasonable minimum standards, the courts have shown hostility to secured creditors who do not evidence some diligence in securing bidders at their sales. Although those courts are willing to enforce the presumptive standard when the buyer is able to show exact compliance,[37]

(Alaska 1977); Levers v. Rio King Land & Inv. Co., 560 P.2d 917 (Nev. 1977); Foster v. Knutson, 84 Wash. 2d 538, —, 527 P.2d 1108, 114 (1974).

27. Dynaelectron Corp. v. Jack Richards Aircraft Co., 337 F. Supp. 659 (W.D. Okla. 1972); Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797 (E.D. Pa. 1968); Investors Acceptance Co. v. James Talcott, Inc., 454 S.W.2d 130 (Ct. App. Tenn. 1970).

28. I.T.T.—Indus. Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, —, 229 S.E.2d 814, 820 (1976).

29. California Airmotive Corp. v. Jones, 415 F.2d 554 (9th Cir. 1969); Massey-Ferguson Corp. v. Hamlin, 9 UCC Rep. Serv. 142 (Ct. App. Tenn. 1971).

30. Goodwin v. Farmers Tractor & Equip. Co., 458 S.W.2d 419, 421 (Ark. 1970).

31. *In re* Zsa Zsa, Ltd. 352 F. Supp. 665, 671 (S.D.N.Y., 1972).

32. Luxurest Furniture Mfg. Co. v. Furniture, Etc., 132 Ga. App. 661, —, 209 S.E.2d 63, 65 (1974), *aff'd*, 233 Ga. 934, 214 S.E.2d 373 (1975); J.F. England's Sons, Inc. v. Liggett, 152 N.W.2d 583, 586 (S.D. 1967).

33. Bulldog Concrete Forms Sales Corp. v. Taylor, 195 F.2d 417, 425 (7th Cir. 1952); Valley Nat'l Bank v. Brooks, 3 Ariz. App. 340, 414 P.2d 189, 192 (1966); Johnson Constr. Co. v. Cannon, 242 S.C. 42, 129 S.E.2d 750, 755 (1963).

34. Fardy v. Mayerstein, 221 Ind. 339, 47 N.E.2d 315 (1935), *reh. denied*, 221 Ind. 349, 47 N.E.2d 966 (1943); *See also* Arcola Sugar Mills Co. v. Burnham, 67 F.2d 981 (5th Cir. 1933), *cert. denied*, 292 U.S. 630 (1934).

35. Louisville Trust Co. v. Drewry, 266 Ky. 279, 98 S.W.2d 900 (1936).

36. Shuchman, *Profit on Default*, 22 STAN. L. REV. 20, 56 (1969).

37. Graham v. Northwestern Bank, 16 N.C. App. 287, —, 192 S.E.2d 109, 111 (1972).

even slight deviations from the statutory prescription can lead to verdicts for the debtor.[38]

Although it is of little immediate solace to Wilkerson, the court did do future secured creditors a service in adopting the three-part guideline developed by the Supreme Court of Washington to determine the commercial reasonableness of the publicity a seller gives a foreclosure sale.[39] To be commercially reasonable, the advertisements must be:

> 1) given to the public sufficiently in advance to allow interested bidders a reasonable opportunity to participate;
> 2) given to a public reasonably expected to have an interest in the collateral to be sold and notifying the public of the exact time and place of the sale reasonably convenient to potential bidders;
> 3) [given] in a manner reasonably calculated to assure . . . that the collateral will bring the best possible price from the competitive bidding of a lively concourse of bidders.[40]

This test should give secured sellers a better idea of what is expected of them in conducting their foreclosure sales. Considering what happened to Wilkerson because of its failure to meet that standard, a secured creditor who still intends to conduct such a sale would be well advised to meticulously abide by those standards.

V. EFFECTS OF FAILURE TO COMPLY WITH U.C.C. SECTION 9-504

The U.C.C. has not brought about uniformity on the question of what occurs when a secured creditor fails to comply with section 9-504 in disposing of the collateral. As indicated previously, section 9-507(1) states that when the secured party fails to comply, the debtor may recover damages. The disagreement is as to whether or not this is the debtor's sole remedy. Many courts and commentators argue that another possible remedy is to allow the debtor to use the creditor's noncompliance as either a partial or total defense to the creditor's action for a deficiency judgment.[41]

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38. I.T.T.—Indus. Credit Corp. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976) (incorrect date on notice); Hodges v. Norton, 29 N.C. App. 193, —, 223 S.E.2d 848, 851 (1976) (inability to prove that notice was mailed to debtor).

39. Foster v. Knutson, 84 Wash. 2d 538, —, 527 P.2d 1108, 1114 (1974).

40. 580 P.2d at 509.

41. For commentary favoring the use of creditor misconduct as a total bar to the creditor's action for a deficiency judgment, *see* II G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, § 44.9 at 1264 (1965); White, *Representing the Low Income Consumer in Repossessions, Resales, and Deficiency Judgment Cases*, 64 NW. U.L. REV. 808, 828 (1970); Clontz, *Guide to a Secured Creditor's Remedies on a Debtor's Default*, 7 U.C.C.L.J. 348, 369 (1975); Note, *Creditor's Deficiency Judgment Under Article 9 of the Uniform Commercial Co-e: Effect of Lack of Notice and*

There are three general approaches taken in defining a debtor's remedy when the secured party fails to comply with Part Five of the U.C.C. Some jurisdictions allow a debtor to use this noncompliance as a complete defense to the creditor's action for a deficiency judgment. Others have held that the debtor's exclusive remedy is an affirmative cause of action under U.C.C. section 9-507(1). Still others have held that creditor misconduct creates a rebuttable presumption that the repossession discharged the debt, but these jurisdictions will allow the secured party to recover a deficiency judgment if he can prove otherwise. But even within those individual approaches, there are differences that require elaboration.

Approach I: Bar the deficiency

The majority of the courts which have reached the conclusion that the errant creditor should lose his right to a deficiency judgment have done so on the theory that strict compliance with Part Five of Article Nine of the U.C.C. is a prerequisite to collecting a deficiency judgment.[42] The requirements of Part Five (proper repossession,[43] notice to the debtor of the sale,[44] and a commercially reasonable resale[45]) are viewed as elements of the creditor's prima facie case. Thus, when a

a Commercially Reasonable Sale, 33 MD. L. REV. 327, 350 (1973); Note, *Denial of Deficiency: A Problem of Reasonable Notice Under U.C.C.* § 9-504(3), 34 OHIO STATE L.J. 657, 699 (1973); Note, *Debtor's Rights Against a Deficiency Judgment Under Article Nine,* 16 HOW. L.J. 148, 164 (1970); 40 TENN. L.R. 532 (1973).

For commentary opposing a total defense to the creditor's action for a deficiency judgment, *see* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 999 (1972); Minetz, *May a Wrong-Doer Recover a Deficiency, or is Section 9-507(1) a Debtor's Exclusive Remedy?* 6 U.C.C.L.J. 344 (1974); Henszey, *A Secured Creditor's Right to Collect a Deficiency Judgment Under U.C.C. Section 9-504: A Need to Remedy the Impasse,* 31 BUS. LAW. 2025, 2032 (1976); Note, *Effect of Lack of Notice,* 42 BROOKLYN L. REV. 56 (1975); 76 DICK L. REV. 394 (1972).

42. The jurisdictions which have barred the deficiency using the prerequiste theory are: DISTRICT OF COLUMBIA: Commercial Credit Corp. v. Lloyd, 12 U.C.C. Rep. Serv. 15, 18 (D.C. Super. 1973); FLORIDA: Turk v. St. Petersburg Bank & Trust Co., 281 So.2d 534, 536 (Fla. Ct. App. 1973); GEORGIA: Granite Equip. Leasing Corp. v. Marina Dev. Corp., 139 Ga. App. 778, 230 S.E.2d 43 (1976); Gurwitch v. Luxurest Furniture Mfg. Co., 233 Ga. 934, 214 S.E.2d 373 (1975); Braswell v. American Nat'l Bank, 117 Ga. App. 699, 161 S.E.2d 420 (1968); MAINE: C.I.T. Corp. v. Haynes, 161 Me. 353, 212 A.2d 436 (1965); MASSACHUSETTS: One Twenty One Credit Union v. Darcy, 40 Mass. App. Dec. 64 (1968); MICHIGAN: Cities Serv. Oil Co. v. Ferris, 9 U.C.C. Rep. Serv. 899, 903 (Mich. Dist. Ct. 1971); NEW MEXICO: Foundation Discounts v. Serna, 81 N.M. 474, 468 P.2d 875 (1970); OKLAHOMA: Dynaelectron Crop. V. Jack Richards Aircraft Co., 337 F. Supp. 659, 663 (W.D. Okla. 1972); Davidson v. First State Bank & Trust Co., 559 P.2d 1228, 1231 (Okla. 1976); PENNSYLVANIA; Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696, 705 (W.D. Pa. 1963), *modified on other grounds,* 335 F.2d 846 (3d Cir. 1964); UTAH: Chrysler Credit Corp. v. Burns, 562 P.2d 233, 234 (Utah 1977); VIRGINIA: *In re* Bishop, 482 F.2d 381 (4th Cir. 1973); WYOMING: Aimovetto v. Keepes, 501 P.2d 1017, 1019-20 (Wyo. 1972).

43. U.C.C. § 9-503.

44. U.C.C. § 9-504(3).

45. *Id.*

debtor successfully pleads creditor misconduct as a Code-based defense, the creditor is denied any recovery.

A second group of courts arrive at the same result, but find the source of the debtor's defense in pre-Code law which supplements the Code through U.C.C. §1-103.[46] This section states that unless the common law conflicts with a particular provision of the Code, the pre-Code law is not displaced. According to these courts, since the pre-Code law of many jurisdictions recognized an equitable defense of creditor misconduct in deficiency actions, the authors of the Code would have said that section 9-507(1) was the debtor's exclusive remedy if they had intended it to be so.

A third group of cases holds that if the secured party fails to comply with Part Five, it will be conclusively presumed that the repossessed goods were taken in complete satisfaction of the debt.[47] Thus, under this theory, the debtor's defense is accord and satisfaction.

Approach II: U.C.C. Section 9-507(1) is the Sole Remedy

Courts taking this approach hold that the secured party is entitled to a deficiency judgment because the debtor has failed to pay his debt, but hold that the debtor has an affirmative cause of action, if the creditor breached his obligations under the Code.[48] These courts hold that

46. The jurisdictions which allow the debtor to defeat the deficiency actions on a preCode defense theory are: CALIFORNIA: Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, —, 104 Cal. Rprt., 315, 321 (1972). MAINE: Camden Nat'l Bank v. St. Clair, 309 A.2d 329, 331-33 (Me. 1973); NEW YORK: Avis-Rent-A-Car System v. Franklin, 82 Misc. 2d 66, —, 366 N.Y.S.2d 83, 85 (App. Term. 1975); Leasco Data Processing Equip. v. Atlas Shirt Co., 66 Misc. 2d 1089, —, 323 N.Y.S.2d 13, 16 (Civ. Ct. 1971).

47. The jurisdictions which have barred a deficiency judgment on an accord and satisfaction theory are: GEORGIA: Johnson v. Commercial Credit Corp., 117 Ga. App. 131, —, 159 S.E.2d 290, 291 (1968); Moody v. Nides Fin. Co., 115 Ga. App. 859, —, 156 S.E.2d 310, 311 (1967); ILLINOIS: Morris Plan Co. v. Johnson, 271 N.E.2d 404, 408 (Ill. App. 1971); NEW YORK: Associates Discount Corp. v. Cary, 47 Misc. 2d 369, 262 N.Y.S. 2d 646 (Civ. Ct. 1965).

48. The jurisdictions which have held that U.C.C. § 9-507(1) provides the debtor with his sole remedy are: MASSACHUSETTS: Abbott Motors, Inc. v. Ralston, 28 Mass. App. Dec. 35, (1964); MICHIGAN: Jones v. Morgan, 58 Mich. App. 35, 228 N.W.2d 419 (1975); Wilson Leasing Co. v. Seaway Pharmacal Corp., 53 Mich. App. 359, 220 N.W.2d 83 (1974); MISSOURI: Wirth v. Heavey, 508 S.W.2d 263, 268 (Mo. App. 1974); NEW MEXICO: Crosby v. Basin Motor Co., 83 N.M. 77, 488 P.2d 127 (1972); NEW YORK: Leasco v. Sheridan Indus., Inc., 82 Misc. 2d 897, 371 N.Y.S.2d 531 (Civ. Ct. 1975); PENNSYLVANIA: Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797 (E.D. Pa. 1968); Alliance Discount v. Shaw, 195 Pa. Super Ct. 601, 171 A.2d 548 (1964); Atlas Credit Corp. v. Dolbow, 193 Pa. Super. Ct. 649, 165 A.2d 704 (1963); Atlas Constr. Co. v. Dravo Doyle Co., 3 U.C.C. Rep. Serv. 124, 132 (Pa. C.P. 1965); TENNESSEE: Commercial Credit Corp. v. Holt, 17 U.C.C. Rep. Serv. 316 (Tenn. Ct. App. 1975); Massey-Ferguson Fin. Corp. v. Hamlin, 9 U.C.C. Rep. Serv. 142 (Tenn. Ct. App. 1971); Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966); WASHINGTON: Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972); Commercial Credit Corp. v. Wollgast, 11 Wash. App. 117, 521 P.2d 1191 (1974).

section 9-507(1) conflicts with the notion of pre-Code defenses and that section 1-103 is therefore inapplicable.

Approach III: Allow the Deficiency, But Require the Secured Party to Prove the Value of the Collateral

Under this approach, the creditor is not completely barred from receiving a deficiency judgment, but his misconduct raises a rebuttable presumption that the collateral would have brought enough at a proper resale to discharge the debt.[49] This is the same theory as the accord and satisfaction approach (barring the deficiency altogether), except that here the creditor is allowed to prove a lower value for the collateral and obtain a deficiency judgment based on that figure. This third approach also shares some of the reasoning of the prerequisite theory, but rather than making compliance with Part Five a prerequisite for obtaining a deficiency judgment, compliance is seen as a prerequisite for using the resale proceeds as the basis of damages. If the creditor fails to meet the Code's resale requirements, he must independently prove the amount that should be credited to the debt rather than having the benefit of a presumption that the resale proceeds represent the appropriate amount.

49. This approach has been gaining the most support recently, and if any one of the approaches can be said to be the "trend", this is it. Those jurisdictions which have held that an erring creditor is not barred from receiving a deficiency judgment if he can prove the value of the repossessed collateral are: ALASKA: Koubuk Eng'r & Contr. Serv., Inc. v. Superior Tank & Constr., 568 P.2d 1007, 1013 (1977), Weaver v. O'Meara Motor Co. 452 P.2d 87, 92 (1969); ARKANSAS: Farmers Equip. Co. v. Miller 252 Ark. 1091, —, 482 S.W.2d 805, 810 (1974), Universal C.I.T. Credit Corp. v. Rone 248 Ark. 665, —, 453 S.W.2d 37, 39 (1970), Carter v. Ryburn Ford Sales Inc., 248 Ark. 236, —, 451 S.W.2d 199, 203 (1970), Baker v. Horn, 245 Ark. 310, —, 432 S.W.2d 21, 22 (1968); Norton v. National Bank of Commerce, 240 Ark. 143, —, 398 S.W.2d 21, of Commerce, 240 Ark. 143, —, 398 S.W.2d 538, 542 (1966); COLORADO: Community Management Ass'n v. Tousley, 32 Colo. App. 33, —, 505 P.2d 1314, 1316-17 (1973); CONNECTICUT: Savings Bank v. Booze, 34 Conn. Supp. 632, —, 382 A.2d 266, 228-29 (1978); ILLINOIS: Commercial Discount Corp. v. Baker, 372 N.E.2d 926, 930 (Ill. App. Ct. 1978); General Foods Corp. v. Hall, 39 Ill. App.3d 147, 153, 349 N.E.2d 573, 576-77 (1976); Tauber v. Johnson, 8 Ill. App. 3d 789, —, 291 N.E.2d 180, 184 (1972); INDIANA: Hall v. Owen County State Bank, 370 N.E.2d 918, 928 (Ind. App. 1978); MISSISSIPPI: Walker v. V.M. Box Motor Co. 325 So.2d 905, 906 (Miss. 1976); NEBRASKA: Bank of Gering v. Glover, 192 Neb., 575, —, 223 N.W.2d 56, 59 (1974); Coronett v. White Motor Corp., 190 Neb. 496, —, 209 N.W.2d 341, 344 (1973); NEVADA: Levers v. Rio King Land Inv. Co., 560 P.2d 917, 920 (Nev. 1977); NEW JERSEY: Franklin State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632 (Union County Ct. 1975); Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, —, 276 A.2d 402, 404 (Ocean County Ct. 1971); T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (Bergan County Ct. 1969); NEW MEXICO: Clark Leasing Corp. v. White Sands Forrest Prods., Inc., 535 P.2d 1077, 1082 (N.M. 1975); NEW YORK: Security Trust Co. v. Thomas, 399 N.Y.S.2d 511, 514 (Sup. Ct., App. Div. 1977); NORTH CAROLINA: Hodges v. Norton, 29 N.C. App. 193, —, 223 S.E.2d 848, 851 (1976). TENNESSEE: Investors Acceptance Co. v. James Tallcott, Inc., 61 Tenn. App. 307, 454 S.W.2d 130 (1969); TEXAS: United States v. Whitehouse Plastics, 501 F.2d 692, 695 (5th Cir. 1974); VIRGINIA: *In re* Thomas, 12 U.C.C. Rep. Serv. 578, 581 (W.D. Va. 1973).

This approach is premised on the theory that barring the deficiency altogether is unnecessarily harsh and amounts to punitive damages, which are thought not to belong in a contract setting.[50] Nevertheless, the secured party is in a better position to prove what a proper resale would have brought, and so he should bear the consequences of a failure of proof on this issue.[51]

The Oklahoma Supreme Court has used the prerequisite theory to bar a deficiency judgment before,[52] and appears to have done so again in *Wilkerson*.[53] The unique result in *Wilkerson* was that in addition to allowing the debtor to use the creditor's misconduct as a shield to bar the deficiency, they simultaneously allowed him to use that misconduct as a sword to collect damages under section 9-507(1). Although this appears to be unprecedented,[54] it is entirely consistent with the reasoning of the prerequisite theory for barring the creditor's action. This consistency itself presents a strong argument for why that logic is erroneous.

If the prerequisite theory is correct, then a showing that the creditor has not conducted a commercially reasonable resale, or that he has not given the debtor adequate notice of the sale, defeats his prima facie case and he should not be entitled to a deficiency judgment. At the same time, the debtor is able to make out his case under section 9-

50. Coronett v. White Motor Corp., 190 Neb. 496, —, 209 N.W.2d 341, 344 (1973).

51. *Id.* at N.W.2d 343; Community Management Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314, 1316 (1973).

52. Davidson v. First State Bank & Trust Co., 559 P.2d 1228, 1231 (1976); *see also*: Dynaelectron Corp. v. Jack Richards Aircraft Co., 337 F. Supp. 659, 663 (W.D. Okla. 1972).

53. 580 P.2d at 509.

54. The problem of what to do when a debtor attempts to use the creditor's misconduct both as a defense and as an affirmative cause of action has arisen before both in jurisdictions which bar the deficiency and in those which allow it. In Chrysler Credit Corp. v. Burns, 562 P.2d 233 (Utah 1977), where the deficiency was barred, the court remanded the case back to the trial court to find whether the consumer/debtor still had any damages in view of the dismissal of the creditor's action for a deficiency judgment. Similarly, in an earlier Oklahoma case where the court said that it would bar deficiency judgments for noncomplying creditors, the damages that the debtor sought under § 9-507(1) were for injury to his business caused by the creditor's wrongful repossession rather than merely for additional credit he should have received on the sale of the collateral. Davidson v. First State Bank & Trust Co., 559 P.2d 1228, 1231 (Okla. 1976). *See also* Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963); Savings Bank v. Booze, 34 Conn. Supp. 632, —, 382 A.2d 226, 228-29 (1977); Walker v. V.M. Box Motor Co. 325 So.2d 905, 906 (Miss. 1976).

The best approach taken by a jurisdiction which shifts the burden but which allows the deficiency judgment if the creditor can prove what the value of the collateral, was in Conti Causeway Ford v. Jarossy, 114 N.J. Super 382, —, 276 A.2d 402, 405 (1971). There the court held that shifting the burden of proof and receiving damages under § 9-507(1) were, in effect, alternatives. It was also held that the difference between what the creditor would have gotten if the deficiency was based on the resale amount and what he got as a result of the shifted burden would be set off against any recovery the debtor got under § 9-507(1).

507(1). This allows the debtor a double recovery in the case where a proper resale would have resulted in some deficiency. In such a case, one of the recoveries must be viewed as punitive in nature. This could be justified as protecting consumers by penalizing overreaching creditors.[55] However, this type of consumer protection would be very erratic, because it would allow only a single recovery to consumers whose collateral either did or should have netted a surplus at resale.

This problem can be illustrated by means of some hypotheticals. All cases assume the following sale: Debtor (*D*) buys a car from Creditor (*C*) who perfects a security interest in the car. The cash price of the car is $3,000 and the time price differential (interest) is $500, yielding a total contract price of $3500.

Case I: *D* makes a downpayment of $200 but does not pay any of the installments. He successfully puts off *C* long enough for the car to depreciate by $500. *C* then repossesses the car, now worth $2,500, and sells it without advertising for $2,000. *C* credits *D*'s account with $2,000 and that, plus the $200 *D* has already paid, leaves a deficiency of $1,300 ($3,500 − $2,200 = $1,300), which *C* sues for. *D* defends and counterclaims on the basis of *C*'s failure to comply with the public sale provisions of the Code and wins.

In State *X*, U.C.C. section 9-507(1) is *D*'s sole remedy. Here, *D* wins on his counterclaim and is awarded $800. (Time price differential = $500; ten percent of the cash price = $300; $500 + $300 = $800.) But *C* also wins his deficiency judgment of $1,300. (These hypotheticals disregard any attorney fees which might be awarded.[56]) In this case *D* is out $700, ($200 downpayment + $500 difference in judgments) but has had the use of the car from the date of purchase until it was repossessed, during which time it depreciated by $500. *C* is out $800, which is slightly more than the amount by which he injured *D*. (*C* sold *D*'s car, which was worth $2,500, for only $2,000.) Both are "wrongdoers," and both are out something.

In state *Y*, however, *D* gets both a sword and a shield. Now *D* wins his counterclaim for $800, and *C* is barred from collecting a defi-

55. Typically, this argument is used in support of allowing the debtor to defeat the deficiency judgment itself. *See* Shuchman, *Profit on Default*, 22 STAN. L. REV. 20, 56 (1969); Note, *Creditor's Deficiency Judgment Under Article 9 of the Uniform Commercial Code: Effect of Lack of Notice and a Commercially Reasonable Sale*, 33 MD. L. REV. 327, (1973). Thus far, it does not appear that any courts or commentators have asserted it as an argument for *both* denying the deficiency and allowing an affirmative cause of action simultaneously.

56. The U.C.C. allows the creditor to recover attorneys' fees under § 9-504(1)(a). Oklahoma also allows the trial court discretion in awarding attorneys' fees to either party in suit based upon a contract for the sale of goods. OKLA. STAT. tit. 12, § 936 (1971).

ciency. In this situation, *D* has a profit of $600 and has used the car free. *C*, however, is in a bad situation. He has received a total of $2,200 (receipt from resale + downpayment), has paid *D* $800, but he has neither his car nor his profit, and he has lost some expenses. *C* is out $2,100. (Received $2,200 − $800 = $1,400; Expected $3,500.)

Case II: In this case *D* almost has the car paid off when he defaults. Now *D* has paid $3,000, and at the time he defaults the car has a fair market value of $700. Assuming the same amount of larceny in *C*'s heart, his unreasonable sale now nets $200, and he sues for his $300 deficiency. Assuming that a reasonable sale would have netted the fair market value, *D* would owe no deficiency, and *C* would owe *D* the surplus $200. In this case, *C* seems to be much more deserving of punitive damages, but in the state with the puntive damage theory he will be in a better position.

In State *X*, where *D* only got section 507(1) damages, *C* is still out $800 (he collects the deficiency, thus receiving his full $3,500, but he has paid $800 in damages to *D*), and *D* has used the car and paid $2,500 during an amount of time in which the car depreciated by $2,300. But in State *Y*, *C* is out $1,100, ($800 damages + $300 deficiency) while *D* has paid $2,200 ($3,000 payments of the car − $800 received in damages,) and used the car while it depreciated by $2,300.

In the two hypotheticals, *C* acted in approximately the same manner, but if there is a meaningful difference, his conduct with the debtor who had almost paid off the car was more reprehensible than his conduct with the debtor who only paid his downpayment. But the creditor in Case I is out $2,100 in a double recovery state while in Case II he is only out half that much. And it can get worse: If the unreasonable resale does recover enough to pay off the debt, indicating that the value of the collateral at the time of repossession is worth more than the debt, the double recovery state does not punish the creditor at all. He pays only once, since there is no deficiency to bar.

The irrationality of a punitive damage scheme so wholly unrelated to the evil it punishes is a strong argument against allowing the debtor to use the creditor's misconduct as both a defense and an affirmative cause of action simultaneously. But if strict compliance with the statute is an element of the creditor's case in a deficiency proceeding, and if the Code recognizes a separate cause of action for creditor misconduct, then an irrational punitive damages system is the result. On the other hand, if section 9-507(1) is viewed as providing a minimum recovery for consumers, to be exceeded if the consumer can either prove higher

actual damages or when he can find an *alternative* remedy that offers greater protection, then section 9-507(1) is no penalty at all.[57] Rather, it operates to protect the consumer by easing his burden of proof on an otherwise highly speculative point. The consumer would simply be relieved of the burden of showing what price the collateral would have brought at a commercially reasonable resale. But when he could show that element, he would be allowed to do so.

However irrational it is, there is some evidence that the framers of the Uniform Consumer Credit Code[58] (U.C.C.C.) intended to permit a double recovery, at least in some cases. Under the U.C.C.C., the creditor is not entitled to a deficiency judgment when the collateral is low-priced consumer goods.[59] But in the event of a repossession, the debtor is still entitled to insist that there be a resale of the collateral.[60] In that situation, there would still be a resale under U.C.C. section 9-504, and the creditor would still be liable for damages under U.C.C. section 9-507(1). Here, the debtor would not be asserting the creditor's misconduct as both a defense and an affimative cause of action; he would be asserting U.C.C.C. section 5-103 as his defense and U.C.C. section 9-507 (1) as his offense. But even this result is partially avoided if U.C.C. section 9-507(1) is viewed as providing only the alternative of minimum damages.

At least one commentator has come to the conclusion that there is no logical solution to the problem as the laws are now written, and that we are at an impasse.[61] His solution would be to eliminate U.C.C. section 9-507(1) altogether, deny deficiencies on consumer goods worth less than $1,500 at the time of sale, and require other creditors to show compliance with the U.C.C. provisions as a prerequisite to recovery of a deficiency.[62] This would eliminate the double recovery aspects of the

57. *See* note 51 *supra.*

58. Uniform Consumer Credit Code (1968 version). In Oklahoma, OKLA. STAT. tit. 14A. §§ 1-101 through 9-103 (1971 & Supp. 1977). [Hereinafter U.C.C.C.]

59. U.C.C.C. § 5.103. In the 1968 version, the deficiency judgment was barred whenever the creditor voluntarily accepted the return of collateral, if the original cash sale price was $1,000 or less. Under the 1974 version of the U.C.C.C., the figure is $1,750. However, this seems to be a favorite area for non-uniform provisions and there are almost as many configurations as there are adopting jurisdictions.

Even bolder results are reached in California and Washington where deficiency judgments are barred in all consumer goods sales. *See* CAL. CIV. CODE § 1812.5 (Supp. 1977) (West), and WASH. REV. CODE § 62A 9-501(1) (1976). *See also* ILL. REV. STAT. ch. 121 1/2 §§ 556, 580 (Supp. 1977) (barring deficiency judgments for automobiles).

60. U.C.C. § 9-505.

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

62. *Id.* at 2032.

problem, but it would still leave the measure of damages wholly unrelated to the harm and it would deny damages to the debtor whose collateral did pay off the debt but with less of a surplus than should have been recovered. Thus, a preferable approach would be to allow section 9-507(1) damages only as an alternative to denying a deficiency.

VI. DEALING WITH THE PROBLEM IN OKLAHOMA

It may be that Oklahoma's position on deficiencies and the errant creditor is not that firmly entrenched. In *Wilkerson*, the Oklahoma Supreme Court did affirm the sword and shield approach taken by the trial court, but the point was nearly ignored by the court[63] and may not have been argued by the litigants. Certainly the court articulated no rationale for allowing the debtor to use the same conduct as both a defense and an affirmative cause of action. In fact the Oklahoma courts have never clearly articulated their rationale for deciding that U.C.C. section 9-507(1) was not the debtor's exclusive remedy.

The genesis of that decision is a federal district case from Oklahoma's Western District which cites Anderson[64] for the proposition that proof of a commercially reasonable resale is a condition precedent for collection of a deficiency judgment.[65] Neither the district court nor Anderson offers any reason or rationale for the statement, nor do they cite any other authority for a proposition that does not represent a unanimous position among the jurisdictions.[66] The only other indication that Oklahoma regards proof of a commercially reasonable resale as a part of the creditor's prima facie case for a deficiency judgment came in a case where the creditor was not seeking a deficiency judgment.[67] Once again the court did not analyze the question, but rather simply made the statement gratuitously and cited the federal district case as authority.[68]

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63. The parties seemingly argued only the question of commercial reasonableness. The appellant's brief (Wilkerson's) treats the question as a defense to his cause of action (appellant's brief at 14) but tha appellee refers to U.C.C. § 9-507(1) as a statutory penalty. It is therefore not clear whether the parties addressed the issue or not.

64. R. ANDERSON, UNIFORM COMMERCIAL CODE § 9-504:28 (2d ed. 1971).

65. Dynalectron Corp. v. Jack Richards Aircraft Co., 337 F. Supp. 659, 663 (W.D. Okla. 1972).

66. *Cf.* Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797 (E.D. Pa. 1968); Mallicoat v. Volunteer Fin. & Loan Corp., 415 S.W.2d 347 (Tenn. Ct. App. 1966); California Airmotive Corp. v. Jones, 415 F.2d 554 (9th Cir. 1969); Investors Acceptance Co. v. James Talcott, Inc., 61 Tenn. App. 88, 454 S.W.2d 130 (1970).

67. Davidson v. First State Bank & Trust Co., 559 P.2d 1230, 1231 (Okla. 1976).

68. *Id.* at 1231.

It is possible that the Oklahoma Supreme Court would still be receptive to the argument that a creditor is suing on a contractual obligation, that his prima facie case is proof of the debt and that it has not been paid, and that the remedy for creditor misconduct is an affirmative cause of action and not a defense to the debt. Even if the court was unwilling to go that far, it could be argued that the remedies are alternative remedies and that *Wilkerson* should not be binding because the parties did not argue the question, and the court did not fully analyze the issue. Otherwise, if the case does represent binding precedent, it should be overruled.

VII. CONCLUSION

In *Wilkerson Motor Co., Inc. v. Johnson*, the Oklahoma Supreme Court set forth useful guidelines for determining what a secured creditor must do in order to conduct a commercially reasonable resale of repossessed collateral. Although the case dealt only with the question of how much publicity the creditor must give such a sale, the guidelines can also be helpful in determining other questions concerning the conduct of public sales (such as where and when they should be held). In this regard, the decision is laudable and indicates that the court is willing to go considerably further than previous courts in holding the creditor responsible for insuring that the debtor gets fair credit for his collateral.

Nevertheless, the case also indicates that the court is drifting into uncharted waters by allowing double recoveries to certain defaulting debtors and penalizing certain secured creditors on a basis wholly unrelated to their culpability or innocence. To this extent, the decision is a bad one; its effects are highly speculative and do not appear to have been fully anticipated by the court.

Edward M. Kimmel