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Cumulative Remedies Under Article 9 of the Uniform Commercial Code: An Answer to Fuentes v. Shevin

CUMULATIVE REMEDIES UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE: AN ANSWER TO FUENTES v. SHEVIN

The right to take possession of collateral after default has long been the most effective and inexpensive remedy available to secured parties.[1] This was true at common law and under Article 9 of the Uniform Commercial Code. However, in *Fuentes v. Shevin*,[2] the Supreme Court recently decided that the due process clause of the fourteenth amendment requires an opportunity for a debtor to be heard before collateral can be taken from him through replevin proceedings. Additionally, a series of lower court decisions[3] have held that the same constitutional requirements extend to other summary prejudgment remedies, including self-help repossession under Article 9.[4] Together, these decisions have eviscerated repossession as the principle weapon in a secured party's arsenal of remedies. Before taking possession, the secured party now must secure a judicial order in an adversary proceeding. Immediate compliance with this requirement is problematic, since many states presently have no procedural provisions for such adversary proceedings.

This Comment will suggest a method by which some of the vitality of the repossession remedy can be restored to secured parties. The sug-

1. The secured party may gain possession with, or in some cases without, judicial process. UNIFORM COMMERCIAL CODE § 9-503. Repossession is usually followed by sale of the collateral and suit for deficiency.

2. 92 S. Ct. 1983 (1972). The Court held that Florida and Pennsylvania prejudgment replevin provisions worked a deprivation of property without due process of law because they denied the debtor an opportunity to be heard before chattels were taken from him. The Court cited Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969), for the proposition that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property."

3. *See, e.g.*, Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972); Collins v. Viceroy Hotel Corp., 338 F Supp. 390 (N.D. Ill. 1972); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Klim v. Jones, 315 F Supp. 109 (N.D Cal. 1970). *Contra, e.g.*, Reeves v. Motor Contract Co., 324 F Supp. 1011 (N.D. Ga. 1971); Black Watch Farms Inc. v. Dick, 323 F Supp. 100 (D. Conn. 1971); American Olean Tile Co. v. Zimmerman, 317 F Supp. 150 (D. Hawaii 1970); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970).

4. Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *appeal docketed*, No. 72-1484, 9th Cir., —, 1972. *Contra*, Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Green v. First Nat'l Bank, CCH INSTALLMENT CREDIT GUIDE ¶ 51,930 (W.D. Va. Sept. 1972).

Code section 9-503 provides that a secured party may take possession without judicial process if this can be done without breach of the peace.

gested method will employ a novel application of two related remedies enumerated in Article 9. The fundamental requirement of the suggested approach is that the creditor reduce his claim on the debt to judgment. Such a procedure would satisfy the constitutional requirement of due process, and, of course, would vest the secured party with all the rights of a judgment creditor. More importantly, such action would not deprive him of his right to repossession, which is inherent in his status as a secured party.

By employing this procedure, the creditor would enjoy the rights of a judgment creditor concurrently with those of a secured party. This dynamic situation can be achieved only by successful prosecution of an action on the debt; it is submitted, however, that such a procedure will not involve cumbersome delay, since judgment presumably will be entered by default in most instances.

It has been suggested above that this procedure is presently available under Article 9. This conclusion presupposes that the Code has abandoned the doctrine of election of remedies, which at common law precluded a party from pursuing concurrently his rights as a creditor and those as a secured party. Because the election doctrine continues to find adherents even under the Code, it poses a serious threat to the feasibility of the proposed procedure. Accordingly, the election of remedies problem will be the primary focus of this Comment. It will be concluded that the doctrine has been abrogated, and that the specific suggestion of this Comment—securing a judgment and exercising repossession rights —is indeed viable. Before considering the election doctrine, however, it is necessary to establish the default remedies available to a secured party under Article 9

Rights and Duties of a Secured Party After Default

Under section 9-501(1) of the Uniform Commercial Code, a secured party may exercise any right and invoke any remedy accruing to him by virtue of the Code or the security agreement.[5] He is entitled under

5. The parties by agreement may not (with certain exceptions) waive or vary rights and duties set forth by the Code relating to accounting for surplus (sections 9-502(2) and 9-504(2)), disposition of collateral (sections 9-504(3) and 9-505(1)), acceptance of collateral as discharge of obligation (section 9-505(2)), redemption of collateral (section 9-506), and liability of the secured party for failure to comply with Part 5 of Article 9 (section 9-507) Uniform Commercial Code § 9-501(3). The parties may, however, determine the standards by which fulfillment of their rights and duties are to be measured so long as the standards are not manifestly unreasonable. *Id.*

the Code to reduce his claim to judgment, foreclose, or otherwise enforce his security interest by any available judicial procedure.[6] Unless the security agreement provides otherwise, a secured party also has the right to possession of the collateral upon default.[7] Possession may be gained through appropriate legal proceedings[8] or, if possible without a breach of the peace, through self-help.[9] Superimposed upon these rights is the

6. If the claim is reduced to judgment, the lien arising from any levy upon the secured party's collateral by virtue of execution upon that judgment relates back to the date of the perfection of the security interest in such collateral. *Id.* § 9-501(5). A judicial sale on such execution is a foreclosure of the security interest by judicial procedure within the meaning of section 9-501(1), and the secured party may purchase the collateral at such sale and thereafter hold it free of any other requirements of Article 9. *Id.* Such a sale is public, and section 9-504(3) permits the secured party to buy at a public sale.

In the case of goods secured by documents, the secured party may proceed against either the documents or the goods. *Id.* § 9-501(1). If the security interest extends to both real and personal property, the secured party has the option of proceeding against the personalty under the Code or proceeding against both in accordance with his rights and remedies with respect to the real property, in which case the provisions of the Code are not applicable. *Id.* § 9-501(4).

The rights, remedies, and duties of a secured party who is in possession at time of default or who takes possession after default also are determined by section 9-207. *Id. See also* § 9-501, Comment 3. Of primary importance is the secured party's duty to use reasonable care in custody and preservation of the collateral. *Id.* § 9-207(1). If the creditor is also a seller, he may have the remedies provided in Article 2. *See, e.g.*, UNIFORM COMMERCIAL CODE § 9-113, Comment 5.

If the "security interest" arises solely by virtue of Article 2 (as opposed to a security agreement between the parties) and if the seller has possession, he is precluded from using the remedies of Article 9, and must invoke the seller's remedies of Article 2. *Id.* § 9-113.

7. *Id.* § 9-503.

8. The possessory action will generally depend upon existing state law. In Virginia, the action is ordinarily one of detinue. *See, e.g.*, VA. CODE ANN. §§ 8-586 *et seq.* (Repl. Vol. 1957), *as amended,* (Cum. Supp. 1972); Lloyd v. Federal Motor Truck Co., 168 Va. 72, 190 S.E. 257 (1937). In the majority of states, the action will be replevin. Three states have augmented the UCC to remove any doubt about the judicial remedy available by providing that "if a secured party elects to proceed by process of law, he may proceed by writ of replevin or otherwise." MD. ANN. CODE art. 95B, § 9-503 (Repl. Vol. 1964); PA. STAT. ANN. tit. 12A, § 9-503 (1970), *construed in* Karp Bros. v. West Ward Savings & Loan Ass'n, 440 Pa. 583, 271 A.2d 493 (1970); UTAH CODE ANN. § 70A-9-503 (Repl. Vol. 1968).

9. UNIFORM COMMERCIAL CODE § 9-503. This section also validates provisions in the security agreement which require the debtor, upon demand, to assemble the collateral and make it available at a place designated by the secured party reasonably convenient to both. Furthermore, when the secured party is entitled to possession of the collateral, he may render equipment unusable and may dispose of it on the debtor's premises subject to the requirements of commercial reasonableness in section 9-504(3). *Id.* § 9-503.

Fuentes requirement that the debtor be afforded an opportunity to be heard before the collateral is repossessed.[10]

Once the secured party has gained possession, however, he has the right to sell, lease, or otherwise dispose of any or all of the collateral.[11] Disposition may be by private or public proceeding, but every aspect of the disposition must be commercially reasonable.[12] In the case of a secured indebtedness, the debtor is entitled to any surplus[13] and, unless it is agreed otherwise, is liable for any deficiency.[14]

In brief, the principal rights[15] of the secured party on default (in a

10. *See* notes 2-4 *supra* & accompanying text.

11. UNIFORM COMMERCIAL CODE § 9-504(1). The collateral may be prepared or processed prior to disposition within the bounds of commercial reasonableness. *Id.*

12. *Id.* § 9-504(3). A secured party may buy the collateral at a public sale, but unless 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, purchase of the collateral by the secured party at a private sale is not commercially reasonable. *Id.*

Commercial reasonableness has been said to embody prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business. Mallicoat v. Volunteer Fin. & Loan Co., 57 Tenn. App. 106, 415 S.W.2d 347 (1966)

The collateral may be sold or otherwise disposed of as a unit or in parcels, and by way of one or more contracts. UNIFORM COMMERCIAL CODE § 9-504(3).

Whether the sale is public or private, the secured party must give reasonable notice thereof to the debtor and, in certain cases, to junior secured parties. *Id.* Under the 1962 version of the Code, except with respect to consumer goods, it was necessary to notify any person who had an existing and duly filed security interest in the collateral, as well as any other person known by the secured party to have an interest therein. The 1972 version requires notification of persons other than the debtor only if such persons had notified the secured party of their claims of interest before he sent notification to the debtor or before the debtor renounced his rights under the Code. The same changes apply under section 9-505(2)

13. UNIFORM COMMERCIAL CODE §§ 9-502(2), -504(2) A surplus will exist only after application of the proceeds to reasonable expenses of disposition, the secured party's claim, and the claims of any junior secured parties, in that order. *Id.* § 9-504(1).

14. *Id.* §§ 9-502(2), -504(2). Conversely, if the transactions underlying the security agreement were sale of assets, contract rights, or chattel paper, the debtor is entitled to any surplus or liable for any deficiency only if so agreed. *Id.* The Washington version of the Code precludes a deficiency in the case of a purchase money security interest in consumer goods. WASH. REV. CODE ANN. § 62A. 9-501(1).

15. There are of course some limitations placed upon the secured party's course of action. For example, in a consumer transaction, if the debtor has paid 60 percent of the cash price or loan and has not renounced his rights under the Code, a secured party in possession after default must dispose of the collateral within 90 days. UNIFORM COMMERCIAL CODE § 9-505(1). Otherwise the secured party may propose to retain the collateral in satisfaction of the obligation. *Id.* § 9-505(2). Conversely, retention of the collateral for an unreasonable time may be found to indicate an intention to retain it in satisfaction of the debt even though the secured party has manifested no such inten-

consumer loan context) are: (1) the right to repossess and dispose of (or retain) the collateral; (2) the right to foreclose on the collateral under the security agreement; and (3) the right to reduce the claim on the underlying debt to judgment.[16]

The Doctrine of Election of Remedies

Having established the remedies available to a secured party, the crucial inquiry is whether they may be pursued concurrently or successively. The Code itself seems to answer in the affirmative: The remedies provided in section 9-501 are expressly declared to be "cumulative."[17] However, "cumulative" is not defined in the Code, and because of the tenacity with which some courts hold to pre-Code concepts, a secured party who brings an action on the debt and later attempts to repossess

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tion. In such a case, further recovery would be barred. *See, e.g.*, Bradford v. Lindsay Chevrolet Co., 117 Ga. App. 781, 161 S.E.2d 904 (1968), where retention of the collateral for approximately 50 days before commencing suit on the contract and for over 16 months thereafter was found to constitute rescission and satisfaction of the contract, barring the secured party from further recovery. *Cf.* Cox Motor Car Co. v. Castle, 402 S.W.2d 429 (Ky. 1966). These decisions do *not* hold that repossession of collateral constitutes an election, barring an action on the debt. Rather, they merely stand for the proposition that retention of collateral *for an unreasonable time* bars pursuit of any other remedy.

Upon failure of the secured party to proceed in accordance with the provisions of the Code (for example, as to good faith or commercial reasonableness), disposition may be ordered or restrained on appropriate terms and conditions, and the secured party may be liable to the debtor and other secured parties for loss caused by the failure to comply. Uniform Commercial Code § 9-507(1).

16. Additionally, the secured party has the limited right to pursue any other remedy provided by the security agreement, and if the creditor is also a seller, he may exercise remedies provided in Article 2. *See, e.g.*, Uniform Commercial Code § 9-113, Comment 5. *Compare* §§ 2-701 and 2-706 *with* § 9-504. Furthermore, the creditor may collect the costs and expenses of storing and processing the collateral. *Id.* § 9-207.

While not a remedy itself, one of the most effective methods a creditor can employ to protect his interest in the collateral is the right to define what constitutes a default. Default could be defined, for example, as failure of the debtor to make any required payment, unauthorized removal of the collateral from the immediate vicinity, filing of a bankruptcy petition, death of the debtor, legal seizure of the collateral, unauthorized sale or transfer of the collateral, or insecurity of the secured party as to the transaction generally. *See* Hogan, *The Secured Party & Default Proceedings Under the UCC*, 47 Minn. L. Rev. 205, 209 (1962); 6 ABA-ALI Uniform Commercial Code Practice Handbook/Secured Transactions at 26-27 (1966).

17. Uniform Commercial Code § 9-501(1). Cumulative has been defined as "increasing in size or strength *without corresponding loss*." Peoples Nat'l Bank v. Peterson, 498 P.2d 884, 886 (Wash. App. 1972), *quoting from* Webster's New Int'l Dictionary (3d ed. 1969).

or exercise any other remedy still must overcome the common law doctrine of election of remedies. In this regard, one noted author has stated:

> It would be oversanguine to hope that § 9-501 in its final version will, despite its forthrightness, put an end to the argument. The election of remedies doctrine is dear to the hearts of many lawyers and procedural reforms are always bitterly resisted. We may assume that the argument will continue to be made that the action on the debt bars a later resort to the security [18]

The doctrine provides that if a party chooses one of two inconsistent existing remedies, he is precluded from thereafter pursuing the other.[19] Under pre-Code law relating to chattel mortgages and conditional sales, it was frequently held that recovery of collateral by a secured creditor was inconsistent with an action on the debt, similarly, an action on the debt was said to bar a subsequent repossession of the goods.[20] An attempt to take possession of collateral was seen as an assertion of ownership rights in the secured party, while an action on the debt was viewed as an affirmation of title to the collateral in the debtor. Once the secured party chose either course, he was deemed to have made an election which was final and irrevocable.[21]

Code section 9-202 provides that Article 9 is applicable to a secured transaction without regard to location of title to the collateral.[22] If the

18. 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.7 at 1210 (1965).

19. *See, e.g.*, Henderson Tire & Rubber Co. v. Gregory, 16 F.2d 589 (8th Cir. 1926).

20. *See, e.g.*, Hollenberg Music Co. v. Barron, 100 Ark. 403, 140 S.W 582 (1911); Boas v. Knewing, 175 Cal. 226, 165 P. 690 (1917); American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908); Boyette v. Reliable Fin. Co., 184 So. 2d 200 (Fla. Dist. Ct. 1966); Frisch v. Wells, 200 Mass. 429, 86 N.E. 775 (1909); Norman v. Meeker, 91 Wash. 534, 158 P. 78 (1916). *Contra, e.g.*, Murray v. McDonald, 203 Iowa 418, 212 N.W 711 (1927); Allis-Chalmers Mfg. Co. v. Nein, 64 S.D. 235, 266 N.W 156 (1936); Lloyd v. Federal Motor Truck Co., 168 Va. 72, 190 S.E. 257 (1937). *See generally*, GILMORE, *supra* note 18, § 43.6.

It has been suggested that jurisdictions which followed the Uniform Conditional Sales Act prior to adoption of the Uniform Commercial Code generally held that recovery of collateral was not inconsistent with an action on the debt, while a majority of the jurisdictions which did not enact the Uniform Conditional Sales Act held that the remedies were inconsistent. 1959 DUKE L.J. 640, 641-42. *See generally* GILMORE, *supra* note 18, § 43.6.

21. *See, e.g.*, Eilers Music House v. Douglass, 90 Wash. 683, 156 P 937 (1916). The forfeiture aspect of common law conditional sales theory was a further basis for the election doctrine. *See* note 42 *infra* & accompanying text.

22. The Official Comment to section 9-101 of the Code similarly declares that "this article does not determine whether 'title' to collateral is in the secured party or in the debtor and adopts neither a 'title theory' nor a 'lien theory' of security interests."

purpose of Article 9 is to provide a simple and unified structure for operation of secured transactions with distinctions drawn along functional rather than formal lines,[23] the succinct declaration of section 9-202, in light of the provision of section 9-501(1) that the secured party's rights upon default are cumulative, would appear to render the doctrine of election of remedies inapplicable to secured transactions under the Code. Thus, until the debt is recovered, the secured party should be able to bring an action for the debt and contemporaneously repossess and dispose of the collateral, applying the proceeds of such disposal to the indebtedness.

The provision that the rights under Article 9 are "cumulative" was not added to the Code until 1958. The 1952 version of section 9-501(1) merely provided that:

> When a debtor is in default under the security agreement a secured party may reduce his claim to judgment . . . If the collateral is goods, he may in addition do one or more of the following . . .:
> (a) foreclose the security interest by any available judicial procedure;
> (b) take possession of the collateral under Section 9-503. . . .

In *In re Adrian Research & Chemical Co.*,[24] decided under the 1952 version of the Code, the Court of Appeals for the Third Circuit reversed a district court[25] finding that a secured party who had reduced his claim to judgment had waived his rights to possession of the collateral.[26] Pre-Code Pennsylvania decisions had held, with respect to conditional sales and bailment-leases, that an action on the debt was inconsistent with the

23. UNIFORM COMMERCIAL CODE § 9-101, Comment.

24. 269 F.2d 734 (3d Cir. 1959).

25. 169 F Supp. 357 (E.D. Pa. 1958).

26. In consideration of rent arrearage due the petitioner, the debtor had executed both a promissory note with a confession of judgment clause and an agreement creating a security interest in the debtor's equipment. On default, petitioner obtained judgment on the note, execution was issued, and a levy was made by the sheriff. Shortly thereafter, the debtor filed a voluntary petition in bankruptcy. The receiver in bankruptcy obtained an order restraining the sheriff's sale of debtor's property on the ground that the judgment lien was a voidable preference, having been obtained within four months of bankruptcy. Petitioner thereupon sought to take possession of the collateral under the security agreement.

Section 9-501(5), discussed in note 6 *supra*, was added to the Code shortly after the *Adrian* case and would appear to resolve this particular problem. The levy of execution following judgment on the debt would relate back to the date of perfection of the security interest and the issue of voidable preference removed. *Id.*

later assertion of a security interest. The district court found these decisions unchanged by the 1952 version of the Code.[27] In reversing, the court of appeals concluded that the general purpose of the Code was to abandon the intricacies involved in the decisions relied on by the district court. It held that plaintiff's remedies on the debt and against the collateral were consistent in kind and in purpose, each having as its objective the reduction of the debt.[28] It should be emphasized that the court relied on no specific Code provisions in reaching its decision; it drew instead from pre-Code case law distinctions. It is apparent that the 1958 revision of section 9-501(1) providing that the remedies are "cumulative" is evidence of a determined effort by the drafters of the Code to put to rest the intricacies of pre-Code law and that the section in its present form coincides with the result reached by the court of appeals in *Adrian.*

Several recent decisions clearly recognize that the Code was intended to change pre-Code law regarding the doctrine of election of remedies. A Michigan court of appeals concluded in *Michigan National Bank v. Marston*[29] that "the intent of the code was to broaden the options open to a creditor after default rather than to limit them under the old theory of election of remedies." [30] In that case the plaintiff bank held a security interest in defendant's automobile. The defendant, prior to bankruptcy, had placed the car in the physical control of a garageman, creating a lien superior to plaintiff's[31] and possibly in excess of the car's value. The trustee in bankruptcy released title to the bank. After attempting unsuccessfully to sell the automobile, the bank sued on the debt.

In a well-reasoned decision, the court of appeals upheld the finding of the trial court that the bank's actions in obtaining title to the car and in attempting to sell it were commercially reasonable under Code section 9-504.[32] It observed that the purpose of collateral is to secure the creditor and increase his chance of recovery upon default and that the existence of a security interest in no way affects the existence of the

27. 169 F Supp. at 359.

28. 269 F.2d at 737

29. 29 Mich. App. 99, 185 N.W.2d 47 (1970).

30. 185 N.W.2d at 51.

31. Notwithstanding section 9-501(5), a repairman's lien is superior to a prior perfected security interest unless that lien is statutory and the statute expressly subordinates the repairman's lien to the prior perfected security interest. UNIFORM COMMERCIAL CODE § 9-310.

32. Since the debtor had not paid 60 percent of the loan, the provisions of section 9-505(1) as to compulsory disposition of collateral were found inapplicable. 185 N.W.2d at 50.

debt.[33] It was found that if the bank were required to sell the collateral, it would first have to pay the garageman or file suit to challenge the priority of his lien. In either case, expenses could well exceed the proceeds of such disposition, and the bank would be no closer to recovering the debt.[34]

While holding that there had been no election of remedies such as to bar the bank's action on the debt, the court noted a limitation on a secured party's rights. Where disposition does not appear feasible, the court implied that standards of commercial reasonableness require that the collateral be returned to the debtor, still subject to the creditor's security interest. However, in this case no evidence was found indicating a lack of commercial reasonableness or loss to the debtor caused by the bank's failure to return title to the car.

In *Peoples National Bank v. Peterson*,[35] defendants defaulted on promissory notes secured in part by farm machinery and equipment. Plaintiff bank took possession of a substantial portion of this collateral and simultaneously filed an action to recover upon the notes, foreclose the security, and secure a judgment for any deficiency. Plaintiff subsequently mailed to defendants a notice of repossession and sale. Upon receipt of a letter from defendants' attorney noting the irregularity of selling the collateral at the same time a foreclosure action was pending,[36] plaintiff abandoned its public sale and caused a writ of attachment to be issued. The trial court granted defendants' motion to dismiss the bank's action on the notes, reasoning that plaintiff, in exercising its right to repossess the collateral peacefully and failing to sell it within a reasonable time thereafter, had elected to retain such collateral in full satisfaction of the indebtedness.

The court of appeals reversed, holding that plaintiff was entitled concurrently to institute an action and *obtain judgment* for the unpaid balance on the promissory notes and to hold a private or public sale of prop-

33. The court noted with approval Professor Steinheimer's assertion that inasmuch as the secured party's remedies under section 9-501(1) are cumulative, they may be employed without danger of election of remedies. 185 N.W.2d at 50.

34. Reasonable expenses incurred in disposing of collateral must be deducted from the proceeds of disposition before such proceeds can be applied to the indebtedness. UNIFORM COMMERCIAL CODE § 9-504(1).

35. 498 P.2d 884 (Wash. Ct. App. 1972).

36. Although the court did not deal with this question, it would seem that there is no "irregularity" in pursuing both foreclosure and repossession, at least up to the point at which some definitive disposition of the property has been made or the debtor prejudiced.

erty in its possession, crediting the proceeds received therefrom against defendants' indebtedness. In the event the private or public sale was abandoned without prejudice to the debtor, or failed to dispose of all the property described in the security agreement, the plaintiff also was entitled to foreclose by judicial procedure upon the remaining collateral. The court found that until the time plaintiff abandoned the public sale, it had acted in a commercially reasonable manner and that by withdrawing notice of the public sale and obtaining the writ of attachment, plaintiff was no longer proceeding under Code section 9-504(3), but was foreclosing the security by judicial procedure as authorized by section 9-501(1).

Further support for the proposition that the intent of the Code was to broaden a secured party's default remedies may be found in *Olsen v. Valley National Bank*,[37] upholding a bank's right to set-off a customer's account without first proceeding against the collateral on a secured indebtedness.[38] That decision rejected the purported distinction between a secured and an unsecured indebtedness, relative to the right of set-off, holding that a bank's foresight in obtaining collateral on an indebtedness should not deprive it of its right of set-off. The court based its decision on what it termed the "majority rule"—that a creditor may proceed with a number of remedies until the debt is satisfied—and cited Code section 9-501(1) for the proposition that Illinois was within the "majority rule." The implicit suggestion is that the "minority rule"—that there can be but one action for the recovery of a secured debt—could be applicable only in jurisdictions which had not adopted the Code.

Accommodating Due Process Requirements to Article 9

The combined holdings of *Peterson, Olsen* and *Marston,* coupled with sound analysis of Code language, lends firm support to the proposition that a secured party upon default may concurrently or successively pursue a number of remedies until the debt is recovered, without danger of "electing" a remedy.[39] It follows from this general conclusion that a secured creditor may reduce his claim on the debt to judgment, thereby

37. 91 Ill. App. 2d 365, 234 N.E.2d 547 (1968).

38. Although the right of set-off is specifically excluded as a Code remedy under Article 9, § 9-104(i), such right may be included in the security agreement, thereby placing it within the remedial scheme encompassed by section 9-501(1). Frank Briscoe & Co. v. Suburban Trust Co., 100 N.J. Super. 431, 242 A.2d 54 (1968).

It is arguable that the right of set-off falls within the penumbra of the *Fuentes* decision.

39. Minor limitations on the secured party's rights are discussed in note 15 *supra.*

satisfying any question of due process, and still retain his option of taking possession and disposing of the collateral. Repossession and sale of the collateral may be pursued in lieu of foreclosing the execution or judgment lien or may be pursued concurrently with execution until all obligations of the debtor have been satisfied.[40] Professor Gilmore has observed:

> Nothing the secured party may do to collect his debt through the process of the law courts will operate to destroy his security interest vis-a-vis the debtor or to impair its priority over third parties.[41] This seems to be an entirely sensible solution. The secured party's attempt to collect his debt without immediate resort to his security in no sense harms or takes advantages of the debtor. The only logical basis for the election of remedies doctrine, in this context, was the forfeiture aspect of common law conditional sales theory Since the Code does not allow such forfeiture, there is no reason for stripping the secured party of his security rights because he attempts to collect the debt first.[42]

40. Moreover, in those states in which attachment is a means of ensuring that the debtor does not abscond with or secrete the property, the secured creditor may wish to have the collateral attached. *See, e.g.*, VA. CODE ANN. §§ 8-519 *et seq.* (Repl. Vol. 1957). After attachment and levy, the debtor is subject to criminal penalties for fraudulently removing or secreting the attached property with intent to defeat the levy. *Id.* §§ 18.1-100, -108 (Repl. Vol. 1960).

41. *Cf.* § 9-501, Comment 6.

42. 2 GILMORE, note 18 *supra*, § 43.7 at 1209. This proposition is not without appeal:

> [T]he seller should be permitted to pursue his *in personam* remedy without waiving his *in rem* rights in the chattel; the seller's remedies should be made cumulative and not in the alternative. This would be in keeping with the seller's expectations and, it is submitted, could improve rather than impair the protection given the buyer. It could improve the protection given the buyer to allow the security interest to continue beyond judgment (and until satisfaction) because there seems to be little doubt that it is permissible for sellers (and it is the practice of some sellers) to obtain judgment for the price and then proceed to levy upon and sell the chattel sold under the conditional sales contract. While this has the beneficial effect of placing the sale under the jurisdiction of the court, the scanty advertisement given execution sales in Virginia and the failure to attract bidders usually result in the seller being able to buy the goods at a low price and then holding the buyer for the deficiency. It would seem that buyers with a substantial equity would be better protected by allowing the seller's security interest to continue after judgment, denying the seller a right to levy on those goods but allowing him to make sale in a manner which is more adequately designed to protect the buyer's equity, or, in a proper case, by allowing him to repossess by legal process and to credit the judgment with the fair market value of the goods.

Thus far this Comment has focused on the determination of whether it is possible to repossess collateral following a judgment on the debt. Having concluded that it is,[43] and that due process guarantees are not infringed thereby, the desirability of such a procedure remains to be established.

Advantages of Judgment Followed by Repossession

One advantage of seeking judgment first is the ease with which a deficiency can be collected. In *Associates Discount Corp. v. Palmer*,[44] involving a combination sales-security agreement, the court characterized a deficiency suit as merely a simple *in personam* action for that part of the sales price which remains unpaid after the seller has exhausted his rights under Article 9 by selling the collateral.[45] The court went on to state that

> [A] seller may get his "deficiency judgment" *before* foreclosing his security interest or *before* deciding whether or not such a foreclosure would even be necessary or desirable. By reducing his total claim on the sales contract to judgment prior to foreclosure, a subsequent deficiency action becomes unnecessary should the collateral be insufficient to satisfy the buyer's debt.[46]

Thus, by reducing his claim to judgment, the secured party not only satisfies due process requirements, but also establishes his right to any deficiency. Moreover, obtaining judgment also enables the secured party to reach assets *in addition* to the collateral. In the event the proceeds of a sale conducted by the secured party fail to satisfy the obligation, he still has the option of proceeding upon the judgment or ex-

Snead, *Retail Installment Sales: Virginia Remedies on Default*, 16 Wash. & Lee L. Rev. 1, 17-18 (1959), (pre-Code law). *See also* Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. Ind. & Com. L. Rev. 535 (1967).

43. It should be noted, however, that those states which have enacted the Uniform Consumer Credit Code preclude the use of the foregoing procedure. If a secured party in a consumer credit sale repossesses or voluntarily accepts surrender of goods which were the subject of the sale or which were security for a collateral sale, and if the cash price of such goods was $1000.00 or less, the creditor is not obligated to sell the goods, but he may not in any case seek a deficiency Uniform Consumer Credit Code, §§ 5.103(1)-(3). Alternatively, where the creditor would not be entitled to a deficiency judgment if he repossessed the collateral, his election to bring an action on the debt constitutes a waiver of his right to repossess the collateral or to levy upon it pursuant to any judgment he may obtain. *Id.* § 5.103 (6).

44. 47 N.J. 183, 219 A.2d 858 (1966).

45. 219 A.2d at 861.

46. 219 A.2d at 861 n.2 (citing Pennsylvania enactment of §§ 9-501(1),(5) and 9-504(2).

ecution liens which have attached to the debtor's *other* property. Having obtained judgment first, the liens will have attached earlier than those which would have arisen from a suit *following* repossession and sale. This of course will give the secured party priority over unsecured creditors who bring a later action. Similarly, an earlier judgment may enable the resultant lien to "ride through" a subsequent bankruptcy proceeding.

An additional advantage both to creditor and debtor is the likelihood that a privately conducted, commercially reasonable sale will generate greater proceeds than a judicial sale.[47] While this result would obtain regardless of whether a judgment had been rendered on the merits, it does suggest a reason for looking to the security before seeking to collect under the judgment through levy and sheriff's sale. Furthermore, the existence of an adjudication would toll the statute of limitations to which a deficiency suit following a non-judicial sale would otherwise be subject.[48]

Conclusion

The apparent intent of the Uniform Commercial Code is to broaden the options available to a creditor after default rather than to limit them under the old theory of election of remedies. Inasmuch as the Code declares the secured party's remedies to be cumulative, and inasmuch as distinctions regarding location of title are eliminated, it is submitted that a secured party may pursue all available remedies, including repossession of collateral, concurrently or successively with an action on the debt, until all obligations of the debtor are satisfied. The only limitations on the creditor's action are that he must act in good faith and that the collateral must be disposed of in a commercially reasonable time and manner. Of course the creditor is limited to one satisfaction of the debt plus costs.

This conclusion takes on greater significance in light of the *Fuentes* decision and its extension to peaceful repossession. The due process requirements of those cases can be accommodated to the secured party's rights under Article 9 of the Code by recognizing that even after obtaining personal judgment on the debt, a secured party retains his rights against the collateral. Judgment on the debt satisfies due process, and the creditor retains the protection and expediency of the repossession remedy.

47. *See* Snead, quoted in note 42 *supra*.

48. *See, e.g.*, Associates Discount Corp. v. Palmer, 47 N.J. 183, 219 A.2d 858 (1966). For a general discussion of the advantages and disadvantages of proceeding to judgment in lieu of other remedies see Gilmore, *supra* note 18, § 43.6 at 1201-02.