

Model Consumer Amendments to Uniform Commercial Code Article 9[®]

National Consumer Law Center*

Introduction

Existing law governing repossession of motor vehicles and other personal property leaves consumers vulnerable to the whims of creditors and largely in the dark as to the nature of the process. Secured creditors can, without any court or other government supervision, decide when to repossess a consumer's property, seize it without notice, and sell it in a manner it chooses—often at an auction from which the consumer is barred and that is held at a time and place hidden from the consumer.

Repossession of consumer collateral often involves stealth or entry onto private property. Physical confrontations, high-speed chases, and the use of weapons are all too common.¹

After seizure, typically the property is sold for far below its value, sometimes to an insider, large fees are tacked on, and the secured party then seeks a deficiency—the outstanding debt plus repossession, storage, processing, and sale costs as well as attorney fees, crediting only the below-value sale price of the consumer's property. The consumer has lost not only the property but also owes a deficiency, a debt that is often unaffordable and will follow the consumer for many years.

The harm to the consumer, though, is far more than the deficiency obligation. Repossession of cars in particular causes great financial disruption to families, preventing access to employment, day care, schooling, medical care, and other essential services. Other seized property may have special significance or utility to the consumer and his or her family not replaceable by a substitute purchase, even if such a substitute were affordable.

The basic law regulating consumer repossession is found in Uniform Commercial Code Article 9, in effect in all fifty states. Article 9 rules, with few exceptions, apply equally to commercial and consumer transactions. The rules are essentially the same whether the seizure involves a major corporation's oil rig or a consumer's ten-year-old car.

Model consumer amendments to Article 9 rationalize the rules for consumer repossession, because consumer transactions require different considerations than secured transactions among commercial entities. The amendments temper for consumers the harsh aspects of existing repossession law. Yet they do so in a way carefully crafted to accommodate creditors' interests. The amendments do not prohibit self-help repossession or restrict the sale of consumer goods at dealer-only auctions, and the creditor is still entitled to a full recovery on the debt.



Key elements of the model amendments

Avoiding unnecessary repossession. Both the creditor and the consumer benefit when a secured transaction is ultimately successful and the consumer acquires full ownership of the collateral after paying the debt. Thus, both have an interest in avoiding unnecessary repossession. The model amendments give consumers additional avenues to avoid loss of their property by allowing them a right to cure: a limited period of time to catch up on back due payments before repossession.² Many states already provide a right to cure.³

The model amendments would thus not only extend this right to cure to more jurisdictions, but would also promote uniformity.

The model amendments also give the consumer the right to reinstate the contract during the 20 days after repossession, by paying all past due amounts plus the expenses of the repossession.⁴ A number of states already give consumers a right to reinstate,⁵ so this amendment adopts a proven, workable approach. It benefits both the creditor and the consumer by providing one more chance to make the transaction successful.

Public safety. Addressing certain public safety concerns involved with self-help repossession, the model amendments codify the rule that the creditor must stop a repossession upon the objection of an individual who appears on the scene of the repossession.⁶ This rule, which many courts already adopt,⁷ is designed to prevent repossession from turning into violent confrontations that can result in injury to consumers, repossession agents, and bystanders. If the repossession agent encounters an objection, the creditor can try again another day, or can seek a court order. The model amendments also seek to deter dangerous high-speed chases by applying the rule against breach of the peace throughout the repossession process, until the secured party or its agent has moved the collateral to a fixed location that it controls.⁸

Low values on repossession sales. One of the issues that roiled the drafting of Revised Article 9 was the problem of low sales prices at repossession sales.⁹ Consumer advocates proposed amending Article 9 to require a secured party to credit the consumer with the fair market value of the collateral.¹⁰ The drafters did not accept this approach, although they did incorporate a more limited provision in the case of a low-price sale to an insider.¹¹

The model amendments expand the definition of an insider for the purposes of the limited protection against low-price sales.¹² But they also reopen the issue more generally by proposing that Article 9 explicitly provide that the price is one of the terms of the repossession sale that must be commercially reasonable.¹³ This approach makes use of the well-accepted and widely-applied concept of commercial reasonableness. Some courts have already interpreted Article 9 as requiring that the price is one of the terms that must be commercially reasonable.¹⁴ Even those that do not go that far typically take the view that a low sale price is an important factor in determining commercial reasonableness.¹⁵ The model amendments also codify the rule, already in force in a number of states, that a secured party is not entitled to a deficiency if it fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with Article 9's requirements.

Greater transparency for consumers. The model amendments provide greater transparency for consumers. If the collateral will be sold at a dealer-only auction, the amendments require the consumer be notified of the date and time of the auction.¹⁶ The amendments lift the veil of secrecy from the creditor's calculation of the amount still owed after a repossession sale, and require the creditor to share its calculations with the consumer.¹⁷ The amendments also ensure that consumers receive proper refunds on service contracts and the like when their property is seized.¹⁸

Scope. Except for a few clarifying provisions, the amendments apply only to consumer transactions, and leave untouched the relationship between commercial lenders and commercial borrowers. All states recognize that consumer repossession require different rules than commercial ones—in fact virtually all the model amendments here have been enacted as consumer legislation or adopted by court decisions in at least some states with no adverse consequences to a consumer's ability to access consumer credit. The model amendments provide uniform rules that are easily grafted onto existing Article 9. They modernize consumer repossession law in ways designed to offer much-needed protection for consumers while not prejudicing creditors.

Listing of Amended Sections

Section 9-102. Definitions and Index of Definitions.

Section 9-103. Purchase-Money Security Interest; Application of Payments; Burden of Establishing.

Section 9-601. Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts,

Chattel Paper, Payment Intangibles, or Promissory Notes.

Section 9-607. Collection and Enforcement by Secured Party.

Section 9-608. Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus.

Section 9-609. Secured Party's Right to Take Possession After Default.

Section 9-610. Disposition of Collateral After Default.

Section 9-611. Notification Before Disposition of Collateral.

Section 9-612. Timeliness of Notification Before Disposition of Collateral.

Section 9-614. Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transaction.

Section 9-615. Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.

Section 9-616. Explanation of Calculation of Surplus or Deficiency.

Section 9-620. Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.

Section 9-623. Right to Redeem Collateral.

Section 9-624. Waiver.

Section 9-625. Remedies for Secured Party's Failure to Comply with Article.

Section 9-626. Action in Which Deficiency or Surplus Is in Issue.

Effective Date

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ARTICLE 9. SECURED TRANSACTIONS

Section 9-102. Definitions and Index of Definitions.

(a) [Article 9 definitions.] In this article:

(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) a person that had previously owned the obligation that the organization is enforcing, or a person directly or indirectly controlling, controlled by, or under common control with such a person;

(C) an officer or director of, or a person performing similar functions with respect to, the organization;

(D) an officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A) or (B);

(E) the spouse of an individual described in subparagraph (A), (B), (C) or (D); or

(F) an individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) and shares the same home with the individual described in subparagraph (A), (B), (C), (D) or (E).

Comment:

The UCC provides protections where collateral is sold to an insider, but the definition of an insider is unnecessarily limited: a person living with an insider is considered an insider only if related by blood or marriage to the insider. Moreover, often credit sellers have close relationships with their assignees and thus the assignor should be considered an insider when the assignee sells the collateral back to the assignor. The limited protections offered by existing Section 9-615(f) concerning sales to assignors are inadequate for consumer transactions. See Comment 3 to Section 9-610.

Section 9-103. Purchase-Money Security Interest; Application of Payments; Burden of Establishing.

(a) [Definitions.] In this section:

(2) "purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used. In consumer transactions involving the purchase of property or the extension of credit to purchase property, the purchase-money obligation does not include amounts necessary to pay off another debt.

Comment:

When an obligation is a purchase-money one, as defined by state law, the U.S. Bankruptcy Code gives rights to a secured creditor beyond the value of its security interest, thus prejudicing other creditors and the debtor. The part of an obligation used to purchase the collateral is logically a purchase-money obligation, but not that part of a loan used to pay off an unrelated debt of the consumer, such as the amount necessary to pay off "negative equity" on a trade-in.

Section 9-601. Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.

(g) [Consignor or buyer of certain rights to payment.] Except as otherwise provided in Section 9-607(c), this part:

(1) imposes no duties upon a secured party that is a consignor; and or is

(2) imposes no duties running from a buyer of accounts, chattel paper, payment intangibles, or promissory notes to the seller of the accounts, chattel paper, payment intangibles, or promissory notes.

Comment:

The language of existing subsection (g), if interpreted literally, would exempt many creditors from its provisions, and this amendment clarifies that this was never the intent.

Section 9-607. Collection and Enforcement by Secured Party.

(d) [Expenses of collection and enforcement.] A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party, but in a consumer transaction only where such fees are allowed by Section 9-615(h).

Comment:

This change is necessary to be consistent with new Section 9-615(h), which limits the right to attorney fees in consumer transactions.

Section 9-608. Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus.

(a) [Application of proceeds, surplus, and deficiency if obligation secured.] If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Section 9-607 in the following order to:

(A) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by Section 9-615(h) or other law, reasonable attorney's fees and legal expenses incurred by the secured party;

Comment:

This change is necessary to be consistent with new Section 9-615(h), which limits the right to attorney fees in consumer transactions.

Section 9-609. Secured Party's Right to Take Possession After Default.

(a) **[Possession; rendering equipment unusable; disposition on debtor's premises.]** After default and, for a consumer transaction, after expiration of the cure period provided in subsection (f), a secured party:

- (1) may take possession of the collateral; and
- (2) without removal, may render equipment, but not consumer goods, unusable and dispose of collateral on a debtor's premises under Section 9-610.

(d) **[Objection and Breach of the Peace.]** An example of breach of the peace is failing to stop a repossession upon the objection of an individual who appears upon the scene of the repossession.

(e) **[Applicability Until Repossession Complete.]** A breach of the peace violates this section if it occurs at any time before a repossession is complete. A repossession is complete when the secured party or its agent has moved the collateral to a fixed location that it controls.

(f) **[Right to cure.]** In a consumer transaction, after a default and thirty days before accelerating the obligation or taking possession of the collateral, the secured party shall provide written notice to the debtor and the obligors of the nature of any default, the imminence of any acceleration or seizure of the collateral, and that the debtor and obligors have the right during that thirty day period to cure the default. If the default is cured, no action can be taken based upon that default to accelerate the obligation or take possession of the collateral.

(g) **[Limits on right to cure.]** The rights provided by subsection (f) shall apply no more than three times in any calendar year.

(h) **[Unsecured personal property.]** A secured party has rights only in the collateral. Any other property taken at the time that the secured party takes possession of collateral shall be returned to the debtor within 5 days. Until returned to the debtor, the secured party shall take reasonable measures to preserve and care for such property. The secured party may not impose any fee or condition upon the debtor to obtain the property, except that it may require a signature to indicate receipt and it may require the debtor to recover the property at a reasonable location no more than ten miles from the location where the secured party took possession of the collateral.

Comments:

1. Subsection (a)(2) clarifies that Article 9 allows for disablement of collateral only in the case of commercial equipment, and provides that a secured party shall not disable other types of collateral used by a consumer, such as a motor vehicle.

2. Self-help repossession is inherently dangerous, and all too often results in personal injuries or even death. One of the most effective ways to reduce physical confrontations is to require the repossession agent to discontinue any attempt to repossess the collateral if an individual appears on the scene and objects. Many courts adopt this rule and recognize that it is a breach of the peace to proceed with a repossession over an individual's objection. Subsection (d) codifies this rule.

3. The objection need not be by the debtor, but can be by any individual, such as a neighbor, a friend, or a member of the debtor's family. The purpose of the provision is to protect the public safety rather than to give the debtor additional rights. The identity of the individual objecting does not determine whether a repossession over that objection will lead to a confrontation and a threat to public safety.

4. Subsection (e) provides that seizing property in a manner that breaches the peace is prohibited as long as the repossession is still in progress, until the collateral is secured at another location. This provision is necessary because some courts have held that a breach of the peace that occurs shortly after a repossession agent has acquired control over the collateral—for example, when a tow truck has lifted a car's wheels off the ground—does not breach the peace, because the repossession is already "complete" at that point.

Tolerating repossession that breaches the peace at this point leads to serious threats to public safety. For example, in *Jordan v. Citizens and Southern Nat'l Bank*, 298 S.E.2d 213 (S.C. 1998), the court held that a 30-minute high-speed chase was not a breach of the peace because the chase did not start until the repossession agent had already started driving the consumer's truck away. Such rulings encourage repossession agents to continue with a repossession despite the debtor's objection, while the debtor is still on the scene or is chasing the repossession agent. This can lead to enhanced threats to public safety as easily or perhaps even more readily than when the objection is earlier in the repossession process.

5. The right to cure in subsection (f), applicable only to consumer transactions, is patterned after many existing state laws and a federal law that applies to manufactured homes. It is an overly harsh and unfair remedy to allow a secured party to accelerate a note without notice and then without notice seize the collateral. The consumer should have the right to cure the secured party's concerns so as to bring matters back to the status quo. Any abuse of this right is limited because it only applies three times in a calendar year.

6. A secured party only has the right to seize property in which it has a security interest. The secured party has no rights in property in which it does not have a security interest. The secured party is also liable for any damage to the unsecured property under its care. Subsection (g) codifies existing law that the secured party has no right to unsecured property it mistakenly or intentionally seizes with the collateral, and must return that property in good condition.

Section 9-610. Disposition of Collateral After Default.

(a) **[Disposition after default.]** After default, and for consumer transactions after complying with Section 9-609(f), a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing, except as limited for consumer transactions by Section 9-614(7).

(b) [Commercially reasonable disposition.] Every aspect of a disposition of collateral, including the method, manner, time, place, price, and other terms must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) [Purchase by secured party.] A secured party or a person related to the secured party may purchase collateral:

(g) [Rebates.] In consumer transactions, in conjunction with the disposition of collateral, the secured party shall seek a rebate of the unearned portion of any insurance, service contract, or other agreement related to the collateral, to the extent that the secured party has the right to seek such a rebate.

Comments:

1. Subsection (a) changes are necessary to be consistent with new Sections 9-609(f) and 9-614(7).
2. Subsection (b) clarifies that the price is one of the terms of a disposition that must be commercially reasonable. Some jurisdictions require that the price used to compute the consumer's obligation be the fair market value, instead of a sale price. This provision allows the secured party to use a sale price as long as that price is commercially reasonable.
3. Subsection (c) ensures that insiders do not purchase collateral at a private sale, where there is great potential for abuse, as the seller may have an incentive to sell the consumer's property to a related party for as little as possible and then recover the difference from the consumer by way of a deficiency.

Section 9-615(f) provides that where a sale is made to an insider, the deficiency or surplus is calculated based not on the actual sale price, but the price if the collateral had not been sold to an insider. This applies only if the sale price is significantly below the range of proceeds that a sale to a non-insider would have brought. This provision is inappropriate in a consumer transaction, requiring the consumer both to determine that the sale was to an insider and to realize when a sale price is significantly below the range of prices that a sale to a non-insider would have brought. Moreover, in commercial settings, there may be a limited market for certain specialized collateral, and a sale to an insider may be the best approach to maximize a sale price. That is not the case for motor vehicles and other typical collateral in a consumer transaction, so that there is no need to sell privately to an insider. Public sales to insiders are permitted, as are private sales to non-insiders.

4. New subsection (g), which applies only to consumer transactions, ensures that consumers receive the benefit of any owed rebate of the consumer's insurance, service contracts and the like that are cancelled when the collateral is no longer in the consumer's possession. Consumers may not know of their rights to such rebates or know how to seek them. Obtaining such rebates is part of the secured party's obligation to make commercially reasonable disposition of the collateral. If such rebates are not obtained, the insurer or service contract company will receive a windfall. This windfall will not only prejudice the consumer, but also the secured party who will instead have to seek a larger deficiency. The secured party must obtain such rebates only if it has the right to seek them.

Section 9-611. Notification Before Disposition of Collateral.

(a) [“Notification date.”] In this section, “notification date” means the earlier of the date on which:

- (1) a secured party sends to the debtor, consumer obligor, and any secondary obligor an authenticated notification of disposition; or
- (2) if not a consumer transaction, the debtor and any secondary obligor waive the right to notification.

(c) [Persons to be notified.] To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:

- (1) the debtor and any consumer obligor;

Comments:

1. Article 9 adopts a convention contrary to normal usage, defining a “debtor” as the collateral's owner, who need not also be the party obligated on a debt. Instead it uses the term “obligor” to refer to the party obligated on the debt. While in commercial transactions it may make sense in certain situations to notify only the collateral's owner or the owner and a secondary obligor, and not the party who is primarily obligated on the debt, such a non-intuitive procedure is not appropriate for consumer transactions. For example, where a parent contracts to buy a car titled in a child's name, the parent is a consumer obligor but not a debtor. The parent, not just the child, should receive Article 9 protections.

Throughout these model consumer amendments, when notices and other rights are provided in consumer transactions, rights are given, if appropriate, both to consumer owners and to consumer obligors, if these parties are different.

2. The change in paragraph (a)(2) is required to be consistent with new Section 9-624.

Section 9-612. Timeliness of Notification Before Disposition of Collateral.

(c) [25-day period in consumer transactions.] In a consumer transaction, a notification of disposition must be sent at least 25 days before any disposition of the collateral.

Comment:

Consumers are less likely than commercial entities to understand their rights after receiving notice of disposition, and are not as able as commercial entities to act quickly on those rights. Consumers also need time to determine an amount necessary to reinstate the debt, obtain the necessary funds, and then exercise that right. Thus in consumer transactions it is important to give the debtor at least 25 days' notice before a sale.

Section 9-614. Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transaction.

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) the information specified in Section 9-613(1), except that for a private auction the notice shall state its time and place;

(C) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 9-623 is available; and

(C) a description of the right to reinstate the obligation pursuant to subsection (7), the 20-day deadline for doing so, and a telephone number from which the amount that must be paid to reinstate the obligation redeem the collateral under Section 9-623 is available; and

(D) The right at any time before disposition to redeem the collateral by paying its market value or the amount owed, whichever is less; and

(D) a telephone number and a mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides 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. You have the right to recover [describe collateral] and reinstate your payment schedule in our agreement by paying, within 20 days of the date of this letter, the past due amount (not the total loan balance) and certain expenses related to the taking, storage and preparation for sale of the collateral. Call xxxxxx to determine the amount owed.

If you prefer, you may redeem the collateral by paying its market value or the total amount owed, whichever is less. This right continues up until the time the collateral is sold. Call xxxxx for more information.

[For a public disposition or private auction:]

Unless you reinstate your payment schedule or redeem the collateral within the time periods stated above, we will sell [describe collateral] at [public sale] or [private auction]. A sale could include a lease or license. The sale will be held as follows:

Date:

Time:

Place

[For a public sale] You may attend the sale and bring bidders if you want.

[For a private auction] Eligible bidders are limited. If you are not eligible to bid, you can arrange for eligible bidders to attend the sale.

[For a private disposition other than a public sale or private auction:] 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].

(7) If within 20 days of the notice of disposition, the secured party receives all past due amounts (not including accelerated payments) and its reasonable expenses of taking, holding, preparing for disposition, and processing the collateral, the secured party shall promptly:

(A) return the collateral to the debtor; and

(B) reinstate the terms of the obligation as set out prior to acceleration.

(8) The obligations set out in subsection (7) shall apply no more than twice in any calendar year.

Comments:

1. Paragraph (1)(A) provides consumers with the right to know when and where their property is sold at a private auction. Motor vehicles and other collateral are often sold at dealer-only auctions where the general public cannot attend. Such auctions are considered private sales under the UCC, and thus under existing Article 9 the debtor need not be informed as to the place or time of the auction or even if there will be an auction, but only that a private sale will be conducted after a certain date. This contrasts with the debtor's right to receive notice of the place and time of a public auction.

It is important for a consumer to know the exact date of a private auction because the consumer has the right to redeem collateral up until that date. Being told that the collateral will be sold at some time after an earlier date may discourage consumers from exercising their rights to redeem the collateral.

In addition, where a private auction does not allow the consumer entry, the consumer should at least have the opportunity to encourage bidding from someone who is able to attend the private auction. This option will be impossible if the consumer does not know the time and place of an auction or even if the property is to be sold at an auction.

2. Changes to subsections (1) and (3) are required so that the notice to consumers accurately reflects the additional rights that this

model law provides for consumers both prior to and at disposition.

3. New subsection (7) provides consumers with the right to recover the collateral and reinstate the credit agreement by paying all past due payments and the secured party's reasonable expenses of taking, holding, preparing for disposition, and processing the collateral. It is a harsh and one-sided right that allows the secured party to accelerate the obligation without notice, then seize the collateral without notice or court involvement, and then sell the collateral as it wishes without court involvement.

Many states already provide consumers in this situation with the right to reinstate the agreement, and this right is only fair to offset the secured party's rights. The reinstatement returns the parties to the status quo and may even help the creditor if the consumer returns to making regular payments, thus eliminating the need to sue for a deficiency.

4. Subsection (8) prevents abuse of the right to reinstate by making it available only twice in a given year.

Section 9-615. Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.

(a) [Application of proceeds.] A secured party shall apply or pay over for application the cash proceeds for disposition under Section 9-610 and any rebates obtained pursuant to Section 9-610(g), in the following order to:

(1) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement, allowed by subsection (h), and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(h) [Attorney's fees.] In a consumer transaction, a secured party in seeking recovery of a deficiency or in calculating a surplus or an amount necessary to cure under Section 9-609(f), to reinstate under Section 9-614(7), or to redeem collateral under Section 9-620, shall not seek attorney's fees or other legal expenses, except for those fees or expenses required to litigate an action in court, and only if those fees are allowed by applicable law.

Comments:

1. Changes to subsection (a) are necessary to make the provision consistent with changes made to Sections 9-610(g) and 9-615(h).
2. Subsection (h) provides that in consumer transactions a secured party cannot seek attorney's fees except for those fees related to an actual court case. There is no reason in a consumer repossession for attorney involvement, much less for the secured party to claim a certain amount in attorney's fees. Such a right instead is subject to significant abuse. Nevertheless, nothing in this provision prevents a secured party from seeking attorney's fees related to a replevin court action or a deficiency court action, as long as applicable law allows for such fees. If applicable law does not allow for such fees in a court proceeding, this provision does not authorize them.

Section 9-616. Explanation of Calculation of Surplus or Deficiency.

(b) [Explanation of calculation.] In a consumer-goods transaction in which a disposition of collateral has occurred, in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under Section 9-615, the secured party shall send an explanation to the debtor and to any consumer obligor after the disposition on or before the earlier of and:

(A) the date on which before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and

(B) within 14 days after receipt of a request for an explanation; or

(C) 30 days after the disposition. or

(2) in the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) [Required information.] To comply with subsection (a)(1)(B), a writing must provide the following information in the following order:

1) 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:

(2) the amount of proceeds of the disposition, any rebates of interest or credit service charges, and any rebates obtained pursuant to Section 9-610(g), with the amount of the rebate and the date on which it was calculated itemized separately for each rebate;

(4) itemization of the amount for each 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 to the extent permitted by Section 9-615(h);

(5) Itemization of each in the aggregate or by type, and type of credits, including rebates of interest or credit service charges, insurance, service contracts, extended warranties, or other agreements related to the collateral, to which the obligor is known to may be entitled and which are not reflected in the amount in paragraph (2); and

(6) the amount of the surplus or deficiency, and whether the secured party will seek to recover the deficiency.

Comments:

1. After consumers' property is seized and sold, consumers need to know their rights and obligations. The consumer can request information from the secured party, but Article 9 does not provide any mechanism for notifying consumers of this right. This amendment revises subsection (b) so that the secured party has an affirmative obligation to inform the consumer shortly after disposition whether a deficiency will be sought or not.

Many consumers are surprised that they might owe a deficiency even after their property is sold, and thus are unprepared to defend a deficiency action when such an action is brought many months or even years after their property is seized. By then any re-

CORDS OR RECOLLECTIONS AS TO THE TRANSACTION MAY BE LOST. CONSUMERS ARE BETTER ABLE TO DEFEND A DEFICIENCY ACTION IF THEY ARE INFORMED OF THIS LIABILITY SHORTLY AFTER DISPOSITION.

OTHER CONSUMERS MAY ASSUME A DEFICIENCY WILL BE SOUGHT WHEN IN FACT IT MAY NOT. IT IS IMPORTANT TO BE INFORMED IF THAT THREAT WILL NOT BE FORTHCOMING. A CONSUMER WHO IS INFORMED A DEFICIENCY IS NOT TO BE SOUGHT MIGHT ALSO QUESTION WHETHER A SURPLUS IS OWED.

2. SUBSECTION (B)(1) IS REVISED SO THAT BOTH CONSUMER OBLIGORS AND CONSUMER DEBTORS ARE ENTITLED TO THE NOTICE. SEE COMMENT 1 TO SECTION 9-611 CONCERNING THE NEED TO EXTEND RIGHTS TO CONSUMER OBLIGORS AND NOT JUST TO DEBTORS.

3. EXISTING ARTICLE 9 PROVIDES FOR A NOTICE TO THE CONSUMER ABOUT THE CALCULATION OF THE DEFICIENCY OR SURPLUS, BUT IT IS A SUMMARY NOTICE, WITHOUT DETAILS THAT CONSUMERS NEED—DETAILS THAT ARE READILY AVAILABLE TO THE SECURED PARTY. THE SECTION HAS BEEN AMENDED TO PROVIDE MORE PRECISE INFORMATION TO THE CONSUMER.

4. THE EXISTING SECTION DOES NOT PROVIDE THE CONSUMER INFORMATION AS TO WHAT REBATES THE SECURED PARTY HAS AND HAS NOT OBTAINED ON BEHALF OF THE CONSUMER (THUS APPLYING THEM TO ANY DEFICIENCY) AS TO INSURANCE, SERVICE CONTRACTS, OR EXTENDED WARRANTIES, OR THE AMOUNTS OF THOSE REBATES. CONSUMERS NEED TO KNOW WHAT REBATES HAVE NOT BEEN SOUGHT SO THEY CAN SEEK THEM THEMSELVES. THE CONSUMER ALSO NEEDS TO BE ABLE TO CHECK WHETHER THE REBATES OBTAINED WERE IN THE PROPER AMOUNT AND HAVE BEEN PROPERLY CREDITED TO THE CONSUMER.

5. THE EXISTING SECTION DOES NOT PROVIDE CONSUMERS WITH A BREAKDOWN OF THE INDIVIDUAL EXPENSES BEING ASSESSED. AS A RESULT, CONSUMERS CANNOT DETERMINE THEIR REASONABLENESS. SUBSECTION (C)(4) HAS BEEN REVISED TO COMPLY WITH STANDARD BUSINESS PRACTICE OF PROVIDING CONSUMERS WITH AN ITEMIZATION OF ANY CHARGES ASSESSED TO THEM, PARTICULARLY CHARGES WHERE THE AMOUNT HAS NOT BEEN DETERMINED IN ADVANCE.

6. THE RIGHT TO SEEK ATTORNEY'S FEES IS LIMITED IN SUBSECTION (C)(4) TO BE CONSISTENT WITH NEW SECTION 9-615(H).

Section 9-620. Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.

(h) **[Secured Party's Treatment of Collateral.]** In a consumer transaction, a secured party's treatment of the collateral as its own shall, at the debtor's option, be treated as acceptance of the collateral in full satisfaction of the obligation.

Comment:

ARTICLE 9 REQUIRES THE SECURED PARTY TO DISPOSE OF THE COLLATERAL TO DETERMINE ITS MARKET VALUE. SECTION 9-620 CURRENTLY GIVES THE SECURED PARTY A LIMITED RIGHT TO ACCEPT THE COLLATERAL IN SATISFACTION OF THE DEBT. WHERE THE SECURED PARTY DOES NOT GO THROUGH THE PROCEDURES SPECIFIED BY SECTION 9-620, THERE HAVE BEEN CASES WHERE THE SECURED PARTY STILL CLAIMS A DEFICIENCY, EVEN THOUGH IT HAS USED THE COLLATERAL BEFORE DISPOSING OF IT OR HAS NOT DISPOSED OF THE COLLATERAL TO DETERMINE ITS VALUE. NEW SUBSECTION (H) PROVIDES CONSUMER RIGHTS WHERE THE SECURED PARTY, INSTEAD OF DISPOSING OF COLLATERAL, RETAINS IT AND TREATS IT AS ITS OWN WITHOUT GOING THROUGH THE PROCEDURES SET FORTH IN SECTION 9-620. THE AMENDMENT GIVES THE CONSUMER THE OPTION TO TREAT THE SECURED PARTY AS HAVING ACCEPTED THE COLLATERAL IN FULL SATISFACTION OF THE DEBT.

Section 9-623. Right to Redeem Collateral.

(a) **[Persons that may redeem.]** A debtor, a consumer obligor on behalf of the debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) **[Requirements for redemption.]** To redeem collateral, a person shall tender the lesser of

(1) fulfillment of all obligations secured by the collateral, plus (2) the reasonable expenses and attorney's fees described in Section 9-615(a)(1) and attorney's fees to the extent permitted by Section 9-615(h);

(2) in a consumer transaction, the collateral's fair market value, less reasonable expenses to sell the collateral.

(d) **[Debtor's interest in collateral.]** Until expiration of the periods set out in Section 9-623(c), the debtor has an interest in the collateral.

(e) **[Appraisal.]** The amounts specified in subsection (b)(2) shall be determined by an independent professional appraiser selected and paid for by the party redeeming the collateral, and agreed to by the secured party. The secured party shall not unreasonably reject the appraiser selected by the person redeeming the collateral or prevent the appraiser from inspecting the collateral.

(f) **[Deficiency remaining after redemption.]** Redemption shall terminate the secured party's security interest in the collateral. Redemption under subsection (b)(2) shall not affect the obligors' liability under Section 9-615(c) for any deficiency remaining after payment of the redemption amount.

Comments:

1. THE ADDITION OF CONSUMER OBLIGOR IN SUBSECTION (A) IS EXPLAINED AT COMMENT 1 TO SECTION 9-611.

2. THE LIMITATION ON ATTORNEY'S FEES IN SUBSECTION (B)(1) MAKES THE SECTION CONSISTENT WITH SECTION 9-615(H).

3. THE CURRENT RIGHT OF REDEMPTION IN SUBSECTION (B) PROVIDES A WINDFALL FOR SECURED PARTIES AND PLACES UNREASONABLE PRESSURES ON A CONSUMER DEBTOR. ON REPOSSESSION, ALL THE SECURED PARTY CAN EXPECT FROM POSSESSION AND DISPOSITION OF THE COLLATERAL IS THE COLLATERAL'S VALUE LESS SALES EXPENSES. THE SECURED PARTY ALSO RETAINS THE RIGHT TO SEEK A DEFICIENCY.

THE CURRENT RIGHT OF REDEMPTION, ON THE OTHER HAND, GIVES THE SECURED PARTY A WINDFALL AT THE EXPENSE OF THE CONSUMER. INSTEAD OF THE VALUE OF THE COLLATERAL LESS SALES EXPENSES, THE SECURED PARTY IMMEDIATELY RECEIVES IN EXCHANGE FOR THE COLLATERAL THE TOTAL OUTSTANDING OBLIGATION AND ALL EXPENSES TO REPOSSESS, STORE, PROCESS AND CONDITION THE COLLATERAL, EVEN IF THIS IS FAR MORE THAN THE COLLATERAL'S VALUE.

FOR MANY CONSUMERS, THOUGH, THIS BAD DEAL MAY BE A NECESSITY. CONSUMER COLLATERAL MAY HAVE SPECIAL SIGNIFICANCE TO THE CONSUMER OVER ITS MONETARY VALUE. INEFFICIENCIES IN THE MARKETPLACE, PARTICULARLY FOR LOW-INCOME CONSUMERS OR CONSUMERS WITH BLEMISHED CREDIT RECORDS, MAY MAKE FINDING A REPLACEMENT FAR MORE COSTLY THAN THE COLLATERAL'S VALUE. EXISTING SUBSECTION (B) THUS AUTHORIZES SECURED PARTIES TO HOLD CONSUMERS' COLLATERAL HOSTAGE UNLESS THE CONSUMER PAYS THE SECURED PARTY IN MANY CASES FAR MORE THAN THE COLLATERAL IS WORTH TO THE SECURED PARTY.

4. Amended subsection (b) allows consumers to recover their property by paying the secured party in full for everything that the repossessed property is worth to the secured party. Subsection (f) allows the secured party to seek a deficiency for the amount owed less the redemption amount.

Thus the secured party is in no worse a position than if the consumer did not redeem and instead the secured party disposed of the collateral and sought a deficiency. The secured party would recover from the sale the collateral's value less sale expenses, and this is exactly what the amended subsection (b) requires the consumer to pay the secured party to redeem the collateral. Indeed, the secured party may be better off because the consumer will not be able to defend a deficiency action by claiming that the disposition was not commercially reasonable, since there is no disposition.

5. Subsection (e) provides that the collateral's market value is determined by an appraisal at the consumer's expense, by an appraiser approved by the secured party. This provision is patterned on a similar provision in the federal Consumer Leasing Act regulations. See 12 C.F.R. § 1013.4(l).

6. The appraisal determines not only the market value, but also reasonable selling expenses. The collateral's sale price may be related to the size of the selling expenses—selling a vehicle on the lot may bring a higher price than a dealer-only auction, but selling expenses may be higher. In addition, the market value less the sales expenses is the amount required to redeem, so the appraisal will include an estimate of selling expenses.

Section 9-624. Waiver.

(a) [Waiver of disposition notification.] A debtor or secondary obligor may waive the right to notification of disposition of collateral under Section 9-611, but not in a consumer transaction, and only by an agreement to that effect entered into and authenticated after default.

Comment:

Notice before disposition is critical for consumers, providing the right to reinstate the loan and recover the collateral, the right to redeem the collateral, and the right to purchase the collateral at the repossession sale. Typical consumers will have no knowledge of these rights and notice of these rights should not be waivable, even after default. Otherwise important consumer protections will be meaningless. Even after default, the waiver might be included in small print buried in another document the consumer signs, and the rights here are too fundamental to be lost in this manner.

Section 9-625. Remedies for Secured Party's Failure to Comply with Article.

(b) [Damages for noncompliance.] Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's or a consumer obligor's inability to obtain, or increased costs of, alternative financing.

(c) [Persons entitled to recover damages: statutory damages if collateral is consumer goods.] Except as otherwise provided in Section 9-628:

(2) if the collateral is consumer goods, a person that was a debtor or an 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. There can be only one recovery under this paragraph for each instance in which the secured party seeks to enforce its interest.

(e) [Recovery in consumer transactions when deficiency eliminated or reduced.] In a consumer transaction in which the deficiency is eliminated or reduced under Sections 9-620(h) or 9-626(b) or otherwise, a debtor or obligor may recover damages for the loss of any surplus and may also recover under subsection (b) or (c) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(ef) [Statutory damages: noncompliance with specified provisions.] In addition to any damages recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover \$500 in each case from a person that:

(4) fails to cause the secured party of record to file or send a termination statement as required by Section 9-513(a) or (c); or

(5) fails to comply with Section 9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) fails to comply with Section 9-616(b)(2).

Comments:

1. See Comment 1 to Section 9-611 for a discussion of the change made in subsection (b) and a similar change made to subsection (c). Because both the owner and the obligor have a remedy in a consumer transaction, subsection (c)(2) is changed to clarify that there can be only one recovery of statutory damages between the owner and obligor.

2. Article 9 allows secured parties extraordinary powers—to seize and sell the consumer's property without court or other governmental supervision, only limited by Article 9's requirements. But typically a consumer will not know whether the secured party in fact complies with Article 9's standards. There must be a deterrent to prevent widespread abuse in the seizure and sale of consumer collateral. Because Article 9 does not provide for such a deterrent through government agency enforcement, it must provide for it by its own terms. Subsection (e) is thus amended to be consistent with a number of court rulings. If the secured party cannot prove the

reasonableness of its claimed deficiency, this should not prevent the secured party from being liable under Article 9 for its Article 9 violations.

3. Section 9-616 provides an important notice to a consumer as to the status of the obligation after the repossession sale (see Comment 1 to Section 9-616) and new section 9-616(b) requires that the notice be sent to the consumer. Violation of this requirement merits a remedy for the individual consumer who is deprived of this important notice, and there is no reason for that consumer to have to prove that the failure to send the notice is part of a pattern or practice of non-compliance.

Section 9-626. Action in Which Deficiency or Surplus Is in Issue.

(b) [Non-**Consumer transactions**; no inference.] The limitation of the rules in subsection (a) to transactions other than consumer 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. In an action arising from a consumer transaction in which the amount of a deficiency or surplus is in issue, the following rules apply:

- (1) a secured party has the burden of proving compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance whether or not the debtor or an obligor places the secured party's compliance in issue.
- (2) a secured party is not entitled to a deficiency if it fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part.

Comments:

1. Existing Section 9-626 specifies the rules for actions for a deficiency or surplus in commercial transactions, but not for consumer transactions. Instead, existing subsection (b) leaves that to the courts. Article 9 sets out specific rules and burdens governing secured transactions. But Section 9-626 fails to specify consumer rights when at issue is one of the most important aspects of a consumer repossession—the consequences of a repossession or sale that violates Article 9.

Unlike commercial entities that have clear rules, this section leaves consumers uncertain as to their rights. To promote clarity and uniformity, these amendments provide specific rules in actions involving a deficiency or a surplus in a consumer transaction—rules that have been adopted by many courts for many years.

2. For commercial transactions the debtor must first place in issue the commercial reasonableness of a sale before the secured party has the burden to establish its compliance with Article 9. While this rule may make sense between two commercial entities, it is inappropriate for consumer transactions, particularly where the consumer, after having lost the collateral, is defending a deficiency action unrepresented.

The secured party has sold the collateral without court or other governmental supervision, often at a sale from which the consumer and other consumers are barred. The consumer is unlikely to be knowledgeable about the secured party's sale procedures and whether they are commercially reasonable. If the secured party wishes to establish the value of the collateral through a sale procedure over which it has complete control, it should bear the burden in consumer transactions to show that the procedures it chose are reasonable. It is not burdensome for a secured party to detail the procedures it used.

3. New subsection (b)(2) adopts the absolute bar rule that is utilized today in many jurisdictions for consumer transactions. Article 9 provides secured parties with extraordinary rights. They can accelerate a note without notice, and then without notice can seize the consumer's property without supervision by a court or any government agency. They can then sell the property without any court or other government agency supervision, and can do so in almost any manner they choose. The secured party then can recover the total amount of the obligation less whatever price results from the sale.

There are enough instances of abuse to merit a strict standard for a secured party if it does not follow the minimal standards placed upon it. For example, the secured party should not be able to obtain a deficiency after seizing and selling the consumer's collateral in a commercially unreasonable manner. The sale price cannot be presumed to be reasonable in the absence of proof that the sale was conducted in a commercially reasonable manner, so the amount sought in a deficiency cannot be shown to be reasonable.

Effective Date

This Act takes effect 90 days after enactment and applies to any aspect of enforcement of a security interest occurring after the effective date, even if the security interest was created before the Act takes effect. This Act does not affect an action, case, or proceeding commenced before this Act takes effect.

Comment:

These amendments take effect 90 days after enactment. Even if a credit agreement was consummated before enactment, the amendments apply to actions to enforce a security interest or recover a deficiency after the amendments' effective date. For example, if notice of a planned disposition took place before the effective date, the secured party's pre-disposition notice need not comply with these amendments. In the same transaction, if the required post-disposition notice is sent after the effective date, that notice must comply with the amendments. The amendments do not apply to any court proceedings brought before the effective date.

* The principal authors of these model consumer amendments are NCLC staff attorneys Jonathan Sheldon, Carolyn Carter, and John Van Alst. They are also the principal authors of *Repossessions* (8th ed. 2013), updated at www.nclc.org/library.

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¹ See J. Van Alst and R. Jurgens, National Consumer Law Center, REPO MADNESS: HOW AUTOMOBILE REPOSSESSIONS ENDANGER OWNERS, AGENTS AND THE PUBLIC (2010), at https://www.nclc.org/images/pdf/special_projects/auto/report-repo-madness.pdf.

² Model amendment to U.C.C. § 9-609(f), (g).

³ See NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS § 4.5, Appx. B (8th ed. 2013), updated at www.nclc.org/library.

⁴ Model amendment to U.C.C. § 9-614(7).

⁵ See NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS § 9.2 (8th ed. 2013), updated at www.nclc.org/library.

⁶ Model amendment to U.C.C. § 9-609(d).

⁷ See NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS § 6.4.4 (8th ed. 2013), updated at www.nclc.org/library.

⁸ Model amendment to U.C.C. § 9-609(e).

⁹ See Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 Wash. U. L. Q. 69, 133—144 (1997).

¹⁰ *Id.* at 139—140.

¹¹ U.C.C. § 9-615(f).

¹² Model amendment to U.C.C. § 9-102(a)(63).

¹³ Model amendment to U.C.C. § 9-610(b).

¹⁴ See NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS § 10.9.3 (8th ed. 2013), updated at www.nclc.org/library.

¹⁵ *Id.* at § 10.6.2.

¹⁶ Model amendment to U.C.C. § 9-614.

¹⁷ Model amendment to U.C.C. § 9-616.

¹⁸ Model amendment to U.C.C. § 9-610(g).