Randolph v. Franklin Investment Co.: Forfeiture of Deficiency Judgement for Failure to Give Reasonable Notice of Resale under the Default Provisions of the U.C.C.

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Part Five, Article Nine, of the Uniform Commercial Code (U.C.C.)\(^1\) governs the rights of the secured party (creditor)\(^2\) and his debtor\(^3\) in the event of default.\(^4\) One of the steps the creditor must ordinarily take to comply with Part Five is to send the debtor "reasonable notification" of any sale of the repossessed collateral.\(^5\) While section 9-504(3) plainly im-


The purposes of the Code are "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions." U.C.C. § 1-102(2). Underlying the Code is the concept that commercial transactions is a single subject of the law, despite its many aspects. General Comment, id. at x. Article Nine propounds a comprehensive scheme for the regulation of security interests in personal property and fixtures. Id. § 9-101, Official Comment.

2. A secured party is "a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold." U.C.C. § 9-105(1)(m). A security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a 'security interest.' " Id. § 1-201(37).

3. A debtor is "the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper." Id. § 9-105(1)(d).

4. The Code does not define default but, rather, indicates that what constitutes default in a particular situation is a function of the security agreement. See id. § 9-501(1). A security agreement is "an agreement which creates or provides for a security interest." Id. § 9-105(1)(f). Since a security interest secures payment or performance of an obligation, see note 2 supra, default is the failure of the debtor to pay or otherwise perform what the security agreement requires of him.

5. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any
poses a duty of notification upon the creditor, it states no specific sanction for the breach of this duty. Instead, section 9-507(1) provides the debtor with a general action for damages should his creditor dispose of the repossessioned collateral in violation of any of the provisions of Part Five — including the notification requirement.6 A growing number of courts have concluded that the section 9-507(1) action for damages inadequately protects the debtor’s right to notification of resale under section 9-504(3).7 In *Randolph v. Franklin Investment Co.*,8 the District of Columbia Court of Appeals joined these courts by holding that a creditor who fails to send proper notice of resale is not entitled to a deficiency judgment.9

Joseph and Antoinette Randolph purchased a used Pontiac from Lee Ford in November, 1968. They were consistently late in making payments under the terms of their contract, which the dealer had assigned without

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6 The damages the debtor may recover are “any loss caused by a failure to comply with the provisions of this Part.” *Id.* § 9-507(1). “If the collateral is consumer goods, the debtor may recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price.” *Id.* The drafters term this penalty for the improper disposition of consumer goods a “minimum recovery.” *Id.*, Official Comment 1.


8 398 A.2d 340 (D.C. 1979) (rehearing en banc).

9 *Id.* at 347. In a companion case, the court not only deprived a secured creditor of his right to a deficiency judgment for failure to give notice of resale but also permitted the defaulting debtor to collect the minimum recovery for the improper resale of consumer goods. Gavin v. Washington Post Employees Fed. Credit Union, 397 A.2d 968 (D.C. 1979). Indeed, in *Randolph* itself, the court parenthetically remarked that its limitation on the recovery of a deficiency does not negate the creditor’s liability in damages to his debtor. 398 A.2d at 343 n.4.
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recourse to the Franklin Investment Company. In September, 1969, Franklin repossessed the car and eventually sold it for scrap at a private sale four months after an advertised public sale had elicited no bids. After hearing evidence on the car’s resale value, the trial court offset $378 against the claimed deficiency of $1,128 and awarded Franklin a judgment of $750. Since the car had sold for $125, the trial court implicitly valued it at $503 by allowing the $378 setoff.

On appeal, the Randolphs argued that, by failing to give the required notice of the private sale, Franklin had forfeited its right to a deficiency judgment under section 9-504(2) of the Code. The three-judge panel held that the purpose of the section 9-504(3) notice provision is to afford the debtor an opportunity to protect the full value of his collateral. This purpose, the panel reasoned, had been effectuated by the trial court’s reduction of the deficiency judgment by an amount equal to the fair market value of the car’s resale price.

On rehearing, the full court vacated the panel’s opinion and reversed, holding that the secured creditor who fails to give notice of resale may not pursue a deficiency judgment; rather, he is limited to the proceeds of the improper disposition, however inadequate they may be. The court reasoned that the secured creditor’s failure to give proper notice could not be judicially cured because of the substantial prejudice to the debtor’s right of redemption and to his ability to defend himself against a deficiency suit.

Should the debtor wish to redeem his property, he must have adequate

10. 398 A.2d at 341.
11. Id. at 342.
12. Id. Franklin sent the Randolphs notice of the proposed public sale by certified mail. Although this notice was returned unclaimed, proof of receipt was unnecessary. Further, the Randolphs had actual knowledge of the repossession of their car. Randolph v. Franklin Inv. Co., 368 A.2d 1151, 1155-56 (D.C. 1977), rev’d on rehearing en banc, 398 A.2d 340 (1979).
13. 398 A.2d at 342. The damages due the Randolphs under § 9-507(1), see note 6 and accompanying text supra, were not set off against the deficiency because the trial court had denied their motion to amend their answer by filing a counterclaim. See 368 A.2d at 1156. The full court reversed and remanded to permit the Randolphs to pursue their § 9-507(1) remedy. See 398 A.2d at 351.
14. See 398 A.2d at 342-43. Several other issues were raised on appeal, including whether the Consumer Credit Protection Act of 1971 precluded the trial court from awarding a deficiency judgment even had Franklin given fully adequate notice of resale. See note 102 and accompanying text infra.
15. 368 A.2d at 1155-56.
16. 398 A.2d at 343.
17. See id. at 345-47.
notice of a contemplated resale in order to make necessary arrangements. Furthermore, even in the absence of redemption, notice of resale would enable the debtor to attend the sale and thereby put him in the best possible position to produce evidence to rebut the contention, in a deficiency suit, that the creditor had disposed of the property at a reasonable price. Such considerations, the court concluded, justified making proper notification a condition precedent to the creditor’s right to a deficiency judgment.


Many of the Uniform Commercial Code provisions governing default have their historical antecedents in the Uniform Conditional Sales Act (U.C.S.A.). Under the Act, the seller could either notify the buyer of his intention to retake the goods upon default or retake without notice and then retain the goods for a ten-day period during which the buyer might redeem. If the buyer did not redeem the goods and had paid at least fifty per cent of their purchase price, the seller was required to sell the goods at public auction, with notice to both the buyer and the public. If less than

18. Id. at 345.
19. Id.
20. See id. at 347.
22. U.C.S.A. § 17. To be served upon the buyer personally or by registered mail 20 to 40 days before retaking, the notice was to state the fact of default, the period after which the goods would be retaken, and the buyer’s rights upon retaking. If the buyer did not cure the default before retaking, he lost his right of redemption. Id. Retaking had to be by legal process if it could not be accomplished without breach of the peace. Id. § 16.
23. Id. § 18. The seller could immediately resell perishable goods. The buyer could make a written demand, delivered personally or by registered mail to the seller, for a written statement of the sum due under the contract and the expense of retaking, keeping, and storing the goods. Failure to furnish such a statement within a reasonable time exposed the seller to a $10 fine and liability for damages. Id.
24. Id. § 19. The seller himself could bid at the auction, which had to be held not more than 30 days after retaking. The notice requirements were numerous. First, the seller had to give the buyer 10 days’ written notice of the sale, either personally or by registered mail.
fifty per cent of the purchase price had been paid, the buyer could demand the sale of the goods. Absent such a demand, the seller could voluntarily resell the goods or retain them as his own, thus discharging the buyer of liability for the balance due under the contract. The proceeds of any resale were applied to the cost of the resale; the expenses of retaking, keeping, and storing the goods; and the satisfaction of the debt. The buyer was entitled to any surplus and was liable for any deficiency.

Failure to comply with the default provisions of the Uniform Conditional Sales Act rendered the seller liable to his buyer, who could recover the greater of his actual damages or one-fourth the sum of all payments made under the contract plus interest. Although the Act specified no other penalty for noncompliance, courts construing the default provisions of the Act generally held a properly conducted resale to be a condition precedent to the seller's right to recover a deficiency.

Second, at least five days before the sale, the seller had to post at least three notices of the sale in different public places within the filing district where the auction was to occur. Finally, if the buyer had paid $500 or more on the purchase price, the seller had to give notice at least five days before the sale by publication in a newspaper published or having a general circulation within the filing district where the auction was to occur. Id.

25. Id. § 20. The demand had to be made in writing within 10 days of the retaking. The sale had to be conducted in conformity with § 19 within 30 days of the demand. Id. The purpose of the buyer in demanding a resale would have been to determine his equity in the goods. Id. § 19, Commissioners' Note.

26. Id. § 20.

27. Id. § 23. The seller had no obligation to account to the buyer except as provided in § 25. Id. See note 31 and accompanying text infra.

28. Id. § 21.

29. Id.

30. Id. § 22.

31. Id. § 25.

Some penalty is necessary in order to insure that the resale will take place. It seems fair to allow the buyer his actual damages (the difference between the amount of his part payments and the value of the use of the property which he has had, and also the value of his bargain) and to fix a minimum penalty to be recovered in all cases. This will protect the buyer in all cases where his equity is of any appreciable value.

Id., Commissioners' Note.

32. See, e.g., Bulldog Concrete Form Sales Corp. v. Taylor, 94 F. Supp. 328 (N.D. Ind. 1950), aff'd, 195 F.2d 417 (7th Cir. 1952) (applying Indiana law: to recover deficiency, seller must strictly comply with statutory requirements as to length of time and contents of notice but not as to form of notice); United Sec. Corp. v. Tomlin, 198 A.2d 179 (Del. Super. Ct. 1964) (no right to deficiency when car sold without required notice and public auction); Commercial Credit Corp. v. Swiderski, 195 A.2d 546, motion for rehearing denied, 196 A.2d 214 (Del. Super. Ct. 1963) (failure to give statutory notice of resale of car discharges buyer from contract and entitles him to recover damages or penalty); Frantz Equip. Co. v. Anderson, 37 N.J. 420, 181 A.2d 499 (1962) (noncompliance with statutory provisions governing resale deprives seller of right to deficiency judgment and makes him liable for damages); Bancredit, Inc. v. Meyers, 62 N.J. Super. 77, 162 A.2d 109 (Super. Ct. App. Div. 1960)
Unlike the Act, the Uniform Commercial Code contains no provision for an optional notice of intention to retake upon default. Instead, the Code simply gives the secured creditor the right to repossess the collateral, which the debtor, under section 9-506, has the right to redeem any time before the creditor has disposed of it or retained it in satisfaction of the obligation. If the collateral is consumer goods and the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest or sixty per cent of the loan in the case of another security interest, the creditor must resell the collateral. Otherwise, unless the debtor objects, the creditor may propose to retain the collateral in satisfaction of the obligation. Under section 9-504(3), the debtor is entitled to "reasonable notification" of the disposition of the collateral, which must be "commercially reasonable" and which may be conducted by public or private sale. The proceeds of the resale are to be applied first to the reasonable expenses of repossession and disposition and then to the satisfaction of indebtedness secured by the collateral. The debtor is entitled to any surplus and is liable for any deficiency arising from the disposition.

33. U.C.C. § 9-503. The secured party may proceed by action or without judicial process if he can avoid breach of the peace. Id.

34. To redeem, the debtor must tender fulfillment of all obligations secured by the collateral as well as the creditor's reasonable expenses for repossessing the collateral and arranging for its disposition. Id. § 9-506.

35. Consumer goods are those "used or bought for use primarily for personal, family or household purposes." Id. § 9-109(1).

36. A purchase money security interest is a security interest that is
   (a) taken or retained by the seller of the collateral to secure all or part of its price;
   or (b) taken by a person who by making advances or incurring an obligation gives
   value to enable the debtor to acquire rights in or the use of collateral if such value
   is in fact so used.
   Id. § 9-107.

37. Id. § 9-505(1). If the creditor fails to dispose of the collateral within 90 days of repossession, the debtor may recover in conversion or under section 9-507(1). Id. See note 42 and accompanying text infra.

38. Id. § 9-505(2). The creditor must send written notice of his proposal to the debtor, who must object in writing within 21 days to compel disposition. Id.

39. See note 5 supra. The secured party may buy at any public sale and at a private sale "if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations." U.C.C. § 9-504(3).

40. Id. § 9-504(1)

41. Id. § 9-504(2)
the creditor does not comply with the Code's default provisions, section 9-507(1) renders him liable to the debtor, who can recover actual damages in all cases and, in the case of consumer goods, a penalty in lieu of damages.42

Courts ruling on the relationship between the creditor's duty of notification imposed by the Code and his right to a deficiency have generated a full spectrum of responses.43 At one end of this spectrum, a few courts have allowed the noncomplying creditor his deficiency less any proved damages or penalty to which section 9-507(1) entitles the debtor.44 In concluding that the creditor's failure to give the required section 9-504(3) notice of resale does not excuse the debtor from liability for his debt, these courts have uniformly relied upon the action for damages expressly given the creditor of his right to a deficiency.45 Such courts have also provided that the debtor defending in a deficiency suit may assert his action for damages as a setoff or counterclaim.46 The common assumption of these courts is that section 9-507(1) is the debtor's exclusive remedy for the creditor's noncompliance with the notice requirements of Part Five of the Code.

In the middle of the spectrum of judicial rulings on the consequences of creditor noncompliance with the Code's notice requirement, many courts have imposed a rebuttable presumption that the collateral was worth the amount of the debt, thus requiring the noncomplying creditor to prove that the collateral was worth less than this amount in order to recover a deficiency.47 Like the courts which have adopted the exclusive remedy rule,

42. See note 6 supra.
45. See note 44 supra.
these courts have emphasized the advantage to the debtor of the express section 9-507(1) remedy for creditor noncompliance and the absence of any suggestion in Part Five that the creditor forfeits his right to a deficiency by failing to give notice of resale.\textsuperscript{48} In Norton v. National Bank of Commerce,\textsuperscript{49} the court which created the rebuttable presumption rule specifically rationalized going beyond the express provisions and obvious implications of the Code. Noting that the creditor's failure to give notice makes it harder for the debtor to sustain his burden of proving loss with reasonable certainty, the court concluded that it "would be manifestly unfair for the creditor to derive an advantage from its own misconduct."\textsuperscript{50}

To redress this perceived unfairness, the court simply shifted the burden of proof from the unnotified debtor, where section 9-507(1) places it,\textsuperscript{51} to the noncomplying creditor.\textsuperscript{52}

In order to exercise his right to a deficiency under the rebuttable presumption rule, the creditor must make one of two showings: first, that the resale was conducted according to the requirements of the Code, including the giving of proper notice, in which case the amount received at the sale is evidence of the collateral's true value; or, second, that the amount received at an improperly conducted sale represented the true value of the collateral, which must be independently established.\textsuperscript{53} Such a rule not only precludes the offending creditor from benefiting from his failure to give notice but also enhances the power of section 9-507(1) to compensate the aggrieved debtor for the violation of his section 9-504(3) right to notification\textsuperscript{54} and his section 9-506 right of redemption.\textsuperscript{55}


\textsuperscript{49} 240 Ark. 143, 398 S.W.2d 538 (1966).

\textsuperscript{50} \textit{Id}. at 149-50, 398 S.W.2d at 542. The court continued:

\textit{We think the just solution is to indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law.}\textsuperscript{51} \textit{Id}. at 150, 398 S.W.2d at 542.

\textsuperscript{51} U.C.C. § 9-507(1) requires the debtor to bear the burden of proving whatever damages he hopes to collect, which would include establishing the fair market value of the collateral at the time of resale.

\textsuperscript{52} Norton v. National Bank of Commerce, 240 Ark. at 149-50, 398 S.W.2d at 542.

\textsuperscript{53} \textit{See} Leasing Assocs., Inc. v. Slaughter & Son, Inc., 450 F.2d at 177; Universal C.I.T. Credit Co. v. Rone, 248 Ark. at 669, 453 S.W.2d at 39-40.

\textsuperscript{54} \textit{See} United States v. Whitehouse Plastics, 501 F.2d at 695; Leasing Assocs., Inc. v. Slaughter & Son, Inc. 450 F.2d at 177.

\textsuperscript{55} \textit{See} United States v. Whitehouse Plastics, 501 F.2d at 696.
At the other end of the spectrum of rulings on the relationship between the duty of notification and the right to a deficiency, many courts have held that the secured creditor who fails to give his debtor proper notice of resale forfeits his right to a deficiency.\(^5^6\) Such courts have sometimes reasoned that, because the section 9-507(1) action for damages is not an expressly exclusive remedy for the violation of the section 9-504(3) notice requirement, the Code’s policy of deferring to supplementary principles of law and equity, expressed in section 1-103,\(^5^7\) empowers the courts to require proper notice of resale as a condition precedent to a creditor’s right to a deficiency judgment.\(^5^8\) Specific authority for grafting the condition precedent rule onto the Code has been found in adjudication under the Uniform Conditional Sales Act.\(^5^9\) For example, in *Leasco Data Processing Equipment Corp. v. Atlas Shirt Co.*,\(^6^0\) the court reasoned that the judicial denial of a deficiency for noncompliance with the Act’s notice requirement was so established that the drafters of the Code would have expressly repudiated it had they intended courts to rule differently under the Code.\(^6^1\)

The *Leasco* court also found implicit support for the condition precedent rule in the structure and language of the Code itself. The court reasoned that the structural conjunction, within a single section of the Code,\(^6^2\) of the right of the creditor to a deficiency and his duty to notify the debtor implies that the exercise of the right logically depends upon the discharge of the duty.\(^6^3\) Furthermore, the court relied upon the language of section

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\(^5^6\) See note 7 supra.

\(^5^7\) “Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.” U.C.C. § 1-103.


\(^6^0\) 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. 1971).

\(^6^1\) If the authors of the Uniform Commercial Code proposed to overthrow the firmly established and generally accepted construction of the [Uniform Conditional Sales Act] denying recovery for a deficiency where there was not precise compliance with the notice requirement, they surely would have manifested that intent in clear and unambiguous language. In fact, there is not the slightest intimation of any such purpose to be found in the Uniform Commercial Code. *Id.* at 1091, 323 N.Y.S.2d at 15-16 (citation omitted).

\(^6^2\) See U.C.C. § 9-504(2), (3).

\(^6^3\) It surely has meaning that the very section that affirms the right to a deficiency judgment after sale of a repossessed article also describes in simple and practical terms the rules governing dispositions as well as the pertinent notice requirements. If a secured creditor’s right to a deficiency judgment were intended to be independ-
9-507(1): "If the disposition has occurred the debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part." Such language, the court concluded, plainly contemplates an affirmative action for damages sustained, not a defense against an impermissible deficiency suit.64

Like those courts that have adopted the rebuttable presumption rule,65 the courts preferring the condition precedent rule stress the significance of the section 9-506 right of the debtor to redeem the collateral and the substantial prejudice to this right arising from the creditor's failure to give the notice of resale required by section 9-504(3).66 One such court has implicitly justified preferring the condition precedent rule over the rebuttable presumption rule on the ground that the section 9-507(1) right of action for damages cannot fully compensate the debtor, who, because of his creditor's failure to give notice, has lost his right to redeem his property in specie.67

Thus, when the District of Columbia Court of Appeals sat en banc to reconsider the issue of whether and under what conditions Part Five of the Code permits a creditor who has not notified his debtor of resale to recover a deficiency, it had access to a fully articulated spectrum of answers and arguments. By permitting a deficiency less a setoff for the amount by which the actual value of the collateral exceeded its resale price, the trial court had applied the rebuttable presumption rule.68 The three-judge panel affirmed the trial court's judgment without explicitly considering the alternatives available in the exclusive remedy and condition precedent rules.69 The task facing the full court was, therefore, to adopt one of the three lines of authority for the District and to explain persuasively its reasons for doing so.


64. Id. at 1092, 323 N.Y.S.2d at 16.
65. See notes 54-55 and accompanying text supra.
68. See Randolph v. Franklin Inv. Co., 398 A.2d at 342, 347.
69. See Randolph v. Franklin Inv. Co., 368 A.2d at 1155-56.
II. Randolph v. Franklin Investment Co.: The Condition Precedent Rule and the Limits of Persuasive Construction

In Randolph v. Franklin Investment Co., the District of Columbia Court of Appeals held proper notice of resale to be a condition precedent to a deficiency judgment because of the substantial prejudice to debtors in the absence of such notice, which any creditor can easily give to his debtor.\(^70\)

This prejudice consists of the foreclosure of the debtor’s right of redemption and the added difficulty of showing, by way of defense in a deficiency suit, that the creditor did not dispose of the collateral at a reasonable price.\(^71\) Such considerations, the court asserted, “are solid reasons why failure to give notice can never (in the absence of actual notice) be deemed harmless.”\(^72\)

The court’s suggestion that the creditor’s failure to give notice of resale forecloses the debtor’s right of redemption assumes that the purpose of the notice is to enable the debtor to redeem: without reasonable notice of resale, the debtor will not have a clear idea of how much time he has to make arrangements necessary for redemption.\(^73\) Although the notice required by section 9-504(3) of the Code does not have to inform the debtor of his right to redeem,\(^74\) the logical nexus between the Code’s notice requirement and the ability of the debtor to exercise his right of redemption is evident from a comparison of the provisions of the Code with those of its predecessor, the Uniform Conditional Sales Act. The Act required the seller to retain the goods within reach of the buyer for ten days to allow him to redeem them if he could raise the money.\(^75\) The Code dropped this requirement and substituted a combination of provisions for “reasonable notification” of resale and for the debtor’s right to redeem any time before the creditor’s disposition or retention of the collateral.\(^76\)

\(^{70}\) 398 A.2d at 347. The majority noted that Super. Ct. Civ. R. 55-II(b) bars recovery of a deficiency judgment after repossession of personal property unless the plaintiff-creditor has complied with applicable law and resold the property for a fair and reasonable price. Id. at 344 & n.7. Rule 55-II(b) does not, however, add substantive content to such law. Id. at 347.

\(^{71}\) Id. at 345.

\(^{72}\) Id.

\(^{73}\) Id.

\(^{74}\) See notes 34 & 39 supra.

\(^{75}\) U.C.S.A. § 18, Commissioners’ Note (act withdrawn 1943). See note 23 and accompanying text supra.

\(^{76}\) See notes 34, 39 and accompanying text supra; U.C.C. § 9-504(3), Official Comment 5.
of reasonable notice of resale, a minimum period of time for redemption which the Act had secured by other means.

Although a comparison of the pertinent sections of the Act and the Code illuminates the importance the drafters of the Code attached to notice of resale as a means of securing an interval during which the debtor might redeem, the Randolph court did not conduct this analysis. Nor did the court reason that because of this special function of reasonable notice of resale under the Code, holding proper notice a condition precedent to a deficiency judgment is more warranted under the Code than it had been under the Act. Even if the court had so reasoned, it could not gainsay the incompatibility of the condition precedent rule with commercial reasonableness. Although section 1-103 of the Code permits the use of supplementary principles of law and equity such as the condition precedent rule, section 1-106(1) indicates the drafters' intent that remedies be administered in a generally compensatory rather than in a penal spirit. In so providing, the Code incorporates the common law principle that compensatory, but not punitive, damages are recoverable for breach of contract.

77. Courts which have appealed to judicial construction of the Act as authority for adopting the condition precedent rule under the Code have not argued for the special function of notice under the Code. See notes 56-61 and accompanying text supra. The Randolph court did, however, cite Professor Gilmore, 398 A.2d at 347, who argues that the judicial use of the condition precedent rule under the Act is authority for its use under the Code. See 2 G. Gilmore, Security Interests in Personal Property § 44.9.4, at 1261-64 (1965). Curiously, Gilmore does not base his argument on the importance of notice in securing an interval for redemption under the Code but upon the greater ease of giving notice under the Code than under the Act. Id. See notes 5, 24 supra.

78. Another court observed:

In the situation where reasonable notice of sale has not been given, the spirit of commercial reasonableness requires that the secured party not be arbitrarily deprived of his deficiency but that the burden of proof be shifted to him to prove that the sale resulted in the fair and reasonable value of the security being credited to the debtor's account. When that burden has been borne, the resultant deficiency ought to be collectable by the secured party, especially in view of the rights to damages afforded the debtor by [section 9-507 (1)]. Conti Causeway Ford v. Jarossy, 114 N.J. Super. at 386, 276 A.2d at 404-05.

79. The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law. U.C.C. § 1-106(1).

80. “Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented by the defendant's breach, in excess of savings made possible...” Restatement of Contracts § 329 (1932). “Punitive damages are not recoverable for breach of contract.” Id., § 342, to which Comment a adds: “Damages are punitive when they are assessed by way of punishment to the wrongdoer or example to others and not as the money equivalent of harm done.” See 5 A. Corbin, Contracts § 992 (1964); 11 S. Williston, Contracts § 1338 (3d ed. 1968).
Section 9-507(1) makes an exception to this principle by granting the aggrieved consumer-debtor a minimum recovery capable of penalizing the creditor. The Code does not, however, create a further exception by providing for the denial of a deficiency judgment because of the failure of the creditor to give proper notice of resale to his debtor. Thus, to adopt the condition precedent rule is tantamount to writing into Part Five the additional penalty of the creditor's forfeited deficiency, a result neither authorized by the letter nor contemplated by the spirit of the Code.

The court further reasoned that the general requirement that a creditor's disposition of collateral upon default be "commercially reasonable" is inadequate to protect the debtor's interest in the collateral. Thus, one purpose of the notice requirement must be to enable the debtor to make the best defense possible if he is sued for a deficiency: unless he attends the sale, the debtor will be hard pressed to produce evidence, even if available, to rebut the contention that the creditor disposed of the property at a reasonable price.

The drafters of the Code thought otherwise. They perceived the principal limitation on the right of the secured party to dispose of the collateral to be the requirement that he proceed in good faith and in a commercially reasonable manner—a requirement deriving substance from the tests of commercial reasonableness stated by section 9-507(2) and the section 9-507(1) remedies of injunctive relief, damages, and minimum recovery.

81. See note 6 supra. Depending upon the facts, the minimum recovery may well not only exceed a consumer-debtor's actual loss but also wipe out any deficiency. See J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 26-14, at 998-99 (1972).

82. In addition to resulting in a double penalty for the creditor in consumer transactions, consisting of the § 9-507(1) minimum recovery and the forfeited deficiency, the adoption of the condition precedent rule introduces the latter penalty into purely commercial transactions. Said one court concerning the place of penalties in commercial transactions under the U.C.C.: "No sound policy requires us to inject a drastic punitive element into a commercial context." Cornett v. White Motor Corp., 190 Neb. 496, 501, 209 N.W.2d 341, 344 (1973).

83. U.C.C. § 9-504(3). See note 39 and accompanying text supra.

84. See 398 A.2d at 346.

85. See id. at 345. Although the court cited no authority for this proposition, another court concluded similarly:

The purpose of [the section 9-504 (3) notice], without doubt, is to enable the debtor to protect his interest in the property by paying the debt, finding a buyer or being present at the sale to bid on the property or have others do so, to the end that it not be sacrificed by a sale at less than its true value.


86. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203.
ery for the consumer-debtor.\textsuperscript{87} Furthermore, the fact that section 9-504(3) requires merely reasonable notification of the time after which any disposition other than a public sale is to be made suggests that the purpose of the notice is not to enable the defaulting debtor to be present at every sale to protect his interest in the collateral.\textsuperscript{88} Indeed, the Official Comments to section 9-504 confirm this implication, for although the drafters provided for public sales, they sought to encourage the “private sale through commercial channels” in the belief that it would “result in higher realization on collateral for the benefit of all parties.”\textsuperscript{89} These parties could include not only the debtor but other secured creditors with interests in the collateral, and it is their participation in a private sale which the notice requirement contemplates. The first paragraph of the Official Comment presents the requirement of reasonable notification to the debtor as the means of securing an interval during which he may redeem the collateral.\textsuperscript{90} The second paragraph then explains that the function of notice regarding other secured parties is to enable them “to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire.”\textsuperscript{91} Thus, the assumption of the Code seems to be that if the debtor is incapable or undesirous of redeeming, he has no further role to play. Other secured parties, however, would probably be both capable and desirous of participating in the disposition. Protecting the interests of both debtor and other secured parties, of course, is the requirement of good faith and commercial reasonableness.

Underlying the court’s distrust of the ability of the reasonableness requirement to assure the debtor that he has received credit for the full value of the collateral is what the court presented as “the questionable quality of evidence at the trial.”\textsuperscript{92} The court suggested that the problem of inadequate evidence of the fair market value of collateral is inherent in all cases in which proper notice of resale has not been given, leaving a conscientious appellate court no alternative to adoption of the condition precedent rule.\textsuperscript{93} In \textit{Randolph}, the trial judge noted the lack of evidence establishing

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  \item \textsuperscript{87} See U.C.C. § 9-507, Official Comment 1.
  \item \textsuperscript{88} The court partially conceded the point: “[A]bsent a requirement of notice of the exact time and place of sale (in contrast with the notice required for a public sale or auction), notice of the time left prior to private sale is especially significant, for the debtor’s option at that point is virtually limited to redemption . . . .” 398 A.2d at 345.
  \item \textsuperscript{89} U.C.C. § 9-504, Official Comment 1.
  \item \textsuperscript{90} See notes 75-76 and accompanying text \textit{supra}.
  \item \textsuperscript{91} U.C.C. § 9-504, Official Comment 5.
  \item \textsuperscript{92} See 398 A.2d at 346.
  \item \textsuperscript{93} See id.
\end{itemize}
the actual condition of the car, which in average condition could have been worth between $375 and $800.\footnote{94} Given the facts that no bids were placed on the car at an advertised public sale and that Franklin sold it as scrap for $125 at a private sale four months later, the trial judge, employing the rebuttable presumption rule, probably did more than justice by the Randolphs when he implicitly valued the car at $503.\footnote{95} Even had the appellate court been unwilling to accept this valuation, however, it could have protected the Randolphs fully by remanding with the instruction that they be given credit for the maximum $800 which their repossessed car could have been worth. Alternatively, the court could have held that the trial court erred in applying the rebuttable presumption rule by awarding a deficiency judgment despite the failure of Franklin to rebut the presumption that the collateral was worth the amount of the debt. Thus, the quality of evidence in the case was not the insurmountable obstacle to justice upon which the court claimed it relied in adopting the condition precedent rule.

In fact, the rebuttable presumption rule relieves the unnotified debtor of any evidential burden as to fair market value in a deficiency suit\footnote{96} without having the condition precedent rule's necessarily punitive impact on the noncomplying creditor.\footnote{97} Because of this consideration, another court concluded that the rebuttable presumption rule, no less than the condition precedent rule, encourages compliance with the notice requirements of section 9-504(3) and appears more consonant with the scheme of the Code.\footnote{98} The District of Columbia Court of Appeals, however, referred to the rebuttable presumption rule not to give it serious consideration but to reject it summarily,\footnote{99} and the court further appears to have reviewed the cases from other jurisdictions so superficially that it thought the rebuttable presumption rule and the exclusive remedy rule\footnote{100} to be an undifferentiated line of authority.\footnote{101}

The unpersuasiveness of the court's statutory construction, its cursory consideration of judicial precedent, and its inability to point to an inequitable disposition of the case at trial suggest that the court may have had an ulterior motive for holding as it did in \textit{Randolph v. Franklin Investment Co.}

\footnote{94} Id. at 344 n.8. \footnote{95} See notes 11-13 and accompanying text \textit{supra}. \footnote{96} See notes 47-53 and accompanying text \textit{supra}. \footnote{97} See notes 77-82 and accompanying text \textit{supra}. \footnote{98} United States v. Whitehouse Plastics, 501 F.2d at 695. See notes 54-55, 77-82 and accompanying text \textit{supra}. \footnote{99} 398 A.2d at 347-48. \footnote{100} See notes 44-46 and accompanying text \textit{supra}. \footnote{101} See 398 A.2d at 347 & n.12.
For example, at one point in its opinion, the court characterized the purposes and practices of repossessing creditors as inherently suspect. Whether or not such a motive existed, the secured party must now plead and prove reasonable notice of resale as a condition precedent to his right to recover a deficiency. He must show both notice and the reasonable-

102. See id. at 346. Speculation as to this motive must remain tentative because the court's opinion seems paradoxical. On the one hand, the court presents itself as engaging in judicial activism to defend the hapless debtors of unscrupulous creditors. See id. Relying upon a 1971 study of automobile deficiency judgments in the District of Columbia, the court concluded that the availability of a deficiency judgment encourages the creditor to settle for less than "the highest possible price" because of laziness or a desire to minimize his own proceeds so that his affiliated purchaser can maximize his profit on his subsequent sale of the collateral back to the public. Id. Although the court acknowledged that Franklin seemed unaffected by such disincentives, it reasoned that "the rule of law governing the legal consequences to a secured creditor for failure to give the requisite notice of resale must be uniform for all creditors, based on the range of commercial practices realistically to be anticipated." Id.

On the other hand, the court could have dealt more severely with automobile financers such as Franklin by holding that the Consumer Credit Protection Act of 1971 precluded the trial court from awarding a deficiency judgment even had Franklin given fully adequate notice of resale. See 398 A.2d at 343 & n.3. Under that act, a consumer is not personally liable to the creditor for repossessed or voluntarily surrendered goods with a cash price of $2,000 or less. D.C. CODE § 28-3812(e)(3) (1973). Two other provisions of title 28, however, appear to exempt banks and savings and loan associations, permitting them to enforce installment sales contracts for automobiles through repossession and deficiency suits. D.C. CODE §§ 28-3812(a), 28-3601 (1973). Because Franklin is neither a bank nor a savings and loan association, it would not appear to have been privileged to a deficiency suit against the Randolphs, whose car had a cash price of less than $2,000. See 398 A.2d at 341.

Relying upon the anomalous result of creating such a preferred status for banks and savings and loan associations and upon a formal opinion of the Corporation Counsel to the District government, the three-judge panel reasoned that Congress must have intended to permit all automobile financers to enforce installment sales contracts through repossession and deficiency suits. 368 A.2d at 1154-55. The panel was forced to address this issue because it went on to hold that Franklin was entitled to a deficiency judgment even though it had failed to give the Randolphs proper notification of resale. 368 A.2d at 1155-56. The full court, however, did not address the Consumer Credit Protection Act issue because it held that failure to give proper notice independently deprived Franklin of its right to a deficiency judgment. 398 A.2d at 347.

Because the full court vacated the panel's opinion, 398 A.2d at 341, the possibility exists that the District of Columbia Court of Appeals may yet deny a large class of automobile financers the right to pursue deficiency judgments on default. To the extent that the court addressed the U.C.C. issue to avoid this result, the court may have been more sympathetic to automobile financers than it acknowledged by adopting the condition precedent rule as a means of staking out a middle ground between permitting automobile financers such as Franklin to pursue deficiency judgments under the Uniform Commercial Code despite non-compliance with its notice requirements and denying many deficiency judgments altogether under the Consumer Credit Protection Act.

103. See, e.g., 398 A.2d at 347; Twin Bridges Truck City, Inc. v. Halling, 205 N.W.2d 736, 739 (Iowa 1973).
ness of notice. Because the court provided secured creditors with no guidance concerning what constitutes reasonable notification, and because failure to give such notice after *Randolph* will undoubtedly result in the forfeiture of sometimes substantial deficiency judgments, it seems appropriate to examine how reasonable notice of resale can be given. Because what constitutes reasonable notification in the District is now an open question, the prudent creditor should employ the strictest notification practices required in other jurisdictions.

Section 9-504(3) requires that notice "be sent by the secured party to the debtor," not that it be received. Sending notice involves adequate postage and a proper address, both of which the creditor will have to prove. He may also have to prove that the letter was written and actually mailed. Thus, although the Code does not so require, the creditor should retain a dated copy of the notice, mail it by registered or certified mail, and keep the receipt, which establishes adequate postage, proper address, and actual posting, as well as the date of posting. If a registered or certified notice is returned before the sale unclaimed rather than refused, and the creditor knows of another reasonable means of contacting the debtor, the creditor may have to take additional steps to satisfy the notification requirement. Finally, the creditor must send notice of each

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104. See, e.g., Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 496 (Iowa 1977).
105. See U.C.C. § 1-201(26).
106. See id. § 1-201(38).
108. In the case of repossessed cars, the District of Columbia Rules and Regulations require the following notices:

Within five days after any motor vehicle is repossessed, the holder shall deliver to the buyer personally, or send him by registered or certified mail to his last known address, a written notice stating (1) the buyer's right to redeem and the amount due and payable; (2) the buyer's rights as to a resale and his liability for a deficiency; and (3) the exact address where the motor vehicle is stored and the exact address where any payment is to be made or notice delivered.


The holder shall, at least 10 days prior to the date of any such public sale or auction, give written notice to the buyer of the time and place of such sale or auction, which notice shall be delivered personally or sent by registered or certified mail, or, in the case of a private sale, 10 days notice of the time after which such private sale may be held.

5AA D.C.R.R. § 5.3, id. at 30. The notices may be given before the expiration of the 15-day redemption period prescribed in 5AA D.C.R.R., § 5.2(b). Id. See 398 A.2d at 343-44.
and every contemplated sale.\textsuperscript{110}

Of course, the notice the creditor sends must be reasonable,\textsuperscript{111} and the reasonableness of notice is a question of fact.\textsuperscript{112} What constitutes reasonableness obviously depends upon the purpose of the notice provision. Under \textit{Randolph}, this purpose is to enable the debtor to exercise his right of redemption or otherwise protect his interest in the collateral.\textsuperscript{113} The District of Columbia Rules and Regulations provide a minimum standard of reasonableness for one kind of collateral by requiring the giving of written notice at least ten days prior to the sale of a repossessed car.\textsuperscript{114} Thus, a secured creditor in the District would probably be ill-advised to give less than ten days' notice of the resale of any item of collateral unless it falls into one of the exceptions enumerated in the Code.\textsuperscript{115} Moreover, the more valuable the collateral, the more advance notice the creditor might have to give the debtor to satisfy the requirement of reasonableness, since the greater the financial burden he must assume to exercise his right to redeem, the more time the debtor might need. The creditor may establish reasonable notification provisions by contract,\textsuperscript{116} but he should bear in mind that failure to follow them will result in defective notice.\textsuperscript{117} In short, given the penalty of the forfeited deficiency judgment, the guiding principle for the secured creditor in the District seeking to give "reasonable notification" must be knowledge of the most stringent requirements of the law and scrupulous caution in observing them.

\section*{III. Conclusion}

In \textit{Randolph v. Franklin Investment Co.}, the District of Columbia Court of Appeals reasoned that the secured creditor should forfeit his right to a

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  \item[\textsuperscript{110}] See 398 A.2d at 344 (unsuccessful public sale followed by successful private sale); DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 408-09, 243 N.W.2d 745, 751 (1976) (collateral disposed of in several transactions).
  \item[\textsuperscript{111}] U.C.C. § 9-504(3).
  \item[\textsuperscript{113}] See notes 70-91 and accompanying text supra. See also Wells v. Central Bank of Ala., 347 So. 2d 114, 119 (Ala. Civ. App. 1977) (notice given after sale or when there is no time to redeem the collateral prior to the sale); Levers v. Rio King Land & Inv. Co., 93 Nev. 95, 97, 560 P.2d 917, 919 (1977) (notice must precede sale by enough time to permit debtor to protect his interest in collateral).
  \item[\textsuperscript{114}] See note 108 supra. On "giving notice," see U.C.C. § 1-201(26).
  \item[\textsuperscript{115}] See note 5 supra.
  \item[\textsuperscript{116}] See U.C.C. § 9-501(3).
  \item[\textsuperscript{117}] See, e.g., Moody v. Nides Fin. Co., 115 Ga. App. 859, 860, 156 S.E.2d 310, 311 (1967); Twin Bridges Truck City, Inc. v. Halling, 205 N.W.2d at 738.
\end{itemize}
deficiency judgment for failure to give proper notice of resale because such notice secures important rights for the debtor which are inadequately protected by other default provisions of the Code. Plausible on its surface, the reasoning of the court is deeply flawed. Although the notice of resale after default does secure a period of time within which the debtor may redeem, the notice requirement was not designed to assist the debtor in defending himself in a deficiency suit. Further, the drafters of the Code thought the requirement that the creditor conduct the resale in a commercially reasonable manner and his liability for not doing so to be equal to the ends of justice, and they proved to be so in *Randolph*, buttressed as they were by the trial court's use of the rebuttable presumption that the collateral was worth at least the amount of the outstanding debt. Finally, holding proper notice of resale to be a condition precedent to the right to a deficiency judgment is a punitive remedy, and punitive remedies are expressly disfavored by the Code.

The unpersuasiveness of the *Randolph* opinion is unfortunate, for the court imperiled the legitimate interests of secured creditors, leaving them to fend for themselves. Because what constitutes reasonable notice of resale is an open question in the District and because the consequence for failing to give it is the forfeiture of the right to a deficiency judgment, secured creditors should conform their notification practices to the judicial maxima prescribed in the various jurisdictions.

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