ENFORCING SECURITY INTERESTS UNDER UNIFORM COMMERCIAL CODE ARTICLE 9A

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I. WHEN IS AN ARTICLE 9A SECURITY INTEREST ENFORCEABLE?

A. Prerequisites of Enforceability. RCW 62A.9A-203(b) makes an Article 9A security interest enforceable against the debtor and third parties with respect to the collateral only if and when:

(1) value has been given for the security interest;

(2) the debtor has rights in the collateral or the power to transfer rights in the collateral to the secured party; and

(3) at least one of the following four conditions is met:

(a) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers standing timber, a description of the land concerned (the term "security agreement" is defined by RCW 62A.9A-102(73) to mean "an agreement that creates or provides for a security interest");

(b) the collateral is not a certificated security (such as a stock certificate) and is in the possession of the secured party for purposes of perfection pursuant to the debtor's security agreement;

(c) the collateral is a certificated security in registered form and the certificate has been delivered to the secured party pursuant to the debtor's security agreement; or

(d) is deposit accounts, electronic chattel paper, investment property or letter-of-credit rights and the secured party has obtained control of the that collateral by the means required by Article 9A pursuant to the debtor's security agreement.

B. Default.

1. What is a "Default"? Part 6 of Article 9A provides various rights and remedies in favor of a security party. Those rights and remedies become available to a secured party "[a]fter default." RCW 62A.9A-601(a). Like the prior Article 9, Article 9A does not define "default," but instead leaves it to other applicable law, and to the parties by their agreement, to determine whether a default has occurred. Apart from the modest limitations imposed by the unconscionability doctrine and the requirement of good faith, default is whatever the security agreement says it is and, in the absence of anything specific in the parties' agreement, whatever the parties intend a default to be . ***Chrysler Credit Corp. v. B.J.M., Jr., Inc.***, 834 F.Supp. 813, 831 (E.D. Pa. 1993); ***Kahwaty v. Potter,*** **2005 Wash.App.LEXIS 1457 (Wn. App. 2005) (failure to maintain insurance as required by agreement constituted default entitling secured party to repossession notwithstanding absence of any definition of a "default" in the agreement);** 4 J. White & R. Summers, ***Uniform Commercial Code***, § 34-2, 386 (4th Ed. 1995).

It is not unusual to find in security agreements a provision to the effect that an event of default takes place if the secured party considers itself to be insecure. Washington courts in the past have held that the obligation of good faith imposed by RCW 62A.1-208 applies to the exercise of such a right, but that since "good faith" as defined in RCW 62A.1-201 applies a subjective standard of "honesty in fact"—a "pure heart and empty head" standard, if you will—it followed that negligence of the secured party in ascertaining the actual state of affairs "is irrelevant to good faith," and that an honest but mistaken belief would support an exercise of the right to accelerate. ***Van Hor v. Van de Wol***, 6 Wn.App. 959, 960-61, 497 P.2d 252 (1972). The continued vitality of this approach is questionable with the adoption of Article 9A, which as noted above includes a definition of "good faith" that includes both that same subjective standard as well as an objective standard requiring the "observance of reasonable commercial standards of

fair dealing." RCW 62A.9A-102(43). Although Article 9A does not include any overarching provision imposing its own definition of "good faith" for all purposes, Official Comment 19 to new UCC § 9-102 states that "[t]he definition [of "good faith"] in this section applies when the term is used in this Article, and the same concept applies in the context of this Article for purposes of the obligation of good faith imposed by Section 1-203."

In the case of an agricultural lien, a default occurs "at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created." RCW 62A.9A-606.

2. Right of Acceleration. Unless otherwise agreed, a failure to pay sums owed when due generally will be treated as a default. ***Wisenhunt v. Allen Parker Co.***, 168 S.E.2d 827, 829 (Ga. App. 1969). Often by agreement of the parties a default with respect to currently-due payments will entitle the secured party to accelerate the secured indebtedness so that it becomes due and payable in full. While Washington recognizes contractual acceleration rights, it makes an election to accelerate effective only upon the creditor's communication of that election to the debtor (by written notice, service of a complaint for the accelerated indebtedness or by otherwise making the acceleration known to the debtor), even where the parties' agreement purports to give the creditor a right to accelerate without notice; and until the creditor's election to accelerate is communicated to the debtor, the debtor has the right to cure and avoid acceleration. ***Cook v. Strelau***, 127 Wash. 128, 135-36, 219 Pac. 846 (1923); ***Weinberg v. Naher***, 51 Wash. 591, 595-98, 99 Pac. 736 (1909); ***Glassmaker v. Ricard***, 23 Wn.App. 35, 37-38, 593 P.2d 170 (1979). However, unless otherwise agreed, advance notice of an intended acceleration is not required. ***Jacobson v. McClanahan***, 43 Wn.2d 751, 754, 264 P.2d 253 (1953).

3. Waiver of Default. A secured party's habitual acceptance of late payments without objection may be treated as a waiver of a secured party's right to insist upon strict performance until the debtor has been notified of the secured party's intention to insist upon future strict performance and provided the debtor with a reasonable time to cure an existing default in payment. *See, e.g.,* ***Rocha v. McClure Motors, Inc.***, 64 Wn.2d 942, 946, 395 P.2d 191 (1964); ***Wadham v. McVicar***, 115 Wash. 503, 505-06, 197 Pac. 616 (1921). However, where the parties' agreement expressly provides that the secured party's acceptance on one or more

occasions of late payments will not operate as a waiver or estoppel of the secured party's continued right to strict performance of payment obligations, such a course of dealing likely would not be treated as a waiver. See, ***Badgett v. Security State Bank***, 116 Wn.2d 563, 572-73, 807 P.2d 356 (1991) (holding that prior course of dealing in renewing notes did not create an obligation to grant or consider additional renewals inconsistent with the terms of the parties' agreement requiring payment upon maturity of the indebtedness).

II. WHAT REMEDIES ARE AVAILABLE TO A SECURED PARTY WITH AN ARTICLE 9A SECURITY INTEREST?

A. General. The remedies set forth in Part 6 of Article 9A are not exclusive. Rather, RCW 62A.9A-601(a) provides that after default the secured party has both those remedies and, except as otherwise provided by RCW 62A.9A-602 (which sets forth a variety of rules that, along with the implied obligation of good faith, may not be waived or varied by agreement of the parties), those which the parties fashion for themselves. The Code thus allows the parties, subject to the limitations set forth in RCW 62A.9A-602, to determine by their agreement the remedies available to the secured party on account of a default.

Even with respect to rules that under RCW 62A.9A-602 are not subject to waiver, the parties generally are permitted to establish standards by which the fulfillment of the rights of a debtor or obligor and the duties of the secured party are to be measured, so long as the standards that they establish are not "manifestly unreasonable" (a term that is not defined). RCW 62A.9A-603(a). They are not free, however, to agree as to what is and is not to constitute a "breach of the peace" (discussed below) in connection with the secured party's exercise of self-help repossession rights. RCW 62A.9A-603(b).

Additional, a secured creditor after default may:

(1) reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest or agricultural lien by any available judicial procedure; and

(2) if the collateral is a document of title, may proceed either as to the document of title or as to the goods covered by it. RCW 62A.9A-601(a).

Moreover, the various remedies provided for and allowed by Part 6 of Article 9A are cumulative, and may be exercised simultaneously with each other. RCW 62A.9A-601(c).

B. Disablement of Collateral. Because the continued use by a debtor of equipment after a default may adversely affect its value, to the detriment of the secured party, Article 9A permits a secured party after default to render equipment unusable, either pursuant to judicial process or without judicial process if the disablement can be effectuated without a "breach of the peace" (a concept discussed more fully below). RCW 62A.9A-609(a)(2), (b). The requirement that the secured party proceed without a "breach of the peace" is non-waivable. RCW 62A.9A-602(6).

Software that is embedded in and that would normally would be transferred with associated computer equipment will be treated for such purposes as part of the equipment. RCW 62A.9A-102(44). Software that is not so treated is dealt with by Article 9A as a form of general intangible. RCW 62A.9A-102(75); Official Comment 25, UCC§ 9-102. Article 9A does not provide a secured party with a right to disable software collateral that is not treated as party of collateralized equipment. That is not to say, however, that the parties could not by their security agreement provide the secured party with such a right; as noted above, RCW 62A.9A-601(a) accords a secured party after default with not only the rights provided for by Part 6, but also "those provided by agreement of the parties."

C. Obtaining Possession Of Collateral. In order to effect remedies provided for by Article 9A, it may be important, and in some cases essential, for the secured party to obtain possession of collateral. A secured party obtaining possession of collateral generally has an obligation to keep the collateral identifiable unless it is fungible, in which case it may be commingled. RCW 62A.9A-207(b)(3). The secured party may only use or operate collateral in the secured party's possession, however, for the purpose of preserving its value, or as permitted by a court having competent jurisdiction, or (except in the case of consumer goods) in the manner and to the extent agreed by the debtor. RCW 62A.9A-207(b)(4). The obligation to refrain from use of consumer goods except for the purpose of preserving its value or as allowed by court order may not be waived by agreement of the parties. RCW 62A.9A-602(1).

A secured party wishing to obtain possession of collateral has a number of options open to it:

1. Self-Help Repossession. A secured party may take possession after default without judicial process "if it proceeds without breach of the peace." RCW 62A.9A-609(a),(b). The condition that there be no "breach of the peace " is a carryover from the previous Article 9.

The state's authorization of a private self-help remedy does not entail such "state action" as to implicate due process requirements. ***Faircloth v. Old National Bank***, 86 Wn.2d 1, 3-6, 541 P.2d 362 (1975).

Like Article 9, Article 9A is purposefully vague in specifying what a "breach of the peace" does or does not entail. Official Comment 3 to UCC § 9-609 states in part:

> Like former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. In considering whether a secured party has engaged in a breach of the peace, however, courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of the collateral.
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> This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A number of cases have held that a repossessing secured party's use of a law-enforcement officer without benefit of judicial process constituted a failure to comply with former Section 9-503.

Significantly, Article 9A does *not* permit parties to determine what will and will not constitute a "breach of the peace." RCW 62A.9A-603(b).

As one might expect, case law interpreting the "no-breach-of-the-peace" requirement is not entirely uniform and consistent, but over time a number of general rules of thumb have evolved:

(1) Unauthorized entry into the interior of a structure occupied by the debtor or others will likely be treated as a "breach of the peace," even where entry can be had without the use of force (for example, through an unlocked door), but unauthorized entry onto a driveway or other open areas on land occupied by the debtor generally will not in and of itself constitute a breach of the peace. 4 J. White & R. Summers, *Uniform Commercial Code*, § 34-7, 414-17, 422-23 (4th Ed. 1995); ***Ragde v. Peoples Bank***, 53 Wn.App. 173, 175-76, 767 P.2d 949 (1989) (nighttime repossession of vehicle from debtor's residential driveway);

(2) Repossession over the protest of the debtor or third parties, even from a public street or other public place, and even in the absence of any display of anger or use of physical force, will likely be treated as a breach of the peace. *Id*., at 421-23; ***Jackson v. Peoples Federal Credit Union***, 25 Wn.App. 81, 86, 604 P.2d 1025 (1979);

(3) A repossession to which the debtor voluntarily consents at the time it takes place will not be treated as a breach of the peace. *Id*., at 418;

(4) Repossession with the consent of a person so closely related to the debtor, and of such age and maturity, that the person effecting the repossession reasonably would presume that the person is authorized to give such consent will likely be treated as a repossession without any breach of the peace; but a consent by others will not *ipso facto* eliminate a claim of breach of the peace. *Id*., at 419-420;

(5) A consent of the debtor or a third person to repossession that is procured by fraud will not be treated as an effective consent, and may itself provide the debtor with a basis for claiming breach of the peace. Id., at 418-419; and

(6) The mere fact that a repossession is noisy does not result in a "breach of the peace." ***Ragde v. Peoples Bank***, at 176 (debtor unsuccessfully sued for damages for alleged violation of breach of peace requirement, claiming that secured party's wee-hours repossession of car from his driveway entailed a "tremendous ruckus," causing him to jump out of bed, fall and hurt his back).

A secured party's right to repossession in the case of fixtures or a manufactured home includes the right to remove the collateral from the real property to which the collateral is attached if the secured party's interest "has priority over all owners and encumbrancers of the real property." RCW 62A.9A-604(c). However, a secured party exercising the right to remove such collateral is required promptly to reimburse any owner or encumbrancer, other than the debtor, for the cost of repair of any physical damage caused by the removal, but is not required to compensate anyone for any diminution in the value of the property caused by the absence of the collateral removed or any necessity of replacing that collateral. RCW 62A.9A-604(d). An owner or encumbrancer entitled to reimbursement may refuse permission to remove fixtures or a

manufactured home until the secured party gives adequate assurance that the secured party will provide the required reimbursement. *Id*.

A secured party having a security interest in fixtures, but no security interest in the underlying land (e.g., by virtue of a mortgage, deed of trust or other lien) has not right by virtue of its security interest to foreclose against the real estate itself. ***FGB Realty Advisors v. Bennett***, 672 A.2d 545 (Conn.Super. 1995).

2. Dispossession Of Collateral From The Debtor Through Judicial Process.

a. Replevin. A secured party after default is entitled to take possession of the collateral. RCW 62A.9A-609(a)(1).

Article 9A adds a new provision giving a secured party the right after default to require the debtor "to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties." RCW 62A.9A-609(c). Although secured parties often include a provision in security agreements imposing such an obligation upon debtors, the obligation is now made automatic, and applies even if the security agreement is silent on the subject.

A secured party seeking to enforce the right to possession of collateral provided by RCW 62A.9A-609(c) or otherwise by the parties' agreement may do so through a replevin action under chapter 7.64 RCW. An order under that statute requiring the debtor to place the secured party in possession of collateral may only be entered after the debtor is given notice (by means of a show cause order) and an opportunity to be heard; replevin orders cannot be obtained *ex parte*. RCW 7.64.020-035, and requires the posting of a bond by the secured party in such sum as the court may order "conditioned that the plaintiff will prosecute the action without delay and that if the order is wrongfully sued out, the plaintiff will pay all costs that may be adjudged to the defendant and all damages, court costs, reasonable attorneys' fees, and costs of recovery that the defendant may incur by reason of the order having been issued." RCW 7.64.035(1)(b). The debtor in a replevin action may prevent the secured party from taking possession by posting a redelivery bond "by one or more sufficient sureties to the effect that they are bound in an amount equal to the value of the bond filed by the plaintiff, conditioned that the defendant will deliver

the property to the plaintiff if judgment is entered for the plaintiff in the action for possession and will pay any sum recovered by the plaintiff in that action." RCW 7.64.050.

b. Attachment. RCW 6.25.030(10) and RCW 6.25.030(1) operate in tandem to permit a secured party to whom a debt has become due to attach personal property of an obligor who is also a debtor. Note that the statute does not limit attachment to collateral; rather, essentially any real or personal property of the debtor may be attached pursuant to chapter 6.25 RCW. A writ of attachment may be issued prior to the entry of judgment. RCW 6.25.070. Although the statute provides under certain circumstances for issuance of a writ with respect to personal property of the defendant without prior notice and an opportunity to be heard, RCW 6.25.070(2), notice and an opportunity to be heard may be required as a matter of due process under federal constitutional law unless the creditor can demonstrate "immediate danger that a debtor will destroy or conceal disputed goods." ***Fuentes v. Shevin***, 407 U.S. 67, 80-93, 92 S.Ct. 1983 (1972); ***Sniadach v. Family Finance Corp.***, 395 U.S. 337, 338-342, 89 S.Ct. 1820 (1969); ***Rogoski v. Hammond***, 9 Wn.App. 500, 502-06, 513 P.2d 285 (1973). As in the case of a replevin order, the plaintiff as a condition of obtaining a writ must post a bond in a sum specified by the court protecting the debtor from damages if ultimately the court determines that the writ should not have been issued. RCW 6.25.080-090. However, unlike the situation in a replevin action, there is no procedure by which the defendant, by posting a counter-bond, may prevent the attachment. While both a replevin order and a writ of attachment operate to dispossess a defendant of property, only a replevin order results in possession by the plaintiff—where a writ of attachment against personal property is executed upon, it is the sheriff who takes possession of property pending a final adjudication.

c. Receivership. Where a secured party is faced with loss, removal or injury of collateral, or where the debtor is an entity and has dissolved or is insolvent or imminently faces insolvency, the secured party may seek the appointment of a receiver with respect to the collateral. RCW 7.60.020(3), (5). The ultimate object of a receivership being the protection and preservation of property for the benefit of persons having an interest in that property, R. **Graves, *Washington Receivership*, 37 Univ. Wash. L. Rev. 573, 579 (1962), it follows that a receiver need not be appointed over all of the defendant's property or with a**

charge to liquidate the property over which the receiver is appointed (although, as CR 66 indicates, such authority in appropriate cases may be conferred), and that a receiver may be appointed simply **to manage assets pending the ultimate adjudication of the action (such a receiver generally being referred to as a "temporary receiver" or a "receiver pendente lite") 1 Clark, *A Treatise on the Law and Practice of Receivers* (3rd ed. 1959) § 13. A receivership is an ancillary procedure exercised in aid of a court's jurisdiction to grant some other ultimate relief which the court is empowered to grant, and is not available as an independent remedy. *Hamburger Apparel Co. v. Werner*, 17 Wn.2d 310, 320, 135 P.2d 311 (1943); *Grays Harbor Commercial Co. v. Fifer*, 97 Wash. 380, 382, 166 Pac. 770 (1917). Consequently, a court may not appoint a receiver over personal property collateral unless the party seeking appointment has prayed for some other, ultimate relief justifying the appointment. *United States v. Sloan Shipyards Corp.*, 270 Fed. 613, 616-17 (W.D. Wash. 1921).**

d. Specific Performance. Our state's replevin statute expressly provides that the remedy that it affords is to be "in addition to any other remedy available to the plaintiff. RCW 7.64.010. Thus, where the agreement of the parties requires the debtor upon default to place the secured party in possession of collateral, the secured party alternatively may seek specific performance of that obligation. The remedy, being equitable, is not a matter of right but is instead subject to the sound discretion of the court, exercised in accordance with general principles of equity jurisprudence. ***Streater v. White***, 26 Wn.App. 430, 432-33, 613 P.2d 187 (1980), *review denied*, 94 Wn.2d 1014. Moreover, in cases in which a genuine issue of material fact might be raised by the debtor with respect to matters bearing upon those general principles (for example, as to the existence of "clean hands" on the part of the secured party or as to the adequacy of a remedy at law), thus preventing a summary adjudication, the remedy may not be one that can be obtained within the same relatively short time frame in which a replevin order generally may be obtained. To some extent such potential roadblocks may be counteracted by thoughtful drafting of the security agreement (for example, the security agreement might expressly provide that "the secured party and the debtor each shall have a right to seek and obtain specific performance of each of the other party's obligations under this Agreement in the

event of any actual or threatened breach or default, notwithstanding the existence of an adequate remedy at law").

e. Use Of Collateral. A secured party in possession of collateral only has the right to use the collateral in the manner and to the extent agreed by the debtor, and then only if the collateral is not consumer goods. RCW 62A.9A-207(b)(3)(C). Repossessing someone's car, for example, doesn't confer upon the secured party a right to drive it around.

D. Strict Foreclosure. The term "strict foreclosure" refers to the process by which a secured party may retain collateral in full or partial satisfaction of the secured obligation.

1. Retention Of Collateral In Full Satisfaction of Secured Obligation. A secured party may accept collateral in full satisfaction of the secured obligation if the following conditions are met:

(a) *the secured party has sent a proposal for acceptance of collateral in satisfaction of the secured obligation* to (1) any person from whom the secured party receives an authenticated record claiming an interest in the collateral prior to the debtor's consent to the acceptance, (2) to other secured parties or lienholders having a security interest in the collateral evidenced by a properly completed financing statement on file at least 10 days before the debtor's consent to the acceptance, and (3) any other secured party that had a security interest in the collateral perfected by compliance with a federal statute, regulation or treaty (for example, a security interest in aircraft perfected under 49 U.S.C. § 44107-11), or by compliance with any state statute requiring perfection by notation on a certificate of title. RCW 62A.9A-621;

(b) *the secured party does not receive an objection* from such a person within 20 days after the secured party's proposal is sent to that person, and does not receive an objection from anyone else (other than the debtor) holding an interest in the collateral subordinate to the secured party's security interest within 20 days after the last such proposal was sent or before the debtor consents to the acceptance. RCW 62A.9A-602(a)(2).

(c) *the secured party consents to the acceptance in an authenticated record or sends a proposal for acceptance of collateral in full satisfaction of the secured indebtedness*. RCW 62A.9A-620(b). The effect of this requirement is to eliminate a contention by the debtor or others (junior secured parties or secondary obligors) of a "constructive" strict foreclosure, i.e.,

that the secured party's retention of collateral for an unreasonable length of time implies an acceptance of the collateral in satisfaction of the debt (however, such a delay may have implications in terms of the requirement that the secured party act with commercial reasonableness, discussed more fully below). Official Comment 5 to UCC § 620;

(d) *the debtor consents to the acceptance* by the secured party of the collateral in full satisfaction of the secured obligation. RCW 62A.9A-620(a)(1). The debtor is treated as consenting if either (1) the debtor manifests the debtor's consent in an authenticated record after default, or (2) the secured party after default sends the debtor an unconditional proposal (or a proposal that is conditioned only upon the preservation or maintenance of collateral not in the possession of the secured party) in which the secured party proposes acceptance of collateral in full satisfaction of the secured obligation, and the secured party does not receive an objection authenticated by the debtor within 20 days after the secured party's proposal is sent. RCW 62A.9A-620(c). A debtor who fails to timely object, and thus is deemed to have consented, may not thereafter claim commercial unreasonableness on the basis that the value of the collateral retained by the secured party grossly exceeds the secured indebtedness. ***Eddy v. Glen Devore Pers. Trust***, 2006 Wash.App. LEXIS 86 (Wn.App. 2006);

(c) *if the collateral is consumer goods, the collateral is not in the debtor's possession* at the time of the debtor's consent to the acceptance (which, where a proposal is sent and no timely and proper objection is forthcoming, presumably would mean the 20th day after it is sent). RCW 62A.9A-620(a)(3);

(e) *if the collateral is consumer goods in the secured party's possession, either the secured party is not subject to a required disposition of it or the debtor waives the requirement that the secured party dispose of such collateral in an authenticated record after default.* If less than 60% of the principal amount of the secured obligation has been paid, the secured party must dispose of consumer goods collateral within 90 days after taking possession unless the debtor and all secondary obligors consent to a longer period in an authenticated agreement after default. RCW 62A.9A-620(a)(4), (e)-(f); RCW 62A.9A-624(b).

2. Acceptance Of Collateral In Partial Satisfaction Of Indebtedness. The rules applicable to an acceptance of collateral in partial satisfaction of indebtedness are the same as

those that apply with respect to an acceptance of collateral in full satisfaction of indebtedness, with the following exceptions:

(1) the debtor's consent to such an acceptance may only be manifested by an agreement to the terms of the acceptance in an authenticated record after default, and will not be "deemed" to have agreed to a proposed acceptance by failing to respond to a secured party's proposal, RCW 62A.9A-620(c)(1);

(2) the secured party must also send its proposal for partial acceptance to all secondary obligors, RCW 62A.9A-621(b); and

(3) acceptance of collateral in partial satisfaction of the secured obligation is not allowed at all in a consumer transaction. RCW 62A.9A-620(g).

3. Implications Of Good Faith Obligation. Nothing in the language of RCW 62A.9A-620 or RCW 62A.9A-621 requires that a secured party alert the recipient of a proposal for acceptance of collateral in satisfaction of indebtedness that the proposal may become effective if the recipient fails to timely object. The drafters of Article 9A appear to have appreciated that a recipient inadvertently might not object, failing to appreciate that no response effectively might have the same effect as an acceptance. Official Comment 11 to UCC § 620. Rather than requiring secured parties to alert recipients of such a proposal to the significance of a failure to respond, the drafters of Article 9A appear to have contemplated that a secured party proposing to retain collateral with a value disproportionately greater than the amount of the debt to be satisfied "in the hopes that the debtor might inadvertently fail to object" might be subject to a claim of failure to adhere to the non-waivable requirement of good faith (although they note that "even a clear excess of collateral value over the amount of obligations satisfied [does] not necessarily demonstrate the absence of good faith"). *Id.*

4. Consequences Of Strict Foreclosure. A secured party's acceptance of collateral in full or partial satisfaction of the obligation secured by that collateral (1) discharges the obligation to the extent consented to by the debtor, (2) transfers to the secured party all of the debtor's rights in the collateral, (3) discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or subordinate lien in the collateral, and (4) terminates any other subordinate interest in the collateral. RCW 62A.9A-

622(a). Subordinate security interests and liens are discharged, and other subordinate interests terminated, notwithstanding a failure by the secured party to comply with the requirements of Article 9A applicable to a strict foreclosure (for example, a failure to communicate the secured party's proposed acceptance to those of them who are entitled to it); but a secured party in such a case remains liable for its non-compliance under RCW 62A.9A-625 (discussed below). Official Comment 2 to UCC § 9-622.

Strict foreclosure does not affect senior security interests and other senior liens. Somewhat strangely, however, the literal language of RCW 62A.9A-621 nevertheless requires a secured party to send its proposal not only to junior secured parties of record but to *anyone* having a security interest of record in the collateral—which would include senior secured parties whose security interests are not affected by a strict foreclosure. What is more, RCW 62A.9A-620 precludes a secured party from accepting collateral in satisfaction of the secured indebtedness if a timely objection is received from such a person. Since RCW 62A.9A-622 makes a strict foreclosure effective notwithstanding a failure by the secured party to comply with RCW 62A.9A-621, it would seem that a secured party concerned that a senior interest-holder might object would be inclined deliberately to withhold communication of its proposal from that person.

5. Requirements Are Generally Non-Waivable. The uniform version of Article 9A does not permit the rules applicable to strict foreclosures to not be waived or varied in any respect by agreement of a debtor or obligor. RCW 62A.9A-602(10). Washington's non-uniform version of UCC § 9-602 would allow those rules, to the extent that they grant rights to a secondary obligor (e.g., the right to notice of a proposed acceptance of collateral in partial satisfaction of the secured indebtedness), to be waived by an agreement of the secondary obligor.

E. Collection Rights; Enforcement Of Supporting Obligations.

1. General. After default, or otherwise if so agreed, RCW 62A.9A-607(a) confers the following rights upon a secured party:

(1) *the right to notify an account debtor or other person obligated on an obligation to the debtor that serves as collateral to pay or otherwise render performance* of the obligation to or for the benefit of the secured party;

(2) *the right to take proceeds of collateral* in which the secured party also has a security interest. RCW 62A.9A-315 provides that a security interest in an asset generally attaches automatically as well to any proceeds of that asset (see definition of "proceeds" above);

(3) *the right to enforce*, and to exercise the debtor's rights with respect to, the obligations of an account debtor or other person obligated on an obligation to the debtor serving as collateral;

(4) where the secured party is a bank with a security interest in a deposit account maintained at that bank, *the right to apply the balance of a deposit account to the secured obligation*; and

(5) in other instances in which a secured party holds a security interest in a deposit account by means of control (see RCW 62A.9A-104(a)(3)-(3)), *the right to instruct the bank at which the deposit account is maintained to pay the balance of the deposit account* to or for the benefit of the secured party.

The collection and enforcement rights provided by RCW 62A.9A-607(a) are quite broad. Suppose, for example, that a secured party holds a security interest in a debtor's equipment, that the equipment was defective when sold the debtor, and that the debtor therefore might assert a breach of warranty claim against the seller. Because the debtor's breach of warranty claim would constitute "proceeds" of the equipment, and because a security interest in the equipment automatically attaches to proceeds, the secured party also has a security interest in the warranty claim, and would have the right to assert that claim directly against the seller of the equipment after default under RCW 62A.9A-607(a). The secured party is not required to strictly foreclose against the debtor's breach of warranty claim before enforcing it. Official Comment 3 to UCC § 607.

Since a security interest in collateral also automatically attaches to all supporting obligations (see definition above), RCW 62A.9A-203(f), a secured party after default effectively has the right to take such steps as the debtor might take to enforce a supporting obligation. For example, suppose that a secured party holds a security interest in a promissory note payable to the debtor, that the maker of the note has granted to the debtor a security interest in assets of the maker, and that a third party has guaranteed payment of the note. In this case, the secured party

not only has a security interest in the note, but also has a security interest in the debtor's own security interest in the maker's assets (as "proceeds") and in the debtor's rights against the guarantor (as a "supporting obligation"); and after default, the secured party would have the same right that the debtor would have to enforce the note and both the security interest and guarantee supporting that note.

The secured party's enforcement rights under RCW 62A.9A-607(a) apply even where the collateral extends to a mortgage (which, as discussed above, would include for purposes of Article 9A a deed of trust or real estate contract vendor's interest) held by the debtor. After default, the secured party in such a case has the same right that the debtor would have to foreclose judicially or non-judicially upon the mortgage. To the extent necessary to enable the secured party to exercise nonjudicial foreclosure rights, the statute permits the secured party to record (and requires recording offices to accept) a sworn affidavit to the effect that a default has occurred, that a copy of the security agreement is attached to the affidavit, and that the secured party is entitled to nonjudicial enforcement of the mortgage. RCW 62A.9A-607(b). The Washington Comments to RCW 62A.9A-607 indicate that the recordation of such an affidavit will be a prerequisite of a secured party's nonjudicial foreclosure of a deed of trust or real estate contract.

Just as the debtor itself might compromise and settle a claim against its account debtor, a secured party exercising enforcement rights under RCW 62A.9A-607 with respect to the debtor's claim against the account debtor similarly has the right to settle and compromise that claim. Official Comment 9 to UCC § 607.

However, in the exercise of its collection rights, the secured party has an obligation "to proceeding a commercially reasonable manner; and that obligation, except (in Washington) as it applies to secondary obligors, is not subject to waiver or variance by agreement. RCW 62A.9A-607(c); RCW 62A.9A-602(3).

2. Application of Cash Proceeds. A secured party exercising collection and enforcement rights has the right to reimburse itself out of the sums it thereby collects for its reasonable expenses of collection, including reasonable attorneys' fees and legal expenses (even

if the security agreement does not otherwise provide for recovery of attorneys' fees). RCW 62A.9A-607(d).

Cash proceeds of collection and enforcement by a secured party in the exercise of rights under RCW 62A.9A-607 must be applied in the following order:

(1) to the reasonable expenses of collection and enforcement (including attorneys' fees and legal expenses not recoverable automatically under RCW 62A.9A-607(d), if provided for by agreement and not otherwise prohibited by law);

(2) the satisfaction of the secured indebtedness or agricultural lien under which the collection or enforcement occurred;

(3) the satisfaction of any subordinate security interest or other lien on the collateral subject to the security interest or agricultural lien of the secured party if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed, RCW 62A.9A-608(a)(1); however, if the secured party requests a person making such a demand to furnish reasonable proof of the claimed interest, and that proof is not forthcoming within a reasonable time, the secured party is not required to apply sums collected to that person. RCW 62A.9A-608(a)(2); and

(4) to the debtor, if there is any surplus, unless the underlying transaction between the secured party and the debtor was a sale of accounts, chattel paper, payment intangibles or promissory notes, in which case no right to a surplus exists in favor of the debtor. RCW 62A.9A-608(a)(4); RCW 62A.9A-608(b).

As between a secured party and the debtor or an obligor other than a secondary obligor, the rules governing the application of collection and enforcement proceeds are not subject to waiver or variance by agreement. RCW 62A.9A-602(4).

3. Noncash Proceeds of Collection or Enforcement. Noncash proceeds of collection and enforcement are treated differently than cash proceeds. A secured party is not obligated to apply noncash proceeds of enforcement or collection unless the failure to do so would be commercially unreasonable; but where the secured party does apply or pay over noncash proceeds, the secured party must do so in a commercially reasonable manner. RCW 62A.9A-608(a)(3). For example, suppose that a secured party enforcing an obligation of an

account debtor enters into a commercially reasonable settlement under which the account debtor agrees to pay the settlement amount over time pursuant to a promissory note. The note in such a case would "constitute noncash proceeds of collection and enforcement." Thus, the secured party would not be obligated to pay anyone anything on account of having received the account debtor's note unless and until the account debtor pays on that note. At that point, the account debtor's payments would constitute "cash proceeds of collection and enforcement" and would be have to be dealt with in the manner described above.

4. Senior Interest Holders. A secured party whose security interest in proceeds of collection is junior to the security interest of another person may be subject to a claim to those proceeds by that senior secured party, unless the junior secured party qualifies for priority as a purchaser of an instrument (see, RCW 62A.9A-330(d)), as a holder in due course of an instrument (see, RCW 62A.9A-305 and RCW 62A.9A-331(a)), or as a transferee of money under RCW 62A.9A-332(a). Official comment 5 to UCC § 607. The obligation of the secured party to apply cash proceeds in the order referenced above only applies as among the secured party and the persons who would be entitled to the application of cash proceeds under those rules, and does not affect any the priority of a senior secured party in those proceeds. Official Comment 5 to UCC § 608.

5. Right to Deficiency. If the exercise of collection and enforcement rights does not result in satisfaction in full of the secured indebtedness—in other words, if there remains a "deficiency"—then the obligor remains liable for that deficiency unless the underlying transaction was a sale of accounts, chattel paper, payment intangibles or promissory notes, in which case no right to a deficiency exists. RCW 62A.9A-608(a)(4), (b). However, where a deficiency exists and recovery of it is pursued, the amount of the deficiency may be reduced or eliminated if it is determined in the action that the secured party did not proceed in a commercially reasonable manner, under the same rules that apply where the secured party seeks to recover a deficiency remaining after a disposition of collateral and the amount of the deficiency is placed in issue (see discussion in Section V below).

F. Nonjudicial Disposition Of Collateral.

1. Nonjudicial Foreclosure Of Collateral Covered By Deed Of Trust Or Real Estate Contract. Where a security agreement covers both real and personal property—as is often the case in deeds of trust in commercial lending transactions and is occasionally the case where both real and personal property are sold pursuant to a real estate contract—the secured party has the choice of either (1) utilizing the remedies provided by Article 9A with respect to the personal property, without prejudicing the secured party's rights with respect to the real property, or (2) proceeding as to both the real and personal property in accordance with the law applicable to the secured party's realization against its real property collateral, i.e., by means of a nonjudicial foreclosure under chapter 61.24 RCW or a nonjudicial real estate contract forfeiture under chapter 61.30 RCW (as the case may be). RCW 62A.9A-604(a).

Where collateral consists of fixtures, moreover, the secured party may proceed under Article 9A or "in accordance with the rights with respect to real property"—even where the secured party has no interest in any other part of the real property. RCW 62A.9A-9-604(b). Exactly what is meant by "the rights with respect to real property" is unclear. It would seem that unless a secured party uses a deed of trust to secure its interest in fixtures—a somewhat unusual approach where no security interest in the underlying real property is being taken—there would be no basis upon which a secured party might pursue a nonjudicial foreclosure under chapter 61.24 RCW (how can there be a trustee's sale, after all, where there is no trustee?). At most, it would seem that a secured party might be permitted to treat a security agreement covering fixtures as a mortgage, and to foreclose judicially upon it in accordance with chapter 61.12 RCW (in which case the rights of a buyer at the foreclosure sale presumably would be subject to rights of redemption in favor of the debtor and junior lienors that are far more favorable than the right of redemption provided for by Article 9A discussed below).

2. Disposition Of Collateral.

a. Types of Dispositions Allowed. A secured party after default "may sell, lease, license or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation and processing." RCW 62A.9A-610(a). A secured party may not dispose of collateral without undertaking preparation or processing if,

taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral without such actions. Official Comment 4 to UCC § 9-610.

A disposition may be by either private or public proceedings if commercially reasonable. RCW 62A.9A-610(b). Although the term "public disposition" is not defined in Article 9A itself, Official Comment 7 to UCC § 9-610 states that "a 'public disposition' is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding," and that "[a] 'meaningful opportunity' is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition)."

Although Article 9A itself might permit collateral to be disposed of by means of a public sale, in some cases (particularly in the case of investment securities) federal laws may restrict such dispositions or give rise to registration requirements.

Article 9A is not intended to affect the right of a junior secured creditor or junior lienor to invoke the equitable doctrine of marshalling, by which a senior secured creditor who has a security interest in other assets, in which the junior secured party or junior lienor has no interest, may be compelled first to dispose of its other collateral. Official Comment 5 to UCC § 610. The doctrine is applied in appropriate cases both under Washington law, ***Edward L. Eyre & Co. v. Hirsch***, 36 Wn.2d 439, 457, 218 P.2d 888 (1950), ***In re Brazier Forest Products, Inc.***, 921 F.2d 221, 223 (9th Cir. 1990) (*applying Washington law*); and under federal law. ***Meyer v. United States***, 375 U.S. 233, 236-37, 84 S. Ct. 318 (1963) (quoting ***Sowell v. Federal Reserve Bank***, 268 U.S. 449, 456-57, 45 S.Ct. 528 (1925)).

b. Requirement of Commercial Reasonableness. Every aspect of the disposition must be commercially reasonable, including the time, place and other terms; but if commercially reasonable, a secured party may dispose of collateral either 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. RCW 62A.9A-610(b). A disposition will be treated as having been made in a commercially reasonable manner if it is made:

(1) in the usual manner on any recognized market (meaning one, such as the New York Stock Exchange, in which the items sold are fungible and prices are not subject to individual negotiation, Official Comment 9 to UCC § 9-610);

(2) at the price current in any recognized market at the time of disposition; or

(3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. RCW 62A.9A-627(b).

A disposition approved in a judicial proceeding, or by a bona fide creditors' committee, by a representative of creditors generally, and by an assignee for the benefit of creditors is deemed commercially reasonable. RCW 62A.9A-627(c). The failure to obtain such an approval does not mean that the disposition was not commercial reasonable. RCW 62A.9A-607(d). Although it would seem that a pre-approval is what the statute has in mind, at least one Washington decision holds that an after-the-fact trial court determination that the sale price was equal to the depreciated value of collateral constitutes a "disposition . . . approved in [a] judicial proceeding" within the meaning of analogous former UCC § 9-507(2). ***Grant County Tractor Co. v. Nuss***, 6 Wn.App. 866, 871, 496 P.2d 966 (1972).

A secured party's failure to comply with an agreement with respect to its disposition of collateral may itself provide a basis for a determination that a disposition is not commercially reasonable. *See*, ***Beardmore v. American Summit Financial Holdings, LLC***, 351 F.3d 352, 357 (8th Cir. 2003).

The fact that the secured party might have received a greater amount at a different time or by proceeding in a different manner is not of itself sufficient to preclude the secured party from establishing that the disposition was made in a commercially reasonable manner. RCW 62A.9A-627(a). However, "a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." Official Comment 2 to UCC § 9-627. Moreover, gross inadequacy in the price obtained has itself been held to be evidence of commercial unreasonableness. ***Auto Credit v. Long***, 971 P.2d 1237 (Mont. 1998). promissory note The secured creditor faces a rebuttable presumption that the value of the collateral is at least equal to the amount of the outstanding debt; and if the sales price is at least

equal to the amount of the debt, the sales price is presumptively commercially reasonable. ***Casey v. Chapman***, 123 Wn.App. 670, 684-85, 98 P.3d 1246 (2004) (citing ***McChord Credit Union v. Parrish***, 61 Wn.App. 8, 809 P.2d 759 (1991)). In Casey, the court stated:

> In order to overcome the presumption [that the collateral value is at least equal to the debt, the creditor must either obtain a fair and reasonable appraisal at or near the time of repossession or produce convincing evidence of value of collateral.

b. Requirement Of Pre-Disposition Notice Of Sale. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, a secured party disposing of collateral under UCC § 9-610 must send a reasonable authenticated notice of disposition to:

(1) *the debtor*;

(2) *any secondary obligor*; and

(3) if the collateral is other than consumer goods, to *a secured party or lienholder* who, at least 10 days before notice of the disposition was first given to or waived by the debtor and any secondary obligor, had a security interest or lien perfected by a properly completed and filed financing statement identifying the collateral, or perfected in accordance with any federal statute or any statute requiring perfection by notation on a certificate of title. RCW 62A.9A-611(c), (d).

Article 9A provides something of a "safe harbor" when it comes to notice to other properly perfected secured parties and lienors. A secured party who requests a search report from the proper office not more than 30 and not less than 20 days before the date upon which notice of the disposition was first given to or waived by the debtor and any secondary obligator, and who then sends notice of disposition to each secured creditor or lienholder named in the response with a financing statement covering the collateral, will be deemed to have complied with the notification requirement as to everyone other than the debtor and secondary obligors. RCW 62A.9A-611(e). Similarly, the requirement is deemed satisfied if the secured party making such a request receives back no response to the request before the date upon which notice of the disposition was first given to or waived by the debtor and any secondary obligator. *Id*. The language used in UCC § 9-611 seems to contemplate that both the debtor and any secondary

obligor will either receive or waive notice; and it is anything but clear how the "safe harbor" rules are to operate where the debtor or a secondary obligor waives but the other does not.

Although the uniform version of UCC § 9-611 would require a secured party to give notice as well to any other person from whom the secured party receives an authenticated notification of a claimed interest in the collateral before the date upon which notice of the secured party's disposition was first given to or waived by the debtor and any secondary obligation, Washington omits this requirement. Thus, a person claiming an interest in collateral—even another secured party—does not obtain any right to notice of a disposition by notifying the secured party making the disposition of that claimed interest.

A debtor or secondary obligor who "makes itself scarce" may not complain if notice to that person is not sent by the secured party. A secured party only owes a duty to a debtor or obligor (including a secondary obligor) if the secured party knows "how to communicate with the person." RCW 62A.9A-605(1)(c).

A debtor or secondary obligor may waive the right to notice of disposition, but a debtor's (as opposed to a secondary obligor's) waiver of that right is only effective if it is effected by an authenticated agreement after default. RCW 62A.9A-624(a). Washington does not follow the uniform version of UCC § 9-624(a), which similarly would make a secondary obligor's waiver effective only by an authenticated post-default agreement.

Significantly, an obligor who is neither a debtor nor a secondary obligor is not entitled to notice. Thus, where Ulugbek borrows money and delivers a promissory note without providing any security, Shukhrat executes a guaranty with respect to Ulugbek's indebtedness, and Timor grants a security interest in Timor's property as security for Ulugbek's indebtedness, it is only Shukhrat (the secondary obligor) and Timor (the debtor) who are entitled to notice, not Ulugbek, the maker of the note. Official Comment 3 to UCC § 9-611.

c. Timing of Notice. The secured party's notice must be sent at least a reasonable period of time before the disposition takes place, and that generally will be a question of fact; but in a non-consumer transaction, the notification will be deemed to have been sent within a reasonable time if it is sent after default and 10 days or more before the earliest time of disposition indicated in the notice. RCW 62A.9A-612.

d. Contents of Notice.

i. Non-Consumer-Goods Transactions. In a transaction other than a consumer-goods transaction, the contents of a notification of disposition are sufficient if the notification describes the debtor and the secured party and the collateral to be disposed of, states the method of intended disposition, states that the debtor is entitled to an accounting of the unpaid indebtedness and the charge (if any) for such an accounting, and states the date, hour of day and place of a public disposition or the time after which any other disposition is to be made, RCW 62A.9A-613(1); Official Comment to UCC 9-613. A notice that does not contain some of this information nevertheless may be sufficient if found by a trier of fact to be reasonable; and a notification that provides substantially this information is sufficient even though it includes additional information or contains minor errors that are not misleading. RCW 62A.9A-613(2), (3).

RCW 62A.9A-613(5) sets out an optional statutory form of disposition notice which, if used, will be deemed to be sufficient in content.

ii. Consumer-Goods Transactions. In a consumer-goods transaction, by contrast, the notification *must* describe the debtor and the secured party and the collateral to be disposed of; state the method of intended disposition; state that the debtor is entitled to an accounting of the unpaid indebtedness and the charge (if any) for such an accounting; state the date, hour of day and place of a public disposition or the time after which any other disposition is to be made; describe any liability for a deficiency of the person to which the notification is sent; provide a telephone number or mailing address from which the amount that must be paid to redeem the collateral (see discussion below) is available; and provide a telephone number or mailing address from which additional information concerning the disposition and the secured obligation is available. RCW 62A.9A-614(1).

No particular phrasing is required. RCW 62A.9A-614(2). However, an optional statutory form of notice is provided for by RCW 62A.9A-614(3), and if used it will be deemed sufficient in content, even if additional information appears at the end of the form and even if there are errors in the additional information supplied, unless the error is misleading with respect to rights arising under Article 9A. RCW 62A.9A-614(3)-(5).

e. Transmission Of Notice. A notification of a disposition of collateral must be "authenticated," and authentication implies a "record." See, RCW 62A.9A-102(7); Official Comment 9 to UCC § 9-102. Consequently, a strictly oral notice (i.e., one transmitted directly from mouth to ear) will not suffice. However, a "record" need not take the form of a paper document; and an authenticated record transmitted by email or other electronic means will be adequate if the medium used is retrievable in "perceivable form." See, RCW 62A.9A-102(69).

f. Right Of Secured Party To Purchase. The secured party may purchase the collateral at a public disposition, but may not purchase the collateral at a private disposition unless the collateral is of a kind customarily sold on a recognized market or the subject of widely distributed standard price quotations. RCW 62A.9A-610(c).

g. Warranties On Disposition. A contract for sale, lease, license or other disposition of collateral includes the warranties related to title, possession, quiet enjoyment and the like which by operation of law accompany a voluntary disposition of that kind of property. RCW 62A.9A-610(d). Thus, in the case of a sale or lease of goods, the implied warranties of title provided for in Articles 2 and 2A would generally apply. Official Comment 11 to UCC § 9-610.

However, otherwise applicable warranties may be disclaimed either in the manner provided for by the law generally applicable to those warranties or by communicating to the person to whom the disposition is made a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties. RCW 62A.9A-610(e). A record sufficiently disclaims for such purposes if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import. RCW 62A.9A-610(f).

h. Rights Of Transferee; Effect Of Disposition On Interests Of Third Parties In The Collateral. A secured party's disposition of collateral (1) transfers to a transferee for value all of the debtor's rights in the collateral, (2) discharges the security interest under which the disposition is made, and (3) discharges any subordinate security interest or other subordinate lien. RCW 62A.9A-617(1). However, the disposition does not affect interests in the

collateral held by either (a) a senior secured party, or (b) a secured party of equal priority with the secured party effecting the disposition, and their security interests remain in effect and subject to enforcement themselves. Official Comments 5 and 6, UCC § 9-610.

Furthermore, as long as a transferee acts in good faith, the transferee takes free of the secured party's security interest and any subordinate security interests or liens, even if the secured party fails to comply with Article 9A or the requirements of any judicial proceeding. RCW 62A.9A-617(b). A junior secured party or lienor harmed by such non-compliance will have recourse against the non-complying secured party (as discussed below), but not against the collateral disposed of or the good-faith transferee. A transferee that does not act in good faith in acquiring collateral takes the collateral subject to the debtor's rights in the collateral, the security interest or agricultural lien under which the disposition is made, and any other security interest or lien in the collateral. RCW 62A.9A-617(c). The transferee who does not act with both honesty in fact and in accordance with reasonable commercial standards of fair dealing may find itself in a truly unenviable position—having given value for property which remains fully encumbered, with no right to a return of that value from the secured party effecting the disposition.

To facilitate the transfer of title to collateral in cases in which title to the collateral is evidenced by an official record or certificate of title (as in the case of a vehicle), Article 9A allows a properly completed and authenticated "transfer statement" to be submitted to the appropriate government office, in which case that office is required to accept the transfer, amend its records to reflect the transfer and, where applicable, issue a new appropriate certificate of title in the name of the transferee. RCW 62A.9A-619. A transfer of title pursuant to a transfer statement to the secured party itself is not of itself a disposition under Article 9A, and does not of itself relieve the secured party of any of its duties under Article 9A. *Id*.

Secondary obligors not infrequently seek to deal with their obligations to a secured party by purchasing the secured obligation from the secured party or by satisfying their guarantees in a manner giving them the right to step into the shoes of the secured party. Where a secondary obligor receives an assignment from a secured party of the secured obligation, or receives a transfer of the collateral from the secured party and agrees to accept the rights and assume the duties of the secured party, or becomes subrogated to the rights of the secured party with respect

to the collateral (e.g., where a guarantor honors the guarantee by fully satisfying the secured obligation), the secondary obligator acquires all of the secured party's rights and becomes obligated to perform all of the secured party's obligations, and the secured party is thereafter relieved of further duties under Article 9A. RCW 62A.9A-618. Such circumstances are not treated as a disposition under RCW 62A.9A-610, and thus are not subject to commercial reasonableness or notification requirements. RCW 62A.9A-618(b)(1). On the other hand, the mere fact that a secondary obligor is the party acquiring collateral does not in and of itself make the general disposition requirements of Article 9A inapplicable. Official Comment 3 to UCC § 9-618.

i. Application Of Proceeds Of Disposition.

i. Cash Proceeds. The secured party must apply or pay over cash proceeds of a disposition of collateral in the following order:

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

(2) to *satisfaction of the obligation secured* by the security interest or agricultural lien of the secured party;

(3) to *satisfaction of any subordinate security interest or subordinate lien* in the collateral if an authenticated demand for proceeds is made by that person before distribution of proceeds is completed, unless a consignor has an interest in the collateral that is senior to that of the subordinate secured party or subordinate lienor; and

(4) to a *secured party who is a consignor of the collateral* if the secured party receives from the consignor an authenticated demand for proceeds before distribution of proceeds is completed; *but if there is no consignor, then any surplus is to be paid to a debtor*. RCW 62A.9A-615(a), (d). The debtor is not entitled to any surplus, however, if the underlying transaction is a sale of accounts, chattel paper, payment intangibles or promissory notes. RCW 62A.9A-615(e)(1).

If the original owner of the collateral who granted a security interest in it sells the collateral subject to that security interest (which can occur either because the transaction is so

structured or because the sale is of non-consumer goods outside of the ordinary course and the secured party does not consent to the sale and to a relinquishment of the security interest), the buyer becomes the "debtor," RCW 62A.9A-102, and is thus entitled to any surplus payable to the debtor under the rules set forth above. Official Comment 5 to UCC § 9-615. If the secured party does not know that there is a new debtor and accordingly pays the original debtor, the secured party is exonerated from liability to the new debtor. *Id.*; RCW 62A.9A-605, RCW 62A.9A-628(a)-(b).

Although secured parties with perfected security interests senior to the interest of the secured party or agricultural lienor effecting the disposition will typically be entitled to notice of the disposition under the rules discussed above, senior secured parties and senior lienors do not by virtue of Article 9A have any right to proceeds of the disposition or any right to claim a "conversion" of collateral by virtue of a disposition of it by a junior secured party pursuant to Article 9A; but by the same token their senior security interests remain unaffected by the disposition. Official Comments 5 and 6 to UCC § 9-610. On the other hand, the holder of a senior security interest is entitled, by virtue of its own priority, to take possession of collateral from the junior secured party and conduct its own disposition, if it would have the right to take possession from the debtor. *Id*; RCW 62A.9A-609. Provided that the junior secured party or agricultural lienor effecting the disposition receives cash proceeds in good faith and without knowledge that receipt of those proceeds violates rights of the senior party or senior lienor, the junior secured party or agricultural lienor takes the proceeds free of the security interest or lien of such a person, and has no obligation to pay any of the proceeds to that person. Id; RCW 62A.9A-615(g).

ii. Noncash Proceeds. A secured party is not required to apply or pay over for application noncash proceeds of a disposition of collateral unless the failure to do so would be commercially unreasonable; and a secured party that does apply or pay over for application noncash proceeds must do so in a commercially reasonable manner. 62A.9A-615(c). This rule is the analog to the similar rule that applies under 62A.9A-608(a)(3) where noncash proceeds are obtained from the secured party's collection or enforcement of an obligation constituting collateral.

k. Post-Disposition Explanation Of Surplus Or Deficiency In Consumer Transactions. As discussed below, a secured party collecting on or disposing of collateral remains thereafter entitled to look to the obligor that portion of the total obligation that is not thereby satisfied (a "deficiency"). Where a consumer-goods transaction is involved, the secured party is required following a disposition to provide an explanation to the debtor (in the case of a surplus) or consumer obligor (in the case of a deficiency) of its calculation of any surplus or deficiency. RCW 62A.9A-616. Where there is a deficiency for which the consumer obligor is liable, the secured party must provide the explanation before or when making a demand for the deficiency, and must send the consumer obligor either the required explanation or a record waiving the deficiency within 14 days following the secured party's receipt of a request for an explanation. RCW 62A.9A-616(b). Where there is a surplus, the secured party must send the explanation before or when it accounts to the debtor and pays the surplus, and within 14 days of a request for it. The explanation must set forth the aggregate amount of the secured obligation, the amount of proceeds of the disposition, the aggregate amount of obligations after deducting the amount of proceeds, the amount (in the aggregate or by type) of recoverable expenses (including attorneys' fees secured by the collateral), the amount (by in the aggregate or by type) of credits to which the obligor is known to be entitled, and the amount of the resulting surplus or deficiency. RCW 62A.9A-616(c) No particular phrasing is required and minor errors will not prevent an explanation from being sufficient. RCW 62A.9A-9A-616(d).

A debtor or consumer obligor is entitled without charge to one response to a request for an explanation from a secured party in any six-month period, but may charge up to $25.00 for each additional response requested by that person. RCW 62A.9A-616(e). A secured party who fails to provide a timely explanation following a timely request by a consumer obligor from whom a deficiency may be sought is liable to the consumer obligor for any loss caused by that non-compliance plus a statutory penalty of $500.00. RCW 62A.9A-625(e)(6). A secured party who fails to provide a required explanation in other circumstances is subject to that same statutory penalty if the failure is part of a pattern, or consistent with a practice, of non-compliance. RCW 62A.9A-625(e)(5).

l. Non-Waivable Obligations. As between a secured party and a debtor or an obligor who is not a secondary obligor, the rules set out in Article 9A with respect to a secured party's use and disposition of collateral, its application or payment of collection proceeds and of any surplus, its provision for an accounting for a surplus and an explanation of the calculation of any surplus or deficiency in certain cases, and the permissibility of waivers of such matters, are not subject to waiver or variance by agreement of the parties. RCW 62A.9A-9A-602. However, in Washington those rules, subject to the overarching non-waivable obligation of good faith, may be waived or varied as between a secured party and a secondary obligor by agreement.

G. Judicially Authorized Disposition Of Collateral. A secured party may choose to have collateral to be disposed of on account of a judgment against the debtor-obligor in the manner generally applicable to executions on a judgment. RCW 62A.9A-601(a)(1); chapter 6.17 RCW. A secured party purchasing collateral at an execution sale (for example, by "credit bidding" some or all of the amount of its judgment) thereafter holds the collateral free of any other requirements of Article 9A. RCW 62A.9A-601(f).

Any judicial lien that a secured party acquires by judgment or levy against collateral is effectively treated as a continuation of the original security interest, if it has been perfected, and the priority of that judicial lien relates back to the date of the filing of a financing statement covering the collateral or any earlier perfection under Article 9A or, in the case of collateral covered by an agricultural lien, any applicable agricultural lien statute. RCW 62A.9A-601(e).

III. WHEN MAY A SECURED PARTY RECOVER A DEFICIENCY?

The obligor is generally liable for a deficiency remaining after application of the proceeds of collection or disposition as required by Article 9A, except where underlying transaction is a sale of accounts, chattel paper, payment intangibles or promissory notes, in which case no liability for any deficiency arises (just as, correspondingly, no right to any surplus in such a case would exist in favor of the debtor). RCW 62A.9A-615(d)(2).

In an action for where the amount of a claimed deficiency or for a claimed surplus is in issue, the secured party is not required to prove compliance with Article 9A's provisions relating to collection, enforcement, disposition or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue; but where that happens, the burden of proving

compliance shifts to the secured party. RCW 62A.9A-626(a)(1)-(2). If the secured party meets that burden of proof, the secured party is entitled to the claimed deficiency. However, if the secured party fails in such a case to meet its burden of proving compliance, then the secured party also has the burden of proving that the secured obligation (including any liability for expenses and attorneys' fees) nevertheless exceeded amount that would have been realized if the secured party had been in compliance. RCW 62A.9A-626(a)(3)-(4). If the secured party meets that latter burden of proof, then the secured party is skunked and recovers no deficiency. While under the uniform version of new Article 9 this "rebuttable presumption" approach is only required to be applied in the case of non-consumer transactions, Washington's non-uniform version of RCW 62A.9A-626 makes the same approach applicable in the case of both consumer and non-consumer transactions.

Note that RCW 62A.9A-626 does not allow an obligor who is not a the debtor or a secondary obligor to raise non-compliance in an effort to reduce the amount of any deficiency claimed against such an obligor. Such an obligor, who is responsible for the indebtedness even if the secured party chooses not to look to its collateral, and who has no interest in the collateral, is not in a position to complain if non-compliance with the requirements of Article 9A generates less of a recovery than if the secured party had complied with those requirements.

Where a deficiency remains after a disposition, but the amount of the deficiency to which the secured party is entitled is contested, the secured party remains entitled to engage in the disposition of other collateral for the purpose of collecting the disputed deficiency. If because of a result adverse to the secured party in the dispute over the claimed deficiency it turns out that the secured party's recovery from further dispositions is excessive, the secured party may be held liable for the excess; however, the secure party's further disposition of collateral is not itself treated as wrongful, even if the secured party is denied a deficiency altogether. Official Comment 6 to UCC § 626.

If (1) the secured party's non-compliance pertains to particular requirements of Article 9A applicable to consumer transactions, consumer-goods transactions or consumer goods collateral (for example, special notice requirements), (2) the secured party's non-compliance was based upon a belief that the secured party was not dealing with a consumer transaction,

consumer-goods transaction or consumer goods (as the case may be), and (3) that belief was based upon the secured party's reasonable reliance upon the debtor's representation as to the purpose for which the collateral was to be used, acquired or held, or upon an obligor's representation as to the purpose for which the secured obligation was incurred, then the secured party's right to recover a deficiency is unaffected by that non-compliance. RCW 62A.9A-628(c).

IV. WHAT RIGHTS OF REDEMPTION EXIST UNDER ARTICLE 9A?

Until a secured party has collected collateral under RCW 62A.9A-607, or has disposed of it or entered into a contract for disposition of it under RCW 62A.9A-610, or has accepted collateral in full or partial satisfaction of the secured indebtedness under RCW 62A.9A-622, the debtor, any secondary obligor, or any other secured party or lienholder (whether senior, equal or junior in priority) has a right to redeem by tendering fulfillment of all obligations secured by the collateral and paying reasonable expenses and attorneys' fees of the secured party incurred in retaking, holding, and preparing or processing collateral. RCW 62A.9A-623.

Thus, if the entire balance of the secured obligation has been accelerated, the entire balance must be paid—there is no analog under Article 9A to the right to effect a "cure" under the Deed of Trust Act so as to prevent a trustee's sale of real property. Official Comment 2 to UCC § 622. Of course, if a secured party has the right under rules discussed above to foreclose against personal property assets in which a security interest is granted pursuant to a deed of trust, and elects to exercise that right, then the "cure" provisions of the Deed of Trust Act would come into play.

Significantly, a redemption does *not* result in a termination of the security interest unless the fulfillment of outstanding secured obligations otherwise would have that effect. A redemptioner is only obligated for purposes of a redemption under RCW 62A.9A-623 to fulfill monetary obligations that are then due and to perform any other non-monetary obligations that have matured. Official Comment 2 to UCC § 622. The redemptioner is not obligated to fulfill secured monetary obligations not yet due or other secured obligations that have not yet matured; but by the same token, those obligations continue in effect, secured by the collateral, notwithstanding the redemption. *Id*.

A secured party may make successive dispositions of portions of its collateral, and the disposition of one part of a secured party's collateral does not affect the right to redeem portions that have not yet been disposed of. Official Comment 3 to RCW 62A.9A-623.

A secured party generally has the right to grant a security interest in its collateral for the purpose of securing the secured party's own obligations. RCW 62A.9A-207. A debtor's right under RCW 62A.9A-623 to redeem is not affected by a security interest created by the debtor's own secured party. Official Comment 4 to UCC § 9-623.

A debtor or secondary obligor may waive the right to redeem collateral under RCW 62A.9A-623 only by an agreement to that effect entered into and authenticated after default. RCW 62A.9A-624(c).

V. WHAT RECOURSE DOES A PERSON HARMED BY A SECURE PARTY'S NON-COMPLIANCE HAVE?

As discussed above, a failure by the secured party to comply with commercial reasonableness requirements may jeopardize its ability to recover a deficiency.

In addition, Article 9A provides a number of remedies for the purpose of preventing, or as a compensation for, noncompliance. Those include:

(1) equitable relief to restrain collection, enforcement or disposition of collateral on appropriate terms and conditions. RCW 62A.9A-625(a);

(2) damages favor of a debtor, a secondary obligor, and/or another secured party or lienor for any loss caused by any failure to comply with Article 9A (including a failure to comply with the obligation of good faith made applicable to the exercise of rights under Article 9A by RCW 62A.9A-1-203, *see*, Official Comment 2 to UCC § 9-625), or by the recordation of any false affidavit claiming a right to non-judicially foreclose on a mortgage, or by the filing with a governmental office of any false "transfer statement" (falsely claiming, for example, an interest in property covered by title certificate). RCW 62A.9A-625(b)-(c). Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing. RCW 62A.9A-625(b).

The damages recoverable for non-compliance with Article 9A are those reasonably calculated to put an eligible claimant in the position that the claimant would have occupied in the absence of the violation. Official Comment 3 to UCC § 625. Principles of tort law supplement the provisions of Article 9A authorizing recovery of damages for non-compliance with statutory requirements. For example, where a tort is committed as part of a "breach of the peace," damages may be recoverable under applicable tort law; however, "to the extent that damages in tort compensate the debtor for the same loss dealt with by [Article 9A], the debtor should be entitled to only one recovery." *Id.*

Where the collateral is consumer goods, the minimum damages recoverable by the debtor or a secondary obligor on account of the secured party's non-compliance (except for failure to provide an explanation of a deficiency or surplus in accordance with RCW 62A.9A-616) is (1) the credit service charge plus 10% of the principal amount of the obligation, or (2) the time-price differential plus 10% of the cash price. RCW 62A.9A-625(c)(2); RCW 62A.9A-628(d). A secured party may not be held liable for such minimum damages more than once with respect to any one secured obligation. RCW 62A.9A-628(e).

A secured party who fails to provide the explanation of a deficiency or surplus required by RCW 62A.9A-616 in the case of a consumer-goods transaction may be held liable for a statutory penalty of $500 per failure on top of actual damages. RCW 62A.9A-625(e)(5)-(6). Except where the secured party has failed to provide the required explanation on a timely basis in response to a request for it, the statutory penalty is imposed in such a case only if the failure is part of a pattern or consistent with a practice of noncompliance. RCW 62A.9A-625(e)(5).

RCW 62A.9A-210 gives a debtor the right by means of an authenticated record to request and receive an accounting of the unpaid obligations secured by the collateral, an approval or correction of a list of collateral submitted by the debtor, and an approval or correction of a statement of account submitted by the debtor (indicating what the debtor believes the unpaid secured obligations to be). A secured party who fails without a reasonable cause to respond to such a request within the time periods set forth in RCW 62A.9A-210 may be held liable for a statutory penalty of $500 per failure, on top of actual damages. RCW 62A.9A-625(f). Where a secured party fails to comply with a request that it approve or correct a list of collateral supplied

by the debtor, the secured party will be statutorily estopped from claiming a security interest in collateral not shown in the list as against anyone who is reasonably misled by the secured party's failure. RCW 62A.9A-625(g); Official Comment 6 to UCC § 625. Certain additional failures to provide acknowledgments or termination statements, and the filing of a record that a person is not entitled to file, can result in the imposition of a $500-per-failure statutory penalty in addition to actual damages. RCW 62A.9A-625(e)(1)-(4).

A debtor whose deficiency is eliminated under RCW 62A.9A-626 may recover damages for the loss of any surplus. However, in order to prevent double recovery, to the extent that a person's obligation to the secured party for a deficiency is reduced under that section, the right to recover damages against the secured party (other than for the statutory $500 penalties) is correspondingly reduced . RCW 62A.9A-625(d).

The statutory remedies provided for by Article 9A cannot be waived or varied by agreement of the debtor or an obligor other than a secondary obligor. RCW 62A.9A-602(13).