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Guarantors as Debtors Under Uniform Commercial Code § 9-501(3)

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GUARANTORS AS DEBTORS UNDER UNIFORM COMMERCIAL CODE § 9-501(3)

INTRODUCTION

Section 9-504(3) of the Uniform Commercial Code ("U.C.C." or the "Code")[1] requires a secured party to notify the debtor[2] before disposing of collateral in satisfaction of an unpaid debt or obligation. The drafters of the Code considered the reasons for requiring the secured party to notify the debtor of the impending sale of the collateral to be of such importance that they disregarded freedom of contract principles[3] to state in section 9-501(3) that the notice requirement cannot be waived or varied by agreement prior to default.[4]

Although section 9-504(3) speaks only of debtors,[5] it is well established that guarantors are considered debtors under this section.[6] Courts disagree, however, whether a guarantor is considered a debtor under section 9-501(3) and, as such, cannot waive prior to default his right to notice of the sale of collateral.[7]

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1. U.C.C. § 9-504(3) (1978). Section 9-504(3) states:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

Id.

2. Section 9-105(1)(d) of the Code defines a debtor as anyone who "owes payment or other performance of the obligation secured." U.C.C. § 9-105(1)(d) (1978). In situations where the collateral is owned by a third party, however, the term debtor includes both the owner of the collateral and the person who is obligated on the debt or the performance. *Id.*

3. The Code generally favors freedom of contract principles, *see* U.C.C. § 1-102(3) & official comment 2 (1978), subject to specific exceptions of varying degrees of explicitness contained within the Code. *Id.* The exception found in § 9-501(3), however, is "quite explicit." U.C.C. § 1-102 official comment 2 (1978).

4. Section 9-501(3) states:

> To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in [subsection (3) of 9-504] may not be waived or varied . . . but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable . . . .

U.C.C. § 9-501(3) (1978).

5. *See supra* note 1.

6. *See infra* note 34 and accompanying text.

7. *Compare, e.g.*, United States v. Willis, 593 F.2d 247, 257-58 (6th Cir. 1979) (guarantors permitted to raise § 9-504(3) defenses under Ohio Code despite any waiver in guaranty agreement) *and* Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1004 (E.D. Pa. 1982) (guarantor is a debtor within the meaning of Article 9 and as such is afforded the nonwaiver protection of § 9-501(3)) *with* United States v. New Mexico Landscaping, Inc., 785 F.2d 843, 846 (10th Cir. 1986) (in the guaranty agreement, guarantor can waive right to notice of sale of collateral under New Mexico U.C.C.) *and* First Nat'l Park Bank v. Johnson, 553 F.2d 599, 602 (9th Cir. 1977) (guarantors not debtors under Montana U.C.C. § 9-501(3)); *see also infra* note 35 and accompanying text.

Part I of this Note discusses the elements of a secured transaction, the guarantor's role therein and the importance of the notice requirement. Part II argues that entitling guarantors to the nonwaiver protection of section 9-501(3) best serves the purposes of Article 9 of the U.C.C. and the basic principles of equity and fairness.

I. SECURED TRANSACTIONS

A. *The Guarantor's Role*

Article 9 governs secured transactions,[8] which are transactions that create a security interest.[9] A security interest arises when the parties to a commercial transaction enter into an agreement that provides the seller or lender[10] with an interest in described property to ensure payment or performance of an obligation.[11]

Although most secured parties contemplate that the debtor will fulfill his obligations under the security agreement, secured transactions exist to cover those instances when the debtor fails to meet his obligation. The underlying rationale of the secured transaction lies in the secured party's rights in the collateral[12] after the debtor has defaulted.[13] Following de-

8. *See* U.C.C. § 9-101 & official comment (1978); 1 G. Gilmore, Security Interests in Personal Property § 10.1, at 296 (1965).

9. The U.C.C. defines a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201(37) (1978). Creation of an enforceable security interest requires three elements: a security agreement that contains a description of the collateral and is signed by the debtor, unless the debtor has given the secured party possession of the property; the giving of value by the secured party; and the existence of the debtor's rights in the collateral. U.C.C. § 9-203(1) (1978).

10. The U.C.C. calls such a party a "secured party." (defining "secured party" as "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) (1978)).

11. *See* U.C.C. § 9-105(1)(l) (1978); R. Henson, Secured Transactions § 3-51, at 41 (1979). The purpose of a security agreement is to confirm the contract that the parties have made. *See* R. Henson, *supra*, § 3-10, at 40. While the security agreement generally will be valid as to its terms between the parties and against third parties, § 9-201 provides two exceptions. *See* U.C.C. § 9-201 (1978). A provision in the security agreement that conflicts with a specific provision in the Code that cannot be waived or varied by agreement or is illegal under the terms of another statute is unenforceable. U.C.C. § 9-201 official comment (1978); *see also* R. Henson, *supra*, § 3-6, at 34 (citing U.C.C. § 9-501(3) as an example of Code provision that cannot be changed by a security agreement).

12. U.C.C. § 9-501 official comment 1 (1978) ("The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction."). "Collateral" is a general term for tangible and intangible property subject to a security interest. *See* U.C.C. § 9-105(1)(c) & official comment 3 (1978).

13. The U.C.C. does not actually define the term "default." The Code allows the parties to determine what constitutes default in the security agreement. *See* U.C.C. § 9-501(1) (1978); R. Duncan & W. Lyons, The Law of Practice of Secured Transactions: Working with Article 9, § 5.01, at 5-3 (1987); 2 G. Gilmore, *supra* note 8, § 43.3, at 1193; R. Henson, *supra* note 11, § 10-2, at 350. Default generally occurs when a debtor fails to pay the debt or perform the obligation in accordance with the terms agreed upon in the security agreement. *See* R. Duncan & W. Lyons, *supra*, § 5.01, at 5-3; 2 G. Gilmore, *supra* note 8, § 43.3, at 1193; R. Henson, *supra* note 11, § 10-2, at 350; T. Quinn, Uni-

fault, the secured party has the right to take possession of the collateral, unless he already has it in pledge.[14] The secured party then can sell the collateral in order to liquidate the debt[15] and can seek a deficiency judgment against the debtor if the value received for the collateral falls short of the secured obligation.[16]

Although the secured party possesses these rights in the collateral, as well as the option of pursuing the debtor,[17] frequently he desires some further assurance that the debt will be paid. Thus, in many secured transactions the secured party requires the debtor to obtain a guarantor.[18] The guarantor promises to become secondarily liable for payment of the debt or for performance of the obligation in the event the debtor defaults.[19] The guarantor also agrees to be held liable for any deficiency judgment.[20]

Guarantors resemble debtors, then, in that a guarantor, upon default by the primary debtor, owes payment on an obligation secured.[21] The Code does not specifically address guarantors in Article 9, however, and it is unclear whether a guarantor falls within the meaning of "debtor" every time the word appears in Article 9 of the U.C.C.[22] Consequently,

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form Commercial Code Commentary and Law Digest ¶ 9-501[A][11], at s9-486 (Cumm. Supp. No. 2 1987).

14. U.C.C. § 9-503 & official comment (1978).

15. U.C.C. § 9-504(1) states that after default the secured party may "sell, lease or otherwise dispose of the collateral." U.C.C. § 9-504(1) (1978); *see also* R. Duncan & W. Lyons, *supra* note 13, § 5.02[2], at 5-11 (discussing the remedies under Article 9). The only restriction the Code places on the secured party is that the method of disposition be "commercially reasonable." *See* U.C.C. § 9-504(1) & official comment 1 (1978). Although the Code specifies that certain methods of disposition are considered "commercially reasonable" (sale of collateral to or through a dealer or in recognized market), the term is otherwise undefined by the Code. *See* U.C.C. § 9-507 & official comment 2 (1978); R. Duncan & W. Lyons, *supra* note 13, § 5.04[3], at 5-28 to 5-33 (discussing commercial reasonableness).

16. *See* U.C.C. § 9-504 official comment 3 (1978).

17. *See* U.C.C. § 9-501(1) (1978) (granting the secured party upon default the right to "reduce his claim to judgment").

18. *See, e.g.*, Ford Motor Credit Co. v. Lototsky, 549 F. Supp 996, 997 (E.D. Pa. 1982); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1121, 229 Cal. Rptr. 396, 397 (1986); Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 275, 496 N.E.2d 625, 626 (1986).

19. *See Lototsky*, 549 F. Supp. at 998; Commercial Credit Corp. v. Lane, 466 F. Supp. 1326, 1332 (M.D. Fla. 1979); First Nat'l Bank v. Cillessen, 622 P.2d 598, 600 (Colo. Ct. App. 1980); McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1223 (Ind. Ct. App. 1984); Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 278, 496 N.E.2d 625, 628 (1986); J. Elder, The Law of Suretyship § 4.1, at 58 (5th ed. 1951).

20. *See supra* note 19.

21. *See* Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1002-03 (E.D. Pa. 1982); First Nat'l Bank v. Cillessen, 622 P.2d 598, 600 (Colo. Ct. App. 1980); McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1223 (Ind. Ct. App. 1984); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772, 779 (N.D. 1980).

22. *See* Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1002 (E.D. Pa. 1982); Barnett v. Barnett Bank of Jacksonville, 345 So. 2d 804, 805 (Fla. Dist. Ct. App. 1977); Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 86, 401 N.Y.S.2d 404, 410 (N.Y. Sup. Ct. 1977).

the courts decide whether the term "debtor" includes guarantors on a section-by-section basis.[23] A rational connection between the various findings of the courts, however, does not always exist.

B. *Importance of the Notice Requirement*

The U.C.C. recognizes and is wary of the great potential for overreaching on the part of creditors that exists in default situations.[24] Comment 4 to section 9-501(3) states that in default situations, agreements made by creditors limiting debtors' rights must be viewed with suspicion.[25] Commentators also have recognized creditors' tendency to overreach when default occurs.[26]

Consequently, section 9-504(3) states that a debtor, upon default, has a right to notice of the sale of the collateral by the secured party.[27] The purpose of requiring such notice is to give the debtor a chance to protect his interest in the property.[28] He can protect himself by paying the debt and redeeming the property, by challenging any aspect of the sale before it is made, or by finding a third party who may be interested in purchasing the property.[29] The ultimate goal of section 9-504(3) is to promote economic efficiency by giving the debtor an opportunity to maximize the

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23. *See infra* note 68.

24. *See* Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1000-01 (E.D. Pa. 1982); U.C.C. § 9-501 official comment 4 (1978).

25. Comment 4 states:

> In general, provisions which relate to matters which come up between immediate parties may be varied by agreement. In the area of rights after default our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties . . . . The default situation offers great scope for overreaching; the suspicious attitude of the courts has been grounded in common sense.

U.C.C. § 9-501 official comment 4 (1978).

26. *See, e.g.*, Sachs & Belgrad, *Liability of the Guarantor of Secured Indebtedness After Default and Repossession Under the Uniform Commercial Code: A Walk on the Wild Side by the Secured Party*, 5 U. Balt. L. Rev. 153, 159-63 (1976); Note, *Commercial Law—Commercially Unreasonable Foreclosure Sales in the Context of a Surety Relationship*—United States v. Lattauzio, 34 U. Kan. L. Rev. 175, 189 (1985).

27. *See supra* note 2 and accompanying text.

28. U.C.C. § 9-504 official comment 5 requires that notice be sent such that "persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire." U.C.C. § 9-504 official comment 5 (1978); *see* Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1124, 229 Cal. Rptr. 396, 399 (1986); First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 600-01 (Colo. Ct. App. 1980); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983); Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 90, 401 N.Y.S.2d 404, 412 (N.Y. Sup. Ct. 1977); 2 G. Gilmore, *supra* note 8, § 44.6, at 1241.

29. *See* Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1124, 229 Cal. Rptr. 396, 399 (1986); Rutan v. Summit Sports, Inc., 173 Cal. App. 3d 965, 972, 219 Cal. Rptr. 381, 384-85 (1985); First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 600-01 (Colo. Ct. App. 1980); Reeves v. Habersham Bank, 254 Ga. 615, 621, 331 S.E.2d 589, 595 (1985); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983); Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 90, 401 N.Y.S.2d 404, 412 (N.Y. Sup. Ct. 1977).

sale price of the collateral and thus minimize or eliminate any potential deficiency for which he may be liable.[30]

As previously stated, a guarantor may become liable for any deficiency upon default by the primary debtor.[31] Depending upon the guaranty agreement, the secured creditor may be able to obtain any deficiency amount directly from the guarantor.[32] As a result, the guarantor has as much of an interest in protecting his rights during the sale of collateral as does the primary debtor.[33]

Recognizing the interests of the guarantor, courts hold that guarantors are entitled to receive notice of the sale of the collateral by the secured party under section 9-504(3).[34] Courts disagree, however, whether guarantors may invoke the protections of the nonwaiver provision of U.C.C. section 9-501(3).[35] This issue arises frequently because guaranty agree-

30. *See* R. Duncan & W. Lyons, *supra* note 13, § 5.01, at 5-3; Sachs & Belgrad, *supra* note 26, at 159; *supra* note 29; *see also* T. Quinn, *supra* note 13, ¶ 9-501[A][9], at s9-485 (notice "designed to make sure [debtor] gets a fair deal on the resale").

31. *See supra* note 19 and accompanying text.

32. The guaranty agreement generally states whether the secured party must first attempt to pursue the primary debtor before obtaining any deficiency from the guarantor. T. Quinn, *supra* note 13, ¶ 9-501[A][13], at s9-488.

33. *See* Commercial Credit Corp. v. Lane, 466 F. Supp. 1326, 1332 (M.D. Fla. 1979); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1124, 229 Cal. Rptr. 396, 399 (1986); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983); R. Duncan & W. Lyons, *supra* note 13, § 5.04[2], at 5-27.

34. *See* United States v. New Mexico Landscaping, Inc., 785 F.2d 843, 845 (10th Cir. 1986) (New Mexico Code); United States v. Meadors, 753 F.2d 590, 594 (7th Cir. 1985) (Indiana Code); First Nat'l Park Bank v. Johnson, 553 F.2d 599, 601 (9th Cir. 1977) (Montana Code); United States v. Kurtz, 525 F. Supp. 734, 745 (E.D. Pa. 1981) (California Code), *aff'd mem.*, 688 F.2d 827 (3d Cir.), *cert. denied*, 459 U.S. 991 (1982); National Acceptance Co. v. Wechsler, 489 F. Supp. 642, 647 (N.D. Ill. 1980) (Illinois U.C.C.); Norton v. National Bank of Commerce, 240 Ark. 143, 145, 398 S.W.2d 538, 540 (1966); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1125, 229 Cal. Rptr. 396, 400, (1986); First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 600-01 (Colo. Ct. App. 1980); Barnett Bank of Tallahassee v. Campbell, 402 So. 2d 12, 14 (Fla. Dist. Ct. App. 1981); Reeves v. Habersham Bank, 254 Ga. 615, 621-22, 331 S.E.2d 589, 595 (1985); McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1223 (Ind. Ct. App. 1984); Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 278-79, 496 N.E.2d 625, 628 (1986); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983); Clune Equip. Leasing Corp. v. Spanglar, 615 S.W.2d 106, 108 (Mo. Ct. App. 1981); Borg-Warner Acceptance Corp. v. Watton, 215 Neb. 318, 323, 338 N.W.2d 612, 615-16 (1983); Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 90-91, 401 N.Y.S.2d 404, 412 (N.Y. Sup. Ct. 1977); Hernandez v. Bexar County Nat'l Bank of San Antonio, 710 S.W.2d 684, 687 (Tex. Ct. App. 1986).

35. *Compare* United States v. Willis, 593 F.2d 247, 254-58 (6th Cir. 1979) (guarantors permitted to raise § 9-504(3) defenses under Ohio Code despite any waiver in guaranty agreement) *and* United States v. Conrad Publishing Co., 589 F.2d 949, 952-53 (8th Cir. 1978) (waiver of rights in a guaranty agreement restricted by § 9-501(3) of the North Dakota Code) *and* Ford Motor Credit Corp. v. Lototsky, 549 F. Supp. 996, 1004 (E.D. Pa. 1982) (guarantor is a debtor within the meaning of Article 9; nonwaiver protection of § 9-501(3) applies) *and* Commercial Credit Corp. v. Lane, 466 F. Supp. 1326, 1332 (M.D. Fla. 1979) (waiver of right to notice by the guarantor in guaranty agreement ineffective) *and* Prescott v. Thompson Tractor Co., 495 So. 2d 513, 517 (Ala. 1986) (same) *and* Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1125, 229 Cal. Rptr. 396, 400 (1986) (same) *and* First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 600-01

ments generally contain a provision that waives the right to notice of the sale of collateral.[36] If a guarantor is considered a debtor under section 9-501(3), the waiver in the guaranty agreement conflicts with section 9-501(3) of the Code because the guaranty agreement is signed prior to default.[37] In view of the significance the Code assigns to the requirement that the secured party notify the guarantor,[38] the nonwaiver provision in the Code should invalidate any waiver of the right to notice of the sale of the collateral in a guaranty agreement. Invalidation of the waiver furthers the Code's purpose of promoting economic efficiency and uniformity, given that the guarantor has as much of an interest in the value of the collateral as does the debtor.

(Colo. Ct. App. 1980) (guarantor is a debtor under Article 9 of U.C.C. and is "entitled to the same defenses as the [owner] of the collateral.") *and* Barnett Bank of Tallahassee v. Campbell, 402 So. 2d 12, 14 (Fla. Dist. Ct. App. 1981) (guarantor cannot waive right to notice of sale of collateral in guaranty agreement) *and* Barnett v. Barnett Bank of Jacksonville, 345 So. 2d 804, 805-06 (Fla. Dist. Ct. App. 1977) (same) *and* Branan v. Equico Lessors, Inc., 255 Ga. 718, 722, 342 S.E.2d 671, 674 (1986) (guarantor is a debtor under § 9-501(3); predefault waiver of § 9-504(3) rights invalid) *and* McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1224-26 (Ind. Ct. App. 1984) (guarantor cannot waive right to notice of sale of collateral prior to default) *and* Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 279-80, 496 N.E.2d 625, 629-30 (1986) (§ 9-501(3) precludes guarantor from waiving rights afforded him as a debtor under § 9-504(3)) *and* Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983) (guarantor's waiver of right to notice invalid under U.C.C.) *and* Borg-Warner Acceptance Corp. v. Watton, 215 Neb. 318, 324, 338 N.W.2d 612, 615-16 (1983) (guarantor a debtor under Article 9 of U.C.C. and cannot waive right to notice of sale of collateral prior to default) *and* Hernandez v. Bexar County Nat'l Bank of San Antonio, 710 S.W.2d 684, 687 (Tex. Ct. App. 1986) (same) *and* Peck v. Mack Trucks, Inc., 704 S.W.2d 583, 586 (Tex. Ct. App. 1986) (per curiam) (guarantors covered by term "debtor" under § 9-501(3)) *with* United States v. New Mexico Landscaping, Inc., 785 F.2d 843, 846 (10th Cir. 1986) (guarantor can waive right to notice of sale of collateral in guaranty agreement under New Mexico's U.C.C.) *and* United States v. Meadors, 753 F.2d 590, 594 (7th Cir. 1985) (Indiana Code does not prohibit guarantor from waiving right to notice in guaranty agreement) *and* United States v. Lattauzio, 748 F.2d 559, 562-63 (10th Cir. 1984) (guarantors can waive defenses afforded them under New Mexico's U.C.C. § 9-504(3)) *and* United States v. Kukowski, 735 F.2d 1057, 1059 (8th Cir. 1984) (North Dakota's U.C.C. allows guarantor to waive right to notice in the guaranty agreement) *and* First Nat'l Park Bank v. Johnson, 553 F.2d 599, 602 (9th Cir. 1977) (guarantors not debtors under Montana's U.C.C. § 9-501(3)) *and* United States v. Crispen, 622 F. Supp. 75, 79, 81 (N.D. Ill. 1985) (Illinois U.C.C. does not prohibit guarantor from waiving right to notice prior to default) *and* National Acceptance Co. v. Wechsler, 489 F. Supp. 642, 647-49 (N.D. Ill. 1980) (§ 9-501(3) does not invalidate guarantor's waiver of right to notice in the guaranty agreement) *and* United States v. Kurtz, 525 F. Supp. 734, 746 (E.D. Pa. 1981) (guarantors can waive protections afforded them under California U.C.C.), *aff'd mem.*, 688 F. 2d. 827 (3d Cir.), *cert. denied*, 459 U.S. 991 (1982) *and* Rutan v. Summit Sports, Inc., 173 Cal. App. 3d 965, 973, 219 Cal. Rptr. 381, 385-86 (1985) (guarantor's waiver valid).

36. *See* Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1125, 229 Cal. Rptr. 396, 397, 400, (1986); Barnett Bank of Tallahassee v. Campbell, 402 So. 2d 12, 14 (Fla. Dist. Ct. App. 1981); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983); T. Quinn, *supra* note 13, ¶ 9-501[A][10], at s9-485.

37. U.C.C. § 9-501(3) (1978).

38. *See supra* notes 3, 4, 30 and accompanying text.

II. THE GUARANTOR AS DEBTOR UNDER U.C.C. SECTION 9-501(3)

A. *Guarantor's Interest in the Property's Value is Equal to that of the Debtor*

A guarantor should not be able to waive his right to notice prior to default for the same reason he was afforded it in the first place: to protect his interest in the collateral by reducing any deficiency for which he may be liable.[39] In *National Acceptance Co. v. Wechsler*,[40] the court concluded that debtors, as owners of the collateral, have a greater interest in the collateral than guarantors.[41] Therefore, it held that the waiver of the right to notice in the guaranty agreement was valid.[42] This argument, however, fails to recognize that the guarantor possesses as much of an interest in the collateral as the primary debtor because both the debtor and the guarantor may be liable for any deficiency.[43] Therefore, although the debtor, if he is the owner of the collateral, may have a greater interest in the actual property, the guarantor has an equal interest in the property's value.

In addition, requiring the creditor to notify the guarantor of the sale of the collateral neither burdens nor prejudices him in any way because the creditor already knows the identity of the guarantor.[44] Moreover, if the secured party readily can contact the guarantor when it is time to collect the deficiency, then no valid reason can exist for not contacting him to notify him of the sale of the collateral.

B. *Nonwaiver Promotes Economic Efficiency*

Allowing a guarantor to waive his right to notice of the sale of collateral in the guaranty agreement also runs contrary to the Code's purpose of promoting economic efficiency.[45] In fact, such a rule actually spurs

39. *See* Commercial Credit Corp. v. Lane, 466 F. Supp. 1326, 1332 (M.D. Fla. 1979); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1124, 229 Cal. Rptr. 396, 399 (1986); McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1224 (Ind. Ct. App. 1984); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983).

40. 489 F. Supp. 642 (N.D. Ill. 1980), *not followed in* Commercial Discount Corp. v. King, 515 F. Supp. 988, 991-92 (N.D. Ill. 1981).

41. 489 F. Supp. at 647-48.

42. *Id.*

43. *See* Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1004 (E.D. Pa. 1982); Commercial Credit Corp. v. Lane, 466 F. Supp. 1326, 1332 (M.D. Fla. 1979); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1124, 229 Cal. Rptr. 396, 399 (1986); First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 600 (Colo. Ct. App. 1980); Hepworth v. Orlando Bank & Trust Co., 323 So. 2d 41, 42 (Fla. Dist. Ct. App. 1975); Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 278-79, 496 N.E.2d 625, 628-29 (1986); Chemlease Worldwide Inc. v. Brace, Inc., 338 NW.2d 428, 433 (Minn. 1983); Googins, *Commercial Law*, 1981 Ann. Surv. of Am. L. 721, 736 n.106 (1981); Sachs & Belgrad, *supra* note 26, at 161; Note, *supra* note 26, at 189.

44. *See* Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 90, 401 N.Y.S.2d 404, 412 (N.Y. Sup. Ct. 1977) (citing Sachs & Belgrad, *supra* note 26, at 165-66).

45. The basic policy behind requiring the secured party to notify the debtor prior to the sale of the collateral is to promote economic efficiency. *See* United States v. Willis, 593 F.2d 247, 258 (6th Cir. 1979); Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996,

economic inefficiency because it encourages secured parties to hold "sloppy" sales, knowing that they can demand payment of any deficiency from the guarantor.[46]

The Code's requirement that a sale of collateral be "commercially reasonable" does not guarantee that the price obtained will be the highest possible price.[47] When secured transactions do not include a guarantor, the secured party has an incentive to sell the collateral at the highest possible price because the proceeds from the sale are likely to be all that he will recover in the event of default.[48] The debtor, although liable for any deficiency, probably will not be able to pay given that he already has defaulted on the original debt.[49] If the transaction involves a guarantor, however, the secured party's incentive to sell the collateral at the highest price possible no longer exists because the guarantor is available to pay any deficiency judgment.[50] Accordingly, secured creditors should not be allowed to circumvent the Code's purpose of maximizing efficiency "by the simple expedient of requiring a debtor to obtain a guarantor."[51]

One commentator has questioned[52] whether guarantors were intended to receive the nonwaiver protection of section 9-501(3), because comment 4 of 9-501(3) is tied to common law equity of redemption principles that provide the owner of the collateral the right to redeem the property after default.[53] This argument fails to recognize, however, that the nonwaiver provision primarily attempts to promote economic efficiency[54] by provid-

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1003-04 (E.D. Pa. 1982); *see also* 2 G. Gilmore, *supra* note 8, § 44.5, at 1234 (1965) (discussing importance of getting highest price for collateral).

46. *See* B. Clark, Law of Secured Transactions § 12.5[7][c], at s12-24 (Cumm. Supp. No. 3 1987).

47. *See* U.C.C. § 9-507(2) (1978) ("The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."); R. Duncan & W. Lyons, *supra* note 13, § 5.04[3][d], at 5-33 (inadequacy of the selling price obtained by the secured party not enough to make the sale unreasonable); *see also* 2 G. Gilmore, *supra* note 8, § 44.6, at 1237 (quoting U.C.C. § 9-507(2)); R. Henson, *supra* note 11, § 10-10, at 368 (standard of commercial reasonableness varies depending on type of collateral and circumstances).

48. R. Henson, *supra* note 11, § 10-10, at 367-68 ("A deficiency may be the debtor's responsiblity, but it is likely to be uncollectible.").

49. *Id.*

50. *See supra* note 19 and accompanying text.

51. Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1004 (E.D. Pa. 1982); *see* B. Clark, *supra* note 46, § 12.5[7][c], at s12-24.

52. *See* Note, *The Waiver of Defenses by Guarantors in Guaranty Contracts and the Nonwaiver Provisions of the Uniform Commercial Code*, 5 Vt. L. Rev. 73, 92 (1980) ("The interests of a guarantor do not share the same historic concerns that have protected debtors from creditors.").

53. Section 9-506 provides that the debtor has an opportunity to redeem the property by paying the debt or fulfilling the obligation before the secured party sells the collateral. U.C.C. § 9-506 (1978).

54. *See* United States v. Willis, 593 F.2d 247, 258 (6th Cir. 1979); Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1004 (E.D. Pa. 1982); *see also* 2 G. Gilmore, *supra* note 8, § 44.2, at 1216 ("The principal thing is that the debtor be credited with the value of the property against the debt.").

ing the "debtor," even if he does not own the collateral, with a right to notice of the sale of the collateral that may not be waived prior to default.[55] Notice provides the "debtor" with an opportunity to assure that the collateral is sold at the highest price possible.[56] Since guarantors may be liable for any deficiency, providing them with the same notice equally will insure that the price is maximized, thereby achieving the Code's goal of efficient use of resources.[57] To do otherwise would be to encourage economic waste.[58]

Moreover, denying the guarantor the protections of the Code's nonwaiver provisions promotes formalism over functionalism.[59] In *McEntire v. Indiana National Bank*,[60] the court held that the guarantor's waiver of his right to notice of the sale of collateral in the guaranty agreement was invalid.[61] The court emphasized that a decision to uphold the waiver would "hinge upon semantics rather then actualities."[62] Similarly, commentators have observed that it would be "arbitrary" and "capricious" to include in the definition of "debtor" the third-party owner of the collateral who is willing to make his property available as security but who is not liable for any deficiency but then to exclude the guarantor who may be accountable for the entire deficiency.[63]

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55. U.C.C. § 9-501(3) (1978).

56. *See supra* note 30 and accompanying text.

57. *See* Commercial Credit Corp. v. Lane, 466 F. Supp. 1326, 1332 (M.D. Fla. 1979) ("At the very least, notice of an impending sale would have provided defendants the opportunity to assure that the price obtained for the [collateral] was the best price possible."); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1124, 229 Cal. Rptr. 396, 399 (1986) ("[A] guarantor has as much interest in protecting his rights during the sale or disposition of the collateral as does the primary debtor and therefore is equally entitled to notice;" the purpose of notice is to allow him to reduce any potential liability resulting from the sale); First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 600-01 (Colo. Ct. App. 1980) (notice provision should be construed to include guarantors in order to minimize any deficiency resulting from sale of the collateral); Chemlease Worldwide Inc. v. Brace, Inc., 338 N.W.2d 428, 433 (Minn. 1983) ("The interest [the guarantors] have in the best sale price is their interest in their potential liability on the guaranty."); *see also* Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1004 (E.D. Pa. 1982) ("When the probability of deficiency looms after default, the guarantor is the real target of the secured party.").

58. *Lototsky*, 549 F. Supp. at 1004.

59. The official comment to U.C.C. § 9-101 provides that the Code should make distinctions along functional rather than formal lines. U.C.C. § 9-101 official comment (1978); *see* Prescott v. Thompson Tractor Co., 495 So. 2d 513, 517 (Ala. 1986); McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1224 (Ind. Ct. App. 1984); Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 88, 401 N.Y.S.2d 404, 411 (N.Y. Sup. Ct. 1977).

60. 471 N.E.2d 1216 (Ind. Ct. App. 1984).

61. *Id.* at 1224.

62. *Id.*; *see also* Prescott v. Thompson Tractor Co., 495 So. 2d 513, 517 (Ala. 1986) (quoting McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1224 (Ind. Ct. App. 1984)); Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 88, 401 N.Y.S.2d 404, 411 (N.Y. Sup. Ct. 1977) ("[I]n view of the code's 'scheme . . . to make distinctions . . . along functional rather than formal lines' . . . it would seem that a 'guarantor' is a 'debtor' within the meaning of article 9." (quoting N.Y. U.C.C. Law § 9-101 (Mckinney's 1981)).

63. Sachs & Belgrad, *supra* note 26, at 161.

C. *Nonwaiver Promotes Uniformity*

Allowing the guarantor the protections of U.C.C. section 9-501(3) also promotes uniformity within the Code.[64] The U.C.C. would be arbitrary if the various definitions within Article 9 were not uniform. It is well established that a guarantor falls within the definition of a debtor under section 9-105(1)(d).[65] It is also well established that guarantors are considered to be within the meaning of "debtor" under section 9-504(3),[66] which requires the secured party to notify the debtor of the sale of the collateral.[67] From the conclusion that a guarantor is a debtor under both sections, 9-501(1)(d) and 9-504(3), it follows that a guarantor also should be considered a debtor for purposes of section 9-501(3),[68] especially in light of the significance that the drafters of the Code, the courts, and commentators place on the notice requirement in general.[69]

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64. *See infra* note 68. The Code places great importance on having a uniform commercial law among jurisdictions. *See* Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 278-79, 496 N.E.2d 625, 628-29 (1986) (better course is to follow majority view); Peck v. Mack Trucks, Inc., 704 S.W.2d 583, 586 (Tex. Ct. App. 1986) (per curiam) (it is well-settled law that guarantors are debtors under § 9-504; it would be illogical not to include them under § 9-501(3)). Section 1-102(2)(c) of the Uniform Commercial Code states that one of the underlying purposes of the Code is to make the law among various jurisdictions uniform. U.C.C. § 1-102(2)(c) (1978); *see* Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1125, 229 Cal. Rptr. 396, 400 (1986). Clear definitions within the Code will promote uniform Code interpretations among the various jurisdictions.

65. *See* Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1004-05 (E.D. Pa. 1982); National Acceptance Co. v. Wechsler, 489 F. Supp. 642, 647 (N.D. Ill. 1980); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1125, 229 Cal. Rptr. 396, 400 (1986); First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 600 (Colo. Ct. App. 1980); Barnett v. Barnett Bank of Jacksonville, 345 So. 2d 804, 805 (Fla. Dist. Ct. App. 1977); Reeves v. Habersham Bank, 254 Ga. 615, 622, 331 S.E.2d 589, 595 (1985); McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1223 (Ind. Ct. App. 1984); Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 278, 496 N.E.2d 625, 628 (1986); Borg-Warner Acceptance Corp. v. Watton, 215 Neb. 318, 324, 338 N.W.2d 612, 615 (1983); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772, 779 (N.D. 1980); First Bank & Trust Co. of Ithaca v. Mitchell, 123 Misc. 2d 386, 389, 473 N.Y.S.2d 697, 700 (N.Y. Sup. Ct. 1984); Chase Manhattan Bank v. Natarelli, 93 Misc. 2d 78, 89, 401 N.Y.S.2d 404, 412 (N.Y. Sup. Ct. 1977).

66. *See supra* note 34 and accompanying text.

67. *See* U.C.C. § 9-504(3) (1978).

68. *See* McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1223-24 (Ind. Ct. App. 1984); Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 279, 496 N.E.2d 625, 629 (1986); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772, 779 (N.D. 1980); Peck v. Mack Trucks, Inc., 704 S.W.2d 583, 586 (Tex. Ct. App. 1986) (per curiam); *see also* First Bank & Trust Co. of Ithaca v. Mitchell, 123 Misc. 2d 386, 389, 473 N.Y.S.2d 697, 700 (1984) (court stated in dictum that since a guarantor is a debtor under § 9-105(1)(d) and § 9-504(3), it is likely that a guarantor would be a debtor under § 9-501(3)). *But see* First Nat'l Park Bank v. Johnson, 553 F.2d 599, 602 (9th Cir. 1977) (although guarantor is entitled to notice as a "debtor" under § 9-504(3), policies of U.C.C. notice provision do not prohibit by implication a guarantor from waiving right to notice prior to default); National Acceptance Co. v. Wechsler, 489 F. Supp. 642, 647-48 (N.D. Ill. 1980) (guarantor's status as a debtor under § 9-504(3) does not mandate that guarantor cannot waive rights accorded thereunder).

69. *See supra* notes 3, 4, 30 and accompanying text.

Some courts have based their decisions to uphold waivers in guaranty agreements on the fact that to do otherwise would infringe on the parties' right to contract freely.[70] Although the guaranty agreement contains a waiver of the right to notice of the sale of the collateral, and the guarantor, by signing the agreement, voluntarily waives this protection, the waiver nevertheless should be invalidated by section 9-501(3). The drafters of the Code considered the notice requirement essential enough to the Code's purposes to make it explicitly nonwaivable.[71] Under section 9-501(3), a debtor cannot validly waive his right to notice of the sale of the collateral prior to default, even if he receives valuable consideration in exchange for the waiver.[72] Therefore, neither should a secured party be allowed to evade the purpose of the Code by contract when the language of the section clearly prohibits such a waiver.[73]

D. *The Identity of the Secured Party Should be Irrelevant for Purposes of Nonwaiver*

Many of the decisions that have allowed a guarantor to waive his right to notice of the sale of collateral in the guaranty agreement have involved the Small Business Administration ("SBA")[74] and, as such, appear to be giving the government special treatment by not affording the guarantors the protections normally provided by section 9-501(3).[75] Because they upheld the waivers in the SBA guaranty agreements, the courts in these cases held guarantors liable for the deficiency resulting from the sales of the collateral even though they had not received notice of them.[76] If these guarantors had been considered debtors under section 9-501(3) of the Code, the waivers of the right to notice would have been unenforcable[77] and, because the SBA did not give the guarantors the opportunity to monitor the sales, they most likely would not have been liable for any deficiency judgment.[78]

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70. *See* United States v. Meadors, 753 F.2d 590, 594-98 (7th Cir. 1985) (discussing contract theories); United States v. Crispen, 622 F. Supp. 75, 78 (N.D. Ill. 1985) ("plain language of the guaranty controls").

71. U.C.C. § 9-501(3) (1978); *see supra* note 3.

72. *See* U.C.C. § 9-501(3) (1978).

73. *See supra* note 3. One commentator has called decisions allowing a guarantor to waive in the guaranty agreement the right to notice of the sale of collateral prior to default "masterpiece[s] of statutory destruction." B. Clark, *supra* note 46, ¶ 12.5[7][c], at s12-22.

74. *See* United States v. Meadors, 753 F.2d 590, 591 (7th Cir. 1985); United States v. Kukowski, 735 F.2d 1057, 1057 (8th Cir. 1984); United States v. Kurtz, 525 F. Supp. 734, 736 (E.D. Pa. 1981), *aff'd mem.*, 688 F.2d 827 (3d. Cir.), *cert. denied*, 459 U.S. 991 (1982); United States v. Lattauzio, 748 F.2d 559, 560 (10th Cir. 1984); United States v. Crispen, 622 F. Supp. 75, 76 (N.D. Ill. 1985).

75. *See* B. Clark, *supra* note 46, ¶ 12.5[7][c], at s12-25.

76. *See supra* note 74.

77. *See* U.C.C § 9-501(3)(b) (1978).

78. The Code does not address the relationship between the debtor's liability for a deficiency and the secured party's noncompliance with the required default procedures of Article 9. *See* R. Duncan & W. Lyons, *supra* note 13, § 5.08[3], at 5-62; 1 G. Gilmore,

The decisions affording the government special treatment fail to recognize that "the United States does business on business terms."[79] In *United States v. Kimbell Foods*,[80] the Supreme Court stated that "federal law governs questions involving the rights of the United States arising under nationwide federal programs."[81] The Court stated, however, that in cases where the state law is derived from a uniform statute, the federal law should look to the applicable state statute.[82] Despite the Supreme Court's holding in *Kimbell Foods*, the government has tried to avoid the application of state law in cases involving the SBA.[83] It is clear, how-

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supra note 8, § 44.9, at 1263-64. Professor Gilmore, however, states "the secured party's compliance with the default provisions in Part 5 . . . is a condition precedent to the recovery of a deficiency." *Id.* at 1264.

The majority of courts that have decided this issue have agreed with Professor Gilmore and have held that the failure to comply with Part 5 of Article 9 results in an absolute bar to recovery of any deficiency. *See, e.g.*, Commercial Credit Corp. v. Lane, 466 F. Supp. 1326, 1332 (M.D. Fla. 1979); Connolly v. Bank of Sonoma County, 184 Cal. App. 3d 1119, 1125, 229 Cal. Rptr. 396, 400 (Cal Ct. App. 1986); Barnett Bank of Tallahassee v. Campbell, 402 So. 2d 12, 14 (Fla. Dist. Ct. App. 1981); Barnett v. Barnett Bank of Jacksonville, 345 So. 2d 804, 806 (Fla. Dist. Ct. App. 1977); Reeves v. Habersham Bank, 254 Ga. 615, 619-21, 331 S.E.2d 589, 593, 596-97 (1985); Borg-Warner Acceptance Corp. v. Watton, 215 Neb. 318, 323, 338 N.W.2d 612, 615 (1983); DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 409, 243 N.W.2d 745, 751 (1976); Hernandez v. Bexar County Nat'l Bank of San Antonio, 710 S.W.2d 684, 687 (Tex. Ct. App. 1986); Peck v. Mack Trucks, Inc., 704 S.W.2d 583, 586 (Tex. Ct. App. 1986) (per curiam).

Other courts have held that the failure to comply with Part 5 of Article 9 does not automatically preclude the secured party from recovering a deficiency, but it does give rise to a rebuttable presumption in the debtor's favor that the value of the collateral is equal to the amount of the debt. *See, e.g.*, United States v. Willis, 593 F.2d 247, 259-60 (6th Cir. 1979); United States v. Chatlin's Dep't Store, Inc., 506 F. Supp. 108, 112 (E.D. Pa. 1980); First Nat'l Bank of Denver v. Cillessen, 622 P.2d 598, 601 (Colo. Ct. App. 1980); McEntire v. Indiana Nat'l Bank, 471 N.E.2d 1216, 1226 (Ind. Ct. App. 1984); State Bank of Burleigh County Trust Co. v. All-American Sub, Inc., 289 N.W.2d 772, 779-80 (N.D. 1980).

A few courts have allowed the secured party to collect a deficiency judgment from the debtor but have allowed the debtor to offset the deficiency with any loss resulting from the secured party's failure to adhere to Part 5 of Article 9. *See* Shawmut Worcester County Bank v. Miller, 398 Mass. 273, 282-83, 496 N.E.2d 625, 631 (1986); Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 869, 496 P.2d 966, 969 (1972).

79. Clearfield Trust Co. v. United States, 318 U.S. 363, 369 (1943) (quoting United States v. National Exchange Bank of Baltimore, 270 U.S. 527, 534 (1926)). In *Clearfield Trust*, the issue was whether the general rules governing the rights and duties of drawees were inapplicable to the government. *Id.*

80. 440 U.S. 715 (1979).

81. *Id.* at 726.

82. *See id.* at 728-29; *see, e.g.*, United States v. New Mexico Landscaping, Inc., 785 F.2d 843, 845 (10th Cir. 1986) (applying New Mexico U.C.C.); United States v. Meadors, 753 F.2d 590, 592 (7th Cir. 1985) (applying Indiana's U.C.C.); United States v. Lattauzio, 748 F.2d 559, 561-62 (10th Cir. 1984) (applying New Mexico's U.C.C.); United States v. Kukowski, 735 F.2d 1057, 1059 (8th Cir. 1984) (applying North Dakota's U.C.C.); United States v. Kurtz, 525 F. Supp. 734, 744 (E.D. Pa. 1981) (applying California's U.C.C.), *aff'd mem.*, 688 F. 2d 827 (3d. Cir.), *cert. denied*, 459 U.S. 991 (1982).

83. *See, e.g.*, United States v. Meadors, 753 F.2d 590, 592 (7th Cir. 1985) (government relied on federal case law); *Kurtz*, 525 F. Supp. at 744-46 (government argued that state law was inapplicable).

ever, that these arguments should be dismissed given the Supreme Court's holding in *Kimbell Foods*.[84]

In addition, the Sixth Circuit[85] stated that the adoption of state law in situations involving secured creditors does not prejudice the government, and no good reasons exist to allow the government, simply because it is the government, to depart from the U.C.C.[86] Commentators also fail to find any reasons for treating the government differently.[87] Accordingly, the fact that the government is the secured party in a case should be irrelevant to the determination of whether a guarantor is a debtor under the U.C.C.

CONCLUSION

The U.C.C. recognizes the potential for overreaching on the part of creditors in the default situation and therefore requires that when a default occurs, the secured party notify the debtor before the sale of collateral in order to protect the debtor from unnecessary loss. This protection is so important that section 9-501(3) in contravention of the usual Code policy upholding freedom of contract principles provides that it is nonwaivable prior to default.

Since guarantors possess as much of an interest in the collateral as do the primary debtors, they are considered debtors for purposes of receiving notice of the sale of collateral from the secured party. Accordingly, the purposes of Article 9, as well as the basic principles of equity and fairness, are best served by further entitling guarantors the nonwaiver protection of section 9-501(3).

Beth C. Housman

84. United States v. Kimbell Foods, 440 U.S. 715, 733-37 (1979). In *Kimbell Foods*, the government argued that uniform federal rules are needed for effective administration of federal loan programs. *Id.* at 729. The Court stated, however, that incorporating state law as the applicable federal law to determine the rights of the government against private creditors would not hinder the administration of the SBA loan program. Id. at 729-30; *see also*, B. Clark, *supra* note 46, ¶ 12.5[7][c], at s12-25 (discussing *Kimbell Foods*).

85. United States v. Willis, 593 F.2d 247 (6th Cir. 1979).

86. *Id.* at 252-54 (discussing whether federal government should be excepted from U.C.C. standard of commercial reasonableness and requirement that secured party notify debtor prior to sale of collateral).

87. *See* B. Clark, *supra* note 46, ¶ 12.5[7][c], at s12-25; Googins, *supra* note 43, at 739 n.122.