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## PARTIAL SATISFACTION UNDER THE UCC

*Alysse Kaplan*

### INTRODUCTION

Article 9 of the Uniform Commercial Code ("UCC") deals with secured transactions,<sup>1</sup> and sales of accounts<sup>2</sup> and chattel paper.<sup>3</sup> The drafters created Article 9 to simplify the law of secured transactions so that "present-day secured financing transactions can go forward with less cost and with greater certainty."<sup>4</sup> The drafters accomplished this goal by replacing the varied security devices in existence at common law, with one type of security device—the security agreement—thus basing Article 9 on the principle that "all security devices are functionally the same and should follow similar rules and procedures."<sup>5</sup> The drafters also curtailed the myriad terms and procedures that were used before the creation of Article 9,<sup>6</sup> and left only simple concepts such as the security interest,<sup>7</sup> the debtor,<sup>8</sup> and the secured party.<sup>9</sup> The UCC approach is more flexible, and distinctions based solely on form are no longer dispositive.<sup>10</sup>

Under Article 9, a secured party creates a security interest in collateral.<sup>11</sup> The security interest is simply a property right, the purpose of

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1. A secured transaction is any transaction that "is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts." U.C.C. § 9-102(1)(a) (1990). *See also* U.C.C. § 9-105(1) (1990) (defining documents and instruments); U.C.C. § 9-106 (1990) (defining general intangibles); *infra* notes 2-3 (defining account and chattel paper respectively).

2. An account is "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance." U.C.C. § 9-106 (1990).

3. Chattel paper consists of a writing that shows both a monetary obligation and either a security interest in or a lease of specific goods, such as mortgages. *See* U.C.C. § 9-105(1)(b) (1990). When the transaction at issue involves more than one writing, then the writings taken as a group will be considered chattel paper. *See id.*

4. U.C.C. § 9-101 official cmt. (1990).

5. Thomas M. Quinn, Uniform Commercial Code Commentary and Law Digest ¶ 9-101[A][1] (1978).

6. Terms such as the "mortgagor," the "conditional vendee," the "lender," and the "buyer of accounts" are all called the "secured party," while terms such as the "mortgagee," the "conditional vendor," the "pledgor," and the "payee of accounts" are all called the "debtor". *See* U.C.C. § 9-105 official cmt. 1 (1990); 2 James J. White & Robert S. Summers, Uniform Commercial Code: Practitioner's Edition 241 (3d ed. 1988).

7. A security interest is any "interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201(37) (1990).

8. The debtor is the party who "owes payment or other performance of the obligation secured . . . and includes the seller of accounts or chattel paper." U.C.C. § 9-105(1)(d) (1990).

9. The secured party is "a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold." U.C.C. § 9-105(1)(m) (1990).

10. *See* U.C.C. § 9-101 official cmt. (1990).

11. Collateral is "property subject to a security interest." U.C.C. § 9-105(1)(c)

which is to ensure that the debt is repaid.<sup>12</sup> If the debtor defaults and the debt is not repaid, the secured party can respond in one of three ways: "He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure."<sup>13</sup> Under the foreclosure option, the secured party may either sell the collateral in a commercially reasonable manner and retain a deficiency judgment,<sup>14</sup> or he may keep the collateral in satisfaction of the loan.<sup>15</sup>

This option of retaining the collateral in the event of default is fully explained in section 9-505(2).<sup>16</sup> In the past, this section has been interpreted as providing for retention only in exchange for *full satisfaction* of the debt.<sup>17</sup> Full satisfaction simply means that the debtor is left owing no deficiency judgment,<sup>18</sup> whether the value of the collateral is less than, equal to, or greater than the amount of the debt. It is unclear, however, whether section 9-505(2) permits possibilities in addition to full retention and full satisfaction. For instance, may the secured party retain only part of the collateral in exchange for partial satisfaction of the debt, with the debtor still owing a deficiency judgment? Or, even if the creditor

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(1990). Simply stated, collateral is the property put forward by the debtor to ensure that the debt is repaid.

12. See Quinn, *supra* note 5, ¶ 9-101[A][4][c]. For a security interest in collateral to be effective, either the creditor must take actual physical possession of the collateral or the debtor must sign a security agreement. See U.C.C. § 9-203(1)(a) (1990).

13. U.C.C. § 9-501(1) (1990).

14. See U.C.C. § 9-504 (1990). Specifically, section 9-504 states:

[The] secured party after default may sell, lease or otherwise dispose of any or all of the collateral . . . . Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be *commercially reasonable*.

*Id.* (emphasis added).

15. "[A] secured party in possession may, after default, propose to retain the collateral in *satisfaction* of the obligation." U.C.C. § 9-505(2) (1990) (emphasis added).

16. U.C.C. § 9-505(2) (1990). The text of Section 9-505(2) reads as follows:

In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under Section 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

*Id.*

17. The secured party can "keep the collateral as his own, thus discharging the obligation and abandoning any claim for a deficiency." U.C.C. § 9-505(2) official cmt. 1 (1990).

18. See Quinn, *supra* note 5, ¶ 9-505[A].

forecloses on and retains *all* the collateral, may he still retain a deficiency judgment?<sup>19</sup>

Pre-Code law permitted the debtor and the secured party to alter their agreement and arrange for partial satisfaction. As the Restatement of Security set forth:

Subsequent to the creation of a pledge the pledgee's ability to inflict an oppressive bargain upon the pledgor is greatly diminished although not wholly absent. The pledgor and pledgee should not be prevented from making a bargain by which the pledged chattel can be taken in whole or in part satisfaction of the pledgee's claim. Such a bargain will be upheld so long as the pledgee is in a position to show that the bargain is free from fraud or oppression.<sup>20</sup>

Given the rise of such complex commercial transactions as multi-asset financing,<sup>21</sup> this option of partial satisfaction might still be extremely useful. While the UCC's sale of collateral and retention/full satisfaction procedures are sufficient in some situations, they are too inflexible to solve all of the problems that may arise in the commercial arena.

For example, suppose that a debtor utilizes two trucks as collateral for a loan. If the debtor defaults, the creditor's sole options under the traditional approach to section 9-505(2) would be to take both trucks in full satisfaction of the debt,<sup>22</sup> or to sell both trucks in a commercially reasonable manner as specified in section 9-504.<sup>23</sup> This approach, however, is too rigid. The creditor might want to keep only one of the trucks,<sup>24</sup> or might not want to bother with the problems and inconveniences of selling both trucks in a commercially reasonable manner.<sup>25</sup> Moreover, the debtor might have numerous reasons to veto the creditor's election to retain the collateral,<sup>26</sup> and might desire instead to work out a different

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19. Compare Barkley Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* § 4.10(4) (2d ed. 1988) (partial satisfaction in return for retention of all of the collateral does not contradict the policies of the UCC) and Peter F. Coogan, *The New UCC Article 9*, 86 Harv. L. Rev. 477, 520-21 (1973) (arguing for the allowance of partial satisfaction in exchange for retention of all of the collateral) with William D. Hawkland, *Uniform Commercial Code Series* § 9-505:08 (1986) (full satisfaction should be the only alternative for retention of all of the collateral). Professor Hawkland also raises the possibility of partial retention for full satisfaction of the debt. See *id.*

20. Restatement of Security § 55 cmt. a (Am. Law Inst. 1941) (emphasis added).

21. See *infra* text accompanying notes 24-66.

22. See U.C.C. § 9-505(2) (1990).

23. See *id.* § 9-504.

24. The creditor might prefer to keep only one of the trucks because he might want to obtain some property, but at the same time, not have all of his money tied up. Moreover, the Code does not grant the creditor the option of retaining both trucks and then selling only one. Cf. *Reeves v. Foutz & Tanner, Inc.*, 617 P.2d 149, 151 (N.M. 1980) (Section 9-505 permits strict foreclosure, as long as the creditor intends to retain the collateral and not resell it).

25. See *infra* note 32 and accompanying text (discussing problems associated with commercially reasonable sales).

26. For instance, the collateral might be worth more than the outstanding amount of the debt owed by the debtor.

agreement with the secured party that calls for partial retention of the collateral or for a decreased deficiency judgment.<sup>27</sup> In other words, both parties could benefit from an agreement. However, the option of taking one truck and having the debtor still be liable for some of the debt—a more desirable alternative under such circumstances—is not directly addressed by the UCC.

Another situation not contemplated by section 9-505(2) is when collateral has decreased in value from the time of the original transaction. In this situation, the creditor will obviously not want to take the collateral in full satisfaction of the debt. Furthermore, it might not be advantageous for the creditor to sell the collateral. With the value of the collateral having decreased, the secured party could potentially be left with a large deficiency judgment against an insolvent debtor—a judgment on which the secured party might never be able to collect. In addition, the Code requires that the “reasonable expenses of retaking, holding, preparing for sale . . . selling, . . . and the like”<sup>28</sup> be added on to the deficiency judgment,<sup>29</sup> thus increasing both the creditor’s dissatisfaction, and the amount of the deficiency judgment.<sup>30</sup>

Finally, if the creditor were to dispose of the collateral, such a sale would have to satisfy the commercially reasonable requirements of section 9-504.<sup>31</sup> Because sales of collateral have been overturned for being commercially unreasonable,<sup>32</sup> this could be a risky and undesirable option for a creditor to take.

This Note argues that courts should interpret the UCC expansively and allow parties to fashion and enforce their own agreements providing for partial satisfaction. Specifically, this Note proposes that courts should allow a creditor to retain collateral in partial satisfaction of a secured debt, if the debtor so agrees. Part I discusses in further detail the current accepted procedures under the UCC for retention of the collateral in full satisfaction of the debt or, alternatively, retention of a deficiency judgment. Part II explores the option of retaining the collateral in

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27. See *infra* text accompanying notes 86-92.

28. U.C.C. § 9-504(1)(a) (1990).

29. For a discussion of proceeds of disposition, see *id.*

30. While this is a risk of potential loss that the creditor accepts upon undertaking the transaction, that is no reason to deny the parties the right to alter their agreement upon default.

31. See *supra* note 14 (quoting text of section 9-504).

32. See, e.g., *United States v. Willis*, 593 F.2d 247, 259 (6th Cir. 1979) (public sale declared not reasonable, even if all proper procedures for public resale were carried out); *Kobuk Eng'g & Contracting Servs. v. Superior Tank & Constr. Co.*, 568 P.2d 1007, 1012-13 (Alaska 1977) (sale not commercially reasonable because of insufficient advertising by creditor); *Ford Motor Credit Co. v. Jackson*, 466 N.E.2d 1330, 1332-33 (Ill. App. Ct. 1984) (sale not commercially reasonable when creditor sold truck wholesale, rather than retail); *Villella Enterprises v. Young*, 766 P.2d 293, 297-98 (N.M. 1988) (two advertisements in weekly legal periodical for sale of bar not commercially reasonable); *Jefferson Credit Corp. v. Marciano*, 302 N.Y.S.2d 390, 395 (N.Y. Civ. Ct. 1969) (*every act of disposition must be done in commercially reasonable manner*).

return for partial satisfaction under UCC section 9-505(2), and examines how other UCC sections may favor or limit agreements for partial satisfaction. Part III responds to numerous arguments opposing the partial satisfaction option. Finally, this Note concludes that partial satisfaction should be permitted under UCC section 9-505(2).

### I. ACCEPTED PROCEDURES UNDER UCC § 9-505(2)

Traditionally, a creditor under a secured debt "may, after default, propose to retain the collateral in satisfaction of the obligation."<sup>33</sup> Although this rule is usually interpreted as referring to full satisfaction,<sup>34</sup> the text of the Code does *not* specify that satisfaction is to be in full.<sup>35</sup> Rather, the "full satisfaction" interpretation comes only from the official comment to the Code<sup>36</sup> which states that "the secured party may propose under subsection (2) that he keep the collateral as his own, thus *discharging the obligation and abandoning any claim for a deficiency*."<sup>37</sup> If a creditor elects this method, he is left without a deficiency judgment.<sup>38</sup>

Under UCC section 9-505(2), this retention provision can only be put into effect at the creditor's election.<sup>39</sup> A debtor, however, is not completely at a creditor's mercy when a creditor chooses this option. Rather, under UCC section 9-505(2), the creditor must inform the debtor, in writing, of his choice to retain the collateral.<sup>40</sup> The debtor may then choose whether to allow the creditor to proceed in this fashion.<sup>41</sup> Thus, while the UCC grants the creditor the option of acting to retain the collateral in satisfaction of the debt, the creditor cannot so proceed without the debtor's permission,<sup>42</sup> so long as the debtor objects within twenty-one days.<sup>43</sup>

If the debtor objects to retention—most likely because he believes the

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33. U.C.C. § 9-505(2) (1990). Courts have held that while suing on the debt, it is a "commercially reasonable" option for the creditor to retain the collateral. See *First Int'l Bank of Israel v. L. Blankenstein & Son, Inc.*, 452 N.E.2d 1216, 1221 (N.Y. 1983); *Chemical Bank v. Alco Gems Corp.*, 543 N.Y.S.2d 426, 428 (N.Y. App. Div. 1989).

34. See *supra* notes 17-18 and accompanying text.

35. See *supra* note 15 (quoting partial text of section 9-505(2)).

36. See U.C.C. § 9-505 official cmt. 1 (1990).

37. *Id.* (emphasis added).

38. See *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173, 176 (1st Cir. 1989); *Leasing Serv. Corp. v. Carbonex, Inc.*, 522 F. Supp. 79, 80 (S.D.N.Y. 1981); *Tanenbaum v. Economics Lab., Inc.*, 628 S.W.2d 769, 771 (Tex. 1982); Quinn, *supra* note 5, ¶ 9-505(A); White & Summers, *supra* note 6, § 27-8, at 588.

39. See U.C.C. § 9-505(2) (1990).

40. See *id.* Section 9-505(2) provides that: "Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection." *Id.*

41. See *id.* Section 9-505(2) continues, "If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under Section 9-504." *Id.*

42. See *id.*

43. See *id.*

collateral to be worth more than the amount of the outstanding debt—the creditor must dispose of the collateral in a manner consistent with section 9-504, while retaining a deficiency judgment for the unrecovered debt.<sup>44</sup> The creditor would then either have to sell, lease, or otherwise dispose of the collateral in a commercially reasonable manner.<sup>45</sup>

In situations where a creditor retains collateral without informing his debtor that he is keeping it in satisfaction of the debt, courts have split as to what the effect of the creditor's action should be. Under these circumstances, some courts have held that the creditor's possession is automatically considered to be retention in full satisfaction of the debt.<sup>46</sup> They reason that the Code intends to give the secured creditor two options: he can either sell the repossessed collateral in a commercially reasonable manner under section 9-504 and retain a deficiency judgment, or he can retain the collateral itself in full satisfaction of the debt.<sup>47</sup> Thus, as one court has stated, "[t]he secured creditor cannot both avoid a more 'objective,' market-based valuation of the collateral and also obtain an additional 'deficiency judgment' remedy (unless the debtor expressly consents)."<sup>48</sup>

Other courts have held that lack of notice of an intention to retain property in discharge of a debt does not constitute a proper retention.<sup>49</sup> Some kind of affirmative act from the secured party is necessary for the foreclosure process to begin.<sup>50</sup> One court reasoned that, under section 9-505(2), the option to retain the collateral is the creditor's, and this retention can only be exercised by written notice from the creditor to the

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44. *See id.*

45. *See* U.C.C. § 9-504(1) (1990). If either the creditor refuses to dispose of the collateral, the debtor has paid at least 60% of the debt, or the creditor delays for more than 90 days after taking possession of the collateral, then the creditor can be held liable under § 9-507(1) for any losses incurred. *See* UCC §§ 9-505(1), 9-505(2), 9-505(2) official cnt. 2 (1990). UCC § 9-507(1) states:

If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provision[s] of this Part.

*See also* Crosby v. Basin Motor Co., 488 P.2d 127 (N.M. Ct. App. 1971) (requiring creditor to pay the statutory penalty when he kept a pickup truck for more than 90 days).

46. *See* Lamp Fair, Inc. v. Perez-Ortiz, 888 F.2d 173, 176 (1st Cir. 1989); *In re* Boyd, 73 B.R. 122, 124-25 (Bankr. N.D. Tex. 1987); Shultz v. Delaware Trust Co., 360 A.2d 576, 578 (Del. Super. Ct. 1976); Haufler v. Ardinger, 28 U.C.C. Rep. Serv. (Callaghan) 893, 896-97 (Mass. App. Ct. 1979); Millican v. Turner, 503 So. 2d 289, 291 (Miss. 1987); Schmode's, Inc. v. Wilkinson, 361 N.W.2d 557, 559 (Neb. 1985); Swanson v. May, 697 P.2d 1013, 1015-16 (Wash. Ct. App. 1985).

47. *See* Lamp Fair, 888 F.2d at 176-77; Farmer's State Bank v. Otten, 204 N.W.2d 178, 180 (S.D. 1973).

48. Lamp Fair, 888 F.2d at 177.

49. *See* Chemical Bank v. Alco Gems Corp., 543 N.Y.S.2d 426, 428 (N.Y. App. Div. 1989); Chrysler Credit Corp. v. Mitchell, 464 N.Y.S.2d 96, 97 (N.Y. App. Div. 1983); Flickinger Co. v. 18 Genesee Corp., 423 N.Y.S.2d 73, 76 (N.Y. App. Div. 1979).

50. *See, e.g.,* McCullough v. Mobiland, Inc., 228 S.E.2d 146, 148-49 (Ga. Ct. App. 1976).

debtor.<sup>51</sup> Thus, under a literal reading of section 9-505(2), some creditors have been required to take affirmative action in the form of written notice of an intention to retain collateral.<sup>52</sup>

However, section 9-505(2) is *not* designed to protect the debtor from a wrongful sale.<sup>53</sup> Therefore, the debtor may only protect his rights with the remedies provided to him by UCC section 9-507.<sup>54</sup>

## II. THE POSSIBILITY OF PARTIAL SATISFACTION UNDER UCC § 9-505(2)

### A. The Proposal

Section 9-505(2) expressly allows the debtor to waive or modify his rights under this section. Significantly, this option of waiver or modification is only permitted after the debtor has defaulted, and therefore the parties are not allowed to change the rules of section 9-505(2) in their security agreement.<sup>55</sup> The debtor *cannot* waive his rights under section 9-505(2) at the time the transaction is entered into.

All authorities agree, however, that this waiver of rights permits the debtor to waive his right to written notice of the creditor's intention to keep the collateral in exchange for satisfaction of the debt.<sup>56</sup> Some commentators also contend that this waiver includes the debtor's right to object to the creditor's suggestion of retention within twenty-one days of when that suggestion was sent.<sup>57</sup>

Arguably, the debtor has an additional right under section 9-505(2)—namely, the right to full satisfaction of the debt in exchange for the creditor keeping the collateral.<sup>58</sup> The issue thus arises whether the waiver of

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51. See *Flickinger*, 423 N.Y.S.2d at 76.

52. See *id.*

53. See *id.*

54. Under section 9-507, the debtor may restrain or force disposition of the collateral, or if disposition has already occurred, then he may proceed against the creditor for any losses occasioned by his unpermitted conduct. See *supra* note 45 (providing text of section 9-507); see also *Farmers Bank v. Hubbard*, 276 S.E.2d 622, 626-27 (Ga. 1981) (denying bank deficiency judgment when it failed to prove that sale of collateral was commercially reasonable); *Harris v. Bower*, 295 A.2d 870, 876 (Md. 1972) (suggesting that the debtor's deficiency judgment should be lessened by the value of the yacht at the time it was repossessed by the creditor, rather than the depreciated value of the boat two years later); *General Elec. Credit Corp. v. Durante Bros. & Sons, Inc.*, 433 N.Y.S.2d 574, 577 (N.Y. App. Div. 1980) (suggesting that, to obtain a deficiency judgment, the creditor must overcome the presumption that collateral was at least equal to debt, when sale was not commercially reasonable (citing *Security Trust Co. v. Thomas*, 399 N.Y.S.2d 511, 513 (N.Y. App. Div. 1977))).

55. See U.C.C. § 9-505(2) (1990) (secured party proposing to retain the collateral must notify the debtor of this intent unless the debtor "has not signed *after default* a statement renouncing or modifying his rights under this subsection") (emphasis added).

56. See *Hawkland*, *supra* note 19, § 9-5:01; *Quinn*, *supra* note 5, at 9-336; 2 *White & Summers*, *supra* note 6, at 586.

57. See *Coogan*, *supra* note 19, at 521.

58. See U.C.C. § 9-505(2); *Clark*, *supra* note 19, ¶ 4.10[3], at 4-159 to -160; *Coogan*, *supra* note 19, at 522.



rights under section 9-505(2) refers to the debtor's right to full satisfaction, as well as to the debtor's rights to receive notice and to object within twenty-one days.<sup>59</sup> This Note suggests that the options of waiver and modification should apply to this additional debtor protection.<sup>60</sup>

### B. UCC Section 1-102(3)'s Fair Dealing

Section 1-102(3) of the UCC permits the debtor and the creditor to craft their own agreement, so long as it is not manifestly unreasonable to either side.<sup>61</sup> Section 1-102(3) thus states:

The effect of provisions of this Act may be *varied by agreement, except as otherwise provided in this Act* and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.<sup>62</sup>

Moreover, the official comment to section 1-102 even goes so far as to say that "[t]his Act is drawn to provide flexibility so that . . . it will provide its own machinery for expansion of commercial practices."<sup>63</sup>

As indicated by section 1-102, the drafters intended the Code to be a flexible instrument that would not chain the debtor and the creditor to rigid and unyielding rules—as was the case under pre-Code law<sup>64</sup>—but instead, would allow the parties to fashion their own agreements. In fact, the official comment further states that "[i]t is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of *unforeseen* and new circumstances and practices."<sup>65</sup>

The drafters of the Code thus did not pretend to foresee all possible situations that could arise in the commercial world and would be subject to the Code's provisions. As one commentator suggested, it is likely that the drafters considered only simple scenarios while drafting the Code, such as when the collateral and debt are roughly equivalent in value. Specifically, the Code and its comments give no indication that the drafters contemplated multi-asset financing—wherein the creditor might want to retain only part of the collateral, but would not do so if he had to forego *all* of his deficiency judgment in exchange; nor did the drafters necessarily foresee a situation in which the collateral has greatly decreased in value and is now worth much less than the debt. These "unforeseen" situations demonstrate the need for allowing partial

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59. See Clark, *supra* note 19, ¶ 4.10[4], at 4-160 to -162; White & Summers, *supra* note 6, at 588. But see Hawkland, *supra* note 19, § 9-505:08 (taking the position that the debtor cannot waive his right to full satisfaction).

60. See *infra* notes 66-72 and accompanying text.

61. See U.C.C. § 1-102(3) (1990).

62. *Id.* (emphasis added).

63. *Id.* official cmt. 1.

64. See *supra* note 11 and accompanying text.

65. U.C.C. § 1-102 official cmt. 1 (1990) (emphasis added).

satisfaction in return for retention of collateral by a secured party, and appear consistent with the Code's stated desire to provide a flexible and adaptable set of rules.

Again, the requirement of full satisfaction is not specifically mentioned in the Code,<sup>66</sup> although it is clarified in the official comment to UCC section 9-505.<sup>67</sup> Thus, it could be argued that the Code does not provide for partial satisfaction. Nevertheless, because this comment is *not* part of the text of the statute,<sup>68</sup> and because the statute itself is ambiguous as to whether satisfaction should be full or partial, section 9-505 should instead be viewed as a few other Code sections are viewed—namely, as a foundation that will be in place as long as the parties do not alter the terms among themselves.<sup>69</sup> This approach is authorized by Code section 1-102(3)'s statement that “[t]he effect of provisions of this Act may be varied by agreement.”<sup>70</sup> Additionally, the language in section 9-505(2) seems to authorize this view, because it specifically says that the debtor may renounce or modify his rights after default.<sup>71</sup>

In accordance with the Code's purpose as expressed in section 1-102, section 9-505(2) should be interpreted with as much flexibility as is reasonable. The parties should be able to structure their own agreement, as long as it comports with the requirements of good faith and fair dealing.<sup>72</sup> Good faith is essential, of course, because the provisions in Article

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66. Instead the Code just requires “satisfaction.” See *id.* § 9-505(2); see also *supra* note 15 (providing text of section).

67. See *supra* notes 15-18 and accompanying text for a discussion of the question of full satisfaction.

68. Put simply, the comments to the Code lack the force of law. See *Miller v. Preitz*, 221 A.2d 320, 323 (Pa. Sup. Ct. 1966), *overruled by* *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968), on other grounds. As some commentators have explained: “The [Code] itself is law in the 49 states that have adopted the Code, but the comments are not since they have not been enacted by the legislatures.” John D. Calamari & Joseph M. Perillo, *The Law of Contracts* 16 (3d ed. 1987). “Of course, if the Code and a comment are in conflict, the Code must prevail.” *Id.*

69. One example of such an approach is found in UCC section 2-210(3), in which duties that are usually deemed non-assignable can be made assignable upon agreement by the parties involved. See U.C.C. § 2-210(3) (1990); Calamari & Perillo, *supra* note 68, at 741. Another example is that parties entering into a contract may provide for acceptance to be manifested in a specific manner. Otherwise, under section 2-206(1), an offer can be accepted in any manner. See U.C.C. § 2-206(1) (1990); Calamari & Perillo, *supra* note 68, at 127-28. In addition, regarding the allocation of risk, UCC section 2-509 provides that the risk will initially be upon the seller, but the parties can, amongst themselves, alter this basis and have the initial risk be on the buyer. See U.C.C. § 2-509 (1990); Calamari & Perillo, *supra* note 68, at 581.

70. U.C.C. § 1-102(3) (1990).

71. See U.C.C. § 9-505(2) (1990). This authorization is similar to the authorization given in the sections mentioned above. See *supra* note 69; see, also U.C.C. § 2-210(4) (1990) (containing the language “unless the language or the circumstances . . . indicate the contrary”); U.C.C. § 2-206(1) (1990) (containing the language “[u]nless otherwise unambiguously indicated by the language or circumstances”); U.C.C. § 2-509(4) (1990) (stating that “[t]he provisions of this section are subject to contrary agreement of the parties”).

72. The U.C.C. states that “[g]ood faith means honesty in fact in the conduct or

1—particularly good faith and fair dealing—apply to all transactions that are covered by the Code,<sup>73</sup> including secured transactions under Article 9.

If a creditor wants to keep all or part of the collateral, retention should not bar him from pursuing a deficiency judgment, so long as the debtor has assented to this course of action. The UCC's firm requirement of debtor assent before the secured party can proceed<sup>74</sup> is an effective protective measure that will help a debtor avoid exploitation and overreaching by a secured party. A debtor will only assent to partial satisfaction if he thinks that it is in his interest to have the secured party keep the collateral in partial satisfaction of the debt, rather than to dispose of it in a commercially reasonable manner.<sup>75</sup>

### C. UCC Section 9-501(3) and the Limitation on Modifications

Despite the flexibility embodied in UCC section 1-102(3), section 9-501(3)(a) states that the provisions of section 9-505(2) concerning the acceptance of collateral in discharge of an obligation "may not be waived or varied."<sup>76</sup> Notwithstanding such explicit language, section 9-501(3) does allow some variation in section 9-505(2):

To the extent that they give rights to the debtor and impose duties on the secured party, *the rules* stated in the subsections referred to below may not be waived or varied *except as provided* with respect to compulsory disposition of collateral . . . *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.<sup>77</sup>

Therefore, despite its limiting provisions, section 9-501 can be interpreted as *not* inhibiting the waiver of full satisfaction under section 9-

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transaction concerned." U.C.C. § 1-201(19) (1990). Moreover, the Restatement (Second) of Contracts states that examples of bad faith include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, *abuse of a power to specify terms*, and interference with or failure to cooperate in the other party's performance." Restatement (Second) Contracts § 205 (1979) (emphasis added). See also *Efron v. Kalmanovitz*, 57 Cal. Rptr. 248, 251 (Cal. Ct. App. 1967) ("good faith" is an honest intention not to unfairly take advantage of another); *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259-60 (Sup. Ct. 1954) (" 'Good faith' is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or *to seek an unconscionable advantage*." ) (emphasis added); Quinn, *supra* note 5, 1-29 ("The test is the conduct of the actor himself: whether he is or is not acting decently.").

73. See Calamari & Perillo, *supra* note 68, at 501.

74. See *supra* note 15 (quoting text of U.C.C. § 9-505(2) (1990)).

75. Professor Hawkland raises the possibility that this might result in overreaching by the creditor, but, as indicated later on, his argument can be refuted. See Hawkland, *supra* note 19, § 9-501:09; *infra* text accompanying notes 101-06.

76. U.C.C. § 9-501(3)(a) (1990).

77. *Id.* (emphasis added). The official comment to UCC section 9-501 further states, "the specified rights of the debtor and duties of the secured party may not be waived or varied *except as stated*." *Id.*, § 9-501 official cmt. 4 (1990) (emphasis added).

505(2). Section 9-505(2) specifically says that the debtor may renounce or modify his rights under this subsection and section 9-501 only requires that the *rules* of section 9-505(2) are invariable. Therefore, the remaining question is whether one of the rights referred to in section 9-505(2) is the right to full satisfaction.<sup>78</sup> If it is, then section 9-505(2) expressly allows the parties to tailor their own agreement after default.<sup>79</sup> On the other hand, if section 9-505(2)'s waiver-of-rights provision is construed as *not* specifically referring to the right to full satisfaction, this will preclude the possibility of allowing the parties to fashion their own agreement, given section 9-501(3)'s stricture that section 9-505(2) may not be waived or varied "to the extent that [it] give[s] rights to the debtor and impose[s] duties on the secured party."<sup>80</sup> In this latter scenario, full satisfaction is a non-modifiable obligation of the creditor, rather than a waivable right of the debtor, and section 9-501(3) would prohibit any agreement for partial satisfaction.

For numerous reasons, full satisfaction should be construed to be a debtor's right under section 9-505(2). First, it is illogical to argue that a creditor's obligation is not *also* a debtor's right. When the secured party retains collateral under section 9-505(2), the right of retention will require the creditor to give up his right to a deficiency judgment against the debtor. Nevertheless, because only the debtor is in a position to insist that the creditor forego a deficiency judgment as required by the Code,<sup>81</sup> it makes little practical difference whether this discharge is described as the creditor's obligation or the debtor's right. Either way, the debtor may or may not demand full satisfaction, depending upon his specific needs. This is particularly true given that, if the creditor refuses to give full satisfaction, the debtor can refuse to allow retention and demand a commercially reasonable sale of the collateral.<sup>82</sup> Thus, this creditor's obligation would seem to create a corresponding right in the debtor—namely, the right to full satisfaction of the debt when the secured party

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78. Assuming, of course, that section 9-505(2) actually requires full satisfaction. *But see supra* notes 66-71 and accompanying text (disputing this assumption).

79. *See Coogan, supra* note 19, at 521 (stating that section 9-505(2) should be construed as allowing waiver by the debtor of his right to full satisfaction).

80. U.C.C. § 9-501(3) (1990).

81. This, of course, is not entirely true. Section 9-505(2) states that "notice shall be sent to *any* other secured party from whom the secured party has received . . . written notice of a claim of an *interest in the collateral*" and that the secured party may receive an objection to retention from any "person entitled to receive notification." U.C.C. § 9-505(2) (1990) (emphasis added). Nevertheless, it is difficult to see why, in most instances, an interested third party would object to partial satisfaction, as such a situation will leave the debtor with either collateral that he would not otherwise have under the retention/full satisfaction scenario, or with a lesser deficiency judgment. *See supra* notes 22-29 and accompanying text. In other words, partial satisfaction will leave the debtor in a better financial state, increasing the possibility that the interested, but subordinated, third party will also be compensated. In fact, where the debtor will not be left financially better off by partial satisfaction, this Note would limit its use. *See infra* notes 115-39 and accompanying text.

82. *See Coogan, supra* note 19, at 522.

retains the collateral.<sup>83</sup>

Second, language inserted into the re-draft of the Code in 1972 indicates that the drafters intended the debtor's right of full satisfaction to be waivable and modifiable. When the drafters revised the Code, they added the phrase "if [the debtor] has not signed after default a statement renouncing or modifying his *rights* under this subsection" into section 9-505(2), as part of the sentence that gives the debtor the right to written notice of retention.<sup>84</sup> In the same 1972 revisions, a similar phrase was added to section 9-504(3), retaining the debtor's right to notification of the sale of collateral, but only "if [the debtor] has not signed after default a statement renouncing or modifying his *right to notification of sale*."<sup>85</sup> The wording added to section 9-504(3) shows a clear intention to specifically limit the debtor's right to notification of sale of the collateral. In

83. *See id.*

84. U.C.C. § 9-505(2) (1990) (emphasis added). The full sentence of the relevant portion states: "Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection." U.C.C. § 9-505(2) (1990). The previous version, without the waiver provision, stated:

In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor and except in the case of consumer goods to any other secured party who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or is known by the secured party in possession to have a security interest in it. If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification or if any other secured party objects in writing within thirty days after the secured party obtains possession the secured party must dispose of the collateral under Section 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

U.C.C. § 9-505(2) (1957). This previous draft does not make any mention of waiver of rights after default.

85. U.C.C. § 9-504(3) (1990) (emphasis added). The pre-1972 Code stated:

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. 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, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

U.C.C. § 9-504(3) (1957). This previous version did not include any provision for waiver of the right to notification after default.

contrast, such specific language is lacking from the addition to section 9-505(2), which actually refers to “rights” in the plural. If the drafters had intended the rights in section 9-505(2) to be limited to the right to notification, they would have specified this as they did in section 9-504(3). That the drafters instead chose not to limit their language in this way suggests that the waivable rights that exist under section 9-505(2) are not limited to the right to notification.

Finally, an approach that reads section 9-505(2) as authorizing partial satisfaction is preferable to an approach that would not allow the parties to tailor their own post-default agreements because it increases the flexibility of the Code. To refer again to the example in which the debtor has put up two trucks as collateral, partial satisfaction does not *require* the debtor to choose between: (1) the option of allowing retention, resulting in the debtor owing no deficiency judgment, but also being left with no assets, and (2) the option of requiring the collateral to be sold, resulting in the debtor still having no assets, *but adding as well the potential burden of owing a deficiency judgment to the secured party*. Instead, under a broad reading of section 9-505(2), the debtor and the secured party could arrange an alternative agreement in which the debtor will not be left bereft of all his assets and may be able to negotiate a lower deficiency judgment in return for allowing partial satisfaction. At the same time, the creditor will be better able to protect his investment by retaining one of the trucks as well as a manageable deficiency judgment against the debtor.<sup>86</sup>

Similarly, the benefits of partial satisfaction are present in the situation where the collateral has decreased in value since the time of the original transaction. Obviously, the creditor would not want to take such collateral in full satisfaction of the debt, nor would he desire to dispose of it under section 9-504 given the huge deficiency judgment against an insolvent debtor that would likely remain.<sup>87</sup> With partial satisfaction, however, the parties can work out an agreement wherein the secured party could keep the collateral and still retain a decreased deficiency judgment against the debtor. In this way, the creditor will lose less money because the amount of this deficiency judgment will be smaller, and he will have an increased chance of collecting this deficiency judgment from the insolvent debtor. Moreover, a debtor might prefer this option given his need to maintain good business relations with both the secured party and with the financial and business communities as a whole.

An additional benefit of partial satisfaction to both the creditor and the debtor is that they can more often avoid disposing of the collateral. The debtor, for example, can arrange for a smaller deficiency judgment. In turn, the secured party will not need to comply with the rules of selling the collateral in the commercially reasonable manner dictated by section

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86. See *supra* note 24 and accompanying text.

87. See *infra* note 121 and accompanying text.

9-504.<sup>88</sup> Under that section's requirements, a host of problems are possible: (1) the secured party might not get much for selling the collateral; (2) the debtor might still be left owing the difference, with the "reasonable expenses of retaking, holding, preparing for sale . . . selling . . . and the like" added on to the deficiency;<sup>89</sup> and (3) the sale may very well be overturned as being commercially unreasonable.<sup>90</sup>

Finally, it is not necessary to interpret section 9-505(2) as precluding partial satisfaction in order to protect the debtor. The debtor's ability to thwart the creditor's request<sup>91</sup> for retention of the collateral demonstrates that the creditor is not all-powerful in the debtor/creditor relationship and does not need to be shielded.

For all of these reasons, section 9-505(2) should be interpreted as granting the debtor a right to full satisfaction. The combined effect of sections 9-505(2) and 9-501(3) would then authorize retention in return for partial satisfaction—section 9-505(2) by allowing the waiver and modification of rights and section 9-501(3) by providing that the right to allow waivers and modifications cannot be taken away.<sup>92</sup>

#### D. The Case Law Concerning Partial Satisfaction

As demonstrated above, the Code can and should be interpreted flexibly to allow for partial satisfaction. This flexibility would coincide with the First Circuit's view of Article 9 as expressed in *Lamp Fair, Inc. v. Perez-Ortiz*.<sup>93</sup> In *Lamp Fair*, the court noted that although the creditor's possession of collateral automatically qualified as retention in full satisfaction of the debt,<sup>94</sup> it would be permissible for a debtor to expressly consent to an alternative scenario.<sup>95</sup> Although stated in dictum, the First Circuit unequivocally indicated that the debtor and creditor should be allowed to modify their rights under section 9-505(2).<sup>96</sup>

Professors White and Summers also agree that section 9-505(2) provides for partial satisfaction when the debtor and the secured party both decide that the secured party can keep the collateral and that the debtor will still owe part of the debt.<sup>97</sup> These commentators ground their argu-

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88. See U.C.C. § 9-504 (1990); *supra* note 32 and accompanying text (discussing sales in a commercially reasonable manner).

89. U.C.C. § 9-504(1)(a) (1990).

90. See *supra* note 32 and accompanying text.

91. See *supra* notes 39-54 and accompanying text.

92. Again, the limitations on this right are: (1) that modification can only take place after default, see U.C.C. § 9-505(2) (1990); and (2) that the accord must be in good faith as required by U.C.C. § 1-203 of the Code, see UCC § 1-203 (1990). See Clark, *supra* note 19, at 4-161.

93. 888 F.2d 173 (1st Cir. 1989).

94. See *id.* at 177. The court did not think it fair to allow the secured party to get what would be equivalent to a deficiency judgment calculated with a market-based value of the collateral. See *id.*

95. See *id.*

96. See *id.*

97. See White & Summers, *supra* note 6, at 588.

ment upon a New York court decision, *S.M. Flickinger Co. v. 18 Genesee Corp.*,<sup>98</sup> in which both the majority opinion and the dissent agreed that the debtor can waive or modify his right to full satisfaction, with the debtor remaining liable for a deficiency judgment.<sup>99</sup> The majority in *Flickinger* reasoned that, under section 9-501(3), the parties had the "power to set the standards by which their rights and duties were to be measured."<sup>100</sup> The dissent, citing section 9-505(2), stated:

If the debtor waives his right to full satisfaction, the secured party may then recover a deficiency judgment based upon the amount of the debt less the value of the collateral. If the debtor refuses to waive full satisfaction, the secured party has the choice of retaining the collateral in full satisfaction of the debt or selling it to a third party under the provisions of section 9-504.<sup>101</sup>

Thus, the dissent would have allowed partial satisfaction if the debtor had waived his rights, but argued that the summary judgment should have been reversed because factually it had not been decided whether or not there had been a waiver.

Another case allowing the secured party to retain collateral and still recover a deficiency judgment is *Northwest Acceptance Corp. v. Hesco Construction, Inc.*<sup>102</sup> In *Hesco*, the court upheld a lease provision that allowed the lessor to keep equipment in partial satisfaction of an unpaid debt.<sup>103</sup> The court assumed that the lease was an Article 9 security interest, yet allowed the lessor to recover the unpaid rent under a liquidated-damages provision, even though the lessor had not conducted a foreclosure sale under section 9-504.<sup>104</sup> The court reasoned that the special remedies provision in the lease replaced the Article 9 provisions.<sup>105</sup>

Nothing in Article 9 would seem to authorize the result in *Hesco* because, while section 9-501(1) permits "cumulative remedies, it does not

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98. 423 N.Y.S.2d 73 (N.Y. App. Div. 1979).

99. *See id.* at 76-77.

100. *Id.* at 76. This reasoning, however, was not based upon section 9-505(2) and its waiver of rights provision, but rather upon section 9-501(3). *See id.* Under this section, "the parties may by agreement determine the standards by which the fulfillment of the[r] rights and duties is to be measured if such standards are not manifestly unreasonable." U.C.C. § 9-501(3) (1990). This reasoning is not proper, because section 9-501(3) states that section 9-505(2) "may not be waived or varied" with regard to "acceptance of collateral as discharge of obligation." U.C.C. § 9-501(3) (1990). Since this section expressly forbids the alteration of section 9-505(2), the court should not have been able to reach its conclusion without use of the waiver provision in section 9-505(2). *See* U.C.C. § 9-505(2) (1990).

Despite the fact that the *Flickinger* court reasoned in this way, its conclusion is in accord with my proposal. Therefore, at least in the opinion of one court, the result that I propose is not inconsistent with the UCC.

101. *Flickinger*, 423 N.Y.S.2d at 77 (Moule, J., dissenting).

102. 614 P.2d 1302 (Wash. Ct. App. 1980).

103. *See id.* at 1306.

104. *See id.* at 1305.

105. *See id.*



countenance remedies that conflict with the provisions of Article 9,"<sup>106</sup> as did the lease's special remedies provision. Nevertheless, *Hesco* is important because it demonstrates a liberal approach to the Code in its approval of partial satisfaction.

### III. ARGUMENTS AGAINST PARTIAL SATISFACTION

#### A. Analogy to Private Sales of Collateral

In deciding how to interpret section 9-505(2)'s waiver of rights, opponents of partial satisfaction might argue that it indirectly allows the secured party to do that which the UCC forbids. For example, in section 9-504, a secured creditor is allowed to buy collateral at a public sale, but is not always allowed to do so at a private sale.<sup>107</sup> In fact, a creditor will only be able to buy at a private sale when "the collateral is of a type customarily sold in a recognized market<sup>108</sup> or is of a type which is the subject of widely distributed standard price quotations."<sup>109</sup> These restrictions exist to protect the debtor from an overreaching creditor. If the collateral is sold in a recognized market or is the subject of widely distributed standard price quotations, the price at which the collateral should be sold is more predictable, and the secured party will be unable to buy it for less. Thus, the secured party is prevented from taking advantage of the debtor's vulnerable position.

If the Code allowed a creditor both to retain the collateral and to receive a deficiency judgment against the debtor, some argue that the concerns of section 9-504 would be indirectly implicated, because this arrangement would be equivalent to allowing the secured party to buy the collateral at a private sale, circumventing the restrictions of section 9-504.<sup>110</sup> There is, however, one very important difference. When the creditor buys the collateral at a private sale, the debtor does not influence

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106. Clark, *supra* note 19, at 4-162.

107. See U.C.C. § 9-504 (1990); Coogan, *supra* note 19, at 523.

108. In *Nelson v. Monarch Investment Plan, Inc.*, 452 S.W.2d 375 (Ky. 1970), the Court of Appeals of Kentucky defined "a recognized market" as a market "where sales involve many items so similar that individual differences are nonexistent or immaterial, where haggling and competitive bidding are not primary factors in each sale, and where the prices paid in actual sales of comparable property are currently available by quotation." 452 S.W.2d at 377 (citing *Norton v. Nat'l Bank*, 398 S.W.2d 538, 540 (Ark. 1966)) (rejecting the existence of a recognized market for used cars). Additional examples of this type of market are a commodities market or a stock market. See *id.*

109. U.C.C. § 9-504(3) (1990). The phrase "widely distributed standard price quotations" has undergone some refinement. An Arkansas court has said that "a guide to the price of a [good] of that year, make and model in an average condition," does not constitute a widely distributed standard price quotation. See *Carter v. Ryburn Ford Sales, Inc.*, 451 S.W.2d 199, 202-03 (Ark. 1970). Similarly, a Pennsylvania court rejected as insufficient an auto industry price manual, because it "is adopted for the convenience and benefit of dealers and is not based on market prices which are arrived at in the open, based on asking prices of sellers and bids of prospective buyers." *Alliance Discount Corp. v. Shaw*, 171 A.2d 548, 550 (Pa. Super. Ct. 1961).

110. See Coogan, *supra* note 19, at 521; *supra* notes 107-08 and accompanying text (describing Section 9-504).

the price that is set. The transaction is one-sided, with all the power held by the creditor. Because section 9-504 is concerned with commercial reasonableness and protecting the debtor, it is easy to see why courts will not allow this, absent a clearly defined price.

In contrast, these concerns are not implicated in the partial satisfaction procedure because the debtor directly participates in arranging the terms of the deal and is not required to allow partial satisfaction.<sup>111</sup> The rational debtor will not agree to partial satisfaction if he does not believe that it will make him better off. Therefore, while it might seem that a creditor wields a greater degree of power than a debtor in the default situation, and while this may be a particular concern with a private sale of collateral, in the partial satisfaction scenario it is still the debtor's decision whether or not to allow a modification or waiver.

### B. Analogy to Accord and Satisfaction

Some critics of partial satisfaction argue that UCC section 9-505(2) is a species of accord and satisfaction<sup>112</sup> and, therefore, deny the legitimacy of partial satisfaction. In fact, adhering to this view, some courts have construed section 9-505(2) as permitting full satisfaction only, reasoning that the accord and satisfaction is the debtor's release of the collateral in exchange for the secured party's abandoning of any deficiency judgment.<sup>113</sup> This analogy, however, is problematic and bereft of any support from the Code.

Instead of analogizing partial satisfaction under section 9-505(2) to accord and satisfaction, a more appropriate comparison would be with the principles of modification of contracts. Under common-law principles for modification of an agreement, both parties must offer considera-

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111. See Coogan, *supra* note 19, at 520. Section 9-505(2) should be interpreted as allowing waiver by the debtor of his right to full satisfaction, even "in light of 9-504(3)'s prohibition of the secured party's purchase of the collateral at a private sale." *Id.* at 521.

112. See *Warnaco, Inc. v. Farkas*, 872 F.2d 539, 544 (2d Cir. 1989); *In re Deephouse Equip. Co.*, 38 B.R. 400, 404 (Bankr. D. Conn. 1984); *Johnson v. Commercial Credit Corp.*, 159 S.E.2d 290, 291 (Ga. Ct. App. 1968); *Moody v. Nides Fin. Co.*, 156 S.E.2d 310, 311 (Ga. Ct. App. 1967); R. J. Robertson, Jr., *Rights and Obligations of Buyers with Respect to Goods in Their Possession After Rightful Rejection of Justifiable Revocation of Acceptance*, 60 Ind. L.J. 663, 707 (1985).

Accord and satisfaction is a method of discharging a claim in which the parties agree to give and accept something in settlement of the claim and perform the agreement. See *Holm v. Hansen*, 248 N.W.2d 503, 506 (Iowa 1976).

113. See *Warnaco*, 872 F.2d at 544 (stating that "the secured party may agree to accept the collateral in satisfaction of the debt under section 9-505, the U.C.C. equivalent of common-law accord and satisfaction"); *Deephouse Equip.*, 38 B.R. at 404 (when creditor pleads accord and satisfaction under section 9-505(2), it is the debtor's duty to prove intent to discharge the debt).

An accord is defined as "an offer to give or to accept a stipulated performance in the future in satisfaction or discharge of the obligor's existing duty plus an acceptance of that offer." Calamari & Perillo, *supra* note 68, at 214-15 (emphasis added) (citations omitted). Here, the secured party will retain the collateral in satisfaction or discharge of the debtor's existing duty.

tion.<sup>114</sup> Under the UCC, however, this has changed to reflect the Code's emphasis on flexibility and the facilitation of commercial transactions. UCC section 2-209(1) specifies that *no consideration* is necessary to modify a contract. In this spirit of flexibility, it makes little sense to bind the parties to a secured transaction based on the rigid formulations of accord and satisfaction. Instead, the debtor and creditor should be allowed to modify their security agreement as they would any contract under the Code.

Courts wishing to establish a bright-line rule regarding when modification would be unconscionable could specify that both parties have to give up something, similar to traditional common-law principles of consideration.<sup>115</sup> For instance, the debtor would give up his right to full satisfaction and the secured party would waive his right to receive a full deficiency judgment. The modification would have to put the debtor in a better position than under the traditional option of disposition of collateral. Because both routes could leave the debtor without the collateral, the partial satisfaction option would likely require the debtor's deficiency judgment to be less than it would be if the collateral were sold, meaning simply that the value of the collateral subtracted from the debt should be more than the sale price of the collateral.

This requirement, moreover, will not impede the viability of the partial satisfaction proposal. Logically, the debtor will only be willing to approve a retention agreement when, although he still will owe a deficiency judgment, the amount of that judgment is less than the amount of the judgment that he would owe otherwise—especially if the collateral were sold at a public sale, and all the costs incurred in that sale were added on, as required by section 9-504(1)(a).

As with all contracts and modifications covered by the UCC, the creditor's superior bargaining position would *not* be enough to render a partial satisfaction arrangement invalid.<sup>116</sup> Additional elements of unfairness would have to be present, such as "where freedom of contract is exploited by a stronger party who has control of the negotiations due to the weaker party's ignorance, feebleness . . . or general naivete."<sup>117</sup> Therefore, in the absence of fraud or actual exploitation, any modified agreement reached by the parties would be acceptable.

In addition to a mutual consideration requirement, courts should re-

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114. See *Wisconsin and Mich. Ry. v. Powers*, 191 U.S. 379, 385 (1903); *Alleghany College v. National Chautauqua County Bank*, 159 N.E. 173, 174 (N.Y. 1927); *Calamari & Perillo*, *supra* note 68, at 262.

115. See *supra* note 114 and accompanying text.

116. See *Calamari & Perillo*, *supra* note 68, at 407.

117. *Id.* See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir 1965) (courts should consider the inequality of the bargaining power of a party who signs a commercially unreasonable contract); Jeffrey C. Fort, *Understanding Unconscionability: Defining the Principle*, 9 Loy. U. Chi. L.J. 765, 808 (1978) (stating that courts have used the presence of unequal bargaining power in determining whether an agreement was unconscionable).

quire, for evidentiary purposes, that both the waiver *and* the modification should be in writing.<sup>118</sup> This would greatly simplify the court's job of interpreting and enforcing these agreements.

### C. Sacrificing Debtor's Rights and Overreaching by the Secured Party

Some commentators have argued that allowing flexibility and modification will come at the expense of the debtor's rights. For example, Professor Hawkland rejects the proposition that the secured party can retain all of the collateral in exchange for partial satisfaction of the debt.<sup>119</sup> Hawkland reasons that partial satisfaction would be unfair because the debtor is left with no collateral, and yet is still burdened with a deficiency judgment.<sup>120</sup>

Professor Hawkland, however, does not consider the possibility that the debtor is still better off under partial satisfaction than if the debtor refused to allow such an option. For example, if the secured party were forced to go through with a public sale as specified under UCC section 9-504, both the costs of the sale and the typically low prices of judicial sales<sup>121</sup> could leave the debtor with no collateral, as well as the possibility of an even *larger* deficiency judgment once the costs of the sale are added on and only the low sale price is subtracted. Nor does Professor Hawkland consider the possibility of the parties arranging an agreement whereby the secured party keeps the collateral and, in exchange for the debtor allowing him to keep a deficiency judgment, the amount subtracted from the debtor's debt is worth more than the collateral.<sup>122</sup>

Finally, the basic requirements of section 9-505(2) protect the debtor

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118. This requirement coincides with section 2-209(3) which states: "The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions." U.C.C. § 2-209(3) (1990). section 2-201 further states: "a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense *unless there is some writing sufficient* to indicate that a contract for sale has been made between the parties." U.C.C. § 2-201(1) (1990) (emphasis added).

119. See Hawkland, *supra* note 19, § 9-505:08. Professor Hawkland, however, is not completely rigid in his view of the Code. For example, he believes that the secured party should be able to keep part of the collateral in exchange for full satisfaction of the debt. In his view, this option does not harm the debtor because he is left with some of the collateral, and with *no* deficiency judgment. See *id.*

120. See *id.*

121. Cf. U.C.C. § 9-507(2) (1990) (stating that "[t]he 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"); *C.I.T. Corp. v. Duncan Grading & Constr. Inc.*, 739 F.2d 359, 361 (8th Cir. 1984) (it is not sufficient to prove commercial unreasonableness that a higher price might have been obtained by a sale at a different time or under different circumstances); *Credit Alliance Corp. v. Cornelius & Rush Coal Co.*, 508 F. Supp. 63, 68 (N.D. Ala. 1980) (same); *Monahan Loan Serv., Inc. v. Janssen*, 349 N.W.2d 752, 757 (Iowa 1984) (a price discrepancy, while an important factor, is not determinative in resolving questions of whether a sale was commercially reasonable).

122. See *supra* note 95 and accompanying text.

under partial satisfaction from overreaching by the creditor because, under this section, the debtor's permission is necessary before the secured party can foreclose by retaining the collateral.<sup>123</sup> This protects the debtor because he need only withhold permission if he believes the proposed agreement is unfair or less advantageous than a commercially reasonable sale.

#### CONCLUSION

Partial satisfaction should be allowed under UCC section 9-505(2). UCC section 1-102 provides that the UCC "is drawn to provide flexibility so that . . . it will provide its own machinery for expansion of commercial practices."<sup>124</sup> Analysis of this provision, as well as the limitations imposed by section 9-501(3), reveals that section 9-505(2) could properly be interpreted in a manner that increases the flexibility of secured agreements without sacrificing the debtor's rights as protected under section 9-501(3). This goal can be accomplished by allowing the debtor to waive his right to full satisfaction under section 9-505(2), and by providing for retention of the collateral upon the default of the debtor in combination with a deficiency judgement.

Allowing the parties to have the flexibility of partial satisfaction will help facilitate business transactions, will avoid costly litigation, and will enhance the parties' satisfaction with their agreements—instead of requiring them to live with the other all-or-nothing alternatives. Nothing could be more in tune with the spirit of the Uniform Commercial Code.

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123. See U.C.C. § 9-505(2) (1990).

124. U.C.C. § 1-102 official cmt. 1 (1990).