Secured Party Made Whole: Expenses, Attorneys' Fees and Determination of the Indebtedness Under U.C.C. Sec. 9-504(1).

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THE SECURED PARTY MADE WHOLE—EXPENSES, ATTORNEYS' FEES AND DETERMINATION OF THE INDEBTEDNESS UNDER U.C.C. § 9-504(1)

I. Introduction

Article Nine of the Uniform Commercial Code1 has been hailed as one of the most innovative structurings of consensual secured transactions in modern times.2 Unlike Article Two, which relies heavily on common-law supplementation,3 Article Nine is largely self-contained and self-explanatory.4 But despite this laudatory character, a number of problems still linger for the practitioner.5 One problem area which has received little judicial or scholarly attention until fairly recently is subsection 9-504(1).6 This provision allows a secured party, upon the

1. All references are to the 1972 version of the Code unless otherwise noted. See generally J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1972).
2. W. DAVIDSON & R. HENSON, SECURED TRANSACTIONS—II (Foreword 1966). Pre-Code law has been described as a jerry-built, overlapping, fractured and confused structure of judicial policy, common law rules, and legislative enactments, almost every one of which sprang from a different economic era in answer only to one particular need, which need was either peculiar to that era or to the needs of a special interest group. Davis, The Law of Secured Transactions and Article Nine of the Uniform Commercial Code, 6 S.D.L. Rev. 173, 175-76 (1961).
4. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1075 (1965) [hereinafter cited as 2 GILMORE].
6. U.C.C. § 9-504(1) reads:

The proceeds of disposition shall be applied in the order following to
(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

This comment will not consider subsection (c) and will be confined to nonconsumer transactions.
debtor’s default, to recover the reasonable expenses incurred in repossessing and selling the collateral\textsuperscript{7} and guides the application of the proceeds to the indebtedness.\textsuperscript{8} This comment will examine some of the difficulties encountered in applying 9-504(1) and will suggest possible legal and practical solutions. As a final note, the effect of an acceleration clause and determination of interest charges on the amount of indebtedness will be reviewed.

II. Expenses Under 9-504(1)(a)\textsuperscript{9}

Subsection (1)(a) is not new to the law of secured transactions; the Code replaced two other uniform laws which contained similar provisions. The absence of case law construing the predecessors of 9-504(1)(a) would seem to indicate that those sections posed few, if any, problems for parties who had entered into security agreements.\textsuperscript{10} Similarly, litigation under the Code provision has only begun to surface within the last several years. Much of the recent controversy has centered around three basic issues. First, what types of expenses may a secured party deduct? Secondly, are there any limits on the amount of deductible expenses? Finally, may a secured party recover expenses prior to or without resale of the collateral? The discussion in this section will examine the judicial treat-

\textsuperscript{7} U.C.C. § 9-504(1)(a).
\textsuperscript{8} U.C.C. § 9-504(1)(b).
\textsuperscript{9} See note 6 supra. See also 2 GILMORE, supra note 4, at 1201. See generally R. HENSON, SECURED TRANSACTIONS § 10-12 (1973) [hereinafter cited as HENSON].
\textsuperscript{10} The Uniform Conditional Sales Act [hereinafter cited as U.C.S.A.] was promulgated by the National Conference of Commissioners on Uniform State Laws in 1918 and was subsequently adopted by ten states. The Uniform Trust Receipts Act [hereinafter cited as U.T.R.A.] was promulgated by the National Conference of Commissioners on Uniform State Laws in 1933 and was subsequently adopted by thirty-two states. R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL AND CONSUMER LAW 18 (1974). The comparable provisions of the U.C.S.A. and the U.T.R.A. read as follows:

The proceeds of the resale shall be applied (1) to the payment of the expenses thereof, (2) to the payment of the expenses of retaking, keeping and storing the goods, (3) to the satisfaction of the balance due under the contract. Any sum remaining after the satisfaction of such claims shall be paid to the buyer.

U.C.S.A. § 21.

The proceeds of any such sale, whether public or private, shall be applied (1) to the payment of the expenses thereof, (2) to the payment of the expenses of retaking, keeping and storing the goods, documents or instruments, to the satisfaction of the trustee’s indebtedness. The trustee shall receive any surplus and shall be liable to the entruster for any deficiency.

ment of these problems and will propose some practical and legal solutions.

A. Allowable Expenses

Courts have generally had little difficulty in deciding what expenses qualify as costs incurred in "retaking, holding, preparing for sale or lease, selling, leasing and the like . . . ." Examples of allowable expenses include: private investigator's fees, insurance premiums, lost profits and incidental damages. On the other hand, payments to senior lienholders and fees of a private investigator for surveillance of the collateral prior to resale have been disallowed. Unfortunately, however, the courts have offered little more than a rote and often arbitrary recital of what expenses are or are not allowable. The broad, and seemingly important, phrase "and the like" has remained largely undefined. The only conclusion that can be made, then, is that the courts have promulgated no rule for determining whether a particular expense may properly be deducted by a secured party.

B. Reasonable Expenses

The important question concerning the amount of recoverable expenses has been greatly obfuscated by the Code's requirement that such expenses be reasonable. Since the Code offers no guidelines for determining whether an expense is reasonable, resort must be made to judicial definitions. The courts, perhaps not unexpectedly, have offered a number of divergent treatments of the reasonableness requirement.

One court has dealt with the reasonableness requirement by

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13. Id.
15. See note 14 supra.
18. U.C.C. § 1-102 does not allow the parties to vary the reasonableness requirement; however, they may determine the standards for performance. They may also vary other provisions of the Code unless the specific section prohibits variance. See note 39 infra.
specifically failing to consider it. In Brownstein v. Fiberonics Industries, Inc., the secured party was allowed to recover over $4000 in transportation, labor and equipment expenses. The court, however, gave no indication of whether it (1) made an initial adjudication that the costs were reasonable and therefore allowable, (2) equated allowable with reasonable or (3) completely failed to judicially review the expenses in light of the reasonableness requirement of subsection (1)(a).

In United States v. Gore, expenses of approximately $1000 were found to be reasonable when $1900 was received from the resale of the collateral. Generally, courts have disregarded the ratio between the amount of expenses allowed and the amount received upon resale of the collateral. Although this view is somewhat surprising in light of the generally restrictive judicial attitude with respect to the awarding of expenses to the secured party, it should be noted that Gore is apparently the only case in which a debtor has expressly argued that expenses were disproportionate to the amount of resale proceeds. Thus, it would be unwise for future debtors to perfunctorily dismiss the ratio argument of reasonable expenses.

In Cornett v. White Motors Corp., the Nebraska Supreme Court used the reasonableness requirement to create an inference which shifted the burden of proof of what amount of expenses were reasonable from the secured party to the debtor. Although the secured party had not introduced any evidence to show reasonableness, the court held that the burden of proof had been met since the "value may be reasonably inferred . . . ." The debtor's failure to offer proof that the expenses were unreasonable was thus dispositive of the issue. However, creation of an inference of reasonableness by shifting the burden to the debtor would seem to be contrary to the

20. Id. at ———, 264 A.2d at 267-68.
24. Id. at ———, 209 N.W.2d at 344.
general rule under 9-504 which imposes the burden to prove reasonableness on the secured party.\textsuperscript{25}

In addition to the issue of what amount of expenses are reasonable, a collateral issue arising under subsection (1)(a)\textsuperscript{26} is whether the secured party may collect expenses without proof of payment or without incurring such costs. One court has allowed the secured party to collect reasonable expenses without proof of payment, based on the tort theory of recovery that expenses, as damages, need not be actual (i.e., loss of earning capacity without regard to lost wages) in order to be recoverable.\textsuperscript{27} The language of 9-504(1)(a) can be construed as lending support for the tort-theory result. The clause, "the reasonable attorneys' fees and legal expenses,"\textsuperscript{28} is modified by the word "incurred." If the modifier "incurred" goes only to the clause on attorneys' fees, the tort-theory result could be justified since expenses would not have to be "incurred" to be awarded. Thus, a secured party could presumably recover any of the expenses enumerated in subsection (1)(a) so long as they would have been reasonable under the circumstances.

The tort theory, however, seems contrary to the policy underlying the Code as indicated by section 1-106, which states that one of the purposes of the Code is to make the parties whole, or put them in the position they would have been in had the agreement matured before default, after full performance.\textsuperscript{29} The tort theory of recovery suggests that the secured party may reap a windfall if he can keep his expenses to a minimum, without violating the commercially reasonable resale standard set out in subsection 9-504(3).\textsuperscript{30} Allowing the secured party to reap a windfall is also inconsistent with subsection 9-504(2),\textsuperscript{31} which requires, in most instances, that the secured party ac-
count to the debtor for any surplus and which allows the secured party to collect a deficiency from the debtor. Subsection 9-504(2) is also in accord with the policy in section 1-106 to put the parties in the position they would have attained had full performance occurred. Finally, under a literal reading of 9-504, it is difficult to comprehend how an expense can be reasonable before it has been incurred.

C. Recovery of Expenses Before Resale

In regard to the third issue presented at the beginning of this section—whether the secured party may recover expenses prior to or without resale of the collateral—the Wisconsin Supreme Court, in an action based upon a promissory note underlying a security agreement, has held that the secured party may only recover expenses upon resale or liquidation of the collateral. In Brownstein, however, the court took a contrary position under a somewhat different factual setting. The court there, without articulating its rationale, allowed addition of expenses to the debt before resale had occurred. This procedure appears to be contrary to 9-504(1)(a), which allows the secured party to deduct his expenses from the proceeds of a resale. Certainly, it is arguable that there can be no proceeds unless the collateral is resold. Section 9-505, which allows the secured party to retain the collateral in satisfaction of the debt, supports the deduction rather than the addition procedure since it does not specifically authorize the recovery of expenses when the secured party has elected not to resell. Obviously, if resale does occur, use of the deduction rather than the addition procedure will have no net effect on the amount of indebted-
edness. But, use of the addition practice could result in a lawsuit by the debtor to recoup expenses paid to the secured party where the secured party ultimately elected to retain the collateral.

D. Practical Solutions

To avoid some of the aforementioned problems, it is the suggestion of this author that in drafting a security agreement the parties enumerate, depending on the nature of the collateral, specific expenses that could be anticipated upon default, repossession and resale in addition to those set out in subsection (1)(a). For example, in a security agreement covering an aircraft, the secured party may want to insert a provision covering the cost of pilots' fees and fuel necessary to bring the collateral into the possession of the secured party, especially considering the mobility of the collateral and the distance between the location of the collateral and the secured party's place of business. While it is not contended that such provisions are absolutely necessary to protect the secured party, they are desirable and consistent with subsections 1-102(3) and (4), which allow the parties to vary the provisions of the Code, including the standards by which reasonableness is determined, absent a specific prohibition to the contrary.

III. Attorneys' Fees Under 9-504(1)(a)

At common law a prevailing litigant was not entitled to recover his attorneys' fees from his unsuccessful adversary. As recently as 1975, the United States Supreme Court has found the common-law prohibition to be the "American Rule." The

38. See note 6 supra.
39. (3) 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.
40. See generally E. Weeks, Attorneys at Law, (2d ed. 1892); Note, Reimbursement for Attorneys' Fees From the Beneficiaries of Representative Litigation, 58 Minn. L. Rev. 933, 933-34 (1974).
law of contracts, however, provides an exception to the general rule in cases where the parties have specifically agreed on the awarding of attorneys' fees.\textsuperscript{42} This exception has been codified by 9-504(1)(a), which states that the secured party may deduct from the proceeds of the resale his attorneys' fees "to the extent provided for in the agreement and not prohibited by law . . . ."\textsuperscript{43} While the inclusion in the security agreement of a clause providing for the recovery of attorneys' fees is essential, it is but a basic step which merely places the parties within the ambit of 9-504(1)(a). Once it is determined that the Code subsection applies, a number of subsequent issues may affect the ultimate recovery by the secured party. Those to be examined in this discussion include: (1) Can either party recover attorneys' fees? (2) When will local law inconsistent with the Code preclude recovery? and (3) How is the amount of recovery delimited by the Code's reasonableness requirement? As was the case with the two uniform laws which preceded the Code,\textsuperscript{44} and, as is implied by the phrase "to the extent . . . not prohibited by law . . . .," the resolution of the above problems may depend on local, common or statutory law which modifies, supplements or supersedes the Code.\textsuperscript{45} Finally, this section will suggest some practical drafting tips which may help alleviate these difficulties.

A. Who May Recover Expenses

Although 9-504(1)(a) only provides for recovery of a secured party's expenses, several states have statutes which allow either party to recover attorneys' fees when the agreement contains such a provision for one of the parties. Construing an Oregon statute\textsuperscript{46} of this type, the court in \textit{Webster v. General Motors Acceptance Corp.},\textsuperscript{47} held that because the secured party-seller was entitled to fees under the agreement and subsection (1)(a), the debtor could be awarded his attorneys' fees where he prevailed in an action to collect a resale surplus.

\begin{footnotes}
\footnote{42. 5 \textsc{Corbin, Contracts} § 1037 (1964).}
\footnote{44. See note 10 supra.}
\footnote{45. See \textit{In re American Beef Packers}, 548 F.2d 246 (8th Cir. 1977); U.C.C. § 1-103.}
\footnote{47. 267 Ore. 304, 516 P.2d 1275 (1973).}
\end{footnotes}
While this result is not specifically permitted by the Code, subsection (1)(a) does provide that the agreement governs the award. The Oregon statute merely injected an additional term into the agreement. Thus, the result in *Webster* is within the bounds of section 9-504.

In *First Westside National Bank v. Llera*, the Montana Supreme Court, construing a statute similar to that in *Webster*, refused to allow recovery of attorneys' fees by the co-owners of collateral on the ground that they were not parties to the agreement. Similarly, in *Centennial State Bank v. S.E.K. Construction Co.*, an assignee of the secured party was denied recovery of attorneys' fees because such fees had not accrued at the time of the assignment. These decisions are demonstrative of a general judicial reluctance to award attorneys' fees and imply that only those who are parties to the agreement will be allowed to recover such expenses.

**B. Local Law**

Another issue with respect to the awarding of attorneys' fees is whether local laws which conflict with 9-504(1)(a) can preclude recovery of such expenses. In *In re American Beef Packers* the Nebraska common law was construed to prohibit an award of attorneys' fees: "The courts of Nebraska for many years have followed the principle that the recovery of attorneys' fees will be permitted only where the state legislature has expressly provided by statute that an award of such fees may be made by the court." The Eighth Circuit, construing this rule in conjunction with the comments to the Code, found no intention on the part of the legislature to change the common-law rule. Citing the district court, the court of appeals stated: "'Notably, the comments to this section make no mention of a change in the state law relative to attorneys' fees. The Court cannot envision such a sweeping change in the state law by such innocuous phraseology as found in § 9-504(1)(a).'" The Eighth Circuit also accepted the district court's holding that

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48. 580 P.2d 100 (Mont. 1978).
49. MONT. REV. CODES ANN. 93-8601.1 (1947).
50. 518 S.W.2d 143 (Mo. App. 1974).
51. 548 F.2d 246 (8th Cir. 1977).
52. Id. at 247.
53. See comments to U.C.C. § 9-504.
54. 548 F.2d at 248.
subsection (1)(a) allows recovery of fees only where recognized by state law.

The court in *American Beef Packers*, however, seems to have ignored the obvious question of why the Nebraska legislature, in adopting the Code, included the language on attorneys' fees in light of the strict common-law prohibition. The answer is unascertainable from the language of the subsection or the comments. Instead, the result seems to be attributable to the approach taken by the court of appeals in requiring fees to be specifically recognized by law rather than prohibited by law, as the language in subsection (1)(a) suggests. The opposite result could just as easily have been justified by construing the language in the subsection to be permissive, or a recognition of a change in the common-law prohibition. At least one case has so held.

The Michigan Court of Appeals in *Wilson Leasing Co. v. Seaway Pharmacal Corp.* overruled the trial court's holding that an award of attorneys' fees was contrary to Michigan public policy. The trial court based its ruling on a Michigan statute which provided that attorneys' fees could be taxed as costs up to the amount of $50 unless additional sums were authorized by statute or court rule. The court of appeals found that section 9-504 authorized additional sums and remanded the case to the trial court for a determination of reasonable attorneys' fees. This case lends support for the conclusion that the court in *American Beef Packers* erred, and that the provisions in 9-504 can be read as permissive in nature where other statutes or case law hold to the contrary.

C. Reasonable Attorneys' Fees Under 9-504(1)(a)

As has already been noted, the general common-law proscription against the recovery of attorneys' fees is qualified to the extent that the parties have specifically agreed on the recovery of such expenses. In cases where attorneys' fees have been allowed, the courts have generally required the award to

56. MICH. COMP. LAWS ANN. § 600.2405(6) (1967).
57. See text following note 64 infra.
be reasonable.\textsuperscript{59} Some of the objective criteria considered by the courts in making this determination include

the amount and character of the services rendered, the labor, the time, and trouble involved, the character and importance of the litigation, the amount of money or value of the property affected, the professional skill and experience called for, and the standing of the attorney in his profession; to which may be added the general ability of the client to pay and the pecuniary benefit derived from the services.\textsuperscript{60}

Since the Code does not define the term "reasonable," any definition will have to be provided by common-law rules such as the one above. Unfortunately, Code decisions have shown little consistency in construing the reasonableness requirement.

An important, but as of yet unresolved question is whether and to what extent the objective criteria of reasonableness can be modified by specific provision in the security agreement. The agreement in \textit{General Electric Credit Corp. v. Castiglione}\textsuperscript{61} provided that the secured party would receive

as reasonable attorneys' fees twenty (20\%) percent of the rent then remaining unpaid or [sic] the fair market value of the Vehicle(s) at the time Lessor declared Lessee in default, whichever is greater, if such attorneys' fees are permitted by law, or if prohibited by law, such lesser sum as may be permitted.\textsuperscript{62}

Although the language of the agreement suggests that the parties were stipulating that twenty percent of the balance was a reasonable amount,\textsuperscript{63} the court refused to accept this possibility—resorting, instead, to a curious interpretation of fact and an inconsistent application of law.

The facts in \textit{Castiglione} indicate that the balance at the time of default amounted to $34,614.38, and therefore, attorneys' fees of $6,922.38 were deducted from the proceeds of resale as the greater amount, since the fair market value of the


\textsuperscript{60} Touchett v. E Z Paintr Corp., 14 Wis. 2d 479, 488, 111 N.W.2d 419, 423 (1961) (citing Estate of Huffman, 349 Pa. 59, 64, 36 A.2d 640, 643 (1944)). See also ABA Code of Professional Responsibility No. 2, EC2-18 and DR2-106(B) (1978).

\textsuperscript{61} 142 N.J. Super. 90, 360 A.2d 418 (1976).

\textsuperscript{62} Id. at ____, 360 A.2d at 425.

\textsuperscript{63} See note 18 supra.}
collateral, a truck, at the time of default was $16,000.00 and would have yielded only $3,200.00 in attorneys' fees. The court, in an action for a deficiency judgment against the debtor, based the determination of the deficiency on the truck's fair market value, which was considerably less than the amount due on the note, and awarded $57.00 to the secured party as still owing from the debtor. Stating that the amount involved or awarded in the litigation, as well as the results obtained should be considered in determining reasonableness, the court found that the fees resulting from a calculation of twenty percent of the unpaid balance or fair market value as the agreement provided, would be unconscionable. Instead, the court made a final award of twenty percent of the deficiency, or $11.40. However, the court was quick to point out that the award did not "reflect upon the quality of services rendered . . . ."65

The decision in Castiglione can perhaps best be explained as an extreme example of judicial picking and choosing to attain a desired result which reflects a general antipathy with respect to the awarding of attorneys' fees. This explanation of the result is readily demonstrated by the court's distortion of law and contract. While purporting to follow the objective test for determining reasonableness, the court, in fact, adopted some criteria (amount involved and result obtained) but yet found other factors (quality of the services) to be irrelevant. Importantly, had the court fully adhered to the objective common-law criteria mentioned earlier, the award would almost certainly have been far greater than $11.40. Notably, the factors selected were those which had a minimizing effect on the amount of the award; conversely, those rejected would have had a maximizing effect.

The court in Castiglione afforded a similar treatment to the security agreement, finding unconscionable those provisions which would have maximized the award, but yet retaining the 20% provision. Had the court rejected the contractual provision in its entirety the award would certainly have exceeded $11.40, since the court would then have been constrained to apply the objective criteria listed earlier. Moreover, the court in such a case would not have been able to pick some factors while reject-

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64. 142 N.J. Super. at ____, 360 A.2d at 425.
65. Id. at n.8.
ing others, since this selectivity was, to a large extent, attributable to the validity, and subject to the modification of at least a part of the contractual provision (i.e., the 20% clause). Also, had the court accepted the entire contractual provision the award would have been almost $7,000.00. Thus, it is apparent that had the court fully applied the objective criteria of reasonableness, rejected the entire contractual provision or accepted the entire provision the award would have greatly exceeded $11.40. The only other alternative, then, was to do exactly what the court in fact chose to do—adopt those facets of law and the contract which would minimize the award. Such judicial straining can only be explained by a general reluctance and disfavor to award attorneys' fees.

As a result of its piecemeal analysis, the court in Castiglione failed to resolve the issue concerning the relationship between the objective test of reasonableness and any specific provisions in the agreement. While it is arguable that any amount stipulated in the agreement is one which the parties considered to be reasonable, the better view, and one which is apparently supported by the language of 9-504(1)(a), is that the amount must be reasonable independent of any contractual provision. This does not mean, however, that the contract amount should be disregarded. Instead, courts should initially determine whether the contract amount is reasonable, giving deference to the principle of "freedom of contract" and standards set out in the agreement. Where this amount is found to be unreasonable, courts should invalidate the entire clause, rather than only certain "unconscionable" parts, and base the award on the objective common-law criteria listed earlier. Such a procedure would avoid, to some extent, the overt judicial manipulation and subjective interjection which was apparent in Castiglione.

In cases where the agreement merely provides for the recovery of "reasonable" attorneys' fees and does not specify any amount, the results have been somewhat startling in light of the objective test of reasonableness. For example, in John Deere Co. v. Catalano, relying on language in the security agreement calling for "'all expenses of collection by suit or otherwise, including reasonable attorney's fees,'" the court found that an award of $1500 in attorneys' fees based on a

67. Id. at —, 525 P.2d at 1154.
$1300 deficiency judgment was not unreasonable as a matter of law. An even more stunning example of the Catalano view is an award of 33 1/3 percent of the deficiency in attorneys’ fees where the security agreement provided for reasonable fees. These decisions cannot be reconciled with the proposition in Castiglione that the relationship between the amount due and the fees claimed is one of the factors to be considered in the reasonableness determination. Thus, even in cases where the agreement fails to specify a particular amount, the determination of allowable attorneys’ fees is likely to be confused by inconsistent applications of the objective common-law criteria of reasonableness.

A somewhat collateral issue is whether the secured party may recover attorneys’ fees for services rendered in prosecuting a counterclaim. In Whitson v. Yaffe Iron and Metal Corp., the Eighth Circuit Court of Appeals awarded attorneys’ fees to the secured party based on a counterclaim for repossession where the action was brought by the debtor. The court found “adequate support” for its holding in section 9-504. In A to Z Rentals, Inc. v. Wilson, however, the Tenth Circuit Court of Appeals reached an opposite result in a somewhat different context. The court refused to award fees to the secured party for defending against a counterclaim brought by the debtor for wrongful repossession and damages. When read in conjunction, these cases seem to stand for the proposition that a secured party can recover attorneys’ fees incurred in litigating a repossession claim but not for defending against a claim of wrongful repossession.

D. Practical Solutions

State law, apart from the Code, plays an important role in determining who can recover legal expenses and to what extent fees can be awarded. Subsection 9-504(1)(a) has only a small part in guiding the practitioner, especially in states where there are restrictions or other limits on recovery of fees. It is therefore imperative that the practitioner be conscious of any state law or rule concerning fees. This author has no all-inclusive solu-

68. Judd v. Heitman, 402 F. Supp. 929 (M.D. Tenn. 1975). However, the court did not indicate the actual amount of the fees. Id.
69. 385 F.2d 168 (8th Cir. 1967).
70. Id. at 170.
71. See note 6 supra.
72. 413 F.2d 899 (10th Cir. 1969).
tions to the problems presented other than to suggest that the security agreement be prudently drafted, so as to avoid shocking the consciences of jurists by requests for huge fees in routine cases involving small sums of money; flat percentages are particularly vulnerable to that type of attack. Perhaps the potential problem of unreasonableness can be alleviated by including criteria as to what considerations should be taken into account in determining the fee.

IV. Determination of the Indebtedness Under 9-504(1)(b)\textsuperscript{73}

In order to determine the respective positions of the parties as to a deficiency or a surplus, as well as the rights of junior lienholders under 9-504(1)(c), it is imperative to determine the exact amount of the indebtedness still unsatisfied. Acceleration clauses, and their effect on interest payments, play an important role in determining who owes what to whom and how much. Through the operation of an acceleration clause,\textsuperscript{74} the entire obligation, both principal and interest,\textsuperscript{75} becomes payable in full upon default or other stipulated occurrence or when the secured party deems himself insecure.\textsuperscript{76} The question arises, however, as to whether the secured party may include, upon acceleration, unaccrued interest or finance charges as part of the indebtedness. The Code is silent on this matter.\textsuperscript{77}

In the recent case of Credit Alliance Corp. v. Adams Construction Corp.,\textsuperscript{78} the Kentucky Supreme Court held that “to allow recovery of unaccrued interest or finance charges . . . would be clearly unconscionable.”\textsuperscript{79} The court stressed that one of the reasons for its holding was the fact that the debtor could receive a partial refund of the finance charges on prepayment. Unconscionability, however, is only one of several grounds the courts have used to prevent recovery of unaccrued interest;
others include lack of consideration,\textsuperscript{80} usurious interest rates,\textsuperscript{81} unenforceable penalty\textsuperscript{82} and unenforceable liquidated damages.\textsuperscript{83}

Accepting the general rule that unaccrued interest charges are not recoverable by the secured party,\textsuperscript{84} the question arises as to when such charges cease accruing. Several points in the default procedure could be utilized to measure the interest due upon acceleration; they include: (1) default,\textsuperscript{85} (2) repossession of the collateral, (3) sale of the collateral or (4) entry of a deficiency judgment. Two courts have suggested different points at which interest charges cease accruing: (1) when payment from resale is received,\textsuperscript{86} and (2) until the time the secured party accelerates the debt upon default.\textsuperscript{87} The better view seems to be that interest accrues until the secured party receives payment, based on the time-value concept of money. This view is also in accord with the general practice of charging interest on judgments until they are satisfied.\textsuperscript{88}

The solution to some of the problems posed in this section is to include an acceleration clause in every security agreement and insert terms to allow interest or finance charges to accrue until the principal, and interest to the date of payment, have been satisfied. In addition, it certainly would not be unwise to provide for accrual of both prejudgment and post-judgment interest on any deficiency, as well as a term providing for compounded interest.\textsuperscript{89} Also, to better equalize the position of the parties, a provision awarding interest to the debtor on a surplus may be desirable to make the agreement less susceptible to judicial invalidation.

\textsuperscript{80} Walker v. Temple Trust Co., 124 Tex. 575, 80 S.W.2d 935 (1935).
\textsuperscript{82} Block v. Ford Motor Credit Co., 286 A.2d 228 (D.C. App. 1972).
\textsuperscript{84} See text accompanying notes 84-89 infra.
\textsuperscript{85} Default is not defined in the Code; its definition is left to the agreement between the parties. HENSON, supra note 9, § 10-2 (1973).
\textsuperscript{87} Block v. Ford Motor Credit Co., 286 A.2d 228 (D.C. App. 1972).
\textsuperscript{88} White Motor Corp. v. Northland Ins. Co., 315 F. Supp. 689 (D.S.D. 1970). See also Wis. STAT. § 814.04 (1975) which adds seven percent interest to judgments until they are satisfied.
\textsuperscript{89} Compounded interest on the unpaid balance was permitted in Wilson Leasing Co. v. Seaway Pharmacal Corp., 53 Mich. App. 359, 220 N.W.2d 83 (1974).
V. APPLICATION OF THE PROCEEDS TO THE INDEBTEDNESS UNDER 9-504(1)(b)

In cases where a debtor owes more than one obligation to the secured party a possible question is whether proceeds attributable to one debt may be apportioned among the several obligations. In J.J. Fowler, Inc. v. Fulton National Bank, where a corporation and individual defaulted, the court allowed the secured party to apply the proceeds of resale of pledged securities to both the corporate and individual debt. This result is consistent with 9-504(1) because the collateral had been pledged under both security agreements and was presumably sold on account of both the individual and corporate debts. More importantly, however, it apparently would not have been inconsistent for the secured party to have applied the proceeds to only one of the debts and seek a judgment to satisfy the remaining obligation. This option may be of considerable importance under certain circumstances. For example, where one debtor is an individual and the other is the individual's corporation, and one of the debtors is insolvent, the secured party could apply the proceeds to the obligation of the insolvent party and obtain a deficiency judgment against the solvent debtor. Since the insolvent party will likely be discharged from all obligations, it would be fruitless for the secured party to obtain a deficiency judgment against this debtor. The option of allocating the proceeds between the two debts might, then, be of some importance to the secured party.

A final question to be discussed is whether the order in which the proceeds must be applied under 9-504(1)(a)-(c) can be altered by agreement. More specifically, can the parties agree that proceeds will be applied to the indebtedness before they are applied to expenses? The Georgia Court of Appeals has held that a security agreement stating that "any balance of such proceeds may be applied . . . in such order of applica-

90. See also W. Davenport & D. Murray, Secured Transactions § 6.05(b)(5) (1978) and note 6 supra.
92. However, when multiple security agreements are executed to cover individual lots or units of collateral, and the collateral is sold as a single unit, the value of the proceeds should be proportioned according to the value of each security agreement, and in absence of agreement to the contrary, the secured party has no discretion as to the application. Wilson Leasing Co. v. Seaway Pharmacal Corp., 53 Mich. App. 359, 220 N.W.2d 83 (1974).
tion, as the holder may from time to time elect' " was a waiver of the requirements of subsection (1) as to the order specified in that provision for the application of the proceeds. The decision was based on the application of subsection 1-102(3) to the language of subsection 9-504(1), which does not indicate that it may not be varied by the parties. By applying the precept that "freedom of contract is a principle of the code," the Georgia court cured any possible inconsistencies the decision may have had concerning the question of whether the order of application of the proceeds could be varied by agreement. In the absence of agreement, however, the terms of subsection 9-504(1) are mandatory.

In order to avoid disputes of this nature it would be advisable for secured parties to include provisions in their security agreements to allow them to apply the proceeds of resale against any obligation of the debtor or even to waive the order of application requirements of (1) altogether. This should be made clear so the secured party can apply the proceeds to any of the debtor's obligations, even in situations where different collateral is pledged under each agreement.

VI. CONCLUSION

As innocuous as U.C.C. § 9-504(1) appears on its face, it can present problems for drafters of security agreements and practitioners of commercial law. To recapitulate, the problems posed by this Code provision include: (1) What types, and to what extent are expenses of repossession recoverable? (2) What are the limitations on the recovery of attorneys' fees? (3) How is the amount of indebtedness affected by acceleration of interest charges? and (4) How do multiple obligations of one debtor affect the application of proceeds from the disposition of the collateral? As has been demonstrated, the answers to many of these questions are less than clear.

The suggested means of resolving the problems posed throughout this comment are by no means exhaustive, nor are

94. See note 39 supra.
95. U.C.C. § 1-102, Comment 2.
97. See the discussion of this problem in note 92 supra.
they a panacea for all that may beset the practitioner under subsection 9-504(1), but it is hoped that these suggestions will be helpful in alerting courts and attorneys to some of the problems which may arise under this Code subsection. There is one lesson, however, that seems to ring clear, and that is that “boilerplate” provisions should be avoided; innovative drafting, and drafting agreements *ab initio* in large transactions, will hopefully prevent many clients and Code litigants from encountering some of the many pitfalls inherent in subsection 9-504(1).

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