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Exploring the Creditor's Duty of Reasonable Care Under UCC Article 9 Amidst Recession and Revision

Prior to adoption of the Uniform Commercial Code (UCC), creditors that repossessed collateral had inherent duties of preservation, good faith, and reasonableness in disposal and sale.[1] Repossession arises frequently in the bankruptcy context where the

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[1] *See* Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 190–91 (2000) (examining the duties of repayment under common law principles in a personal property context); *FDIC Can Be*

debtor has defaulted on a security agreement obligation and the creditor exercises his right to take the collateral back for his own use or for sale.[2] Sections 9-207(a) and 9-610(a)–(b), which have now been adopted in all fifty states,[3] prescribe the creditor's duties in dealing with collateral in his possession for preservation and reasonable disposal.[4] Though both UCC provisions seem relatively straightforward, the reasonableness standard implicit to each creates inconsistencies in federal and state case law.[5] Moreover, the relative

Sued on a Contract Claim; Did Not Breach Duties in Disposing of Stock, BANK BAILOUT LITIG. NEWS, Oct. 11, 1999 ("The UCC codified the common law that indicated duties and relations, such as the duty of commercial reasonableness, are created between parties when personal property is pledged as collateral on a loan, thereby becoming part of the contract. Any remedy sought by a party would be a contract claim.").

[2] *See* Barkley Clark, *Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default*, 4 N.C. BANKING INST. 129, 136–39 (2000) (outlining the process through which creditors can achieve perfection and properly repossess collateral upon default); *see also* Lawrence R. Ahern, III, *"Workouts" Under Revised Article 9: A Review of Changes and Proposal for Study*, 9 AM. BANKR. INST. L. REV. 115, 116–18 (2001) (stressing the impact of Article 9 revisions on bankruptcy proceedings).

[3] John Lucas, Comment, *The Article 9 Buyer's Seller Rule & the Justification for Its Harsh Effects*, 83 OR. L. REV. 289, 289 (2004) (asserting that all fifty states adopted the Article 9 revisions in July 2001).

[4] Section 9-207, "Rights and Duties of Secured Party Having Possession or Control of Collateral," states that:

> (a) [Duty of care when secured party in possession.] Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

U.C.C. § 9-207(a) (2005). Section 9-610, "Disposition of Collateral after Default," states that:

> (a) [Disposition after default.] After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.
>
> (b) [Commercially reasonable disposition.] Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

U.C.C. § 9-610(a)–(b) (2005).

[5] Margit Livingston, *Survey of Cases Decided Under Revised Article 9: There's Not Much New Under the Sun*, 2 DEPAUL BUS. & COM. L.J. 47, 78–79, 92–95 (2003) (exploring the implications of sections 9-207 and 9-610 in case law articulating the duties of a creditor in possession of collateral).

sparseness of relevant cases further exacerbates the discrepancies among jurisdictions.[6]

The following analysis will explore a secured party's duties under sections 9-207(a) and 9-610 individually and in tandem to reveal that, despite the clarity of the statute on its face, variances abound.[7] The differences in application of these provisions of the UCC create uncertainty in the marketplace, which is detrimental during times of economic decline.[8] Given the higher incidences of default in times of economic recession, valuation becomes a key determinant of the outcome for the parties involved.[9] Furthermore, unique collateral becomes increasingly difficult to value in a slow economy because of reduced demand.[10] Accordingly, collateral with an established market is easier to value.[11] This facilitation in collateral valuation

[6] *See infra* Part II (analyzing jurisdictional inconsistencies); *see also* Livingston, *supra* note 5, at 48-49 (chronicling the absence of an impact of leading Article 9 cases decided after the 2001 revisions).

[7] *See infra* Part II (identifying the patterns and disparate applications of sections 9-207 and 9-610 in state and federal case law).

[8] *See, e.g.*, *Hotels' Debt-Service Coverage, Value to Decline in 2009*, MORTGAGE BANKING, Mar. 2009, at 89, 89–90 (examining the decline in the hospitality industry amidst a larger economic decline); Hugh Larratt-Smith & Jim Gagan, *The Bicycle Theory of Management: Things Sure Get Wobbly When the Bicycle Slows Down*, SECURED LENDER, Mar. 2009, at 25, 26–27 (illustrating the impact of the economic decline through the record decreases in the commodities market); Leonard I. Nakamura, *Lessons on Lending and Borrowing in Hard Times*, BUS. REV., July/Aug. 1991, at 13, 16 (recounting the negative impact on valuation of unique collateral, such as oil rigs, during the recession of the late 1980s).

[9] *See* Keith Sharfman, *Valuation Averaging: A New Procedure for Resolving Valuation Disputes*, 88 MINN. L. REV. 357, 372–77 (2003) (explaining the intricacies of new valuation techniques relevant to bankruptcy proceedings); *see also* Marjorie Chertok & Warren E. Agin, *Restart.com: Identifying, Securing and Maximizing the Liquidation Value of Cyber-Assets in Bankruptcy Proceedings*, 8 AM. BANKR. INST. L. REV. 255, 263–65 (2000) (emphasizing the importance of consistent valuation in assessing intangible assets such as intellectual property).

[10] *See* Lamp Fair, Inc. v. Perez-Ortiz, 888 F.2d 173, 174–75 (1st Cir. 1989) (describing a security agreement in which light fixture inventory served as collateral); Ray v. City Bank & Trust Co., 358 F. Supp. 630, 634 (S.D. Ohio 1973) (noting the various descriptions of and narrow uses for hydraulic raising rams pledged as collateral); *see also* Chertok & Agin, *supra* note 9 (noting the difficulties in valuing intangible assets such as domain names and the impact of ownership status); Patrick Hosmann, Jr., *Market Viewpoint: Patrick Hosmann, Jr., Vice President, Southern Cross Aviation, LLC*, BUS. & COM. AVIATION, Mar. 2009, at 88 (explaining the plight of small business owners using planes as collateral in a deep recession); Nakamura, *supra* note 8 (observing the difficulty in valuing unique assets tied to a volatile sector, such as oil drilling equipment).

[11] *See* First State Bank v. Hallett, 722 S.W.2d 555, 555–56 (Ark. 1987) (outlining a default leading to the repossession of a debtor's truck as collateral to secure a loan);

leads to a more straightforward assessment of the adequacy of the secured party's preservation and disposal of collateral.[12] Additionally, this Article will investigate the effect of turbulence in the domestic and global markets on creditors' duties of preservation and reasonable sale or disposal under sections 9-207(a) and 9-610.[13]

Reduced expectations as to valuation of an asset as a result of a decline in the larger economic climate are prevalent during a deep recession, such as the current global recession.[14] This analysis takes a holistic approach to evaluating relevant federal and state case law involving disputes as to a potential breach of a secured party's duty under section 9-207(a), section 9-610, or both.[15] Few significant differences exist between state and federal treatment of these issues because of the uniform nature of commercial law and exclusive federal jurisdiction in bankruptcy cases.[16] Thus, comparison and discussion of both lines of case law are appropriate. Patterns in the case law demonstrate that the outcomes of creditor-repossession duty cases are driven both by the parties' past dealings and by the underlying economic environment.[17]

Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 494–95 (Iowa 1977) (discussing the valuation of automobiles pledged as collateral and subsequently repossessed as part of a security agreement); Camden Nat'l Bank v. St. Clair, 309 A.2d 329, 330–31 (Me. 1973) (describing the private sale of automobile collateral and the remaining deficiency on a promissory note); Barkley Clark, *Secured Transactions*, 42 BUS. LAW. 1333, 1393–94 (1987) (noting that collateral sold on "more routinized" secondary markets has a more readily ascertainable value).

12 *See* Clark, *supra* note 11 (noting the relationship between higher collateral sales volume and ease of valuation).

13 *See infra* Part II.A–B (asserting that the cyclical nature of a macroeconomy creates a ripple effect in applying Article 9).

14 *See, e.g.*, Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 734 (2009) (arguing that bankruptcy law must become "transformative" amidst "The Great Recession of 2008–2009"); Anna Gelpern, *Financial Crisis Containment*, 41 CONN. L. REV. 1051, 1056 (2009) (asserting that traditional valuation tools become "inadequate" during times of deep economic decline); Larratt-Smith & Gagan, *supra* note 8, at 26–27 (illustrating the weakness of the global economy based on commodities futures and the availability of capital).

15 *See infra* Part II (surveying the current case law and explaining the effect of macroeconomic conditions on collateral valuation).

16 *See infra* Part II (comparing state and federal treatment of section 9-610 and section 9-207 issues and finding few substantive differences); *see also* Lucas, *supra* note 3 (stating that the UCC's impetus was "simplifying, clarifying, and modernizing the law in order to facilitate commercial transactions").

17 *See infra* Part II (linking economic conditions to courts' application of sections 9-610 and 9-207).

As in many aspects of the commercial marketplace, economic turbulence fundamentally shapes legal outcomes even when applying a transactional statute such as the UCC, which was designed to increase predictability and uniformity to reduce unnecessary business risk.[18] These economic cycles, though predictable in hindsight, do little to ameliorate the valuation ambiguities that plague cases involving the sale or preservation of unique collateral.[19] This Article concludes with recommendations for practitioners in this area based on case law trends and the impact on the macroeconomic environment.[20]

I
INTERPRETING ARTICLE 9 PROVISIONS AMIDST REVISION AND RECESSION

The 2001 revisions to the UCC were intended to create uniformity among jurisdictions and to eliminate the uncertainty around definitions such as "security interest," which had plagued the UCC since 1972.[21] The substantive effect of the 2001 Article 9 revisions was initially thought to be broad, yet the impact on commercial cases has been minimal.[22] Moreover, as a result of the revisions, myriad sections of the UCC were renumbered, including section 9-610,

[18] *See, e.g.*, Valerie Combs, *The Law of Intermediated Securities: U.C.C. Versus UNIDROIT*, 58 ALA. L. REV. 399, 403–04 (2006) (discussing the risk minimization impetus behind the UCC and its amendments); Christian A. Johnson, *Derivatives and Rehypothecation Failure: It's 3:00 P.M., Do You Know Where Your Collateral Is?*, 39 ARIZ. L. REV. 949, 972–74 (1997) (identifying the role of Revised Article 9 provisions, including section 9-207, in minimizing lender risk); Aaron J. Wright, Note, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183, 2203–04 (2005) (arguing that risk minimization persists "even in the face of the economy's cyclical booms and depressions").

[19] *See generally* Larratt-Smith & Gagan, *supra* note 8 (observing the cyclical yet unpredictable nature of economic recession in a global economy); Wright, *supra* note 18, at 2202–03 (discussing a heuristic economic theory).

[20] *See infra* Conclusion (providing guidelines for practitioners wrestling with valuation issues amidst turbulent economic conditions).

[21] Livingston, *supra* note 5, at 47–49 (stating that uniformity and predictability in defining and perfecting the security interest were the main impetuses behind the Article 9 revisions).

[22] *See generally* Clark, *supra* note 2 (analyzing the impact of the Revised Article 9 on case law); Livingston, *supra* note 5 (outlining the UCC revision process and its subsequent effect on commercial cases).

which was formerly section 9-504.[23] This section number change had little more than a facial impact on the section, as did many other numbering changes in 2001.[24] Thus, the pre-2001 case law on section 9-504 remains relevant to an analysis of section 9-610.[25] Generally, the case law on sections 9-207 and 9-610 is sparse, which is a reflection of the mechanical, transactional nature of these provisions.[26] This Article attempts to identify the universe of relevant state and federal cases on the interplay between sections 9-207 and 9-610 to analyze the effect of economic conditions on jurisprudence in the area of secured party duties upon default in secured transactions.[27]

A. Secured Party Collateral Preservation Duties: Section 9-207

Section 9-207 is a central provision of the creditor's self-help remedies upon default and generally requires the post-repossession secured party to take "reasonable care" of the asset to preserve its value.[28] This task becomes increasingly difficult in cases of unique collateral, such as large specialized machinery, or collateral that is difficult to store or preserve because of its physical characteristics.[29] Moreover, when financial assets are pledged as collateral and trigger section 9-207 as a result of repossession, the secured party's duties become increasingly complex and ambiguous.[30]

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[23] *See* Livingston, *supra* note 5, at 94–95 (summarizing the changes to section 9-504 in the Revised Article 9). The author notes that the impact of the revisions to Article 9 were subtle but did not constitute a "major 'sea of change' in the law." *Id.* at 97.

[24] *See id.* at 84–85 (referring to commercial reasonableness under the former section 9-504 interchangeably with the revised provisions).

[25] *See id.* at 94–95 (noting that cases decided before the 2001 revisions tended to employ slightly different criteria for assessing commercial reasonableness under the former section 9-504 (revised section 9-610)). Despite this difference in the emphasis on sales price and procedure, both sets of cases applied the "commercial reasonableness" standard to situations involving a secured party's allegation of improper foreclosure sales. *Id.*

[26] *See* Clark, *supra* note 2, at 130–31 (noting the "predictable framework of the UCC" in integrating lien statutes into the commercial securitization process).

[27] *See infra* Part II (connecting changes in case law to changes in the overall economic environment).

[28] U.C.C. § 9-207(a) (2005) (prescribing the duty of reasonable care for a creditor in possession of collateral upon default); *see also* Clark, *supra* note 2, at 170–71 (explaining repossession as a creditor self-help remedy under Article 9).

[29] *See* Ray v. City Bank & Trust Co., 358 F. Supp. 630, 634 (S.D. Ohio 1973) (identifying hydraulic oil drilling machinery as pledged collateral).

[30] *See* Chain Tech., Inc. v. Fleet Nat'l Bank, 293 B.R. 299, 302–04 (Bankr. D. Conn. 2003) (explaining a complex consignment agreement between a debtor, a gold refiner, and creditors); *In re* MJK Clearing, Inc., 286 B.R. 109, 115–16 (Bankr. D. Minn. 2002)

The classic case of a creditor's breach of section 9-207 duties involves physical neglect of collateral after a secured party has possessed it upon default.[31] It is important to note, however, that the duty of preservation is not synonymous with any obligation on the part of the secured party to act in the debtor's best interest while the secured party is in possession of the collateral.[32] The interplay between a secured party's duty to preserve financial assets in his possession can have a direct bearing on assessing risk in international business transactions, where business decisions become increasingly difficult to analyze when a third party assumes control of the collateral.[33] Additionally, though a secured party's breach of the duty of preservation may be apparent, the damages may become difficult to quantify during turbulent economic conditions.[34]

Cases involving a section 9-207 dispute often arise out of sheer administrative error that easily could have been prevented had the secured party engaged in adequate oversight of the repossession process.[35] *Ray v. City Bank & Trust Co.*[36] provides a poignant

(describing a security agreement involving loan securities and additional liquid assets that declined in value after the 2001 stock market decline); Segovia v. Equities First Holdings, LLC, No. 06C-09-149-JRS, 2008 WL 2251218, at *5–8 (Del. Super. Ct. May 30, 2008) (outlining a pledged stock agreement serving as collateral and the effect of a subsequent sale on a security agreement); Barclays Bank v. Heady Electric Co., 571 N.Y.S.2d 650, 652 (N.Y. App. Div. 1991) (describing the creditor liability arising out of the sale of an electric company's equipment and its additional assets).

31 *See, e.g.*, United States v. Baus, 834 F.2d 1114, 1116 (1st Cir. 1987) (noting that a creditor in possession of collateral failed to prevent vandalism and theft); *Ray*, 358 F. Supp. at 638 (finding "ample evidence" of a wrongful attachment and a breach of creditor duties with respect to repossessed machinery).

32 Harris v. Key Bank Nat'l Ass'n, 193 F. Supp. 2d 707, 716–17 (W.D.N.Y. 2002) (finding that the secured party bank was not obligated to act in the debtor's best interest in preserving the value of the promissory note pledged as collateral and reasoning that the bank did not have a primary fiduciary relationship to the debtor because "it would be absurd to think that Key Bank could never take its own interests into account").

33 *See* Am. Express Int'l Banking Corp. v. Sabet, 512 F. Supp. 463, 464–65, 468 (S.D.N.Y. 1980) (exploring the creditor's defense based on expropriation after the Iranian government expropriated the debtor corporation's assets as part of the 1979 revolution in Iran, which in part precipitated the creditor's claims).

34 *See* Stead v. United States, 419 F.3d 944, 947–48 (9th Cir. 2005) (explaining that the IRS payment timing rules were relevant to the lost record of a payment against a tax levy); *Baus*, 834 F.2d at 1119–20 (recounting situations where, though damage determination was final, claims arising out of improper foreclosure proceedings remained at issue); *Segovia*, 2008 WL 2251218, at *17–18 (analyzing the damages calculation based on the decreased value of the pledged stock and the timing of default).

35 *See, e.g.*, *Stead*, 419 F.3d at 946 (summarizing the bank and the debtors' lack of adequate records of the transfer of funds to the IRS to satisfy a tax levy); *Baus*, 834 F.2d at

example of a lack of secured party supervision, wherein the Sheriff's Office noticed and attached the wrong piece of machinery.[37] This mistake went undiscovered for a year, during which time the machinery was vandalized and eventually sold for scrap at a greatly diminished value.[38] Not surprisingly, the *Ray* court found that the secured party had utterly failed "to act in a commercially reasonable manner."[39]

Similarly, in *United States v. Baus*,[40] the secured party neglected to take proper care of collateral under section 9-207 by leaving the collateral in an unsecured warehouse for nearly two years.[41] In contrast to *Ray*, the scope of the repossession was proper in *Baus*, yet the Economic Development Administration, the government agency that guaranteed the loan, purportedly breached its obligation to preserve the value of the collateral in its possession.[42] The collateral in *Baus* consisted of the debtor's plant, machinery, equipment, and inventory located in Puerto Rico.[43] The theft and vandalism to the collateral in the debtor's plant that occurred during the ensuing delay in the sale of the remaining inventory led to an approximate eighty-eight percent decline in the value of the debtor's inventory.[44] The

1120 (asserting that an administrative delay in foreclosing on property exacerbated the theft and vandalism damages to collateral); *Ray*, 358 F. Supp. at 638 (noting that the sheriff's error in improperly attaching the collateral was not pledged under the security agreement).

36 *Ray*, 358 F. Supp. 630.

37 *Id.* at 638 (asserting that the attachment order was "demonstrably overbroad" and led to the wrongful attachment of the plaintiff's heavy machinery and concluding that the "[i]mplied malice" requirement of wrongful attachment was met as a result of the bank's "willful failure" to release the improperly attached collateral).

38 *Id.* at 641–42 (assessing the liability of the bank and the sheriff as a result of the wrongful attachment). The court was clear in its admonition of the creditor bank's conduct: "The conduct of the bank cannot be condoned. Especially is this so with regard to its refusal to amend the attachment so as to exclude any reference to the Ideco rig, and its failure to take any action, for over a year, to sell or dispose of the property." *Id.* at 642.

39 *Id.* at 642 (finding the bank liable for a breach of common law duties and obligations under section 9-207).

40 *Baus*, 834 F.2d 1114.

41 *Id.* at 1116.

42 *Id.* at 1125–27 (summarizing the basis for the debtor's allegations of breach of the secured party's duties arising under sections 9-504, 9-207, 9-307, and 9-507 and stating that these claims arose out of the delay in foreclosing on the debtor's right of redemption upon a final sale of the collateral).

43 *Id.* at 1116.

44 *Id.* at 1116–17 (explaining that $100,000 of the debtor's inventory netted just $12,131 after the expenses of the sale were taken into account following the delay).

First Circuit in *Baus* found it "likely" that the government guarantor had breached its duties under section 9-207 and several other provisions with respect to the collateral.[45] However, the First Circuit reversed and remanded the case to the district court for a more complete determination of the validity of the debtor's allegations that the secured party guarantor materially breached its duty of commercial reasonableness.[46] *Baus* and *Ray* represent two common factual scenarios that arise when a debtor becomes insolvent upon default or enters bankruptcy proceedings.[47] Though section 9-207 defines creditor duties in detail, other central self-help sections such as section 9-610 further define the secured party's duties with respect to collateral.[48] Market conditions and valuation take on paramount importance in disposal and liquidation.[49]

B. Exploring the Commercial Reasonableness Standard Under Section 9-610

Section 9-610 provides a detailed procedure for a secured party or creditor in possession of collateral that seeks to sell the collateral.[50] Generally, a secured party will auction or sell the collateral in an attempt to recoup all or a portion of his or her investment.[51] During times of financial downturn such as the current "Great Recession," such remedies become more widely employed as a result of an increased volume in debtor default.[52] Courts have taken four

45 *Id.* at 1127–28.

46 *Id.*

47 *See infra* Part II.C (discussing the close interplay between the Bankruptcy Code and Article 9).

48 *See supra* note 4 (providing the full text of the collateral sale process under section 9-610).

49 *See* Wright, *supra* note 18 (observing the effects of economic conditions on Article 9 transactions); *see also supra* note 9 and accompanying text (discussing the importance of valuation in complex transactions including bankruptcy workouts).

50 *See supra* note 4 and accompanying text (quoting U.C.C. § 9-610).

51 *See* Clark, *supra* note 2, at 165–69 (discussing remedies available to a secured party upon debtor default).

52 *See* Bussel & Klee, *supra* note 14, at 734–35 (emphasizing the need for legislative action to stem the effects of the 2008–2009 recession); Jose Gabilondo, *Leveraged Liquidity: Bear Raids and Junk Loans in the New Credit Market*, 34 IOWA J. CORP. L. 447, 504 (2009) (observing the increase in corporate defaults following the recession beginning in mid-2007 coinciding with a "general worsening of the corporate sector"); Steven L. Schwarcz & Gregory M. Sergi, *Bond Defaults and the Dilemma of the Indenture Trustee*, 59 ALA. L. REV. 1037, 1039-40 (2008) (summarizing global trends in default rates in

differing approaches to section 9-610, all of which are based upon the difficult-to-define notion of commercial reasonableness.[53] This reasonableness standard is highly dependent on the facts of a given transaction as well as the economic climate surrounding the transaction.[54]

The sale of unique collateral adds another level of complexity to assessing potential debtor damages based on a creditor's violation of section 9-610.[55] First, the secured party creditor often lacks the market expertise needed to sell unique collateral for an amount that the debtor would consider fair or reasonable.[56] Second, inherently unique collateral often lacks an established market and therefore does not have a value that is precisely ascertainable through objective outside measures.[57] In contrast, cases involving the repossession and

bondholder context); MOODY'S INVESTORS SERV., SPECIAL COMMENT: CORPORATE DEFAULT AND RECOVERY RATES, 1920–2006, at 4 (Feb. 2007), *available at* http://www.moodys.com/cust/content/Content.ashx?source=StaticContent/Free%20Pages/Regulatory%20Affairs/Documents/default_and_recovery_rates_02_07.pdf (predicting potential tenfold increase in cumulative default rates should recession continue to worsen).

[53] *See* Benjamin N. Henszey, *A Secured Creditor's Right to Collect a Deficiency Judgment Under UCC Section 9-504: A Need to Remedy the Impasse*, 31 BUS. LAW. 2025, 2026–31 (1976) (outlining four approaches courts have taken toward creditors attempting to recoup deficiencies, including (1) entirely barring the deficiency; (2) allowing the deficiency but requiring the debtor to prove its loss; (3) presuming that, at a minimum, the collateral is worth the amount owed; and (4) making the deficiency subject to set-off under section 9-507(1)); *see also* discussion *infra* Part II (examining the evolving notions of commercial reasonableness amidst economic decline).

[54] *See infra* note 55 (identifying cases illustrative of the fact-dependent nature of Article 9 cases).

[55] *See* Segovia v. Equities First Holdings, LLC, No. 06C-09-149-JRS, 2008 WL 2251218, at *2–3 (Del. Super. Ct. May 30, 2008) (detailing a complex pledged stock agreement as collateral and discussing the sale process); Christie's Inc. v. Davis, 247 F. Supp. 2d 414, 417–18 (S.D.N.Y. 2002) (explaining a secured financing arrangement where debtors pledged over $10.3 million in fine European artwork); Poti Holding Co., v. Piggott, 444 N.E.2d 1311, 1312 (Mass. App. Ct. 1983) (summarizing the defendant debtor's argument that there was no readily ascertainable fair market value for the insulating machinery serving as collateral). In *Piggott*, the court ultimately concluded that even though the collateral sale was not commercially reasonable, the secured party creditor sold the collateral at fair market value. *Piggott*, 444 N.E.2d at 1314.

[56] *See Davis*, 247 F. Supp. 2d at 420–21 (discussing the defendant debtors' allegations that the creditor undervalued fine decorative art prior to sale); *Piggott*, 444 N.E.2d at 1312 (identifying sources for determining fair market value, such as admissions of fact and party testimony).

[57] *See Davis*, 247 F. Supp. 2d at 420 (relying on deficiency owed on note rather than value of artwork collateral to establish outstanding debtor liability); Chem. Bank v. Haseotes, No. 93 Civ. 2846, 1994 WL 30476, at *1–2 (S.D.N.Y. Feb. 1, 1994) (summarizing the facts surrounding the foreclosure sale of ocean tankers pledged as collateral); Whitney Nat'l Bank v. Air Ambulance, 516 F. Supp. 2d 802, 809–10 (S.D.

sale of motor vehicles rarely involve disputes as to whether the collateral sale price was reasonable because of the availability of reliable sale benchmarks.[58] However, the bulk of case law defining secured party duties under section 9-610 involves motor vehicles as collateral.[59]

Although a prudent secured party should ensure full compliance with section 9-610 to bolster a claim that he or she met the section's requirements, often a secured party located far from the location of the collateral appoints a third party to carry out the sale.[60] This approach, though commercially efficient, can lead to increased liability for the secured party, particularly in cases where the creditor relies on local officials in foreign jurisdictions to seize the assets and conduct the auction.[61] One case involving the sale of four ocean tankers, *Chemical Bank v. Haseotes*,[62] exemplifies this problem.[63] In

Tex. 2007) (explaining the defendant debtor's affirmative defense that sale of aircraft pledged as collateral was not commercially reasonable).

[58] *See, e.g.*, Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 494–95 (Iowa 1977) (noting that the sale price of vehicles pledged as collateral was not in dispute on appeal); Consumer Fin. Corp. v. Reams, 158 S.W.3d 792, 795 (Mo. Ct. App. 2005) (explaining that the only issue on appeal was the reasonableness of notice of sale of the automobile rather than the sale price); Tex Star Motors, Inc. v. Regal Fin. Co., 246 S.W.3d 745, 751–52 (Tex. App. 2008) (expounding on the basis for a creditor's commercial reasonableness in foreclosing on automobile inventory based on industry sales practices). In *Betts*, the court relied on an Iowa statute adopting section 9-610 (formerly section 9-504) in making its determination as to the commercial reasonableness of the creditor's foreclosure of the debtor's right of redemption through sale. *Betts*, 251 N.W.2d at 496 (citing IOWA CODE § 554.9504(3)).

[59] *See, e.g.*, First State Bank v. Hallett, 722 S.W.2d 555 (Ark. 1987); Hicklin v. Onyx Acceptance Corp., 970 A.2d 244 (Del. 2009); *Betts*, 251 N.W.2d 492; Camden Nat'l Bank v. St. Clair, 309 A.2d 329 (Me. 1973); Wilkerson Motor Co. v. Johnson, 580 P.2d 505 (Okla. 1978).

[60] *See Whitney Nat'l Bank*, 516 F. Supp. 2d at 809–10 (describing the process wherein a creditor advertised the sale of aircraft collateral in trade publications and responded to inquiries with bid packages); *see also Piggott*, 444 N.E.2d at 1312–13 (laying out factors relevant to the commercial reasonableness determination regarding an auctioneer's sale of equipment collateral). The creditor in *Piggott*, like the creditor in *Whitney National Bank*, relied on the process of advertising in trade journals and responding to bids via correspondence where a live public auction of large unwieldy collateral was not possible. *Piggott*, 444 N.E.2d at 1312–13.

[61] *Haseotes*, 1994 WL 30476, at *2 (outlining a process requiring a creditor to rely on the South African Court Registrar to conduct a foreclosure sale on ocean tankers).

[62] *Id.*

[63] *Id.* at *4 (holding that the plaintiff creditor met its burden in showing commercial reasonableness despite the debtor's contentions that the notice of and venue for the sale were insufficient).

Haseotes, the sale of vessels pledged as collateral was alleged to be a per se violation of local mortgage laws, section 9-610, and the security agreement between the parties.[64] Given the mobility of the ocean vessels that were pledged as collateral, this provision of the security agreement exposed the creditor bank to increased legal and business risk.[65] However, the U.S. District Court for the Southern District of New York focused on the market value of the collateral and the creditor bank's thorough process in advertising and conducting the sale in a foreign jurisdiction in finding that the creditor met its burden to demonstrate commercial reasonableness under section 9-610.[66] Thus, despite the variable market conditions and the remote location of the collateral, the creditor bank was able to prevail on its motion to dismiss.[67]

Similarly, in *Whitney National Bank v. Air Ambulance*,[68] the secured party found itself in a complex situation where, after the debtor had defaulted on its loan agreement, the debtor committed additional violations of the security agreement by failing to maintain Federal Aviation Administration airworthiness certificates on the aircraft pledged as collateral.[69] The debtor thus impaired the value of the collateral by its own conduct; the creditor, Whitney, responded in kind by notifying the debtor of its intention to conduct a private sale of the collateral under the security agreement.[70] The creditor bank subsequently exercised its self-help right of foreclosure and hired an auctioneer to conduct the sale of the aircraft.[71] The auctioneer advertised the sale in four aviation trade journals and sent out over 500 e-mails and 100 bid packages to potential buyers.[72] The auction yielded twenty-two bids for the various aircraft, yet the debtor's deficiency remained at over $4.8 million after the sales had taken place.[73] The U.S. District Court for the Southern District of Texas

64 *See id.* at *3–4.

65 *Id.* at *2 (describing the Greek and South African courts' involvement in execution of a foreclosure sale).

66 *Id.* at *4 (concluding that the plaintiff bank met its burden to establish commercial reasonableness in the disposal and sale of the collateral upon default).

67 *Id.* at *5 (finding for the plaintiff bank on all counts).

68 Whitney Nat'l Bank v. Air Ambulance, 516 F. Supp. 2d 802 (S.D. Tex. 2007).

69 *Id.* at 806–08.

70 *Id.* at 809.

71 *Id.* at 809–10.

72 *Id.* at 809.

73 *Id.* at 809–10.

relied on the robustness of the auction process to grant Whitney's motion for partial summary judgment on the remaining deficiency.[74] *Haseotes* and *Whitney National Bank* therefore illustrate the importance of engaging in a robust auction process for unique collateral under section 9-610 to minimize risk in light of extenuating circumstances and the potential for market instability.[75]

II
ANALYSIS OF CASE LAW

Given that Article 9 was intended to provide self-help remedies for secured parties upon the debtor's breach of the security agreement, the absence of a voluminous body of case law is not surprising.[76] Moreover, cases interpreting sections 9-207 and 9-610 are heavily dependent on the facts of each transaction.[77] Most holdings are driven by the nature of the collateral and the secured party's behavior in comparison to industry standard practices.[78] In the case of unique collateral such as ocean tankers, airplanes, and oil rigs, industry practices remain difficult to define because of the limited size of the market for such items.[79] Yet, courts must explore these areas of the relevant industry in assessing whether the secured parties properly preserved collateral and behaved with commercial reasonableness in

[74] *Id.* at 817.

[75] *See supra* notes 60–74 and accompanying text (analyzing the implications of a secured party's conduct on section 9-610 liability).

[76] *See* Clark, *supra* note 2, at 170–71 (exploring the self-help remedies available to secured parties under Article 9); Livingston, *supra* note 5, at 61 (observing that "courts have decided just a few cases under Revised Article 9 that deal directly with attachment and perfection issues").

[77] *See supra* notes 55–57 and accompanying text (detailing cases where the possession and sale of unique collateral posed challenges for assessing the secured party's duty of commercial reasonableness).

[78] *See, e.g.*, Chem. Bank v. Haseotes, No. 93 Civ. 2846, 1994 WL 30476, at *4 (S.D.N.Y. Feb. 1, 1994) (concluding that the secured party conformed with acceptable industry practice in carrying out the auction and sale process); Tex Star Motors, Inc. v. Regal Fin. Co., 246 S.W.3d 745, 751–52 (Tex. App. 2008) (relying on automobile sales industry practices to assess the commercial reasonableness of the secured party's conduct); *Whitney Nat'l Bank*, 516 F. Supp. 2d at 817 (comparing the secured party's conduct to industry practices in selling the aircraft collateral).

[79] *See Haseotes*, 1994 WL 30476, at *2 (summarizing the facts leading up to the default on a loan secured by ocean tankers); Ray v. City Bank & Trust Co., 358 F. Supp. 630, 634 (S.D. Ohio 1973) (describing the oil-drilling machinery attached as collateral); *Whitney Nat'l Bank*, 516 F. Supp. 2d at 806–08 (explaining that the security agreement involved aircraft pledged as collateral).

selling collateral.[80] The economic downturn adds another dimension to identifying patterns and trends in the case law through its effect on the valuation of collateral.[81] However, courts are generally averse to making explicit references to economic factors in their reasoning beyond well-established legal rules and guidelines for establishing damages.[82] The sections that follow support this trend and illustrate that the characteristics of the collateral, rather than external economic forces, drive determinations of commercial reasonableness under sections 9-207 and 9-610.[83]

A. Analyzing Section 9-207 Cases in Light of Economic Factors and Industry Practice

For the purposes of this analysis, we have separated the section 9-207 case law into two groups based on the date of decision: cases decided prior to 2001 and cases decided after 2001.[84] This grouping

[80] *See supra* note 78 and accompanying text (identifying cases where courts delved into industry practice to assess commercial reasonableness).

[81] *See supra* notes 8–10, 14 and accompanying text (examining the effect of economic recession in valuing collateral).

[82] *See* United States v. Baus, 834 F.2d 1114, 1125 (1st Cir. 1987) (describing the creditor's failure to safeguard collateral in its possession); *Whitney Nat'l Bank*, 516 F. Supp. 2d at 817 (comparing the creditor's sale of aircraft to industry practices).

[83] *See infra* Part II.A–B (observing patterns in case law and noting courts' emphasis on industry practices and the nature of collateral).

[84] The section 9-207(a) cases decided prior to 2001 in Group One include *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173, 174–75 (1st Cir. 1989) (summarizing a secured financing agreement where the light fixture store served as collateral), *Baus*, 834 F.2d at 1116 (describing a security agreement involving the debtor's factory in Puerto Rico), *American Express International Banking Corp. v. Sabet*, 512 F. Supp. 463, 464 (S.D.N.Y. 1980) (explaining the facts of a case in which the Iranian government expropriated a debtor's corporate assets as collateral), *Ray*, 358 F. Supp. at 634 (detailing the attachment process for oil rig collateral), and *Barclays Bank v. Heady Electric Co.*, 571 N.Y.S.2d 650 (N.Y. App. Div. 1991) (assessing a secured party's liability arising out of the sale of electric company assets).

The section 9-207(a) Group Two cases, which were decided after 2001, include *Stead v. United States*, 419 F.3d 944, 947–48 (9th Cir. 2005) (explaining a secured transaction involving an IRS tax lien), *Harris v. Key Bank National Association*, 193 F. Supp. 2d 707, 716–17 (W.D.N.Y. 2002) (exploring the secured party's duty to preserve the value of the promissory note collateral), *Chain Technology, Inc. v. Fleet National Bank* (*In re Handy & Harman Refining Group, Inc.*), 293 B.R. 299, 302–04 (Bankr. D. Conn. 2003) (summarizing a consignment transaction where the debtor gold refiner's inventory and assets served as collateral), *Ferris, Baker Watts, Inc. v. Stephenson* (*In re MJK Clearing, Inc.*), 286 B.R. 109, 115–16 (Bankr. D. Minn. 2002) (describing the collateral as loan securities and other liquid assets), and *Segovia v. Equities First Holdings, LLC*, No. 06C-09-149-JRS, 2008 WL 2251218, at *5–8 (Del. Super. Ct. May 30, 2008) (identifying a pledged stock agreement as collateral).

is adequately supported by economic contextual facts based on the post-9/11 recession in 2001 and 2002 and the "Great Recession" of 2008 and 2009.[85] This case grouping is further supported by the adoption of Revised Article 9 in July 2001.[86] Though cases decided prior to 2001 may have been decided during a period of economic decline, the global implications of recent recessions, coupled with the increasingly complex structure of secured financing, supports this categorization.[87] This grouping method is applied to the section 9-610 case law in Part II.B.[88]

Another observable dimension of section 9-207(a) case law is the difference in the interpretation of commercial reasonableness for cases involving unique personal property, such as specialized manufacturing equipment, and cases where financial instruments served as collateral.[89] Interestingly, all but two of the post-2001 cases involved financial instruments, whereas nearly all of the cases decided prior to 2001 involved more tangible, unique collateral.[90] The small number of relevant cases prevents any large-scale conclusions as to the significance of this observation, yet this may be indicative of a larger trend toward an increasing role of complex financial assets in secured transactions.[91]

During times of economic downturn, such financial assets can experience wide variation in their value, which is exemplified in *Segovia* and *Harris* where mismanagement of financial assets pledged

[85] *See* Bussel & Klee, *supra* note 14 (defining the parameters of the "Great Recession" to be 2008 to 2009).

[86] *See, e.g.*, Lucas, *supra* note 3 (observing that all fifty states adopted the Revised Article 9 in July 2001); Livingston, *supra* note 5, at 47–49 (touting the advantages of the 2001 revisions to Article 9). *See generally* Ahern, *supra* note 2 (exploring the impact of the 2001 Article 9 revisions).

[87] *See supra* notes 8–10, 14 and accompanying text (chronicling the effects of the recession on valuation and secured transactions).

[88] *See infra* Part II.B (applying identical methodology).

[89] *Compare Baus*, 834 F.2d at 1116 (explaining the scope of a security agreement pertaining to inventory, equipment, and a plant as collateral), *and Ray*, 358 F. Supp. at 634 (parsing through facts involving attachment of oil rigs as collateral), *with Segovia*, 2008 WL 2251218, at *5–8 (delving into complex details behind the financial assets serving as collateral for various loan agreements), *and In re MJK Clearing, Inc.*, 286 B.R. at 115–16 (detailing the terms of a multifaceted transaction where loan securities and other liquid assets served as collateral).

[90] *See* cases cited *supra* note 84 (identifying only two cases, *Stead* and *Chain Technology*, involving tangible personal assets in Group Two (post-2001 cases)).

[91] *See generally* Livingston, *supra* note 5, at 61, 94–95 (asserting that the 2001 revisions to Article 9 had a minimal observable impact on case law).

as collateral in part gave rise to the lawsuits.[92] In both cases, the timing of attachment and secured party takeover of the collateral was critical to the outcome of the case.[93] Though both courts engaged in lengthy discussions of the methods for assessing economic damages and defining the secured party's rights to transfer the collateral upon default, neither court referenced larger economic conditions in making its holding.[94] The absence of such reasoning supports the inference that the collateral type is much more critical to predicting the outcome of an Article 9 case than the economic context in which the case arose.[95] Yet, despite the importance of the individual characteristics of the collateral in determining whether the secured party in possession of the collateral met its duties under section 9-207(a), on a more fundamental level, the state of the overall economy in which the transaction arose remains relevant.[96]

B. Evaluating the Importance of Industry Practices and Economic Factors in Section 9-610 Cases

For purposes of consistency in comparison, we have grouped the section 9-610 cases into two subsets based on their dates of decision:

[92] *See* Harris v. Key Bank Nat'l Ass'n, 193 F. Supp. 2d 707, 710 (W.D.N.Y. 2002) (explaining the basis of the plaintiff's claim that the secured party impaired the value of promissory note collateral in violation of section 9-207(a)); *Segovia*, 2008 WL 2251218, at *9 (summarizing the basis of the plaintiff's claims against a secured party in conjunction with alleged mismanagement of the financial assets pledged as collateral).

[93] *See Harris*, 193 F. Supp. 2d at 710 (recounting the debtor's allegations that the timing and nature of a transfer of promissory note collateral constituted a violation of the secured party's duties); *Segovia*, 2008 WL 2251218, at *18–19 (detailing the basis of a conversion claim based on improper control and preservation of collateral).

[94] *See Harris*, 193 F. Supp. 2d at 715–18 (applying relevant provisions of Article 9 to define the secured party's rights in possession of collateral without discussing economic conditions); *Segovia*, 2008 WL 2251218, at *23–24 (engaging in a lengthy discussion of direct and punitive damages without consideration of the larger economic context).

[95] *See Harris*, 193 F. Supp. 2d at 717–18 (finding that the secured party bank did not violate its duties with respect to promissory note collateral as a result of assignment); *Segovia*, 2008 WL 2251218 (examining the value of various stock assets in calculating damages).

[96] *See* Chem. Bank v. Haseotes, No. 93 Civ. 2846, 1994 WL 30476, at *4 (S.D.N.Y. Feb. 1, 1994) (discussing the absence of a secured party's duty to hold collateral until economic conditions improved in exercising the right of possession and disposal and stating that "[the secured party] was under no duty to risk throwing good money after bad in the hope that a previously volatile market would rebound to the benefit of Defendants"); *supra* notes 8–10, 14 and accompanying text (identifying secondary sources emphasizing the importance of larger economic conditions on valuation in transactions involving secured financing).

pre-2001 and post-2001.[97] In contrast to the section 9-207 cases, claims involving alleged section 9-610 breaches with respect to the possession and sale of automobiles constitute a significant number of relevant section 9-610 cases.[98] Because automobiles have a well-established market and easily ascertainable pricing, we will not explicitly consider this group of cases due to the inherent differences between automobile cases and those involving unique collateral.[99] Generally, section 9-610 automobile cases involve claims of inadequate notice, which, though relevant to a secured party's duties under section 9-610, often has little to do with economic conditions.[100]

Unlike the two groupings of section 9-207(a) cases, which exhibited an observable difference in the nature of the collateral in terms of uniqueness, both groups of section 9-610 cases involve personal property pledged as collateral that lacks a true public market.[101] The collateral in both section 9-610 groups ranges from airplanes to rare artwork, specialized machinery, and ocean tankers.[102] Moreover, the section 9-610 cases rely heavily on an analysis of industry practices in determining whether the secured

[97] The cases decided prior to 2001 in the section 9-610 Group One include *Haseotes*, 1994 WL 30476, at *2 (identifying the collateral as oil tankers located in Greece and South Africa), and *Poti Holding Co. v. Piggott*, 444 N.E.2d 1311, 1312 (Mass. App. Ct. 1983) (explaining that insulating machinery served as collateral).

The section 9-610 Group Two cases consist of *Whitney National Bank v. Air Ambulance*, 516 F. Supp. 2d 802, 809–10 (S.D. Tex. 2007) (exploring whether a post-default sale of aircraft pledged as collateral was commercially reasonable), and *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 417–18 (S.D.N.Y. 2002) (noting that the collateral at issue consisted of $10.3 million in European artwork).

[98] *See supra* notes 58–59 (identifying section 9-610 cases where automobiles were pledged as collateral).

[99] *See supra* note 58 (summarizing cases where notice and sale methods, rather than the price of the automobile, were at issue).

[100] *See, e.g.*, Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 494–95 (Iowa 1977) (explaining that the reasonableness of the sales price of the vehicle collateral was not at issue); Consumer Fin. Corp. v. Reams, 158 S.W.3d 792, 795 (Mo. Ct. App. 2005) (narrowing the issue on appeal to the reasonableness of the notice given to the debtor prior to the sale); Tex Star Motors, Inc. v. Regal Fin. Co., 246 S.W.3d 745, 751–52 (Tex. App. 2008) (discussing the statutory requirement of commercial reasonableness).

[101] *Compare* cases cited *supra* note 84 (categorizing section 9-207(a) cases based on date and observing differences in the types of collateral involved) *with* cases cited *supra* note 97 (grouping section 9-610 cases involving tangible personal property pledged as collateral).

[102] *See* cases cited *supra* note 97.

party's sale was indeed commercially reasonable.[103] Though applying industry practices for selling large items such as airplanes and ocean tankers leads to a well-reasoned holding grounded in commercial reality, this process can easily undermine the predictability benefits that the UCC was intended to create.[104] In other words, if each court that evaluates the commercial reasonableness of the sale of unique collateral must delve into a set of convoluted, specialized industry practices, the fact-specific nature of this inquiry undermines predictability.[105] Furthermore, when predictability is compromised in business transactions, risk and transactional costs tend to increase.[106] Therefore, this secondary effect of courts' attempts to craft well-reasoned decisions appropriate for each case in fact makes the duty of commercial reasonableness in the section 9-610 cases blurry and inconsistent.[107]

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[103] *See* Christie's Inc. v. Davis, 247 F. Supp. 2d 414, 422 (S.D.N.Y. 2002) (citing the customary sales procedures in auctioning artwork as relevant to assessing commercial reasonableness under section 9-610); Chem. Bank v. Haseotes, No. 93 Civ. 2846, 1994 WL 30476, at *4 (S.D.N.Y. Feb. 1, 1994) (relying on industry practice in auctioning tankers in finding that the secured party carried out a reasonable sale); Poti Holding Co. v. Piggott, 444 N.E.2d 1311, 1312–13 (Mass. App. Ct. 1983) (focusing on "the normal commercial practices in disposing of collateral of this type" in assessing commercial reasonableness of a sale under section 9-610); Whitney Nat'l Bank v. Air Ambulance, 516 F. Supp. 2d 802, 817 (S.D. Tex. 2007) (considering the secured party's conduct in a sale of aircraft collateral in comparison to industry practice).

[104] *See Piggott*, 444 N.E.2d at 1313 (observing "the lack of precision" in defining commercial reasonableness under section 9-610).

[105] *Id.* (asserting that commercial reasonableness depends largely on "the particular facts in each case"); *see also* Livingston, *supra* note 5, at 47–49 (arguing that the need for increased uniformity and predictability drove the 2001 revisions to Article 9). Moreover, the *Piggott* court relied on "those authorities which provide for a balancing of equities between the parties and allow the 'remedy and the recovery . . . [to] be adjusted to the particular situation.'" *Id.* (alteration in original) (quoting Barbour v. United States, 562 F.2d 19, 21 (10th Cir. 1977)).

[106] *See supra* notes 8, 18 and accompanying text (linking economic conditions to legal and business risk); *see also* Chertok & Agin, *supra* note 9 (observing the complexities in valuing intangible personal assets during an economic decline); Hosmann, *supra* note 10 (chronicling the difficulties of small business owners securing financing using aircraft as collateral amidst a deep recession); Nakamura, *supra* note 8 (noting the effects of a volatile economic sector on valuing assets such as oil-drilling equipment).

[107] *Compare Piggott*, 444 N.E.2d at 1312 (affirming that the plaintiff secured party's conduct in auctioning wiring machinery was not commercially reasonable despite the robust public auction process), *with Haseotes*, 1994 WL 30476, at *2, 4 (concluding that the sale of collateral was commercially reasonable despite auctions in disparate locations such as South Africa and Greece). In *Piggott*, the auctioneer notified over 200 parties of the sale of the equipment collateral and placed advertisements in several newspapers, including *The Wall Street Journal*. *Piggott*, 444 N.E.2d at 1312–13. Similarly, in *Haseotes* the auctioneer complied with the generic advertising requirements of a public

Surprisingly, clarification in the availability of the right of set-off in the 2001 revisions to Article 9 have had little impact on section 9-610 cases.[108] In theory, the common law right of set-off, coupled with a focus on industry practices, yields case decisions that are well aligned with commercial realities.[109] The right of set-off is yet another self-help tool available to parties who find themselves in disputes over collateral valuation or the effect of the secured party's breach of the duty of commercial reasonableness.[110] Few cases, however, have involved parties employing the right of set-off as a self-help remedy in light of a breach of the secured party's duties under section 9-610.[111] Yet, given the dramatic increase in bankruptcy filings in the wake of economic turbulence, self-help remedies will continue to take on increased importance as parties seek to minimize litigation and transactional costs.[112] Finally, as the body of case law continues to grow amidst debtor defaults involving complex collateral assets, additional trends may emerge to create more consistency in the jurisprudence in this area of the law.[113]

sale under section 9-610 but secured only twenty bidders for the ocean tankers, and this sale was deemed commercially reasonable. *Haseotes*, 1994 WL 30476, at *2, *4.

108 *See* Livingston, *supra* note 5, at 84–85 nn.305–06 (observing that the former Article 9 left open issues of set-off as a self-help remedy, which were closed by the 2001 revisions); *supra* text accompanying note 5.

109 *See* cases cited *supra* note 103 (identifying cases where the assessment of commercial reasonableness by comparison to industry standards was central to the holding).

110 *See* U.C.C. § 9-109(d)(10) (2000) (clarifying that Article 9 does not apply to the common law right of set-off but creating two exceptions: (1) section 9-340 applies to recoupment against deposit accounts, and (2) section 9-404 applies to defenses or claims of the account debtor).

111 *See* Am. Express Int'l Banking Corp. v. Sabet, 512 F. Supp. 463, 468, 471 (S.D.N.Y. 1980) (discussing the application of the right of set-off in a lawsuit following an expropriation of collateral by the Iranian government); Marine Midland Bank v. CMR Indus., Inc., 559 N.Y.S.2d 892, 898 (N.Y. App. Div. 1990) (construing the right of set-off as applicable to damages from an improper disposal of collateral).

112 *See supra* notes 14, 18 and accompanying text (analyzing valuation and business risk amidst periods of economic decline and increased bankruptcy filings); *see also* sources cited *supra* note 2 (examining the impact of the 2001 Article 9 revisions on bankruptcy proceedings).

113 *See supra* notes 104–07 and accompanying text (demonstrating the recognition of inconsistencies in case law and the need for increased uniformity).

C. Bankruptcy Implications of Section 9-207 and Section 9-610 Case Law

Bankruptcy cases are a common context in which debtor claims against creditors in possession of collateral may arise.[114] Bankruptcy often serves as the trigger for a default of a security agreement, which then enables the creditor to engage in the self-help remedy of section 9-207, provided that such action is allowable under the Bankruptcy Code.[115] Thus, any creditor intending to exercise its right of repossession of collateral must be ever mindful not only of the Article 9 exceptions to section 9-207 but also of the provisions of the Bankruptcy Code that might bar such action.[116] Furthermore, in bankruptcy proceedings, valuation is often at the heart of the battle between secured and unsecured parties.[117] Thus, an interpretation of the reasonable duty of preservation under section 9-207 can take center stage.[118] Indeed, a secured party's conduct in preserving collateral can easily lead to the payment or nonpayment of parties with lower priority when the bankruptcy estate is liquidated.[119]

Valuation is also a fundamental consideration in assessing commercial reasonableness under section 9-610 given the tendency of courts to compare the sale price to the fair market value as one of the

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[114] *See* Chain Tech., Inc. v. Fleet Nat'l Bank, 293 B.R. 299, 306 (Bankr. D. Conn. 2003) (denying the debtor's allegation that the secured party failed to preserve the collateral post-petition under section 9-207); *In re* MJK Clearing, Inc., 286 B.R. 109, 121–22 (Bankr. D. Minn. 2002) (finding that the commingling of fungible assets did not violate the secured party's section 9-207(a) obligations in bankruptcy).

[115] *See* Clark, *supra* note 2, at 145–46 (explaining the self-help provisions of section 9-207, including the secured party's duty of reasonable care with respect to collateral); Ahern, *supra* note 2 (explaining the interconnectedness between Article 9 and the Bankruptcy Code in post-default remedies).

[116] *See* Ahern, *supra* note 2 (connecting Article 9 to the Bankruptcy Code).

[117] *See supra* note 9 and accompanying text (discussing the critical importance of valuation in bankruptcy).

[118] *See supra* note 114 and accompanying text (identifying cases where debtors claimed that secured parties breached the duty of reasonable care under section 9-207).

[119] Ahern, *supra* note 2, at 117.

> Understandably, creditors of bankrupt debtors often feel like restaurant patrons who not only hate the food, but think the portions are too small. To press the analogy, they also don't like having to wait in line for a table, possibly being seated only to find out the kitchen has just closed. The bankruptcy court is a little like a soup kitchen, ladling out whatever is available in ratable portions to those standing in line; nonetheless, scarcity begets innovation in the hungry creditor's quest to get a little more than the next fellow.

Id. (quoting *In re* Omegas Grp., Inc., 16 F.3d 1443, 1445 (6th Cir. 1994)).

section 9-610 factors.[120] Thus, a difference in valuation techniques can easily lead to the near full payment of secured creditors to the detriment of unsecured creditors.[121] Though a consideration of priority issues exceeds the scope of this analysis, a secured party's duty under section 9-610 has far-reaching implications for the bankruptcy estate in the sense that the sale of collateral fixes its value and allows for potential disbursements to creditors.[122] Disputes arising from Article 9 are commonly decided as part of bankruptcy proceedings, which demonstrates the interdependence of secured transactions and the Bankruptcy Code.[123]

CONCLUSION

Although the asset path of sections 9-207 and 9-610 appears straightforward and clearly delineated, the duties of reasonable care and commercial reasonableness in disposal remain amorphous. In particular, these duties—with respect to default, seizure, storage, and sale or use—depend heavily on the nature of the collateral. The diversity of asset classification requires a multitude of skills, knowledge, expertise, and facilities to prevent secured party liability. This concern becomes most pronounced with respect to debt resolution based on a breach of the secured party's duty of reasonable care or commercial reasonableness.

The complexity of considerations in exploring sections 9-207 and 9-610 cases, with respect to the collateral type and the potential for economic conditions to impact the outcome of the case, make corporate attorneys' risk assessments in such cases increasingly complex. Though the case law on these UCC provisions is in its nascent stages, this analysis has shown that the nature of the collateral itself, coupled with industry practices, form the basis of the large majority of federal and state cases in this area. Therefore, economic

120 U.C.C. § 9-610(b) (2005) (requiring commercial reasonableness in "[e]very aspect of a disposition of collateral"). Though sales price alone is insufficient to establish commercial reasonableness under section 9-610, "a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." U.C.C. § 9-610 cmt. 10 (2002).

121 *See supra* note 119 (painting an analogy illustrating the scarcity of resources in bankruptcy).

122 *See supra* note 9 and accompanying text (emphasizing the importance of valuation in bankruptcy proceedings).

123 *See supra* note 114 and accompanying text (analyzing bankruptcy cases involving claims of a breach of a secured party's duty under Article 9).

conditions take on a secondary significance. The fact-specific nature of secured transactions involving creditor possession and the sale of collateral upon default will undoubtedly persist; yet as more cases emerge, the definition of commercial reasonableness that is implicit in both section 9-207 and section 9-610 will become more clear. In the meantime, practitioners would be wise to remain mindful of these considerations in evaluating the business and legal risks of these transactions amidst a global economy that continues its slow march to recovery.