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ing.[69] Objections raised in *O'Shea* against injunctive relief would seem applicable to these cases.[70] An avenue into federal court, however, might be found by maintaining that the injuries arising from denial of counsel or pre-trial liberty are more clearly "irreparable" than those alleged in *O'Shea*.[71] An additional distinguishing fact in these cases was that the applicable law was unclear.[72] Nevertheless, the possibility of federally enjoining state judicial misconduct, which may border on criminal culpability, appears foreclosed.

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A STRICT INTERPRETATION OF THE UCC EXTENDS FLORIDA'S POLICY OF DEBTOR PROTECTION

Irving Turk, president of Bob King, Inc., acted as co-maker in executing a $35,000 note along with a security agreement to plaintiff-bank as consideration for floor-plan financing of automobiles which the company was selling. Before Turk ceased to be active in the corporation, he joined Bob King, Inc., in substituting a note of $20,000 for the original one. The bank continued to advance monies until an indebtedness of $36,336 was reached. At that point the bank notified Bob King, Inc., took possession of and then sold the pledged automobiles without notifying Turk. Since only $17,881.52 of the alleged outstanding indebtedness was realized, the bank sued Turk for the deficiency plus interest. A jury returned a verdict of $7,490 in favor of the bank. On appeal, the District Court of Appeal, Second District, *held*, reversed: If the secured creditor repossesses and sells the pledged goods, without notifying the debtor pursuant to Florida Statutes section 679.504(3) (1971),[1] the creditor forfeits his right to a

continue in Florida municipal courts. *See*, Wisotsky, *The Status of Municipal Courts in Florida*, 48 FLA. B.J. 290 (1974).

69. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973).

70. Injunctions against the violations alleged in these cases would also seem to require the daily "monitoring" of and potential interference with state court proceedings by contempt hearings in federal court which were rejected in *O'Shea*. In addition, remedies other than injunctive relief, such as federal habeas corpus, would appear available to the federal plaintiff.

71. The Court of Appeals for the Fifth Circuit, in Pugh v. Rainwater, 483 F.2d 778, 783 (5th Cir. 1973) expressly declined to rule whether loss of liberty through denial of the right to a preliminary hearing fell within the "irreparable injury" exception to *Younger*.

72. The right to counsel cases cited in note 68 *supra* were prior to, and raised issues which were finally disposed of, in Argersinger v. Hamlin, 401 U.S. 908 (1972). *Pugh*, a case of first impression, is now before the Court. 94 S. Ct. 567 (1974). The impermissible conduct in these cases was "valid" under prior law and was, thus, more likely to recur if injunctive relief was denied or to cease once a definitive statement of federal rights was rendered, than the criminal conduct alleged in *O'Shea*.

1. The statute provides in part:

Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time

deficiency judgment against the debtor. *Turk v. St. Petersburg Bank & Trust Co.*, 281 So. 2d 534 (Fla. 2d Dist. 1973).

At common law, the debtor's obligation was terminated upon repossession of the collateral.[2] In the absence of special contractual provisions, deficiencies after disposition of repossessed property were not recoverable. However statutes which regulated both the creditor's sale of repossessed collateral and the nature of the notice given to the debtor,[3] provided that if all statutory requirements were met, the creditor was entitled to receive a deficiency judgment.[4]

The Uniform Commercial Code has liberalized the statutory requirements for sale after default.[5] Sections 9-501 through 9-507 do not set forth explicit rules and definitions,[6] rather, the Code provides the parties with flexible standards under which to fashion their agreements. As a result of this flexibility, two major constructions have developed which purport to define the relationship between sections 9-504(2), (3), and section 9-507.[7] One view treats the sections as mutually exclusive; the other construes the sections in *pari materia*.

Courts which adhere to the theory that the statutes must be interpreted together maintain that failure to give notice is not a defense to an action for a deficiency judgment where the sale is commercially reasonable. Under this view a strict and literal reading is given to section 9-504(2) which states in part: "If the security interest secures an indebtedness, . . . the debtor is liable for any deficiency."[8] Section 9-507[9]

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and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor.

FLA. STAT. § 679.504 (1971); UNIFORM COMMERCIAL CODE § 9-504 [hereinafter referred to and cited as UCC or the Code]. All citations are to the Uniform Commercial Code, 1962 Official Text, *as amended*, 1966, and to the Code as adopted in Florida.

2. *See* Annot., 49 A.L.R.2d 15 (1956) and the authorities cited therein.

3. *See, e.g.*, UNIFORM CONDITIONAL SALES ACT, §§ 19-22.

4. *Id.*

5. For example, while the basic outline has remained the same, the notice requirement now calls for reasonable notice as opposed to ten days notice before public sale. For discussion of reasonable notification, see A.L.I. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE FINAL REPORT (1971); *see also* Comment, *Remedies on Default Under the Proposed Uniform Commercial Code as Compared to Remedies Under Conditional Sales*, 39 MARQ. L. REV. 246, 258 (1956).

6. For example, the Code does not define "default," but leaves its definition to the parties. *See, e.g.*, Goodwin, *Repossession and Sale After Default: An Old Remedy Under Fire*, 10 AM. BUS. L.J. 221, 223 (1973).

7. The pertinent sections to this discussion are: UCC § 9-504(3), which requires that the disposition must be commercially reasonable and that notice must be sent to the debtor of the creditor's intent to make such a disposition; UCC § 9-504(2), which sets out the debtor's liability for deficiencies and the creditor's duty to account for any surplus, and UCC § 9-507(1), which allows the debtor a recovery for losses occasioned by the creditor's failure to comply with the above provisions.

8. UCC § 9-504(2).

9. UCC § 9-507(1) reads in part, "If the disposition has occurred the debtor or any person entitled to notification . . . prior to disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part."

allows the debtor to recover any damages actually incurred if caused by the secured party's failure to comply with the requirements of section 9-504(3). Construing these provisions together the courts have held that if the creditor fails to give notice to the debtor as required by section 9-504(3), section 9-507(1) provides the debtor with a remedy against the creditor for any loss caused by the failure to give notice.[10]

This position was adopted in *Grant County Tractor Co. v. Nuss*,[11] which held that a loss suffered by the debtor could be set-off against the creditor's deficiency judgment.[12] That court separated the requirement of notice in section 9-504(3) from the operation of section 9-504(2) by interpreting the remedial aspects of section 9-507 into the provisions of section 9-504.[13] The reasoning behind this interpretation was expressed in *Conti Causeway Ford v. Jarossy*:[14]

> Where reasonable notice of sale has not been given, the spirit of commercial reasonableness requires that the secured party not be arbitrarily deprived of his deficiency but that the burden of proof be shifted to him to prove that the sale resulted in the fair and reasonable value of the security being credited to the debtor's account.[15]

The only comfort to the debtor comes from a requirement that the creditor show that a commercially reasonable disposition was made.[16] The Supreme Court of Wisconsin adopted this theory in a case where defendants purchased a used car, claimed it to be defective, returned it within a few days, and were sued for the resulting deficiency after resale. Judgment was entered in favor of the defendants, and the plaintiff, who had failed to show that it received a commercially reasonable price for the car, was unable to recover a deficiency judgment.[17] However, even where

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10. Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972); *accord*, Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alas. 1969); Universal C.I.T. Credit Co. v. Rone, 248 Ark. 665, 453 S.W.2d 37 (1970).

11. 6 Wash. App. 866, 496 P.2d 966 (1972).

12. "In view of this remedy, we are of the opinion the writers of the Uniform Commercial Code did not intend that the creditor's failure to give notice would result in a forfeiture of the creditor's right to a deficiency." *Id.* at 870, 496 P.2d at 969.

13. *Id.*

14. 114 N.J. Super. 382, 276 A.2d 402 (Dist. Ct. 1971), *aff'd*, 118 N.J. Super. 521, 288 A.2d 872 (App. Div. 1972).

15. 114 N.J. Super. at 386, 276 A.2d at 404-05; *see also* Norton v. First Nat'l Bank, 240 Ark. 131, 398 S.W.2d 538 (1966); Alliance Discount Corp. v. Shaw, 195 Pa. Super. 601, 171 A.2d 548 (1961).

16. UCC § 9-504(3). *See* Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972).

17. Vic Hansen & Sons, Inc. v. Crowley, 57 Wis. 2d 106, 203 N.W.2d 728 (1973). Similar interpretations have been applied in Illinois, where the plaintiff failed to recover a deficiency because he had not given proper notice to the debtor and had not otherwise proved that the sale was commercially reasonable, Tauber v. Johnson, 8 Ill. App 3d 789, 291 N.E.2d 180 (1972), and in Colorado, where it was held that reasonable notice of sale is not necessary to recover a deficiency judgment if the seller proves that the actual market

he receives a deficiency judgment, the secured party may still be liable under section 9-507(1) for any loss to the debtor occasioned by the sale without notice.[18]

The alternate interpretation demands compliance with the Code's notice requirements as a condition precedent to recovery of any deficiency judgment. Section 9-504 is viewed independently, notwithstanding the remedial provisions of section 9-507. Section 9-504 requires that every aspect of the disposition must be commercially reasonable and that reasonable notification of any public sale, or the time after which any private sale is to be made, shall be sent by the secured party to the debtor.[19] Section 1-203 further imposes on the creditor an obligation of good faith dealing.[20] Only if these requirements are met does section 9-504(2) provide that the debtor is liable for any deficiency.[21] This was the decision of the court in the leading case of *Leasco Data Processing Equipment Corp. v. Atlas Shirt Co.*,[22] on which the *Turk* court relied heavily. Moreover, according to the provisions of section 1-103,[23] since section 9-507 is not stated to be an exclusive remedy, it should be treated as merely cumulative.

The notice requirements of section 9-504(3) have particular importance when viewed in light of section 9-506, which gives the debtor an absolute right to redeem the collateral at any time prior to disposition.[24] From this viewpoint, the purpose of notice is to enable the debtor to (1) protect his interest in the property by paying the debt; (2) find a buyer; or (3) be present at the sale and bid on the property, or have others do

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value of the collateral was less than the indebtedness. Community Mgt. Ass'n v. Tousley, 505 P.2d 1314 (Colo. App. 1973).

Carrying the rule to the extreme, a court has reasoned that even if the disposition was unreasonable, section 9-507 provides the debtor with a remedy in set-off or counterclaim, but the creditor's recovery of a deficiency judgment is not precluded. *See* Abbott Motors, Inc. v. Ralston, 28 Mass. App. Dec. 35 (1964).

18. Community Mgt. Ass'n v. Tousley, 505 P.2d 1314 (Colo. App. 1973).

19. UCC § 9-504(3) requires that "[E]very aspect of the disposition . . . must be commercially reasonable"; and that "[U]nless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification . . . of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor."

20. UCC § 1-203.

21. UCC § 9-504(2). "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." *Id.*

22. 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. 1971) [hereinafter referred to as *Leasco*].

23. UCC § 1-103. "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."

24. UCC § 9-506.

> At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9-504 or before the obligation has been discharged under Section 9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party . . . .

so, to avoid its being sacrificed by a sale at less than its true value.[25] Thus, when a debtor is deprived of notice (and consequently his absolute right of redemption), courts which require notice as a condition precedent to recovery of a deficiency judgment will not posit that if the sale was commercially reasonable there was no injury to the debtor. They will read the "commercially reasonable manner" requirement as general in scope and effect and not as isolated from the conjunctive requirement that notice be sent to the debtor.[26]

The District Court of Appeal, Second District, faced with a split of authority and no prior Florida case construing the language of section 9-504, chose the strict statutory construction and held that the notice requirement is a condition precedent to recovery of a deficiency judgment. In so holding it expressly adopted the reasoning in *Leasco Data Processing Equipment Corp. v. Atlas Shirt Co.*[27] Unfortunately for the development of precedent in Florida, the court failed to mention the alternative interpretation although the briefs presented in the *Turk* case detailed both positions.[28] The court announced the new Florida rule by summarily stating that "many other states have adopted this code and the language is clear that before a secured party . . . can obtain a deficiency . . . the debtor must be given notice of what is to occur."[29] Then without reference to section 9-506, which asserts the debtor's right of redemption,[30] the court proceeded to say, "[T]his is as it should be because the debtor in this instance, Turk, could have done many things. . . . He was not afforded the opportunity to do anything."[31]

The court also stated that the reasoning in the case was adopted from that presented in *Leasco* "to the effect that since deficiency judgments after repossession of collateral are in derogation of the common law, any right to a deficiency accrues only after strict compliance with the relevant statutes."[32] A reading of the *Leasco* opinion readily shows the inaccuracy of this statement. The *Leasco* court did state that the common law defeats the claim for a deficiency judgment upon the failure of the plaintiff to follow the quite modest notice requirements of 9-504.[33] However, the

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25. Mallicoat v. Volunteer Fin. & Loan Corp., 415 S.W.2d 347 (Tenn. App. 1966).

26. See Edmonson v. Air Serv. Co., 123 Ga. App. 263, 180 S.E.2d 589 (1971); Braswell v. American Nat'l Bank, 117 Ga. 699, 161 S.E.2d 420 (1968); *see also* Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *vacated and remanded*, 335 F.2d 846 (3d Cir. 1964) (plaintiff given no opportunity to arrange other financing).

27. 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. 1971).

28. This failure to review the two positions and explicitly set forth Florida policy might well lead to future conflicts in the Florida courts.

29. 281 So. 2d at 536.

30. FLA. STAT. § 679.506 (1971), quoted in note 27 *supra*.

31. 281 So. 2d at 536.

32. *Id.*

33. Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 1091, 323 N.Y.S.2d 13, 15 (Civ. Ct. 1971).

court then demonstrated how the same result was reached by a "textual analysis" of the relevant sections of the Code:

> The very section that affirms the right to a deficiency judgment after sale of a repossessed article also describes in simple and practical terms the rules governing dispositions as well as the pertinent notice requirements. . . . The natural inference that the right depends upon compliance is forcefully underlined by the joining of the two provisions in one section.[34]

The *Leasco* court showed an awareness of the disparity of strength between secured creditors and defaulting debtors and of their respective resources for prosecuting lawsuits. It did not demand strict compliance with the statutes only because deficiency judgments are in derogation of the common law. The court also considered that if section 9-507 is the only remedy a debtor has after being stripped of his property and given no opportunity to take steps to recover it, he must, on his own initiative, resort to the already crowded courts. Therefore, the court fairly requires the stronger party to obey the law, keeps unconscionable practices at bay, and protects the interests of the borrower. The court in *Turk* did not discuss these elements in its opinion.

Turk's brief on appeal[35] stated that the bank should be precluded from obtaining a deficiency judgment because (1) no reasonable notification of sale was given and (2) the automobiles were not sold in a commercially reasonable manner. Yet the court only discussed the first of these points.

There is a strong argument for making the reasonable notification requirement mandatory. The requirement was designed to protect the debtor, or at least allow the debtor to protect himself by insuring that a reasonable price is obtained upon sale of the collateral.[36] However, the court failed to specify how it reached its conclusion and this weakened the effect of its decision. The court could have clarified the law of secured transactions as it relates to the area of deficiency judgments without notice to the debtor; but it failed to take advantage of this opportunity. Even though the opinion lacks analysis, its value is its unequivocal statement of a mandatory notice requirement for recovery of deficiency judgments which will stand as a warning to secured creditors that they must deal fairly with debtors before they may resort to the Florida courts.

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34. *Id.* at 1091, 323 N.Y.S.2d at 16.

35. Brief for Appellant at 12, Turk v. St. Petersburg Bank & Trust Co., 281 So. 2d 534 (Fla. 2d Dist. 1973).

36. 281 So. 2d at 536.