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COMMERCIAL LAW

OVERVIEW

This section comments briefly on Tenth Circuit cases applying the law of banks and banking, creditor-debtor relations, and the Uniform Commercial Code ("UCC"). Extended comment of the court's analysis in each case is not provided in this section, since the primary objective of the overview is to acquaint the reader with only the essential facts and holdings of the more significant cases of this year in the Tenth Circuit. However, several opinions in the UCC section reflect comparatively greater significance in terms of new legal theories and receive more consideration.

I. BANKS AND BANKING

Harr v. Federal Home Loan Bank Board[1] *[Harr I]* and *Harr v. Prudential Federal Savings & Loan Association*[2] *[Harr II]* were companion cases dealing with the remedies available to petitioners who sought to challenge a conversion plan whereby Prudential Federal Savings & Loan, a federally chartered mutual savings and loan association, would become a federally chartered stock association.

Prudential Federal Savings & Loan was created as a federally chartered mutual savings and loan association under the Home Owners' Loan Act of 1933.[3] Prudential drafted a plan whereby it would convert from a mutual savings and loan association to a federally chartered stock association as provided by section 402(j) of the National Housing Act.[4] The approved plan provided for the issuance, without charge, of stock to persons who were depositors as of July 13, 1972. The conversion plan became operative April 15, 1976.[5]

In *Harr I,* the petitioners sought judicial review of the order issued by the Federal Home Loan Bank approving the conversion plan pursuant to section 408a(k) of the Housing Act.[6] The Bank

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[1] 557 F.2d 747 (10th Cir. 1977).
[2] 557 F.2d 751 (10th Cir. 1977).
[3] Home Owners' Loan Act of 1933, § 5(b), 12 U.S.C. § 1464(b)(1) (1976).
[4] National Housing Act of 1934, § 402(j), 12 U.S.C. § 1725(j) (1976).
[5] 557 F.2d at 749.
[6] According to the court, Order No. 75-1164 of the Federal Home Loan Bank Board

Board asserted that the petitioners should not be allowed to proceed because they had not exhausted their administrative remedies by filing timely objections with the Bank Board. The court recognized that administrative remedies must be exhausted in virtually all instances where judicial review is sought, but that, in this case, the exhaustion of administrative remedies was not required because the notices affirmatively stated that there would be an unconditional right to court review.[7] Therefore, the petitioners were allowed to proceed with the petition for review.[8]

The petitioners alleged that the conversion plan was unfair because of the lapse of time between the record date of July 13, 1972, and the effective date of conversion of April 15, 1976; that the conversion by issuance of "free" stock was improper; that the proxy solicitation material was misleading and false; and that there was no authority to convert deposits in a mutual association into stock.[9] In response to these allegations, the court referred to the 1974 amendments to the National Housing Act and the Securities Exchange Act embodied in Public Law 93-495.[10] The court recognized that the time lapse created problems, but noted Congress had mandated the record date and, therefore, the lapse did not invalidate the conversion.[11] The issuance of "free" stock was permitted under the grandfather provisions of the final amendments to section 402 of the National Housing Act.[12] The Bank Board was authorized to supervise and approve the conversion process under section 402 of the Housing Act.[13] Public Law 93-495 amended section 12 of the Securities Exchange Act directing the Bank Board to supervise and administer proxy solicita-

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approved the plan. *Id.* at 748. Petitioner sought review pursuant to the National Housing Act of 1934, § 408(k), 12 U.S.C. § 1730a(k) (1976): "Any party aggrieved by an order of the Corporation under this section may obtain a review of such order by filing in the court of appeals of the United States . . . ."

[7] "This is not an instance of silence as to possible remedy, but an affirmative misleading statement, the statement being that court review would be available." 557 F.2d at 749.

[8] For a discussion of the doctrine of exhaustion of administrative remedies, see Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965); Bank of Commerce v. Board of Govs. of the Fed. Reserve Sys., 513 F.2d 164 (10th Cir. 1975); Bank of Commerce v. Smith, 513 F.2d 167 (10th Cir. 1975).

[9] 557 F.2d at 749.

[10] Pub. L. No. 93-495 §§ 105(b), 105(d), 88 Stat. 1504 (1974) (current version at 12 U.S.C. § 1725(j) (1976); 15 U.S.C. § 78*l*(i) (1976)).

[11] 557 F.2d at 750.

[12] 12 U.S.C. § 1725(j) (1976).

[13] *Id.*

tions.[14] After examining the record, the court held that the proxy solicitation material was neither false nor misleading. Finally, the conversion was authorized by law upon a proper vote of a majority of shareholders.[15] The petition for review was, therefore, dismissed.[16]

In *Harr II,* plaintiffs challenged the conversion plan in a collateral attack under rule 10b-5 of the Securities Exchange Act.[17] Plaintiffs alleged (1) That the conversion plan was part of a conspiracy by the directors to benefit themselves and the officers; (2) that the plan was unfair and deceptive; and (3) that rule 10b-5 was violated.[18]

The Tenth Circuit again referred to the changes made in 1974 to the National Housing Act and the Securities Exchange Act and affirmed the trial court's holding that section 402(j)(4) of the Housing Act,[19] as it refers to section 408(k) of the same Act,[20] creates an exclusive remedy to review a determination by the bank board.[21] The court cited *Fort Worth National Corp. v. Federal Savings & Loan Insurance Corp.*[22] which considered the remedy available under section 408(k):

> When Congress has prescribed a particular method of review, that procedure is exclusive. . . . By specifying that appeals under sec-

[14] Securities Exchange Act of 1934, § 12, 15 U.S.C. § 78*l*(i) (1970), *as amended by* Pub. L. No. 93-495, § 105(b), 88 Stat. 1503 (1974). The Bank Board is authorized to issue rules as to conversions. 12 U.S.C. §§ 1725(j), 1730a(*l*) (1976).

[15] 557 F.2d at 751. 12 U.S.C. §§ 1725(j), 1730a(*l*) (1976).

[16] 557 F.2d at 751.

[17] 17 C.F.R. § 240.10b-5 (1977) states:

> It shall be unlawful for any person . . .
> (A) to employ any device, scheme, or artifice to defraud,
> (B) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading, or
> (C) to engage in any act, practice, or course of business which operates . . . as a fraud or deceit upon any person, in connection with the . . . sale of any security.

[18] 557 F.2d at 751, 753.

[19] 12 U.S.C. § 1725(j)(4) (1976). This section provides in part that: "Any aggrieved person may obtain a review of a final action of the Federal Home Loan Bank Board . . . which approves . . . a plan of conversion . . . only by complying with the provisions of subsection (k) of section 1730a of this title . . . ."

[20] National Housing Act § 408(k), 12 U.S.C. § 1730a(k) (1976). This section provides that the petition for review to the Court of Appeals "shall be exclusive, to affirm, modify, terminate, or set aside, in whole or in part the order of the corporation."

[21] 557 F.2d at 753.

[22] 469 F.2d 47 (5th Cir. 1972).

> tion 1730a(k) were to be filed in the Court of Appeals, Congress expected to prevent conflicting rulings and duplicative proceedings that inevitably would result from permitting collateral attack of Corporation orders in the various district courts . . . .[23]

The cause of action must, in the first instance, be a challenge to the approval by the Bank Board of the plan of conversion and of the proxy materials. A Rule 10b-5 claim would be at best a secondary action based on the consequences or impact of the plan on the plaintiffs. The appeal was dismissed.[24]

II. CREDITOR-DEBTOR RELATIONS

Begay v. Ziems Motor Co.[25] involved a suit brought under the Truth in Lending Act[26] and regulation Z[27] to recover damages for alleged failure of the seller to disclose accurately and meaningfully the amount of any default, delinquency, or similar charges payable in the event of late payments by the buyer. The primary question concerned whether the acceleration provisions in the sales contract constituted charges required to be disclosed in the manner specified by the Act and the regulation.[28] The contract provision permitted the seller upon default of an installment to declare all amounts due or to become due, immediately payable and allowed the seller-creditor to retain unearned finance charges following acceleration.[29]

The Truth in Lending Act requires disclosure for default, delinquency, or other similar charges payable because of late payments on a sales contract.[30] Regulation Z similarly provides for disclosure of terms addressing the amount and method of computing charges for late payments.[31] In light of these requirements, the defendant, Ziem Motor Co., argued that the default or accel-

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[23] 557 F.2d at 754 (citing 469 F.2d at 52).

[24] 557 F.2d at 753.

[25] 550 F.2d 1244 (10th Cir. 1977).

[26] Consumer Credit Protection Act of 1968, § 102, 15 U.S.C. §§ 1601-1666j (1976).

[27] 12 C.F.R. §§ 226.1-.15 (1977).

[28] 550 F.2d at 1245.

[29] *Id.* at 1247.

[30] The Truth in Lending Act requires disclosure for "default, delinquency, or similar charges payable in the event of late payments." 15 U.S.C. § 1638(a)(9) (1976).

[31] Regulation Z provides disclosure of terms covering "[t]he amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments." 12 C.F.R. § 226.8(b)(4) (1977).

eration provisions of the contract were not charges required by the Act and the regulation to be disclosed.[32]

The court briefly reviewed conflicting case authority from other circuits and accepted the reasoning of the Fifth Circuit in *Martin v. Commercial Securities Co.*[33] The court in *Martin* held that an acceleration clause was not subject to the disclosure requirements because there is no reference to them in the Act, the regulations, or the official interpretations of the Federal Reserve Board.[34]

The dissent in *Begay* pointed to the fact that since the acceleration provision included amounts due or to become due, the seller-creditor had reserved, and could assert, the right to accelerate the entire debt, including the unearned finance charges. The creditor could then collect all such unearned finance charges.[35] The dissent continued by noting that this clause was not only the assertion of a remedy by way of acceleration but also obligated the debtor to pay additional, specific pecuniary sums. Therefore, the dissent would require disclosure under the Act and regulation Z.[36]

III. Uniform Commercial Code

A. Consolidated Film Industries v. United States

In *Consolidated Film Industries v. United States,*[37] Consolidated Film Industries [hereinafter Consolidated] sought an injunction enjoining the United States from enforcing a tax levy served on Inflight Motion Pictures, Inc., the assignor of certain contract rights to Consolidated.[38] The main issue facing the court was whether the Utah Uniform Commercial Code (UCC) required the filing of a financing statement in order to perfect a security interest in the assignment of contract rights.[39] If filing was not

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[32] 550 F.2d at 1247.

[33] 539 F.2d 521 (5th Cir. 1976).

[34] *Id.* at 529.

[35] 550 F.2d at 1249 (Holloway, J., dissenting).

[36] *Id.*

[37] 547 F.2d 533 (10th Cir. 1977).

[38] Consolidated was the assignee of certain contract rights granted by Inflight and, as such, the court held it to be the proper party in interest for bringing the action. *Id.* at 534.

[39] The Utah Uniform Commercial Code provides in part: "A financing statement must be filed to perfect all security interests except the following . . . (e) an assignment of accounts or contract rights which does not alone or in conjunction with other assign-

required, the perfected security interest of Consolidated would assume priority over, and preclude enforcement of, the tax levy.[40]

Consolidated contended that the assignment was a security interest covered by a provision of the Utah UCC which exempted from filing for perfection contract rights which are not a *significant* part of the outstanding contract rights of the assignor.[41] The trial court agreed with Consolidated and granted the injunction against the United States. However, the Tenth Circuit reversed on the ground that the assignment *was* a significant part of the assignor's outstanding contract rights and therefore not exempt.[42] The court stated that the burden of proof for establishing significance was upon the party claiming the exemption. In this case, Consolidated had failed to meet its burden.[43]

B. Cargill, Inc. v. Van Stafford

In *Cargill, Inc. v. Van Stafford,*[44] the court dealt with two separate transactions for the sale of wheat by defendant Stafford to plaintiff Cargill. The issue in the first transaction involved whether Cargill's claim of an enforceable contract for the sale of wheat was barred by the Statute of Frauds provision of the UCC.[45] The issue in the second transaction hinged upon determining the proper date for assessing damages for breach of a sales contract under the UCC.[46]

On July 23, 1973, Cargill's agent telephoned Stafford concerning the purchase of wheat. Stafford replied that he had wheat available. He concluded the conversation by instructing the agent

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ments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor." UTAH CODE ANN. § 70A-9-302(1)(e) (1968).

[40] 547 F.2d at 533.

[41] *Id.*

[42] *Id.* at 535.

[43] *Id.* at 536-37. The court noted that the assignment constituted most of the outstanding accounts or rights of the assignor and that the assignee failed to present evidence to the contrary.

[44] 553 F.2d 1222 (10th Cir. 1977).

[45] The parties agreed that Colorado law applied in this case. Section 4-2-201(2) of the Colorado Uniform Commercial Code provides in part: A writing is sufficient "[b]etween merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents . . . ." COLO. REV. STAT. § 4-2-201(2) (1973).

[46] *See* COLO. REV. STAT. §§ 4-2-712 to 713 (1973). Section 4-2-712 relates to damages when the buyer procures substitute goods, i.e. "cover." Section 4-2-713 addresses the measure of damages when "cover" is not used as a remedy.

to forward a confirmation and, if it appeared proper, he would sign and return it. The agent of Cargill prepared the confirmation but addressed it improperly, delaying its arrival until August 17, 1973. Stafford refused to sign the confirmation, citing several objections to its terms. Cargill brought suit for breach of contract.[47]

The trial court held that recovery for breach of contract was foreclosed because of the Statute of Frauds provisions of the UCC governing sales between merchants.[48] The written confirmation was not sufficient because it was not received within a *reasonable time* following the contract. Thus the contract was unenforceable.[49]

The second transaction arose out of a telephone conversation on July 31, 1973, in which a contract for the sale of wheat was negotiated. A confirmation of the second sale was correctly addressed and mailed to Stafford in a reasonable time but contained several additional terms not negotiated by the parties. On August 17, Stafford objected to the additional provisions and declared the contract void. Cargill then brought suit for breach of contract.[50]

The court held that the objection to the additional terms was not made within the ten-day period provided by statute[51] and thus the confirmation was sufficient as written. The court decided, however, that the additional terms constituted a material alteration of the contract and thus did not become a part of it.[52]

Having found a valid, enforceable contract the court then approached the more interesting question of damages for its breach. Since the buyer did not employ the remedy of cover,[53] the buyer's damages were to be assessed in accordance with section

[47] 553 F.2d at 1223-24.

[48] COLO. REV. STAT. § 4-2-201(2) (1973).

[49] 553 F.2d at 1225.

[50] *Id.* at 1222, 1225.

[51] Between merchants, an objection to a writing in confirmation of a contract must be in writing and "given within ten days after it is received." COLO. REV. STAT. § 4-2-201(2) (1973).

[52] COLO. REV. STAT. § 4-2-207(2)(b) (1973) states that, between merchants, the additional terms become part of the contract unless they materially alter the contract.

[53] "Cover" is a remedy by which a buyer may purchase substitute goods and recover the difference in price between the original contract price and the price of the substituted goods. COLO. REV. STAT. § 4-2-712 (1973).

4-2-713 of the Colorado UCC.[54] The section provides that the measure of damages is the difference between the market price at the time the buyer learns of the breach and the contract price.[55] The trial court awarded damages based on the market price as of September 6, the date on which Stafford unequivocally stated he would not perform. The Tenth Circuit, in interpreting section 4-2-713, ruled that the time at which the buyer learns of the breach is the time for performance. In this case this would have been September 30.[56]

The court then discussed the remedy of cover. Apparently influenced by the comment to section 4-2-713[57] dealing with damages for nondelivery or repudiation, the court stated that a buyer should cover unless there is a valid reason for refusal.[58] This opinion placed the Tenth Circuit in a unique position in interpreting the UCC. Cover apparently is not a mandatory remedy for recovery of damages. Until this decision, a buyer had the right to choose between remedies without penalty in choosing one over another.[59]

C. Barbour v. United States

In *Barbour v. United States*,[60] the Tenth Circuit held that a secured creditor's failure to sell repossessed goods in a commercially reasonable manner does not preclude recovery of a defi-

[54] Section 4-2-713 provides in part: "[T]he measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price . . . ." COLO. REV. STAT. § 4-2-713 (1973).

[55] *Id.*

[56] 553 F.2d at 1226. This interpretation has gained some support in other jurisdictions and by legal scholars. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 197-202 (1972).

[57] COLO. REV. STAT. § 4-2-713, Official Comment 1 (1973).

[58] The court stated:

> At the end of a reasonable period he [the buyer] should cover if substitute goods are readily available. If substitution is readily available and buyer does not cover within a reasonable time, damages should be based on the price at the end of that reasonable time rather than on the price when performance is due. If a valid reason exists for failure or refusal to cover, damages may be calculated from the time when performance is due.

553 F.2d at 1227.

[59] The author has not been able to locate any other court or legal scholar taking the same position as the court in this case.

[60] 562 F.2d 19 (10th Cir. 1977).

ciency judgment by the creditor.[61] The case involved a situation where the Small Business Administration (SBA) lawfully repossessed secured equipment but then proceeded to sell it in what failed to qualify as a commercially reasonable manner. The price obtained at the sale was considerably less than the balance on the underlying note and the SBA sued to recover the deficiency. Barbour, the debtor, counterclaimed based upon the SBA's failure to comply with section 9-504(3) of the Uniform Commercial Code (UCC) as adopted in Kansas.[62]

The courts have offered three different interpretations of the effect of noncompliance with section 9-504(3) and its consequent interaction with section 9-507(1),[63] which provides the debtor with a remedy upon a creditor's failure to comply with section 9-504(3). The first interpretation holds that "compliance with section [9-504(3)] . . . is a condition precedent to a secured credi-

[61] *Id.* at 21.

[62] KAN. STAT. § 84-9-504(3) (Supp. 1977) reads as follows:

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

[63] KAN. STAT. § 84-9-507(1) (1965) reads as follows:

If it is established that the secured party is not proceeding in accordance with the provisions of this part dispositon may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.

tor's right to recovery of any deficiency between the sale price of collateral and the amount of the unpaid balance."[64] Assuming a situation where a creditor fails to satisfy the commercial reasonableness test of section 9-504(3), obtains a reasonable price, and yet a sizeable deficiency remains, this rule would bar a deficiency judgment.[65]

The second interpretation does not automatically preclude the creditor from obtaining a deficiency judgment but rather "indulge[s] the presumption . . . that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law."[66] This line of authority thus allows the creditor a deficiency judgment under section 9-504(3) but also permits the debtor an offset to the extent of the difference between the sale price and what that price should have been had the sale been conducted properly. Further, the burden is upon the creditor to prove a value less than the outstanding debt and the amount bid or received at the sale is not considered evidence of its true value.[67]

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[64] Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 496 (Iowa 1977). *See* Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *vacated on other grounds*, 335 F.2d 846 (3d Cir. 1964); Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972); Washington v. First Nat'l Bank, 332 So. 2d 644 (Fla. Dist. Ct. App. 1976); Turk v. St. Petersburg Bank & Trust Co., 281 So. 2d 534 (Fla. Dist. Ct. App. 1973); Gurwitch v. Luxurest Furniture Mfg. Co., 233 Ga. 934, 214 S.E.2d 373 (1975); Braswell v. American Nat'l Bank, 117 Ga. App. 699, 161 S.E.2d 420 (1968); FDIC v. Farrar, 231 N.W.2d 602 (Iowa 1975); Beneficial Finance Co. v. Reed, 212 N.W.2d 454 (Iowa 1973); Twin Bridges Truck City, Inc. v. Halling, 205 N.W.2d 736 (Iowa 1973); Camden Nat'l Bank v. St. Clair, 309 A.2d 329 (Me. 1973); Foundation Discounts, Inc. v. Serna, 81 N.M. 474, 468 P.2d 875 (1970); Leasco Data Processing Equip. Corp. v. Atlas Shirt Co., 66 Misc. 2d 1089, 323 N.Y.S.2d 13 (Civ. Ct. N.Y. 1971); Aimonetto v. Keepes, 501 P.2d 1017 (Wyo. 1972).

[65] For a criticism of this rule, see, *e.g.*, Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

[66] Norton v. National Bank of Commerce, 240 Ark. 143, 150, 398 S.W.2d 538, 542 (1966). *See* Leasing Assocs., Inc. v. Slaughter & Son, Inc., 450 F.2d 174 (8th Cir. 1971); 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); Community Management Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973); Wirth v. Heavey, 508 S.W.2d 263 (Mo. App. 1974); Cornett v. White Motor Corp., 190 Neb. 496, 209 N.W.2d 341 (1973); Conti Causeway Ford v. Jarossy, 114 N.J. Super. 382, 276 A.2d 402 (Ocean County Dist. Ct. 1971); T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (Bergen County Ct. 1969); Investors Acceptance Co. v. James Talcott, Inc., 61 Tenn. App. 307, 454 S.W.2d 130 (1969).

[67] *See, e.g.*, Universal C.I.T. Credit Co. v. Rone, 248 Ark. 665, 668-69 453 S.W.2d 37, 39-40 (1970).

The third line of cases most closely follows the provisions of the UCC. They permit the secured creditor to recover a deficiency judgment subject to an offset for damages to which the debtor is entitled under section 9-507(1).[68] Thus the creditor has the burden of proving his claim for a deficiency judgment without the indulgence of any presumptions while the debtor has the burden of proving his damages resulting from creditor's commercially unreasonable sale.

The Tenth Circuit, interpreting Kansas law, adopted the third interpretation,[69] noting that section 9-507(1) provides a specific remedy for noncompliance with section 9-504(3) and therefore "a complete bar was not intended."[70] Further, the UCC prohibits "penal damages."[71]

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[68] *See, e.g.,* United States v. Whitehouse Plastics, 501 F.2d 692 (5th Cir. 1974); Tauber v. Johnson, 8 Ill. App. 3d 789, 291 N.E.2d 180 (1972); Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966); Commercial Credit Corp. v. Wollgast, 11 Wash. App. 117, 521 P.2d 1191 (1974); Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972).

[69] 562 F.2d at 21.

[70] *Id.*

[71] *Id.*