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Commercial Law

by Robert A. Weber, Jr.*

Commercial law is “the whole body of substantive jurisprudence . . . applicable to the rights, intercourse, and relations of persons engaged in commerce, trade, or mercantile pursuits.” Of course, an article on commercial law that used this statement to define its coverage would be completely unsuitable for a survey. The Author instead relied on Georgia's Commercial Code to determine the body of law to review in this Article and, accordingly, structured it in a similar fashion.

This Article covers case law and statutory amendments from June 1, 1994, through May 31, 1996. The review of Article 9 caselaw includes decisions by federal bankruptcy courts in Georgia as well as those decided by Georgia's state courts. Most notably, however, is what is not covered by this Article. The Georgia General Assembly recently adopted complete revisions of Articles 3 and 4. Because of considerations unique to that massive undertaking, it has been dealt with in a separate article by Professor Michael Sabbath, who served as the Official Reporter for the revision's consideration by the General Assembly. In next year's survey, Articles 3 and 4 will again be dealt with in this Article.

I. Sales

A. Scope

Determining the coverage of Article 2 is not merely an academic endeavor. For example, contracts within the scope of Article 2 are

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Many thanks to my wife, Laurie, for all her support.

subject to a four-year statute of limitations, whereas the limitations period for simple contracts in writing that are not within Article 2 is six years. This distinction, and the necessity of conducting a scope inquiry, was demonstrated by a recent decision of the court of appeals. In *Southern Tank Equipment Co. v. Zartic*, practitioners were provided with a definitive test for deciding whether a hybrid contract—one involving both the sale of goods and the provision of labor—falls within the scope of Article 2. That test is as follows:

When the predominant element of a contract is the sale of goods, the contract is viewed as a sales contract and the UCC applies even though a substantial amount of service is to be rendered in installing the goods. When, on the other hand, the predominant element of a contract is the furnishing of services, the contract is viewed as a service contract and the UCC does not apply. As it is said: A contract for services and labor with an incidental furnishing of equipment and materials is not a transaction involving the sale of goods and is not controlled by the UCC. Factors to be considered in determining the predominant element of a contract include the proportion of the total contract cost allocated to the goods and whether the price of the goods are segregated from the price for services. A smaller proportion of the total price assignable to services, or a failure to state a separate price for services rendered, suggest a contract for the sale of goods with services merely incidental.

Applying this test, the court found the transaction in *Zartic* to be for the sale of goods. Over half of the purchase price was for one piece of equipment, with the remainder of the purchase price representing goods and services. In addition, the sale of the piece of equipment was arranged first, and only thereafter did the parties add the other materials and service. Accordingly, Article 2's four-year limitations period applied to preclude plaintiff's recovery.

Article 2 coverage determines not only the appropriate limitations period, but also the existence of certain remedies. In *Keaton v. A.B.C. Drug Co.*, plaintiff pulled a bottle of bleach from a top shelf in defendant's store. The bottle's cap was loose and bleach spilled into plaintiff's eye when, in the course of removing the bottle from the shelf,

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5. *Id.* at 503-04, 471 S.E.2d at 588 (internal quotations and citations omitted).
6. *Id.* at 505, 471 S.E.2d at 589.
7. *Id.*
plaintiff tipped the bottle towards her. In assessing the validity of plaintiff’s claim for breach of the implied warranty of merchantability, Judge Beasley’s concurrence in the court of appeals decision astutely noted that at the point plaintiff removed the bleach from the shelf, no “sale” had taken place. Because “the UCC warranties can only be made by a seller of goods, and those warranties can only be extended either to the buyer or to those who have a specified relationship with the buyer,” Judge Beasley concluded that the warranty provisions of Article 2 did not apply. The supreme court disagreed, however, finding that plaintiff’s “actions of grasping the product and beginning to take the product from the shelf with the intent to purchase it sufficiently constituted ‘possession’ of the product, establishing privity between [plaintiff] and [defendant].”

The disagreement between the supreme court’s decision and Judge Beasley’s concurrence centered on the interpretation of an earlier decision, Fender v. Colonial Stores, Inc. The court in Fender analyzed the facts before it to decide whether there existed, in the terms of Article 2, “a present sale of goods [or] a contract to sell goods at a future time.” If either existed, Article 2 applied. The plaintiff in Fender had “finished her shopping and was in the physical act of placing the bottles on the [check-out] counter for payment when the explosion occurred.” More importantly, plaintiff said she was at the check-out counter to pay for her purchases. The court first concluded that “the retailer’s act of placing the bottles on the shelf with the price stamped upon them manifested an intent to offer them for sale, the terms of the offer being that it would pass title to the customer when they were presented at the check-out counter and paid for.” The court found that “plaintiff’s act of taking physical possession of the goods with the intent to purchase them manifested an intent to accept the offer and a

9. 266 Ga. at 385, 467 S.E.2d at 560.
11. 214 Ga. App. at 141, 447 S.E.2d at 320 (Beasley, P.J., concurring).
12. Id.
13. 266 Ga. at 386, 467 S.E.2d at 561.
15. Id. at 32, 225 S.E.2d at 693.
16. Id. Article 2 will imply a warranty “upon a contract for sale and not solely upon the execution of the sale itself.” Id. A “contract for sale” is in turn defined as “both a present sale of goods and a contract to sell goods at a future time . . . .” Id. (citing O.C.G.A. § 11-2-106(1)).
17. Id. at 33, 225 S.E.2d at 693.
18. Id.
promise to take them to the check-out counter and to there pay for them."

The supreme court's conclusion that Article 2 applied in *A.B.C. Drug Co.* was obviously premised on a finding that plaintiff had the "intent to purchase" the product when she removed it from the shelf. The supreme court did not specify what evidence supported a finding that the plaintiff in *A.B.C. Drug Co.* "intended to purchase" the bleach when she removed it from the shelf. The opinions only indicate that plaintiff went to defendant's store to purchase laundry detergent and a half-gallon of Clorox bleach, that she already had a box of detergent under her arm, and that she reached above her head to grasp a half-gallon bottle of bleach. From these facts one could certainly infer that plaintiff intended to purchase the bottle of bleach.

The supreme court's decision should have more clearly stressed the necessity that a plaintiff bears the burden of establishing his or her "intent to purchase" a product when retrieved from a shelf. By failing to do so, the decision in *A.B.C. Drug Co.* suggests that every shopper is a purchaser for purposes of Article 2. If subsequent decisions gloss over this requirement as the supreme court did in *A.B.C. Drug Co.*, Article 2 will be transformed into a tort statute in the consumer context.

**B. Warranty Actions**

1. **Express Warranty.** Section 11-2-313 of the Official Code of Georgia Annotated ("O.C.G.A.") sets forth the manner in which a seller may create express warranties, the breach of which may then serve as the basis for a buyer's cause of action. At times, sellers get ahead of themselves and use typical sales language, such as, "this is the best widget on the market," creating an express warranty that they subsequently regret. Whether such sales talk or "puffing" amounts to an express warranty is determined as follows:

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19. *Id.*, 225 S.E.2d at 693-94.
22. In *McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1348 (11th Cir. 1986) (applying Florida law), the Eleventh Circuit found the requisite intent to purchase absent. "[T]he uncontradicted evidence in [plaintiff's] pretrial deposition and trial testimony was that she was shopping for a cookie jar and had lifted the lid of this jar to see if the price tag was located inside. She had not formed any intent to purchase." *Id.* Accordingly, plaintiff had no Article 2 warranty cause of action. *Id.* Only by ensuring that a plaintiff proves an intent to purchase will courts prevent Article 2 from becoming a tort statute in the consumer context.
The decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purported to state a fact upon which it may fairly be presumed the seller expected the buyer to rely and upon which a buyer would ordinarily rely. If the language used is of that character, the fact of reliance on the part of the buyer and the presumption of intent on the part of the seller which the law would raise in such a case would operate to create a warranty. No particular form of words is necessary to constitute a warranty... Whether the words used amount to a warranty or not, is a question for the jury, under the rules of law applicable to the case.23

Applying this test, the court of appeals in Moore v. Berry24 concluded that a seller's representations that a tree stand was "probably the safest one on the market" and that "there is no way you can fall" were not mere sales talk or "puffery" and presented jury questions as to whether an express warranty to that effect had been created.25 The court also disagreed with the trial court's assessment that the foregoing statements were "too vague" to create an express warranty, stating that "if this constitutes vague language, we can hardly imagine words which would be deemed specific."26

In some circumstances, even though the existence of an express warranty is undisputed, the buyer's conduct can preclude his recovery. In Lane v. Corbitt Cypress Co.,27 the court found that the express warranty given—that roofing shingles sold to plaintiff "were 'tidewater' cypress roofing shakes, or that they would last 45 years"—was predicated on the assumption that the shingles would be installed according to seller's instructions.28 Thus, when the buyer failed to follow the seller's installation instructions, he was precluded from recovering on the basis of the express warranty.29

Finally, there is the question of the disclaimer of express warranties. Although BMW received some assistance this year from the Supreme Court of the United States,30 the Georgia Court of Appeals found that BMW's attempt to use separate provisions within its retail installment

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25. Id. at 698-99, 458 S.E.2d at 881.
26. Id. at 698, 458 S.E.2d at 880.
28. Id. at 389, 450 S.E.2d at 857.
29. Id.
sales contract to disclaim express warranties also contained therein was ineffective. The sales contract in question described the car to be sold as "new;" however, the car’s surface had been refinished in places to repair marring that occurred while in transit. The contract also contained a specific disclaimer of any express or implied warranties by the seller, and further proclaimed in all capital letters that the car was "SOLD AS IS." Both disclaimers were ineffective to negate the express statement that the car was "new."

2. Implied Warranty. In every contract for the sale of goods, Article 2 implies a warranty by the seller that the goods are "merchantable," that is, that the goods will at least satisfy the following:

(a) Pass without objection in the trade under the contract description; and
(b) In the case of fungible goods, are of fair average quality within the description; and
(c) Are fit for the ordinary purposes for which such goods are used; and
(d) Run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
(e) Are adequately contained, packaged, and labeled as the agreement may require; and
(f) Conform to the promises or affirmations of fact made on the container or label if any.

When a buyer alleges that the goods are defective because they do not conform to one or more of the foregoing descriptions, he must prove that the defect existed at the time of sale. Thus, the implied warranty of merchantability warrants "against defects or conditions existing at the

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32. Id. at 880, 449 S.E.2d 338-39.
33. Id. at 885, 449 S.E.2d at 341. Although not cited by the court, O.C.G.A. section 11-2-316(1) specifically addresses disclaimer of express warranties, and states: Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence . . . negation or limitation is inoperative to the extent that such construction is unreasonable.
35. Jones v. Marcus, 217 Ga. App. 372, 373, 457 S.E.2d 271, 272 (1995). Until the court of appeals decided Jones, the question of whether the alleged defect had to exist at the time of sale had not been addressed in Georgia. Id.
time of sale, but do[es] not provide a warranty of continuing serviceability. It is also important to note that the nature of a seller's liability for breach of the U.C.C.'s implied warranties differs from the strict tort liability imposed on the manufacturer of defective goods. It is also important to note that the nature of a seller's liability for breach of the U.C.C.'s implied warranties differs from the strict tort liability imposed on the manufacturer of defective goods. In tort-type warranty situations—those in which the goods cause personal injury to the buyer—the defense most commonly asserted by sellers is that the defect which resulted in injury to the buyer was: (1) patent, or (2) latent and was either (a) disclosed to the buyer, or (b) discoverable by the exercise of caution on the part of the buyer. The seller in Keaton v. A.B.C. Drug Co. was unsuccessful in using this defense. When the buyer reached for a bottle of bleach located on a top shelf in seller's store, the bottle tipped and a loose cap allowed bleach to spill into buyer's eyes. Although the court of appeals had summarily concluded without any analysis that the defense precluded recovery by the buyer, the supreme court disagreed, finding that because the top was not off and that there was nothing noticeably wrong with the bottle, "there was no patent or obvious defect." Whether the buyer failed to exercise caution for her own safety was thus a jury question. The patent defect defense similarly failed the seller in Moore v. Berry. Stating "an implied warranty protects the buyer only against latent defects which are not discoverable by the exercise of caution on his part," the court of appeals concluded that the affidavit from the seller's expert alone was enough to create an issue of fact as to whether the defect was patent. Specifically, the court found contradictory the assertions by seller's expert that the defect was nonexistent yet somehow patent.

36. Id.
39. 266 Ga. at 387, 467 S.E.2d at 560.
40. Id. Warranty liability in Keaton was predicated on the supreme court's initial finding in this case that privity had arisen between the putative buyer and the seller, when in fact the buyer had not yet purchased the bottle of bleach. As indicated above (see text accompanying supra notes 20-22), the supreme court's decision in this regard is open to criticism.
42. Id. at 697, 458 S.E.2d at 880.
43. Id.
Sellers who are sued for breach of warranty also commonly raise lack of privity as a defense. Thus, where a warranty arises from a contract for the sale of goods,

it can only run to a buyer who is in privity of contract with the seller. If a defendant is not the seller to the plaintiff-purchaser, the plaintiff as the ultimate purchaser cannot recover on the implied or express warranty, if any, arising out of the prior sale by the defendant to the original purchaser, such as distributor or retailer from whom plaintiff purchased the product. 44

However, some situations can create the requisite privity, as when the manufacturer of goods issues a warranty to the purchaser through an authorized dealer. 45 The privity defense was successfully raised by a manufacturer in the survey period case of Cobb County School District v. MAT Factory, Inc., 46 in which the court found that no privity existed between the manufacturer of playground surface material and the Cobb County School District because the contract for the surface material was between the manufacturer and Cobb County's contractor. 47

Whereas the implied warranty of merchantability arises in every contract for the sale of goods, 48 another warranty implied by Article 2 is dependent upon the intent and conduct of buyer and seller. Thus,

[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under Code Section 11-2-316 an implied warranty that the goods shall be fit for such purpose. 49

Express warranty liability is not a prerequisite for warranty liability under this code section. 50

The fitness warranty "envisages a specific use by the buyer which is peculiar to the nature of his business . . . and also requires that the

47. Id. at 702, 452 S.E.2d at 145.
48. This is assuming of course that the warranty of merchantability has not been disclaimed or modified. See O.C.G.A. § 11-2-316(2), (3) (1994).
49. Id. § 11-2-315.
seller know the buyer is relying on the seller's skill or judgment.\textsuperscript{51} Because the buyer's intended use of the goods must be "peculiar," there may be no recovery under the implied fitness warranty where the buyer's use of goods is the same as all other users. For example, where a buyer merely tells his seller that he wants tires for his pickup truck, the seller's advice to him on the proper size and type will not imply a warranty of fitness for a particular purpose: "Knowledge by [the seller] that the tires were to be used on the truck is not knowledge of a 'particular purpose' within the meaning of O.C.G.A. section 11-2-315."\textsuperscript{52} The use of tires on a truck is not a "particular purpose" because it is "peculiar" to no one buyer.

C. Acceptance and Rejection

One way for "acceptance" to occur under Article 2 is for the buyer to do "any act inconsistent with the seller's ownership."\textsuperscript{53} For example, in one survey period case,\textsuperscript{54} buyer agreed to assist in liquidating overstocked inventory held by seller. Seller shipped the merchandise to buyer, who in turn liquidated it. Buyer then refused to remit the proceeds of the liquidation to seller. Regarding the issue of acceptance, the court found that buyer's liquidation was "an act inconsistent with [the seller's] ownership."\textsuperscript{55}

Acceptance may also occur where the buyer fails to reject the goods after having "a reasonable opportunity to inspect them."\textsuperscript{56} Although what length of time will constitute a "reasonable opportunity" is a function of the facts of each case, any period of time longer than one year appears inherently suspect.\textsuperscript{57}

"Acceptance" has several effects under Article 2. Not only does it obligate the buyer to "pay at the contract rate for any goods accepted,"\textsuperscript{58} it also precludes rejection.\textsuperscript{59} Acceptance is also the act from which the "reasonable time" period in which a buyer must notify his seller of any

\textsuperscript{52} Id.
\textsuperscript{53} O.C.G.A. § 11-2-606(1)(c) (1994).
\textsuperscript{55} Id. at 61, 453 S.E.2d at 63.
\textsuperscript{56} O.C.G.A. § 11-2-606(1)(b) (1994).
\textsuperscript{58} O.C.G.A. § 11-2-607(1) (1994).
\textsuperscript{59} Id. § 11-2-607(2); Contract Sales & Serv. Int'l, Inc., 216 Ga. App. at 62, 453 S.E.2d at 63.
defect is measured. Failure to so notify the seller after acceptance precludes the buyer from any remedy. Although what constitutes a reasonable time period under O.C.G.A. section 11-2-607(3) differs according to the circumstances of each case, courts are not inclined to accept as seasonable notice the filing of a lawsuit at the end of the two-year limitations period.

By citing to O.C.G.A. section 11-2-607(3) (notice of breach after acceptance), the court in Cobb County muddled the issue of whether notice of rejection occurred within a reasonable time. The court's analysis thus suggests that whether notice of breach and notice of rejection were made within a "reasonable time" are equivalent inquiries. However, a "reasonable time" within which goods must be accepted or rejected may, in certain cases, differ from the "reasonable time" within which a buyer is required to notify his seller of breach.

D. Damages

The most noteworthy damages decision under Article 2 during the survey period was Nelson v. C.M. City, Inc. In Nelson, a defective television caused a fire in consumer-plaintiff's home. Defendant-seller Curtis Mathes ("C.M.") had held the television out as one it had manufactured by placing its name on the television, when in fact C.M. had done nothing more than arrange for the television's assembly by different components manufacturers. NEC manufactured the television's chassis; another company placed the cabinet on the chassis; and only then was the television shipped to C.M. In plaintiff's suit for damages, defendant-seller argued that its exclusion of incidental and consequential damages in the sales contract barred plaintiff's warranty-based damages claim. The trial court agreed with seller, ruling that such an exclusion was not unconscionable as a matter of law.

The court of appeals disagreed, finding that the issue was one for the jury:

[Consumer] bought this television because of Curtis Mathes's name and reputation for manufacturing quality, non-defective products "backed" by Curtis Mathes. The warranty exclusion in this case was imposed by

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60. Cobb County School Dist., 215 Ga. App. at 702, 452 S.E.2d at 146 (citing O.C.G.A. § 11-2-607(3)).
61. Id.
63. 215 Ga. App. at 702, 452 S.E.2d at 146.
64. Id.
66. Id. at 850, 463 S.E.2d at 903.
Curtis Mathes as the only condition by which [consumer] could acquire the reputedly high-quality Curtis Mathes product, and it resembled a law more than a meeting of the minds . . . . It may have been deemed by [consumer] that because Curtis Mathes manufactured the television, a provision for consequential damages such as fire damage to their home was superfluous. Thus, in the jury's view it may be unconscionable for Curtis Mathes to take advantage of its name to . . . sell . . . a product as a high-quality product while failing to disclose that it did not actually manufacture that product, and then, by using a one-sided warranty, immunize itself from liability for damages arising out of such defective product sold in that manner.67

Although similar exclusions had been upheld as not unconscionable in other cases,68 the foregoing facts convinced the court of appeals that a jury should decide the issue in this case.69

The court of appeals clearly disapproved of the seller, C.M., placing its name on a television set that it had arranged to be manufactured by others.70 The court's considerable reliance on this fact suggests (but does not require the conclusion) that brand name sellers may not exclude consequential damages. It seems that this result can best be explained as a reaction to recent legislation insulating sellers such as C.M. from strict tort product liability.

In Alltrade, Inc. v. McDonald,71 the defendant in a strict product liability action defended on the grounds that it was merely a "product seller" as defined in O.C.G.A. section 51-1-11.1 and was accordingly immune from the strict tort liability imposed upon a "manufacturer" by O.C.G.A. section 51-1-11.72 Faced with the plain language of the statute, the court agreed: "An entity which merely affixes its label to a product and sells it under its name is a product seller rather than a manufacturer . . . and is not liable in a product liability action based on the doctrine of strict liability in tort."73 However, a special concurrence by Judge Pope expressed a desire that the legislature amend the statute.74 Specifically, Judge Pope found it unjust that a company should be immune from strict product liability when it "has put its own

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67. Id. at 854, 463 S.E.2d at 905-906.
69. 218 Ga. App. at 855, 463 S.E.2d at 906.
70. Id. at 852, 463 S.E.2d at 904.
72. Id. at 759, 445 S.E.2d at 857.
73. Id. at 760, 445 S.E.2d at 858.
74. Id. at 761, 445 S.E.2d at 859 (Pope, C.J., concurring specially).
trade name on a product, thus leading the public to believe it manufactured the product even though it did not.\textsuperscript{76}

\textit{Nelson} is simply a reaction to Judge Pope's concurrence.\textsuperscript{76} The court of appeals, as already noted, vigorously disapproved of C.M. holding out a product as its own that it had not produced; thus, the court sought justice through a strict application of \textit{Alltrade}, finding that C.M. was not a "product seller" and was thus subject to strict product liability.\textsuperscript{77} Because of the legislature's apparent unwillingness to amend O.C.G.A. section 51-1-11.1, the court of appeals judicially ameliorated the harsher effects of the statute through a strict construction of its terms.\textsuperscript{78} By limiting the efficacy of a consequential damages exclusion, the court in \textit{Nelson} ensured the availability of alternative remedies (such as consequential damages for breach of warranty) against those who might qualify as product sellers. Viewing \textit{Nelson} in this light, its holding with regard to consequential damages exclusions is properly restricted to those who might be classified as "product sellers" under O.C.G.A. section 51-1-11.1.

III. SECURED TRANSACTIONS

A. Scope of Article Nine

Article 9 of Georgia's Commercial Code applies: "(a) \textit{to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts; and also (b) to any sale of accounts or chattel paper.}"\textsuperscript{79} Courts often have difficulty applying the foregoing definition to those transactions that, while structured to resemble a security interest, are more properly characterized as leases. Because the parties' intentions are frequently muddled by conflicting motivations, which of course differ with each case, deciding whether a transaction is "intended to create a security interest" can be a daunting task.

The importance and difficulty of deciding whether the parties "intended" the transaction to be a "true lease" is most obvious in bankruptcy. Although upon entering the transaction the debtor may

\textsuperscript{75} Id.

\textsuperscript{76} See Nelson v. C.M. City, Inc., 218 Ga. App. at 853, 463 S.E.2d at 905 ("The fair result advocated by Chief Judge Pope is reached in this case, however, by focusing more precisely on the exact language of O.C.G.A. § 51-1-11.1 . . . .").

\textsuperscript{77} Id. at 851, 463 S.E.2d at 904.

\textsuperscript{78} Id. at 851-52, 463 S.E.2d at 904-05.

have wished to call the transaction a lease for tax purposes, if once in bankruptcy he may "propose to characterize the transaction as a sale... then value the property and bifurcate the claim between secured and unsecured components." If the transaction is in fact a sale, or if the lessor does not want the property returned to again be leased, such a recharacterization is fair. For example, a creditor outside of bankruptcy could hope to obtain, at most, the property's fair market value upon resale. The deficiency between the loan amount and the amount realized upon foreclosure would nine times out of ten be uncollectible against a debtor who could not pay the debt according to its terms in the first instance. Thus, in bankruptcy the creditor's outcome is actually better.

The situation is different for lessors, as recognized by the Bankruptcy Code. A debtor must accept or reject the lease according to its terms; and if rejected, the property must be returned to the lessor. This requirement is based on the notion that most lessors want to again lease the subject property. Allowing a debtor to bifurcate a lease claim disadvantages the typical lessor, who would be better off if the bankruptcy had not occurred because a lessor can obtain much more money from re-leasing the property than from debtor's payment of the secured portion. Therefore, permitting recharacterization in this situation would prejudice lessors and allow debtors to have both the tax advantage of a lease outside bankruptcy and the benefit of bifurcation in bankruptcy.

It is against this backdrop that bankruptcy courts are asked to decide whether a transaction is a lease or a disguised sale. The debtor in In re Paz, wishing to retain the property, contended that the "lease" was actually a disguised sale. After discussing the foregoing motivations that are present in such a situation, the court construed the agreement under O.C.G.A. section 11-1-201(37), as revised in 1993. For a transaction to be a "security agreement" under that provision, the debtor must be incapable of terminating the agreement, and one of the following conditions must exist:

(a) The original term of the lease is equal to or greater than the remaining economic life of the goods,
(b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods.

81. Id. at 745. The court's decision in Paz contains an excellent discussion of this issue.
83. 179 B.R. at 743.
84. Id. at 746.
(c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or (d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.\textsuperscript{85}

Although the court performed at least a cursory analysis of each of these factors, by far the most instructive is the court’s analysis of “additional nominal consideration.” After running the numbers, the court found that a residual payment of $3,303.12 was not nominal when compared to either the ultimate capital cost of the property ($12,129.56) or the original purchase price ($10,000).\textsuperscript{86} Because none of the four factors applied, the transaction at issue was a lease.\textsuperscript{87}

Article 9 not only excludes transactions according to form (like leases), but also according to subject matter. Thus, certain types of property are specifically excluded from Article 9. For example, FCC broadcast licenses may not be subject to a security interest. This exclusion undoubtedly makes financing more difficult for those seeking to enter the broadcast industry. However, the Eleventh Circuit Court of Appeals holding in \textit{In re Beach Television Partners}\textsuperscript{88} should make financing more available and lower barriers to market entry for those without the capital to self-finance. There, the Eleventh Circuit held that “creditors can perfect a security interest in the private right of the proceeds from an FCC approved sale of a broadcast license.”\textsuperscript{89} Although FCC licenses themselves may still not be “hypothecated by way of mortgage, lien, pledge, lease, etc.,” the ability of lenders to obtain a security interest in the proceeds of an FCC approved sale of the license should make market entry much easier for those who cannot self-finance the purchase of such a license.\textsuperscript{90}

Article 9 also excludes transactions that create or transfer “an interest in or lien on real estate, including a lease or rents thereunder.”\textsuperscript{91}

\textsuperscript{85} Id. (quoting O.C.G.A. § 11-1-201(37)). The essence of each element in O.C.G.A. § 11-1-201(37) is that the lessee might one day become the owner of the property. As the court in \textit{City Food Mart v. Bell Atlantic} recognized, “[t]he prime essential distinction between a lease and a conditional sale is that in a lease the lessee never owns the property.” 218 Ga. App. 57, 57-58, 460 S.E.2d 525, 527 (1995) (quoting Ford v. Rolins Protective Serv. Co., 171 Ga. App. 882, 884, 322 S.E.2d 62, 64 (1984)).

\textsuperscript{86} 179 B.R. at 748.

\textsuperscript{87} Id. at 749.

\textsuperscript{88} 38 F.3d 535 (11th Cir. 1994).

\textsuperscript{89} Id. at 537.

\textsuperscript{90} Id.

\textsuperscript{91} O.C.G.A. § 11-9-104(h) (1994).
creditor in Chen v. Profit Sharing Plan\textsuperscript{92} sought to categorize its transaction with debtor as one covered by this exclusion so that the creditor would not be obliged to comply with the notice requirement contained in O.C.G.A. section 11-9-505(2).\textsuperscript{93} The creditor argued that the collateral given by debtor—a promissory note and security deed encumbering real property in debtor's favor—involved "the creation or transfer of an interest in or lien on real estate" and was thus outside of Article 9.\textsuperscript{94} The court of appeals disagreed, finding that although the underlying note and security deed assigned as collateral did involve real property, the creditor "only acquired a lien against the commercial paper, i.e., the security deed and the note."\textsuperscript{95} The underlying note given as security (not its subsequent assignment by debtor) had created the interest in real property, and there was no transfer of an interest in real property as the creditor only acquired a lien against the paper itself, and not the underlying real property.\textsuperscript{96} "Consequently, since the transaction... never resulted in the 'creation' or 'transfer' of an interest in or lien against real property, the [creditor] was not exempt from complying with any notice provision required under Article 9 of Georgia's Uniform Commercial Code."\textsuperscript{97}

As a final survey period note on Article 9 coverage, creditors should remember that "[e]xcept for mobile homes permanently attached to realty, mobile homes are personal property, not real property, and are governed by O.C.G.A. section 40-3-1, the Motor Vehicle Certificate of Title Act, and O.C.G.A. section 11-9-101, the Uniform Commercial Code."\textsuperscript{98}

\textsuperscript{93} Id. at 880-81, 456 S.E.2d at 240-41. Specifically, the creditor in Chen wanted to retain the subject collateral—commercial paper assigned by debtor to the creditor as security—in satisfaction of the underlying debt after default by the debtor. If such a transaction is covered by Article 9, the creditor is required to provide debtor written notice of his intention to do so after default. O.C.G.A. § 11-9-505(2) (1996). Because the creditor in Chen had not complied with this requirement, it sought to avoid the necessity for compliance therewith by arguing that the transaction was outside the scope of Article 9. 216 Ga. App. at 881, 456 S.E.2d at 241.
\textsuperscript{94} 216 Ga. App. at 881, 456 S.E.2d at 241.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
B. Creation and Perfection

1. Generally. Unless a creditor takes the steps necessary to create and perfect its interest in collateral prior to the death of its borrower, the creditor may find itself shut out by a probate court's award of a year's support to the surviving spouse. A "[y]ear's support to the family, duly set apart in the collateral prior to the perfection of the subject security interest, takes priority over such security interest." In Auto Alignment Services, Inc. v. Bray, the creditor claimed priority to the decedent's stock certificates which had been included in a probate court's award of a year's support to the decedent's family. The court of appeals rejected the creditor's claim, finding that there was insufficient evidence of the creditor's creation and perfection of an interest in the stock. "In order to perfect an interest in corporate stock, the stock certificate must be delivered to the secured party, accompanied by a stock pledge agreement." Because the creditor did not show possession of a stock pledge agreement, there was no creation or perfection and the priority rules of O.C.G.A. section 11-9-310(a) did not apply.

Perfection in many instances is not a one-time occurrence: a debtor's name change may necessitate the filing of a new financing statement; the debtor may move the collateral from one state to another, again necessitating refiling; or the creditor may need to refile after five years when the financing statement expires. In addition to these situations which require creditors be diligent, creditors who finance the acquisition of used motor vehicles should be aware that a security interest in a motor vehicle weighing less than ten thousand pounds "shall lapse unless a notice of such security interest or lien is filed with the commissioner within 30 days from the date such vehicle becomes [15 model years old]." Although the statute providing for lapse does not specify how creditors are to determine when a vehicle becomes 15 model years old, the bankruptcy court in In re Perkins used tables from the Georgia Department of Revenue to decide the question. Under that method, "a 1978 vehicle became 15 model years old as of September 1, 1991. Similarly, a 1979 vehicle became 15 model years old as of

101. Id. at 53, 446 S.E.2d at 754.
102. Id. at 55, 446 S.E.2d at 755.
103. Id.
104. Id.
September 1, 1992." Creditors should thus comply with O.C.G.A. section 40-3-4(14)(C)(i) by October 1 of each year as to all motor vehicles in which they have a security interest that will attain 15 model years of age under this formula.

As a final note regarding perfection, Georgia recently adopted a new system for filing financing statements whereby the filing of financing statements in any county of the state will perfect a security interest in most types of personal property collateral. The new system also establishes a central indexing system for all financing statements. Removing any confusion about the effective date of this legislation, the Georgia Supreme Court's decision in Trust Co. Bank v. Georgia Superior Court Clerks' Cooperative Authority unequivocally states, "the legislature intended for January 1, 1995, to be the effective date for the new filing and indexing system."

2. Cross-Collateralization Problems. Although the rule of thumb for determining priority among creditors is first to file is first in right, the holder of a purchase money security interest in inventory has priority over a conflicting security interest in the same inventory. In addition, the Bankruptcy Code makes purchase money status vital to retailers of household furnishings and goods, wearing apparel, appliances, and other merchandise that are considered primarily for a debtor's household use. As long as such a retailer maintains purchase money status, the avoidance power found in 11 U.S.C. § 522(f)(2) cannot be used against it.

Both types of lenders, inventory financiers and retailers selling on credit, encounter problems when they attempt to consolidate purchase money debt and collateral. This occurs when collateral that is already used to secure purchase money debt is pledged as additional collateral (cross-collateralized) for future purchases, and items of collateral

107. Id. at 458. Although the court noted that one might argue that a 1978 model purchased late in 1978 would not become 15 model years old until late 1993, the method used by the Georgia Department of Revenue took into account the fact that next year's car models are actually sold late in the preceding year, i.e., a "1978 vehicle was first offered for sale in the fall of 1977." Id. at 458 n.1.


109. Id. at 390, 456 S.E.2d at 571 (citing O.C.G.A. § 11-9-407 (1994)).


111. Id. at 390 n.1, 456 S.E.2d at 572.


subsequently purchased are used as collateral for pre-existing debt. The result is that later purchased items may secure earlier debt, and although a debtor may actually pay off a particular item of collateral, it remains encumbered as collateral for subsequent purchase money debt. The problem with such a result is that "[t]he extent an item of collateral secures some other kind of debt, the security interest in an item is not purchase money." With paid-off items of collateral still serving as security for subsequent purchase money debt, and subsequent purchase money collateral serving as security for earlier purchase money debt, it is impossible to ascertain the extent to which each item of collateral secures its own price.

The Eleventh Circuit Court of Appeals addressed this problem in Southtrust Bank of Alabama, N.A. v. Borg-Warner Acceptance Corp., stating:

Without some guidelines, legislative or contractual, the court should not be required to distill from a mass of transactions the extent to which a security interest is purchase money. Unless a lender contractually provides some method for determining the extent to which each item of collateral secures its purchase money, it effectively gives up its purchase money status.

Creditors can thus maintain purchase money status in the cross-collateralization context by creating within the security agreement a payment allocation method which provides some method for determining the extent to which each item of collateral secures "all or part of its price." Decisions subsequent to Southtrust have strictly construed payment allocation methods in cross-collateralization situations. In In re Freeman, the Eleventh Circuit rejected a payment allocation method because the allocation formula failed to specify how payments were to be applied among an item's purchase price, sales tax, and interest.

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114. Lee, 169 B.R. at 793 (quoting In re Fickey, 23 B.R. 586, 588 (Bankr. E.D. Tenn. 1982)). This rule stems from the definition of "purchase money security interest," which exists only to the extent that it is "[t]aken or retained by the seller of the collateral to secure all or part of its price . . . ." O.C.G.A. § 11-9-107(a) (1994) (emphasis added).

115. 760 F.2d 1240 (11th Cir. 1985).

116. Id. at 1243 (internal quotations and citations omitted).

117. O.C.G.A. § 11-9-107(a) (1994); see also Southtrust, 760 F.2d at 1243 (allocation method necessary to determine extent to which each item of collateral secures its "purchase money").

118. 956 F.2d 252 (11th Cir. 1992).

119. Id. at 255.
In so holding, the Eleventh Circuit implicitly adopted the narrow interpretation that “the all or part of its price” provision found in the definition of purchase money security interest ... refers only to the “cash price” of the collateral purchased in the transaction and not to other amounts associated with the cost of the credit transaction such as finance, insurance or other charges.120

Faced with what it deemed the binding precedent of Freeman, the survey period decision in In re Lee invalidated a creditor's purchase money status because the payment formula in its security agreement similarly did not allocate payments “among sales tax, interest, insurance and purchase price.”121

In contrast to Freeman and Lee, another bankruptcy court during the survey period upheld a creditor’s purchase money status in the context of a retail charge account agreement where the formula was as follows:

I hereby grant you a purchase money security interest in each item of property purchased by me ... from you, which means you keep an interest in the property until I pay for it as explained in this Agreement .... Such security interest will secure the total amount due from time to time on such item, together with any finance charges, insurance charges, warranty service charges, and non-filing fees applicable to such item, and will remain in such item until the total cash price and any finance charges, insurance charges, warranty service charges and non-filing fees have been paid in full. You may apply payments on my account first to any unpaid finance charges, insurance charges, warranty service charges, and non-filing fees in the order such charges are incurred, and then to the total cash price of my purchases in the order such purchases are made. Items will be paid for in the order in which they are purchased; and, if items are purchased on the same date, the items will be considered paid for in the order of their cash price, with the lowest priced item being considered paid for first.122

The formula makes no mention of sales tax and does not define cash price. The creditor in Carter only asserted purchase money status with regard to three items that had not been paid for in full under the payment formula; the creditor did not claim purchase money status as to six other items, which had been paid for in full under the formula.123 Although the court did not discuss Freeman, it did cite South-

120. Lee, 169 B.R. at 793-94.
121. Id. at 794.
123. Id.
trust, finding that this formula "provides some method for determining the extent to which each item of collateral secures its purchase money."\textsuperscript{124}

The result in Carter is much more realistic. Although application of payment to those portions of the debt not representing an item's cash price is permissive, and sales tax is not dealt with, the formula was sufficient to ensure purchase money status for the creditor. The court in Lee, apparently dismayed at Freeman's strict construction of cash price, cited contrary authority in which a panel from the Third Circuit stated: "We have little difficulty in concluding that 'price' includes not only the actual costs of the goods but also financing charges and sales tax. That interpretation of the statute is but a recognition of the realities of the market place in today's credit-oriented society."\textsuperscript{125}

3. Rents. A creditor's entitlement to post-petition rents assigned to it by a deed to secure debt currently depends upon whether the debtor files bankruptcy in the Northern, Middle, or Southern District of Georgia.\textsuperscript{126} When a debtor assigns rents to the secured party under the terms of a deed to secure debt, Georgia law provides that the secured party obtains only an inchoate right therein.\textsuperscript{127} When debtor files bankruptcy, the question becomes whether the creditor had taken "sufficient [pre-petition] acts of 'enforcement' under Georgia law to give [the creditor] a present choate interest in the rents."\textsuperscript{128} In other words, has the creditor rendered its right to rents "choate" through "the necessary affirmative steps and actions to displace the Debtor from collecting the rents"?\textsuperscript{129} Two survey period decisions highlight the fact

\begin{itemize}
  \item 124. \textit{Id.} at 324 (quoting \textit{Southtrust}, 760 F.2d at 1243).
  \item 125. \textit{In re Pristas}, 742 F.2d 797, 800 (3d Cir. 1984).
  \item 127. \textit{See, e.g.}, \textit{In re Polo Club Apartments}, 150 B.R. 840, 851 (Bankr. N.D. Ga. 1993) (construing Georgia cases on whether out-of-possession security deed grantee has present right to receive rents solely by reason of default).
  \item 128. \textit{May}, 169 B.R. at 468.
  \item 129. \textit{Real Estate West Ventures}, 170 B.R. at 741.
\end{itemize}

Use of the term "choate" should not be confused to mean that the bankruptcy estate has been divested of all rights in rents. As used herein, a "choate" right under Georgia law means only that the creditor has a present enforceable right to the rents superior to the trustee or debtor in possession, \textit{i.e.}, a lien that has been perfected pre-petition. Thus, even where the creditor's right to rents is found to be "choate," the estate will retain an interest sufficient to "allow a debtor-in-possession to use such rents in the operation of its business \ldots subject to the restrictions placed upon the rents as 'cash collateral.'"\textit{ May}, 169 B.R. at 470-71. In \textit{May} the court found that the creditor "ha[d] a perfected, choate lien against the rents under the Assignment." \textit{Id.} at 472.
that bankruptcy courts in the Northern District of Georgia answer this question differently from the Middle and Southern Districts.\textsuperscript{130}

One line of cases, developed in the Middle and Southern Districts, interprets Georgia law as requiring "a literal reading of the contract to determine what act of enforcement shall be required."\textsuperscript{131} These courts look to the language of the assignment of rents clause to decide whether the creditor's pre-petition conduct complied therewith.\textsuperscript{132} As long as the creditor so complied, it has a perfected, choate right to the rents. Accordingly, if the security agreement contains an unconditional assignment of rents clause the creditor "is not required to take any action after default to entitle it to the rents thereunder."\textsuperscript{133}

The second line of cases from the Northern District reads Georgia law as follows:

\begin{quote}
\textit{Regardless of the language contained in the assignment of rents, a security-deed grantee who has not taken some dispossessory action (i.e., appointment of state receiver, ejection action or notice of interest in rents to all tenants) to enforce its interest, is not entitled to the rents derived from the property.}\textsuperscript{134}
\end{quote}

This conclusion is premised on the notion that "possession of the subject property is the touchstone in Georgia when determining entitlement to rents."\textsuperscript{135} Under this reading, "[i]t is necessary for the creditor to take [some affirmative act] despite any unconditional language in the security agreement."\textsuperscript{136}

The prospect of bankruptcy adds importance to this distinction, which may in other respects appear simply academic. Assume that the debtor files for reorganization under Chapter 11. If a creditor is capable of showing a perfected, choate right to rents that is recognized by 11 U.S.C. § 552(b), then the rents may be characterized as "cash collateral" under 11 U.S.C. § 363(a). In that event, a debtor in possession under Chapter 11 may not use the rents in its reorganization unless the creditor consents or the court authorizes the use thereof.\textsuperscript{137} By showing a

\begin{footnotesize}
\begin{enumerate}
\item[130.] Compare May, 169 B.R. at 468-71, with \textit{Real Estate West}, 170 B.R. at 740-42.
\item[132.] \textit{Id.}
\item[133.] \textit{Id.}
\item[134.] \textit{Id.} (citing \textit{In re Polo Club Apartments}, 150 B.R. 840 (Bankr. N.D. Ga. 1993)).
\item[135.] \textit{Id.}
\item[136.] \textit{Real Estate West}, 170 B.R. at 741 (citing \textit{Polo Club}, 150 B.R. at 850).
\item[137.] 11 U.S.C. § 363(c)(2) (1993 & Supp. 1996) (trustee may not use, sell or lease cash collateral unless "each entity that has an interest in such cash collateral consents").
\end{enumerate}
\end{footnotesize}
perfected, choate right to rents, a creditor substantially protects its position in a debtor’s reorganization.

Under Chapter 7, if the creditor fails to establish a perfected, choate right to rents, it may arguably cause the creditor to lose out to the liquidating trustee. In a Chapter 7 proceeding, “the liquidating trustee has no section 363 right to the rents.”\(^\text{138}\) Therefore, the creditor’s concern is rather with the prospect that the liquidating trustee, “as successor to the debtor’s rights, would arguably retain the rents, in contravention of the loan documents, and state law, unless the lender had taken possession pre-petition.”\(^\text{139}\)

Under either Chapter 7 or Chapter 11, the bottom line is whether the creditor has taken the steps necessary to ensure a perfected, choate right to rents. In either the Middle or Southern Districts, the question is answered simply by measuring the creditor’s conduct against the requirements of the assignment of rents clause. Looking to the Northern District by contrast, the survey period case of Real Estate West\(^\text{140}\) provides guidance on what steps are necessary. In that case, creditor had sent debtor’s managing agent a letter pre-petition, after which the managing agent discontinued disbursement of rentals to debtor.\(^\text{141}\) Further, the parties agreed that the creditor was in control of the rental property at a pre-petition meeting.\(^\text{142}\) After the meeting, the creditor accelerated the loan and advertised foreclosure, which was stayed by the filing of the petition.\(^\text{143}\) In light of these facts, the court found that the creditor “had taken affirmative actions and positive steps to displace the Debtor from control over collecting the rents.”\(^\text{144}\) Until the Eleventh Circuit or a Georgia appellate court issues a decision resolving this conflict, practitioners will simply have to live with this troubling inconsistency.

C. Default and Foreclosure Issues

Proceeding towards realization upon collateral and in hopes of collecting a deficiency judgment, creditors must avoid numerous pitfalls; several of these were dealt with during the survey period.

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139. Id.
140. 170 B.R. at 738.
141. Id. at 741. That letter reads: “We do not want any more disbursements made to the owners on either the Milledgeville or Augusta projects owned by [the Debtor]. Our rent and lease assignments give us the authority to control the utilization of the rental income.” Id.
142. Id. at 741-42.
143. Id. at 738.
144. Id. at 742.
1. Determining and Declaring Default. In many instances, the first hurdle is making an appropriate determination that the debtor has in fact defaulted. A proper determination by a creditor that the debtor is in default under the terms of the security agreement is important because it can insulate a creditor from a claim of wrongful repossession by the debtor. In *Fulton v. Anchor Savings Bank*, plaintiff bought a car under a retail installment sales contract, which was subsequently assigned to Bank. Plaintiff was only delinquent in making her monthly payment one time in early 1989 when Bank closed the branch office where plaintiff hand delivered her payments and posted an incorrect address to which customers should forward payment. In December 1988, plaintiff gave Bank notice of her change of address; however, Bank continued to mail correspondence to plaintiff's old address.

On March 16, 1989, Bank mailed a notice to plaintiff's former address stating that if she failed to confirm the existence of insurance on the car, the bank would procure a policy at plaintiff's expense. Because plaintiff never received this notice, Bank obtained an insurance policy on the car. Plaintiff had in fact maintained insurance on her car throughout the loan repayment period, and in December 1989, Bank was named as co-payee on a check from plaintiff's insurance company for damage to plaintiff's car. Notwithstanding this, Bank obtained yet another insurance policy on plaintiff's car. Although the premiums for the policies obtained by Bank were charged against plaintiff's loan account, Bank did not seek reimbursement until after plaintiff had paid off her loan.

After the loan was paid off, Bank sent a notice to plaintiff's former address, stating that if plaintiff failed to confirm the existence of insurance on her vehicle during the period for which Bank obtained insurance policies, Bank would add those amounts to plaintiff's loan account. Again, plaintiff never received the notice. Three more notices followed, each sent to plaintiff's former address, and each demanded payment for the cost of insurance policies obtained by Bank. The second of the three subsequent notices also purported to assess a late charge for the payment in early 1989, when Bank had closed its branch office and provided customers an inaccurate forwarding address. Plaintiff, having

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147. *Id.* at 457-60, 452 S.E.2d at 210-13.
148. *Id.*
never received any of these notices, did not respond. Bank then began
the process of self-help repossession.\textsuperscript{149}

When plaintiff sued for wrongful repossession, Bank claimed that
debtor's default precluded such a claim. Most notably, Bank pointed to
the plaintiff's failure to name Bank as a loss-payee during the loan
period and to pay the late fee from early 1989.\textsuperscript{150} The court refused to
accept plaintiff's failure to name Bank as a loss-payee under the
insurance policy as causing default and explained that:

[i]t can hardly be said that this omission constituted a bona fide event
of default authorizing repossession of plaintiff's car since it is undisput-
ed that . . . Bank did not base repossession of the collateral on the fact
that it was not named as a loss-payee under the plaintiff's motor
vehicle liability insurance policies . . . . It thus follows that . . . Bank
may not defend plaintiff's claim of wrongful repossession on an issue
of default it did not rely on as a basis of repossession and which in no
way is connected to the cause of repossession.\textsuperscript{151}

In the wake of this holding, creditors should be careful to specify in any
communication with the debtor any and all events that have caused
default, and further specify that the creditor is relying jointly and
severally on these events as the basis for repossession.\textsuperscript{152}

When a creditor contemplates a declaration that the debtor is in
default under the terms of the security agreement, he may do so only
with the "good faith belie[f] that the prospect of payment or performance

\begin{footnotes}
\item[149] Id.
\item[150] Id. at 466-67, 452 S.E.2d 216-17. Bank also raised plaintiff's failure to properly
notify it of her change of address. The court of appeals concluded that this presented a
question of fact to be decided by a jury. Id.
\item[151] Id. at 464, 452 S.E.2d at 215. On similar grounds, the court rejected Bank's
contention that nonpayment of the early 1989 late fee was an appropriate event of default
on which to base repossession. In any event, general contract principles excused plaintiff
from making timely payment because the closing of the Bank's branch office resulted in
plaintiff's nonperformance. Id. at 467, 452 S.E.2d at 217 (citing O.C.G.A. § 13-4-23 (1994)).
\item[152] The holding in \textit{Fulton} suggests that a creditor may not include in such a
communication an all-encompassing phrase, such as "and any other event of default which
may subsequently come to light." The thrust of \textit{Fulton} is that creditors should investigate
how a debtor is in default, and only then begin self-help repossession. Failure to perform
a thorough review of a debtor's file prior to declaring default may come back to haunt a
creditor if its determination regarding default is incorrect. For example, the plaintiff in
\textit{Fulton} also sought recovery for Bank's failure to exercise good faith, an obligation imposed
on all U.C.C. contracts by O.C.G.A. § 11-1-208. The court of appeals found Bank's "good
faith" to be at issue because "it acted without checking the facts before ordering
repossession of plaintiff's automobile." Id. at 468, 452 S.E.2d at 218.
\end{footnotes}
was impaired." In Flateau v. Reinhardt, Whitley & Wilmot, the court of appeals was confronted by a debtor's claim that the creditor was liable for not complying with these standards. The court summarily concluded that there was no evidence to suggest that the creditor had acted in bad faith when declaring default and seeking a writ for immediate possession. However, an analysis of the facts as recounted by the court suggest a rationale for this finding.

Defendants Means and his wife owned Al-Temp Service, Inc. ("Al-Temp"); prior to dissolution, the assets were sold to Tifton Heating & Cooling, Inc. ("Tifton"), which was owned by Rhodes. Under the terms of the 1985 sales agreement, Tifton was to pay $20,000 down and make 120 consecutive monthly payments to Al-Temp under the terms of a promissory note. The note and security agreement gave Al-Temp a security interest in almost everything Tifton owned. The security agreement also contained a "deemed insecure" clause allowing default if "the secured party fe[lt] insecure for any reason whatsoever." The discovery that Rhodes was experiencing cash flow problems at Tifton, combined with rumor from Tifton's employees that Rhodes was closing the business, caused Means to approach his attorney with concerns for the loss of easily transported collateral. Means and his counsel at this point decided to declare a default and file a petition for writ of immediate possession. Means and his counsel appeared before a judge on January 23, and signed the writ for possession; however, Means agreed to his counsel's suggestion that they attempt to contact Rhodes and resolve the matter before seeking the writ's execution. When these efforts failed, the writ was filed on January 25 and execution sought thereon. The writ directed the sheriff to levy only on the property described in the note.

Although the court did not elaborate on its conclusion that Means had not demonstrated bad faith, several of the foregoing facts undoubtedly led to that conclusion. First, Means certainly had reason to feel insecure, and Means recounted the facts supporting his feeling of insecurity before a judge. Second, the petition was filed against Tifton, not Rhodes. The writ only sought the property detailed as "security" under the terms of the security agreement. This was obviously not a

154. Id.
155. Id.
156. Id. at 189, 469 S.E.2d at 224.
157. Id. at 188-90, 469 S.E.2d at 224-25.
158. Id. at 191, 469 S.E.2d at 226.
case where Means was attempting to proceed against Rhodes personally. Finally, Means had made at least two attempts to resolve the problem with Rhodes—once at a meeting Rhodes admitted to attending, and a second time after the writ of possession had been signed by the judge.\footnote{Id. at 188-90, 469 S.E.2d at 224-25.}

In his suit against Means and his attorney, Rhodes also contended that the writ of possession was void, most notably due to Means’ failure to file a foreclosure petition prior to seeking the writ of immediate possession. The court rejected this argument because in certain circumstances a creditor seeking possession of collateral after default may retain the collateral, thereby obviating the necessity of foreclosure.\footnote{Id. at 191-92, 456 S.E.2d at 226.}

2. Self-Help Repossession. The court of appeals decision in \textit{Fulton v. Anchor Savings Bank}\footnote{215 Ga. App. 456, 452 S.E.2d 208 (1994).} thoroughly dealt with creditor liability for wrongful repossession. After deciding that the debtor was not in fact in default, the court in \textit{Fulton} addressed plaintiff’s claim that the creditor’s conduct\footnote{215 Ga. App. at 462, 452 S.E.2d at 213-14. Although the creditor contended that it was not liable for a breach of the peace by the independent contractor it hired to repossess the automobile, the court found that it would be against public policy to insulate the creditor, as an employer of an independent contractor. “The general rule that an employer is not ordinarily liable for tortious acts committed by an independent contractor has important exceptions . . . [For example,] public policy forbids such a waiver or release when the duty imposed is on in which the public has an interest.” \textit{Id.}, 452 S.E.2d at 214 (internal quotation omitted). In light of this, the court refused to relieve “a repossessing creditor of liability simply because the creditor employs an independent contractor to carry out the task of repossession.” \textit{Id.} Thus, although the acts of repossession were actually performed by agents of the independent contractor, these acts were imputed to the creditor.} constituted a breach of the peace. Plaintiff was aroused at 5:00 a.m. when a collection agent and two assistants hired by the creditor went to her home to repossess her car. Plaintiff showed the collection agent proof that she had in fact paid off the car loan, along with other documentation demonstrating her right to ownership. Plaintiff then called the police and tried to move the car from her driveway into her garage. However, the collection agent and his associates prevented her from doing so by standing in front of the garage. Later, they complied with plaintiff’s demand and moved. When the police officer arrived, he told plaintiff that she was required to relinquish her car to the collection agent and his two associates.\footnote{Id. at 458-59, 452 S.E.2d at 211-12.} Notwithstanding the bank’s contention that the collection agent and his
helpers were polite, unabrasive, and refrained from profane language, the
court judged these circumstances to be sufficient to support plaintiff's
breach of the peace claim.\textsuperscript{164}

Further, plaintiff's consent to repossession was not a defense under
these circumstances.\textsuperscript{165} For the debtor's consent to constitute a defense
against a claim for wrongful repossession, the consent must be volunt-
ary. The court found that consent induced by a law enforcement official
is not voluntary.\textsuperscript{166}

3. Disposition of Collateral and Deficiency Judg-
ments. Assuming that a creditor has properly declared default, he may
retain the collateral in satisfaction of the debt, or dispose of it in a
commercially reasonable manner and thereafter seek a deficiency
judgment against the debtor. Should the creditor elect to retain the
collateral, he must provide written notice to the debtor of his intention
to do so unless the debtor signs a statement after default renouncing or
modifying the rights provided in O.C.G.A. section 11-9-505(2).\textsuperscript{167} The
section 505 notice requirement permits a debtor to mitigate his loss by
affording him the opportunity to exercise any right of redemption or by
insisting on "liquidation in a commercially reasonable manner as
required by O.C.G.A. section 11-9-504,\textsuperscript{168}" and also insulates the
creditor from claims that the collateral should have been sold in a
commercially reasonable manner. If a creditor retains the collateral in
satisfaction of the debt without providing section 505 notice or securing
a signed waiver by the debtor, the creditor will be subject to an action
by the debtor for damages, under either a conversion theory or pursuant
to O.C.G.A. section 11-9-507(1).\textsuperscript{169}

At issue in Chen v. Profit Sharing Plan was the sufficiency of the
section 505 notice provided the debtor. After default, the creditor sent
the debtor the following letter:

\begin{quote}
"[D]ue to [your] default, [creditor] claims all rights pursuant to various
transfer agreements of promissory note and deed to secure debt from
you to [creditor] which [creditor] already holds an interest. Such note
and security deed originally executed by Frances F. Blankenship dated
August 29, 1986 shall be subject to private sale at any time after
\end{quote}

\textsuperscript{164} Id. at 461, 452 S.E.2d at 213.
\textsuperscript{165} Id.
\textsuperscript{166} Id. (citing 9A RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 9-503:21 at
280-81 (3d ed. 1994)).
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 882, 456 S.E.2d at 241.
August 20, 1990, which date is ten days subsequent to your presumed receipt of this letter allowing reasonable time for delivery of same.\(^{170}\)

In addition, an addendum to the documents creating the security interest stated that if debtor failed to make payments "the assignment of the collateral shall stand and no further duty shall be held between the parties."\(^{171}\)

Because the section 505 notice must "clearly state the creditor’s proposal to retain the collateral in satisfaction of the debt and must notify the debtor that he has 21 days to raise an objection to such a proposal," the court found that the creditor’s above-quoted letter was insufficient.\(^{172}\) Moreover, the language of the addendum was nothing more than an ineffective attempt at a predefault waiver of rights.\(^{173}\) The debtor was therefore entitled to assert a cause of action for conversion or for damages as set forth in O.C.G.A. section 11-9-507(1).\(^{174}\)

However, only rarely will a creditor desire to retain the collateral. Creditors are generally not in the business of the debtor and would rather convert the collateral to cash and collect any deficiency from the debtor. When a creditor is undersecured, disposition is the only alternative because retention of the collateral precludes pursuit of a deficiency judgment.

If a creditor wishes to seek a deficiency judgment, the collateral must be disposed of in a commercially reasonable manner. The court in *Strong v. Wachovia Bank of Georgia, N.A.*\(^{175}\) set forth this rule as follows:

Where the commercial reasonableness of a sale is challenged by the debtor, the party holding the security interest has the burden of proving that the terms of the sale were commercially reasonable and that the resale price was the fair and reasonable value of the collateral. The secured party must also prove [1] the value of the collateral at the time of repossession and [2] that the value of the goods does not equal the value of the debt . . . . Further, even if the sale is conducted in a commercially reasonable manner, proof of the sale price is not sufficient to overcome the presumption against [the creditor] that the value of the collateral equals the debt on it.\(^{176}\)

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170. *Id.* at 879, 456 S.E.2d at 239-40.
171. *Id.*, 456 S.E.2d at 239 (emphasis added).
172. *Id.* at 880-81, 456 S.E.2d at 240-41.
173. *Id.*, 456 S.E.2d at 240.
174. *Id.* at 882, 456 S.E.2d at 241.
176. *Id.* at 574, 451 S.E.2d at 527 (internal quotation omitted and emphasis added).
In *Strong*, debtor defaulted on a loan for which a cabin cruiser boat served as collateral. After repossession of the boat, creditor provided debtor with the requisite notice of its intent to dispose of the boat at a private sale. After the sale, creditor sought a deficiency in excess of $20,000. A jury awarded creditor $12,500. The court of appeals rejected debtor's argument, however, finding the following evidence was sufficient to prove the boat's value when creditor repossessed it. An owner of a boat brokerage company testified without objection as to the value upon repossession and further answered hypothetical valuation scenarios that were dependent upon the boat's condition, whether repaired or improved. Another witness, an employee of creditor who had handled repossessions and foreclosures, gave an opinion to the boat's "book value" based on his review of industry guides. This evidence was sufficient, notwithstanding that the owner of the boat brokerage company did not have personal knowledge of the boat's condition upon repossession, and creditor's employee never observed the boat personally.

Although *Strong* suggests that creditors are not required to conduct an appraisal as soon as possible after repossession, it would still be wise to do so. It must be remembered that the court in *Strong* was reviewing the jury's verdict under the any evidence standard: if any evidence exists to support the jury's verdict, it will not be disturbed. In light of this standard of review, the court of appeals endorsement of the foregoing as sufficient evidence is not as powerful as it would seem to be. The evidence was merely sufficient to defeat debtor's motion for directed verdict. A jury would certainly have been more impressed with the evidence of value had it heard from someone who, very soon after repossession, personally inspected the boat. The trouble of arranging for an appraisal soon after repossession would more than likely pay for itself in the form of the jury's verdict.

177. *Id.* at 572, 451 S.E.2d at 526.
178. *Id.* at 573-75, 451 S.E.2d at 527.
179. *Id.* at 573-74, 451 S.E.2d at 527.
180. *Id.* at 574, 451 S.E.2d at 527.
181. *Id.* at 574-75, 451 S.E.2d at 527.
182. *Id.* at 573, 451 S.E.2d at 527.