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COMMERCIAL LAW: Creditor and Debtor Rights
Under the Uniform Commercial Code, *Kimura v. Wauford*.

I. INTRODUCTION

In *Kimura v. Wauford*,¹ the New Mexico Supreme Court held that upon a debtor's default, a secured creditor has the right to repossess collateral and sue the debtor on the contract for the full amount owed. Although the creditor must ultimately sell the collateral and reduce the debt with the proceeds of the sale, repossession for the purpose of preserving the collateral is not an election to accept the collateral in satisfaction of the debt.² In this case of first impression,³ the *Kimura* court allowed the creditor to retain possession of the collateral for more than three years after default while the suit on the loan agreement was progressing through the courts. The *Kimura* decision implies that a secured party after repossession has no duty to dispose of the property until after a final determination of the lawsuit on the underlying debt.

The court's holding in *Kimura* expands the rights of secured parties and effectively eliminates the repossessing party's duty to dispose of collateral within a reasonable time. This Note will examine whether the holding is consistent with the applicable provisions of the Uniform Commercial Code,⁴ and will suggest that the court's narrow focus in *Kimura* overlooked a broader issue raised by the case, namely, the conflicting interests of the creditor and debtor after default. The Note will also discuss *Kimura's* inconsistency with prior New Mexico case law. Finally, the Note will address potential difficulties that might arise should the *Kimura* holding be applied to other disputes.

II. STATEMENT OF THE CASE

In September 1982, Joe Wauford agreed to purchase a drive-in restaurant from Tom Kimura, Mary Kimura, and Kay Taira (hereinafter collectively referred to as "Kimura").⁵ The sales agreement required a cash

1. 104 N.M. 3, 715 P.2d 451 (1986).

2. *Id.* at 6, 715 P.2d at 454.

3. *Id.*

4. New Mexico originally adopted the Uniform Commercial Code in 1953, and has adopted official amendments to the U.C.C. with few variations. The U.C.C. section numbers are preserved under the New Mexico statutes, except that all section numbers are preceded by 55-. Codification of the commercial law under the U.C.C. was intended to provide consistent rational law in one comprehensive body. See N.M. STAT. ANN. § 55-1-102(2)(c) (Cum. Supp. 1986).

5. *Kimura*, 104 N.M. at 4, 715 P.2d at 452.

downpayment and a promissory note for the balance of the price.⁶ The sellers retained a security interest in the building and restaurant equipment as collateral for the note.⁷

Five months later, Wauford ceased doing business at the restaurant, defaulted on the contract, and deserted the premises, leaving the building unprotected.⁸ In April 1983, Kimura took possession of the property, changed the locks, and prepared the business for re-sale or lease.⁹ While in possession of the property, Kimura initiated suit against Wauford to recover a money judgment on the note.¹⁰ The trial court awarded Kimura full recovery for the amount due.¹¹

At the trial, and upon appeal,¹² Wauford argued unsuccessfully that after default Kimura had to choose either to repossess the collateral or sue for the outstanding debt. Wauford asserted that Kimura's taking possession of the collateral prior to initiating suit constituted an election of remedies that precluded the secured party's right to judgment on the note.¹³ The New Mexico Supreme Court affirmed the trial court's ruling, holding that the secured party had the right to retain possession of the collateral for the purpose of preserving it during the pendency of the suit on the note.¹⁴

III. DISCUSSION AND ANALYSIS

The New Mexico Supreme Court in *Kimura* held that a secured party may repossess collateral after default, and retain possession throughout

6. *Id.* The defendant Wauford made a downpayment of \$10,000, and signed a promissory note for \$41,266.50, which was the remainder of the sale price. *Id.* The note carried no interest. *Id.*

7. *Id.* The restaurant was situated on real property owned by a party not in this lawsuit. *Id.* Wauford assumed the lease on the real property, and the responsibility for negotiating any further leases from the landowners. *Id.* The court did not distinguish between the secured party's right under this lease and the security interest in the equipment. The court's discussion either assumes that they are the same, which would appear to be inaccurate, or that the secured party's interests only extended to the equipment.

8. *Id.* Wauford took possession of the restaurant in September 1982, and abandoned the premises in February 1983. *Id.* Payments on the equipment ceased in December 1982, and plaintiffs made repeated unsuccessful demands on Wauford before initiating suit. *Id.* Wauford contended that he did not abandon the property until after the plaintiffs retook possession of the restaurant and changed the locks. *Id.*

9. *Id.*

10. *Id.* In their complaint, the plaintiffs demanded the full amount remaining on the promissory note. An acceleration clause in the sales agreement allowed the plaintiffs to demand full payment upon default of the contract. *Id.* at 6, 715 P.2d at 454.

11. The trial judge awarded Kimura \$37,863.90. *Id.* at 4, 715 P.2d at 452.

12. New Mexico rules of appellate procedure provide that the New Mexico Supreme Court has original appellate jurisdiction for "appeals from the district courts in which one or more counts of the complaint alleges a breach of contract or otherwise sounds in contract." SCRA 1986 Rule 12-102(A)(1).

13. *Kimura*, 104 N.M. at 5, 715 P.2d at 453.

14. *Id.* at 4, 715 P.2d at 452.

a suit on the debt.¹⁵ According to the *Kimura* court, if the secured party still has possession of the collateral when the suit is decided, the court will award the creditor the entire amount of the outstanding loan,¹⁶ and will trust the secured party to ultimately dispose of the collateral.¹⁷ The judgment is then offset by the amount realized when the collateral is finally sold.¹⁸ The *Kimura* decision is troublesome for three reasons: 1) The debtor's right under sections 9-207, 9-504, and 9-507 of the Uniform Commercial Code to have the debt efficiently discharged is severely compromised; 2) the decision appears inconsistent with an earlier New Mexico Supreme Court decision in this area;¹⁹ and 3) the law created by *Kimura* may yield unacceptable results when applied to other factual situations.

A. The *Kimura* decision and the Uniform Commercial Code.

1. The *Kimura* decision's effect on the debtor.

Upon default, a creditor's interest in collecting an outstanding loan is balanced against the debtor's interest in equitably liquidating the debt without undue hardship. In *Kimura*, the court failed to adequately recognize this balance,²⁰ and primarily focused on the rights and remedies afforded the secured party after default.²¹ The decision strengthened the secured party's ability to recover the outstanding debt by diminishing protections afforded the debtor under the U.C.C.²²

The court determined that the Uniform Commercial Code grants a secured party the right to undertake several measures at once in an effort to collect a loan in default.²³ Although the U.C.C. allows a secured party to both repossess collateral and sue on the loan agreement for the full

15. *Id.* at 6, 715 P.2d at 454.

16. *Id.* The Supreme Court affirmed the trial court's deficiency judgment for the full amount remaining unpaid on the note, even though the creditor still had possession of the collateral. *Id.* at 6, 715 P.2d at 454.

17. *Id.* at 6-7, 715 P.2d at 454-55. The *Kimura* court required the secured party to eventually sell the repossessed collateral and account to the debtor for the amount recovered. The proceeds of the sale would be applied to the outstanding debt. *Id.* at 7, 715 P.2d at 455.

18. *Id.*

19. *Clark Leasing Corp. v. White Sands Forest Prod., Inc.*, 87 N.M. 451, 535 P.2d 1077 (1975); see also *infra* notes 55-63 and accompanying text.

20. The debtor in this case did not dispute the existence or amount of the debt outstanding, nor did he dispute the secured party's right to repossess. *Kimura*, 104 N.M. at 6, 715 P.2d at 454. The debtor's argument is entirely based on his contention that the secured party's repossession and retention of the collateral is equivalent to an election to keep the collateral instead of collecting the debt. *Id.* at 5, 715 P.2d at 453. The particular facts of the case therefore squarely raised the question of the extent to which the secured party is entitled to control the debt collection process. See *infra* note 39.

21. *Kimura*, 104 N.M. 6, 715 P.2d at 454.

22. See also *infra* note 64 and accompanying text.

23. *Kimura*, 104 N.M. at 6, 715 P.2d at 454.

value of the debt owed,²⁴ generally the U.C.C. compels the secured party to insure that the collateral is sold a reasonable time after repossession.²⁵ Because the debtor in *Kimura* abandoned the collateral, the court allowed the creditor to repossess and retain possession of the collateral for three years while the suit on the note was tried and appealed.²⁶ The decision thereby alters the balance contemplated by the U.C.C. and tips the scales in favor of the secured party. Favoring the secured party in this case appears extreme and unnecessary.²⁷

The *Kimura* court recognized a secured party's right to be assured that collateral is not destroyed.²⁸ By allowing the secured party to delay disposition of the collateral, however, the court ignored the debtor's countervailing interest in selling the collateral before its value depreciated. The court's holding implies that even though the debtor lost control of the collateral at repossession, and the secured party is responsible for delaying the sale, the collateral's depreciation must be suffered by the debtor.

On appeal, the debtor in default (Wauford) argued that under the U.C.C.²⁹ the secured party must either retain the collateral in satisfaction of the debt or dispose of it³⁰ and sue for the difference between the sale proceeds and the debt.³¹ The *Kimura* court rejected this argument and held that section 55-9-505 was not intended to apply in this case.³² The court reasoned that section 55-9-505(1) governs only in disputes where the collateral is consumer goods, and the collateral in this case was equipment.³³ In addition, under section 55-9-505(2), the secured party in pos-

24. In *Michigan Nat'l Bank v. Marston*, 29 Mich.App. 99, 185 N.W.2d 47 (1970), the Michigan Court of Appeals commented, "[t]he existence of a security interest in no way affects the existence of the debt. It merely provides the secured party with an immediate source of recovery in addition to the standard remedies of an unsecured creditor." *Id.* at 50.

25. See also *infra* note 46 and accompanying text.

26. *Kimura*, 104 N.M. at 6, 715 P.2d at 454.

27. See also *infra* note 54 and accompanying text.

28. *Kimura*, 104 N.M. at 5, 715 P.2d at 453.

29. N.M. STAT. ANN. §§ 55-9-501 to 9-507 (Cum. Supp. 1983).

30. Under § 55-9-505 of New Mexico's adoption of the U.C.C., the secured party may repossess and retain collateral in satisfaction of the debt. Section 55-9-505 provides in part:

(1) If the debtor has paid sixty percent of the cash price in the case of a purchase money security interest in consumer goods or sixty percent of the loan in the case of another security interest in consumer goods, . . . a secured party who has taken possession of collateral must dispose of it

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such a proposal shall be sent to the debtor

N.M. STAT. ANN. § 55-9-505 (Cum. Supp. 1986).

31. *Kimura*, 104 N.M. at 5, 715 P.2d at 453. The debtor argued that under the U.C.C., the creditor had the right to either accept the collateral instead of the money owed, or to sell the collateral and sue for the debt remaining after liquidating the collateral. *Id.* Because the creditor took possession of the collateral and did nothing with it, the debtor urged the court that an election to retain the property in satisfaction of the debt should be presumed. *Id.*

32. *Id.*

33. *Id.*

session of the collateral must notify the debtor in writing if the collateral is to be accepted in lieu of the debt.³⁴ The secured party did not write the debtor that the collateral would be accepted.³⁵

The court held that because § 55-9-505 was inapplicable, the secured party was not compelled to dispose of the collateral.³⁶ Although the debtor relied on § 55-9-505 for his argument, other theories under the U.C.C. support his position.³⁷ Whether the secured party was entitled to delay disposition of the collateral more than three years should have been examined in the context of the entire Code.³⁸ Focusing its analysis on § 55-9-505 in determining whether the creditor was entitled to delay the collateral sale, the *Kimura* court denied the applicability of other sections.

Part 5 of U.C.C. Article 9 codifies the rights of secured parties and debtors upon default. Under the seven sections of part 5, the secured creditor is allowed to repossess collateral,³⁹ and can either sell the property or keep the collateral in satisfaction of the debt.⁴⁰ The secured party must use reasonable care in the custody and preservation of the collateral.⁴¹ Every aspect of the secured party's disposition of the collateral, including the method, manner, time, place and terms of the sale must be commercially reasonable.⁴² The *Kimura* court ordered that the secured party must be commercially reasonable in the eventual disposition of the col-

34. See *supra* note 30.

35. *Kimura*, 104 N.M. at 5, 715 P.2d at 453.

36. *Id.*

37. See also *infra* notes 46-54 and accompanying text.

38. The official comment to § 55-1-102 of the U.C.C. reads:

The [U.C.C.] should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the act as a whole, . . .

N.M. STAT. ANN. § 55-1-102 (1978).

39. Under § 55-9-503,

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action."

N.M. STAT. ANN. § 55-9-503 (Cum. Supp. 1986).

40. Section 55-9-504 reads in part:

"(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing."

N.M. STAT. ANN. § 55-9-504 (Cum. Supp. 1986). Under § 55-9-505(2), "a secured party may, after default, propose to retain the collateral in satisfaction of the obligation . . ." N.M. STAT. ANN. § 55-9-505(2).

41. Under § 55-9-501, a secured party in possession of collateral after default assumes the obligations imposed by § 55-9-207.

"(1) A secured party must use reasonable care in the custody and preservation of collateral in his possession."

Id. § 55-9-207.

42. 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.

N.M. STAT. ANN. § 55-9-504(3).

lateral.⁴³ The court, however, did not apply this standard to the secured party's conduct before the sale. The court assumed that taking possession of abandoned collateral was commercially reasonable, and apparently did not question whether delaying the sale of collateral for more than three years could be a violation of the secured party's duties.

The *Kimura* opinion does not discuss the effect of delay upon the defaulting debtor. A debtor loses control of the collateral upon repossession, as well as the right to sell the collateral to pay the debt. If the collateral depreciates over time, the longer the sale is delayed, the less likely it becomes that the eventual sale will produce enough to cover the debt. The Code intends to protect against such needless depreciation of collateral property, and encourage the speedy dissolution of the debt.⁴⁴ The Code sections that restrict the secured party's conduct lose meaning if the creditor can delay the sale indefinitely.⁴⁵ Weakening these protections has an obvious adverse effect on the debtor.

2. The Secured Party's Duty.

In contrast to the *Kimura* court's holding, other jurisdictions require secured parties to sell collateral within a reasonable time after repossession.⁴⁶ The *Kimura* opinion quoted with approval selected passages from

43. *Kimura*, 104 N.M. at 6, 451 P.2d at 454.

44. Section 55-9-504 imposes two requirements on the reselling creditor: (1) the creditor must send the debtor appropriate notice, and (2) every aspect of the sale must be commercially reasonable. N.M. STAT. ANN. § 55-9-504 (Cum. Supp. 1986). The second condition is the most important to the debtor in default, because the amount of the deficiency judgment ultimately found against him will be inversely proportional to the sale price of the collateral. If the price received for the collateral is high, the amount of the debt remaining outstanding will be low, and vice versa. The "method, manner, time, place and terms" tests of § 55-9-504(3) insure that an insufficient price, or an unreasonably low price is not recovered at the collateral sale. See White and Summers, *Handbook of the Law Under the Uniform Commercial Code*, §§ 26-29 at 1109, (2nd ed. 1984).

45. The official comments to § 55-9-501 state that part five of Article 9 is an articulation of legislative policy with respect to the rights and limitations on secured lenders. The Code attempts to balance the lender's interests in recovering a debt with the debtor's interests in avoiding financial ruin. N.M. STAT. ANN. § 55-9-501 (Cum. Supp. 1986).

46. *First Nat'l Bank of Thomasboro v. Lachenmyer*, 131 Ill.App.3d 914, 476 N.E.2d 755 (1985). The court held that once a secured party has repossessed collateral, the secured party's actions with regard to the collateral must be reasonable in all respects through the date of disposition. *Id.* If the secured party impairs the debtor's ability to receive fair value for the collateral, the debtor has the right to set off the amount of the injury against the outstanding debt. *F & W Welding Service Inc. v. Pen Smith, Inc.*, 38 Conn.Supp. 455, 35 U.C.C. Rep. Serv. 726 (1982) (repossessing collateral, and doing nothing with it while its value depreciates was not commercially reasonable, and the secured party in possession could be liable to the debtor for damages); *Farmers State Bank v. Ballew*, 626 P.2d 337 (Okla. Ct. App. 1981) (upon repossession, the secured party assumes the good faith duty to reasonably handle disposition, and is therefore responsible for any losses occasioned by his failure to comply with this requirement. Unreasonable disposition of the collateral bars a recovery for deficiency remaining after the collateral sale); *Mack Financial Corp. v. Scott*, 100 Idaho 889, 606 P.2d 993 (1980) (the secured party's unexplained failure to dispose of repossessed collateral for more than two years was held commercially unreasonable, and such conduct by the secured party raised the presumption that the price eventually recovered for the collateral was equivalent to the debt); *Hauffer v. Ardinger*, 28 U.C.C. Rep. Serv. 893 (Mass. App. 1979) (the secured party's

cases decided in other jurisdictions, but the court did not entirely adopt the authorities' reasoning.⁴⁷ Why the *Kimura* court's conclusions deviated from the holdings in these foreign jurisdictions is unclear.

One approach to the conflict between creditor and debtor rights after default is to require the secured party to dispose of the repossessed collateral as soon as practicable.⁴⁸ Requiring a timely sale of the collateral imposes no undue burden on the secured party. Either before bringing suit on the note, or while the suit is pending, an appropriate sale could

prolonged retention of collateral prior to disposition constituted an election to retain the collateral in satisfaction of the debt, which served to cancel the debtor's outstanding obligation); *Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. Ct. 1976) (there must be a reasonable limit to the length of time a secured party is permitted to hold collateral before it is deemed to have exercised its right to retain the collateral in satisfaction of the debt); *Moran v. Holman*, 514 P.2d 817 (Alaska 1973) (the secured party who delays disposition of the collateral an inordinate period of time may forfeit the right to a deficiency. Especially when the collateral depreciates in value while in the secured party's custody, the debtor may validly claim his obligation is satisfied even without notice); *Dynallectron Corp. v. Jack Richards Aircraft Co.*, 337 F.Supp. 659 (W.D. Okla. 1972) (the holder of a security interest is not entitled to a deficiency judgment if the collateral, after repossession, is not disposed of in a commercially reasonable manner. The secured party owes the debtor a duty to use due diligence to recover the highest price possible for the repossessed collateral); *Harris v. Bower*, 266 Md. 579, 295 A.2d 870 (1972) (the court held that when a secured party made no attempt to sell the repossessed collateral and allowed it to depreciate for two years, the debtor was credited with fair market value of the collateral at repossession, and the creditor suffered losses caused by depreciation); *Michigan Nat'l Bank v. Marston*, 29 Mich. App. 99, 185 N.W.2d 47 (1971) (the court found it unfair to allow the secured party to repossess unless with the intent to dispose of the collateral. A secured party unwilling or unable to sell the collateral was obligated to return the property to the debtor, subject still to the creditor's claim. But if a debtor is injured by the secured party's inaction towards the collateral, the debtor has a right of recovery, and when the secured party delays the sale of depreciating collateral, the debtor could validly claim his obligation is satisfied); *Bradford v. Lindsey Chevrolet*, 117 Ga. App. 781, 161 S.E.2d 904 (1968). (The secured party's retention of collateral for more than sixteen months before a sale, without an excuse for the delay, constituted the secured party's acceptance of the collateral in lieu of the debtor's outstanding obligation.)

47. The court cites *Michigan Nat'l Bank v. Marston*, 29 Mich.App. 99, 185 N.W.2d 47 (1971), for the proposition that the secured party is not required under the U.C.C. to elect remedies, but may pursue several at once. But in contrast to the *Kimura* holding, the *Marston* court clearly created a duty on the part of the secured party to protect the collateral from depreciation: "To the extent the creditor's inaction [in disposing of the collateral] results in injury to the debtor, the debtor has a right of recovery." *Id.* at 51.

Similarly, the *Kimura* court quoted from *Moran v. Holman*, 514 P.2d 817 (Alaska 1973), in explaining the debtor's responsibility for payments on the real estate lease. The *Moran* court specifically addressed the issue of the secured party's delay in disposing of repossessed collateral, and held that when the collateral is a depreciating asset,

[t]he secured party who has retaken possession of the collateral should not be permitted to wait an inordinate period . . . and then elect to sue for the full amount of the debt. . . . When [the secured party] retains collateral which depreciates in value . . . for an unduly long period of time, . . . the debtor may validly claim that his obligation has been satisfied. To rule otherwise would permit overreaching and inequitable abuses by some secured parties.

Id. at 820-21.

48. Collateral such as certificates of deposit, bonds and securities that appreciate over time may require the secured party to weigh the present value of the collateral with its scheduled gains before liquidating, but consumer goods and equipment that generally depreciate should be disposed of as quickly as possible.

begin the process of debt liquidation. Any expenses incurred by the secured party in preparing for the sale would be repaid from the proceeds of the disposition.⁴⁹ If sale occurs before the suit on the note is commenced, the action would be for a deficiency judgment if the proceeds of the sale did not cover the debt.⁵⁰ If the collateral is sold after suit has commenced, the suit would be on the note, but the damages would be reduced by the net amount that the secured party realized at the sale. In either situation, the secured party clearly would be acting in accordance with the "commercial reasonableness" standard of § 55-9-504(3).⁵¹ A requirement that timely sale of the collateral be made does not restrict a secured party's choices of remedies under § 55-9-501.⁵² The right to either sue on the note or recover a deficiency judgment after selling the collateral is not affected, and the requirement protects the defaulting debtor by insuring that the goods are not allowed to depreciate in value during the debt collection process.

In *Kimura*, the court did not explain why a three year delay should be allowed, but simply held that the secured party in this case was entitled to take possession of the collateral and hold it "for the purpose of preserving it".⁵³ Even when collateral has been abandoned, if the sale is required within a reasonable time, the debtor is afforded protections at no cost to the secured party. Such a policy is consistent with the Code's requirement that remedies be exercised in good faith.⁵⁴

B. The Kimura Decision's Inconsistency With Prior New Mexico Case Law.

1. New Mexico Precedent.

In *Clark Leasing Corp. v. White Sands Forest Prod., Inc.*⁵⁵ the New

49. Section 55-9-504 provides:

(1) . . . The proceeds of disposition shall be applied to . . . (a) the reasonable expenses of taking, holding, preparing for sale, selling and the like and, . . . the reasonable attorneys' fees and legal expenses incurred by the secured party.

N.M. STAT. ANN. § 55-9-504(1) (Cum. Supp. 1986).

50. Section 55-9-504(2) provides that the debtor is liable for any deficiency remaining if the proceeds from the collateral sale do not cover the debt. N.M. STAT. ANN. § 55-9-504(2) (Cum. Supp. 1986).

51. See also *supra* note 42 and accompanying text.

52. Section 55-9-501 provides the secured party the right to "reduce his claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure The rights and remedies . . . are cumulative." N.M. STAT. ANN. § 55-9-501 (Cum. Supp. 1986).

53. *Kimura*, 104 N.M. at 6, 715 P.2d at 454.

54. Under § 55-1-203, "[e]very contract or duty within [the U.C.C.] imposes an obligation of good faith in performance or enforcement." N.M. STAT. ANN. § 55-1-203 (Cum. Supp. 1986).

55. 87 N.M. 451, 535 P.2d 1077 (1975).

Mexico Supreme Court considered “. . . for the first time in New Mexico, the question whether or not a secured creditor is absolutely precluded from recovering a deficiency judgment under the U.C.C. if he fails to dispose of repossessed collateral as required under [55-]9-504(3).”⁵⁶ The court held in *Clark Leasing* that a secured party was entitled under the U.C.C. to both repossess collateral and sue for a deficiency judgment, but that the secured party after repossessing collateral owed a “. . . good faith duty to the debtor to use reasonable means to see that a reasonable price is received for the collateral.”⁵⁷

The *Clark Leasing* court held that if the commercial reasonableness of the collateral disposition becomes an issue, the burden falls on the secured party to show compliance with § 55-9-504(3).⁵⁸ Every aspect of the secured party's management of the collateral sale would be examined. Specifically the court noted that it would look to the business community to find how goods like those repossessed are normally sold.⁵⁹ The secured party's delay in holding an appropriate sale, the collateral's depreciation during the delay, and even the price obtained at the sale were relevant under *Clark Leasing* to test the commercial reasonableness of the sale.⁶⁰ Furthermore, when a secured party does not conduct a commercially reasonable disposition of the collateral, there is a presumption that the resale value of the collateral is equal to the value of the outstanding debt.⁶¹ This presumption can be rebutted only if the secured party proves that the amount of the judgment on the note exceeded what the collateral would have brought if sold a reasonable time after repossession.⁶²

Although the *Kimura* case involves a similar conflict between a debtor in default and a secured creditor, the *Kimura* court deviated substantially from *Clark Leasing* without explaining why. Inexplicably, the court did not even refer to the prior case.⁶³ Awarding a full deficiency judgment to the secured party before the collateral was sold, the *Kimura* court apparently assumed that the eventual sale of the collateral would be commer-

56. *Id.* at 455, 535 P.2d at 1081.

57. *Id.* at 454, 535 P.2d at 1080.

58. *Id.* at 456, 535 P.2d at 1082.

59. *Clark Leasing*, 87 N.M. at 455, 535 P.2d at 1081.

60. *Id.* at 454-55, 535 P.2d at 1080-81.

61. *Id.* at 456, 535 P.2d at 1082.

62. *Id.*

63. Although the *Kimura* court refers to the instant case as one of first impression, the opinion does not state what it considers to be the new issue before the court. *Kimura*, 104 N.M. at 6, 715 P.2d at 454. Although the debtor's abandonment of the collateral clearly has an effect on the rights of the parties after default, the *Kimura* court did not expressly articulate this as its rationale for deviating from prior law. Thus, the *Kimura* decision's effect on the *Clark Leasing* decision is unclear.

cially reasonable, and did not consider the possible deleterious effects the ruling may have on the debtor.⁶⁴

2. A Possible Reconciliation of *Kimura* and *Clark Leasing*.

a. Creating an exception to *Clark Leasing v. White Sands*.

A holding consistent with *Clark Leasing* could require that the debtor be credited with the value of the collateral a reasonable time after repossession, except where a debtor abandons collateral. When collateral has been abandoned, the debtor would have the burden of proving the collateral's worth when it was repossessed. If the deserting debtor is unable to prove otherwise, the amount recovered at the eventual sale could be presumed to be the collateral's value at the time repossessed. By shifting the burden of proving the collateral's value from the secured party to the debtor, the court's decision in *Kimura* can be explained without disturbing the approach of *Clark Leasing*.

Such an exception to *Clark Leasing* would protect the secured party where the property is abandoned without confusing or redefining the law. The *Kimura* court may have intended to create such an exception to *Clark Leasing*, but nowhere in the opinion is this stated.

b. Recognizing the debtor's obligation to object.

Another path the court could have taken to reach the same result in *Kimura* would have been to rely on those sections of the U.C.C. that specifically provide for debtor protection. Sections 55-9-507(1) and 55-9-207(2) establish causes of action against the creditor when the collateral after repossession is mishandled.⁶⁵ Under § 55-9-507(1) disposition of the collateral may be ordered by the court, and under § 55-9-207(3) the

64. The conflict between *Kimura* and *Clark Leasing* lies in the two courts' differing applications of the U.C.C.'s requirement that disposition of the collateral be commercially reasonable. *Clark Leasing* imposes obligations on the secured party from the moment of repossession, and implies that a secured party in possession of collateral who delays disposition may forfeit the right to recover anything more than the proceeds of the eventual collateral sale. Under *Kimura*, the secured party is allowed to repossess the collateral, and pursue a money judgment obligated only to dispose of the collateral some time in the future and subtract the proceeds from the judgment amount. In *Kimura*, the court held that only the eventual sale of the collateral will be subject to a test for commercial reasonableness, and effectively freed the secured creditor from proving compliance with § 55-9-504 while holding the collateral for three years.

65. Section 55-9-507 provides the debtor with remedies against a secured party who violates its obligations under the Code:

"(1) If it is established that the secured party is not proceeding in accordance with the provisions of [the Code] disposition may be ordered or restrained on appropriate terms and conditions."

N.M. STAT. ANN. § 55-9-507 (Cum. Supp. 1986). Under § 55-9-207(3),

[a] secured party is liable for any loss caused by his failure to [use reasonable care in the custody and preservation of the collateral].

Id. § 55-9-207(3).

secured party is liable to the debtor for failing to use reasonable care in the custody and preservation of collateral. The court could have held that § 55-9-507 implicitly gives the debtor the right to force an equitable disposition of the collateral and thereby protect his assets, and that the debtor who does not avail himself of § 55-9-507 protections forfeits his claim to any damages suffered because of the creditor's delay. Absent a § 55-9-507 claim, the court could hold that it should not restrict or require a sale, or award the debtor damages independently of the statute.

The *Kimura* court determined that secured parties in possession of the collateral are subject to Section 55-9-207.⁶⁶ Under § 55-9-207 a creditor is responsible for maintaining the collateral, and must pay damages if negligent in discharging this duty. Another approach to the resolution of the *Clark Leasing* and *Kimura* results might have been for the court to hold that § 55-9-207 provides the debtor with exclusive remedies, and because the debtor in this case did not raise an appropriate claim, any loss the debtor suffered could not be recovered. Establishing an obligation in the debtor to object raises additional troublesome questions,⁶⁷ but it would have allowed the *Kimura* court to stay within the holding of *Clark Leasing*. These arguments, however, are not raised in the opinion.

c. Implications of the *Kimura* holding.

The secured party's right under *Kimura* to keep possession of the collateral during the pendency of the lawsuit is tantamount to a right to attach the goods at the commencement of the suit.⁶⁸ New Mexico sta-

66. *Kimura*, 104 N.M. at 6, 715 P.2d at 454.

67. The difficulty with these arguments is that the debtor in default is not likely to be able to afford to initiate an independent action asking for relief. Requiring the secured party to responsibly dispose of the collateral within a reasonable time imposes a minimal burden, and the debtor's failure to file a § 55-9-507 or § 55-9-207 claim should not exonerate a secured party who has kept the collateral an unreasonable period of time without selling it. As the Alaska Supreme Court commented, [A] debtor who has defaulted on his obligation so that the collateral has been repossessed is often in a particularly disadvantageous position to sue the creditor to compel disposition of the collateral or to seek damages for its misuse. Usually, due to his poor financial position, the debtor has scant prospect of obtaining an attorney, and the amount involved is often too small to justify legal services. The possible remedies are thus illusory in most cases. On the other hand, no substantial burden is imposed upon the creditor by requiring him to take action within a reasonable time

Moran v. Holman, 514 P.2d 817, 820 (Alaska 1973).

68. Writs of attachment are court orders that property be seized pending the outcome of a dispute. *Staab v. Hersch*, 3 N.M. 209, 3 P. 248 (1884). While the main objective in attachment was formerly to coerce the defendant to appear in court for a trial, today the writ is used to provide the creditor security. In the event that the creditor wins a favorable judgment on the suit, the judgment can be enforced by liquidating the attached property.

In *Kimura*, the court held that the secured party is entitled to retain possession of the collateral until the suit on the note is terminated by the appeal. Thus, the secured party's right under *Kimura* is similar to attachment.

tutorily reserves the power to attach property to a limited number of situations.⁶⁹ Generally, attachment is an extraordinary measure⁷⁰ used only when the court decides that a creditor's claim is legitimate, and that there is a high likelihood that the debtor will attempt to avoid paying an adverse judgment.⁷¹ Under the New Mexico statute, a creditor seeking attachment is required to file a complaint along with an affidavit that the debt is legally owed, and a bond in an amount sufficient to cover the debtor's expenses should the debtor prevail in the lawsuit.⁷² The debtor must be given the opportunity to contest the attachment.⁷³ Although recent United States Supreme Court decisions have questioned whether the Constitution entitles a debtor to notice and a hearing,⁷⁴ the New Mexico statute clearly intends to protect debtors from overreaching creditors.⁷⁵

The *Kimura* decision might be construed as allowing a secured party to attach a debtor's property after default using strictures of the New Mexico attachment statute. By allowing a secured party to repossess and hold on to collateral until after the debt is determined in court, the case may present a constitutional conflict. Although the Supreme Court has indicated that peaceful repossession is not state action, and is therefore not governed by the Fourteenth Amendment,⁷⁶ repossession followed by the right to keep the goods for an extended period of time while pursuing

69. N.M. STAT. ANN. § 42-9-1 allows attachment only in one of the following situations:

- a) when the debtor is not a resident of New Mexico,
- b) when the debtor refuses to accept service of process,
- c) when the debtor intends to remove his property from the state, or intends to defraud or delay the proceedings,
- d) when the debtor is preparing to fraudulently convey or sell his property so as to defraud or hinder his creditors,
- e) when the debtor has moved his property to New Mexico with the intent to defraud his creditors elsewhere,
- f) when the debtor is an out of state corporation and has no agent in New Mexico to accept service of process,
- g) when the debtor has fraudulently contracted the debt,
- h) when the debt is for services, work or labor,
- i) when the debt was incurred for the necessities of life.

N.M. STAT. ANN. § 42-9-1 (1978).

70. *Martinez v. Martinez*, 2 N.M. 464 (1883).

71. *Staab v. Hersch*, 3 N.M. 209, 3 P. 248 (1884).

72. N.M. STAT. ANN. § 42-9-4 (1978).

73. N.M. STAT. ANN. §§ 42-9-17 and 42-9-18 (1978).

74. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

75. N.M. STAT. ANN. §§ 42-9-1 through 42-9-39 (1978) govern the law of attachment. In addition to requiring a creditor to post a bond, the statute provides the debtor with the opportunity to dispute the allegations of the affidavit and complaint and allows a trial on the appropriateness of the attachment. N.M. STAT. ANN. § 42-9-31 (1978). Both parties are entitled to appeal before the property is seized. *Id.*

76. *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978).

a deficiency judgment may deprive the debtor of property without due process of law.⁷⁷

Perhaps the most disturbing aspect of the *Kimura* decision is its implication that a debtor in default may have to defend a creditor's lawsuit for a debt while being denied possession of the collateral. In *Kimura* the debtor did not contest the amount owed,⁷⁸ but if he had disputed the debt, the lawsuit on the note would have run for more than three years while the creditor retained possession of the subject collateral.⁷⁹ A debtor who is unable to make required payments on a secured loan has the option of liquidating the collateral and using the proceeds to pay the debt. But a debtor loses this repayment possibility when the collateral is repossessed. When the collateral is the equipment or inventory that provides the debtor income, payment of the debt becomes increasingly difficult when the creditor seizes the collateral, because it deprives the debtor the means to earn money.⁸⁰ The court in *Kimura* could not have intended to grant the secured party such broad powers at the debtor's expense, but such a result would not be inconsistent with the broad language of the opinion.

IV. CONCLUSION

In holding that a secured party has no obligation to dispose of repossessed collateral while suing to collect a delinquent loan, the court in *Kimura v. Wauford* disregarded the spirit of Article 9 of the Uniform Commercial Code, and ignored a previous New Mexico decision that clearly had bearing on the issue.⁸¹ The court may have intended to distinguish *Kimura* from similar cases by holding that a debtor who abandons collateral upon default also abandons the right under § 55-9-504 to a commercially reasonable disposition of the property. If this was the court's intent, however, it is not articulated in the opinion.

The *Kimura* case squarely presented the conflict between creditor and

77. The debtor in *Kimura* abandoned the collateral and therefore may have lost all claim to the property. But the court's decision does not limit itself to these facts, and it is conceivable that under *Kimura*, a debtor in default may effectively be deprived of his property, and be forced to suffer loss without an opportunity to be heard.

78. *Kimura*, 104 N.M. at 6, 715 P.2d at 454.

79. Under the law of attachment the debtor has the right to post a bond sufficient to cover the debt, and thereby retain possession of the collateral while defending the creditor's suit. N.M. STAT. ANN. § 42-9-30 (1978). The *Kimura* decision implies that by operation of § 55-9-501 a debtor may have to defend suit on the debt with no similar right to the collateral.

80. Indeed, one of the cases cited by the court in *Kimura* points out that: "For during the period that the debtor is deprived of possession [of the collateral] he may have been able to make profitable use of the asset or may have gone to far greater lengths than the creditor to sell." *Mich. Nat'l Bank*, 29 Mich. App. 99, 103, 185 N.W.2d 47, 51.

81. *Clark Leasing Corp. v. White Sands Forest Prod., Inc.*, 87 N.M. 451, 535 P.2d 1077 (1975).

debtor interests in resolving the debt after default. Although the court may not have intended to significantly affect the balance of these conflicting interests, the court resolved the dispute by enhancing the secured party's power. In weakening the debtor's protections afforded through Article 9 of the U.C.C., *Clark Leasing* and the law of attachment,⁸² the decision in *Kimura* leaves New Mexico law in the area unclear. Failing to fully explain the rationale of its decision, the court also failed to develop the commercial law of New Mexico.

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82. See also *supra* notes 60-75 and accompanying text.