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TRUSTING THE PROCESS AND MISTRUSTING THE RESULTS: A STRUCTURAL PERSPECTIVE ON ARTICLE 9's LOW-PRICE FORECLOSURE RULE

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Introduction

In a fully consensual sale, no question generally arises about the relationship of the sale price to the fair value of the property sold, simply because fair value is generally defined by reference to the price that a willing buyer will pay to a willing seller. ² Foreclosure auctions, by contrast, are non-consensual transactions in which a secured party or mortgagee sells the debtor's property following a default by the debtor on its indebtedness, and in this context the only force tending to cause the sale price to approximate the fair value of the property is competition among potential buyers. ³ However, the hard truth is that foreclosure auctions tend to be poorly advertised and sparsely attended, and as a result, the sale prices generated by those auctions are low. ⁴

This problem is especially acute when the secured party or mortgagee is itself the successful bidder: in these cases, the sales proceeds may even be lower than in foreclosure sales to third parties. The assertion that there is a problem at all with secured parties as successful bidders might not immediately be obvious. As Frank Easterbrook has pithily asked about secured creditors:

[W]hy shouldn't they maximize? Even if the secured party could be assured of a judgment for the full deficiency, why would it forgo a dollar today for the chance to enforce a deficiency judgment tomorrow? ⁵

That is, secured creditors, like anyone else, can be expected to behave in a rational and self-interested manner, and ordinarily this self-interest would lead them to attempt to maximize the value obtained from a foreclosure proceeding, so as to achieve the basic goal of getting their debt satisfied. If the secured party does maximize the value of the collateral in this way, it acts simultaneously in its own best interest and in that of the debtor. In other words, it recovers the optimal amount from the collateral so as to satisfy the debt owed to it, and it minimizes the amount of deficiency remaining, for which the debtor would be responsible. ⁶

However, in some cases, the interests of the secured party and the debtor will not be so conveniently aligned. One obvious case is where the debt is over-secured (that is, when the value of the collateral exceeds the amount of the debt): the secured party has no incentive to maximize returns from the collateral in excess of the debt, since the entirety of that excess would go to the debtor, not to the secured party. ⁷ Another case, more central to this Article, is where the secured party has the opportunity to serve its own interests, rather than those of the debtor, by bidding less for the collateral than it is worth yet not being outbid by others. In such a case (as becomes particularly clear when the secured party resells the collateral at a higher price than the amount bid), the secured party profits from the difference between the foreclosure price and the value of the collateral. Adding insult to injury, if the amount of the secured party's low bid is less than the amount of the debt secured, the secured party will be able not only to profit from the resale but also to enforce the large deficiency against the debtor, thus profiting twice from the same wrong. One of the most interesting innovations of the recent revisions to UCC Article 9, the so-called low-price foreclosure rule appearing in Revised UCC section 9-615(f), ⁸ addresses this abuse, at least in part, and provides the spur to this Article's reflections.

UCC Article 9 has traditionally taken the position that the correctness of the amount generated by a foreclosure sale depends solely upon the process followed in that sale, rather than upon any direct evaluation of the amount resulting from that process as compared to fair market value. One might encapsulate this thought by saying that Article 9's position has traditionally been process-based rather than results-based. Under the recent revisions to Article 9, however, that position has been partially undermined. Section 9-615(f), where it applies, takes a results-based position by measuring the actual amount generated in a foreclosure sale against amounts generated in other foreclosure sales. In cases where the actual amount generated is too low, leaving the secured creditor with a deficiency judgment that is too high, the rule lowers the deficiency judgment. This low-price foreclosure rule has naturally been controversial, not only because it so clearly departs from traditional Article 9 wisdom, but also because it runs contrary to the general thrust of the Article 9 revisions, which has generally been to increase the protections afforded to secured parties.

This Article examines these and other foreclosure auction controversies surrounding the low-price foreclosure rule,⁹ but it also moves beyond them to place the issues in a larger, structural perspective. This perspective becomes accessible when one considers the rule in conjunction with a superficially very different body of law, one that has been largely ignored in discussions of the low-price foreclosure rule: the provisions for avoidance of constructively fraudulent transfers embodied in state law and the federal Bankruptcy Code. Considering the low-price foreclosure rule and constructive fraudulent transfer law together enables one to step back from the doctrinal particularities of either, discern deep ways in which the two bodies of law are kindred, and to think about their common concerns from a more abstract viewpoint. From this perspective, the issues immediately raised by Article 9's low-price foreclosure rule are but the tip of an iceberg. Equally entailed by the low-price foreclosure rule, I show, are profound questions relating to process versus result, property versus contract, rules versus standards, and the meaning of commercial reasonableness.

As a background for analysis, Parts I.A and I.B of this Article analyze Article 9's low-price foreclosure rule and constructive fraudulent transfer law.¹⁰ Part I.C then illuminates the surprising and strong structural kinships between those superficially disparate regimes,¹¹ particularly in light of the sharp, procedurally-based limits on fraudulent transfer law that the U.S. Supreme Court imposed in *BFP v. Resolution Trust Corporation*.¹² Both sets of rules constitute exceptions to a broader regime that seeks to achieve justice by requiring adherence to a process (that is, Article 9's commercial reasonableness requirements), rather than by examining the particular results of that process, and both sets of rules correct the occasional inequitable results of the foreclosure process by focusing, post hoc, directly on those results. The enactment of section 9-615(f), in particular, shows that our system's faith in the foreclosure process has, at least until recently, been undercut by mistrust of particular results, or that that faith in the process has been much less justified than generally thought. But more important, the enactment of section 9-615(f) raises the question whether our system's faith in the foreclosure process should now be renewed.

Part II generally answers this question in the negative, but also provides a schema for thinking about future reforms that may ultimately justify such a renewal of faith. Part II.A shows that the benefits of the rule are questionable in light of the burdens of litigating it, the possible negative effects on credit availability, and the possible chilling of secured parties' willingness to bid at foreclosure sales.¹³ Part II.B shows that not only section 9-615(f), but also any other rule that simply lowers deficiency judgments, is inherently weak, because it adjusts only contractual rights between the debtor and the secured party and, unlike the law of constructive fraudulent transfer, leaves unaffected the more robust property rights that the foreclosing secured party acquires as transferee.¹⁴ Part II.C accordingly considers enhancing section 9-615(f) with a property-based approach borrowed from constructive fraudulent transfer law, but rejects this notion based on the distinction between rules and standards most notably explored by Duncan Kennedy.¹⁵ Part I's distinction between the foreclosure process and the results of that process, combined with Kennedy's distinction between rules and standards, gives rise to four permutations of kinds of legal directives designed to achieve just results in the foreclosure context. Three of these permutations (rules based on results, standards based on results, and standards based on process) are unsatisfactory for reasons having primarily to do either with arbitrariness or difficulty of enforcement. The fourth permutation, rules based on process, is the most desirable, provided that such rules are well-tailored to enhance the process without being unduly burdensome. Part II.D therefore offers some concluding thoughts on possible rules based on process for future reformers to consider, including, by way of illustration only, requiring foreclosing secured parties to create a robust auction market by advertising collateral on one or a few well-channelled Internet sites.¹⁶ The overall effect of this or similar rules would be to enhance Article 9's

current commercial reasonableness standard in easily enforceable ways, thus justifying the result that section 9–615(f) fails to justify: a renewed faith in the process of foreclosure.

I.A Comparative Anatomy of Two Systems

A. Article 9's Low–Price Foreclosure Rule

One of Article 9's bedrock principles is, and has always been, that the debtor is entitled to any amount by which the foreclosure proceeds exceed the indebtedness secured (this excess being called a "surplus"), and that the secured party is entitled to any amount by which the amount of foreclosure proceeds falls short of the amount of indebtedness secured (this shortfall being called a "deficiency").¹⁷ Almost as bedrock a principle, at least until the recent revisions, has been that if a foreclosure is conducted in a commercially reasonable manner, the resulting amount of foreclosure proceeds – and, hence, the resulting deficiency or surplus amount – is to be unquestioned. Specifically, Article 9 provides that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable,"¹⁸ and goes on to make explicit:

The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.¹⁹

The phrase "of itself" in this provision carries the misleading negative implication that a low price can, in combination with other factors, lead to a questioning of the deficiency or surplus amount. In fact, this is not so; as the Official Comments help to clarify, the only effect of a low foreclosure price should be to prompt a court to "scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable."²⁰ Although Article 9 requires all "terms" of a foreclosure to be commercially reasonable,²¹ the foreclosure price is thus, in effect, not a "term" for those purposes.²² In short, one is to judge the legitimacy of a foreclosure sale by the way it is conducted, not the price it generates – in other words, by reference to the process, not the results of that process.²³

Though this principle remains firmly fixed in Revised Article 9, it is now subject to a somewhat contrary provision: the low–price foreclosure rule of Revised UCC section 9–615(f). This rule provides:

The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

- (1) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and
- (2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.²⁴

An illustration of the way in which this rule operates will make later discussion more convenient. Suppose that the debtor owes \$1 million to the secured party, secured by equipment having a value of over \$1 million. When the debtor defaults, the secured party conducts an auction at which the secured party itself "bids in" ²⁵ \$400,000 of its indebtedness; no other party bids a higher amount; and as a result, the secured party emerges as the prevailing bidder and the transferee of the collateral. Under Article 9's ordinary process–based approach, the deficiency would very simply be \$600,000, that is, the amount of indebtedness owed to the secured party minus the amount of the foreclosure sale proceeds. But in this case the transferee is the secured party itself, which is deemed suspect under the low–price foreclosure rule. Thus, under that rule, if the debtor is able to show that commercially reasonable foreclosure sales of this equipment to disinterested third parties would generally bring proceeds in the range of \$700,000 to \$900,000, and if the \$400,000 actual amount of proceeds is deemed to be significantly below that range, then the low–price foreclosure rule will cause the deficiency to be calculated by reference to a hypothetical amount of

proceeds in the \$700,000 to \$900,000 range, thus reducing it from \$600,000 to somewhere between \$100,000 and \$300,000. ²⁶ —

This provision does not amount to an outright exception to Article 9's process-based method of evaluating commercial reasonableness. Even when the foreclosure proceeds are low enough, and the foreclosure is to a person suspect enough, to trigger section 9–615(f), the result is not to render the foreclosure commercially unreasonable, but only to adjust the deficiency. (In fact, section 9–615(f) should be read as applying only to foreclosures that by hypothesis *are* commercially reasonable; ²⁷ foreclosures that are not commercially reasonable are governed by an entirely different set of rules, with different burdens of proof and potentially more severe consequences. ²⁸) To be sure, one consequence of rendering a foreclosure sale commercially unreasonable is generally to adjust the resulting deficiency, but there are other consequences as well that section 9–615(f) does not entail. ²⁹ Nonetheless, the low-price foreclosure rule is clearly inconsistent in spirit with Article 9's longstanding (and continuing, in most cases) commitment to evaluating the correctness of foreclosure proceeds by reference to process rather than result.

The rule focuses only on certain transferees (the secured party, a person related to the secured party, or a secondary obligor) that, for convenience, I will call "suspect parties," and scrutinizes them for sound reasons. In any setting of less than competitive bidding, all rational actors (whether suspect parties or not) have an incentive to bid less than the fair value of the collateral; simple self-interest leads us all to seek to acquire assets at less than their fair value. But the low-price foreclosure rule's suspect parties have an incentive even greater than that of most rational actors to bid less than the fair value of collateral. This is most easily seen in the case of the secured party itself: the lower the price it pays for the collateral, the greater the resulting deficiency judgment for which the debtor is liable. ³⁰ Thus, if the deficiency judgment is collectible, the secured party profits not only by the spread between its low purchase price and the value of the collateral, but also by collecting the difference between the resulting artificially large deficiency and the hypothetical deficiency that would have resulted from a more equitable bid. ³¹ —

Suspect parties other than the secured party itself are subject to the same particularly troubling incentives. A "person related to" the secured party has, by definition, a relationship close enough to the secured party ³² that there is a clear danger of cooperation between the two, and if the low-price foreclosure rule covered only the secured party itself, its formalism limitation would be easily evaded. The last category of suspect party, secondary obligors, is also best understood in light of secured parties. A secondary obligor is liable on the debt if the debtor fails to pay, ³³ and superficially it may seem that the secondary obligor has every incentive to bid a fair price for the collateral, because the lower the price paid by the secondary obligor for the collateral, the greater the deficiency for which the secondary obligor is liable. The law of suretyship, however, gives the secondary obligor a right of recourse against the debtor for any amounts that it pays on the debtor's behalf, ³⁴ and if the amount is collectible, ³⁵ the secondary obligor is able to profit to the same extent as is the secured party or person related to the secured party. ³⁶ —

Some commentators have argued that the low-price foreclosure rule is unnecessary on the grounds that if a foreclosure sale yields a price that is low enough to qualify as "significantly below the range of proceeds that a complying disposition to a [non-suspect party] would have brought," then something must have been wrong with the procedure that generated that price, that is, the disposition must have been commercially unreasonable. ³⁷ If this is true, the argument runs, the deficiency will be reduced even without section 9–615(f), by reason of Article 9's general rule holding secured parties liable for damages resulting from non-complying foreclosure sales. ³⁸ Such an argument, however, places too much faith in the precision both of the judicial process and of the Article 9 foreclosure scheme. Concerning the judicial process, courts' fact-finding is, of course, subject to human error. The debtor may fail to detect a flaw that exists in the secured party's showing, or the court may simply make a wrong judgment about whether the secured party's showing satisfies the burden. Concerning Article 9's foreclosure scheme itself, the scheme is too highly generalized to justify any faith that it ensures consistently just results. The central command is simply that "all aspects of the disposition . . . be commercially reasonable," and this requirement is notoriously elastic. As argued below, ³⁹ the requirement should perhaps be strengthened, to put more teeth into it. Unless and until changes along those lines are adopted, however, one can still desire a rule such as section 9–615(f) as a safeguard to ensure that the processual requirements of commercial reasonableness, even when fully complied with, are actually generating acceptable results. To point to the existing standard, and to declare that anything meeting that standard is ipso facto satisfactory, is unduly complacent. ⁴⁰ —

Overall, then, the low-price foreclosure rule addresses a legitimate concern using means that are not unjustifiable, but, as Part II of this Article will develop in some depth, the rule is nonetheless regrettably weak. The reasons for this weakness will emerge most clearly after a brief exploration of the rule's kinship with the field of constructive fraudulent transfer law.

B. Constructive Fraudulent Transfer Law and the BFP Case

The law of fraudulent transfer predates the works of Shakespeare and, like those works, has survived almost unchanged through generations of analysis and editing. Fraudulent transfer law had its inception in the Statute of 13 Elizabeth,⁴¹ which invalidated transfers made by a debtor of its property with the actual intent "to hinder, delay or defraud" its creditors. In assessing the debtor's actual intent, courts have looked, by necessity, to circumstantial evidence of that intent, and this circumstantial evidence has often fallen into particular categories known as "badges of fraud."⁴² Modern fraudulent transfer law has expanded to cover not only actual fraud but also "constructive fraud," that is, the law is willing to invalidate transfers in exchange for which an insolvent debtor receives less than reasonably equivalent value. The term "constructive fraud" is "a designation, not a description,"⁴³ in that this body of law invalidates transfers that, even if not made with actual fraudulent intent, nonetheless unjustly increase unsecured creditors' risk of nonpayment.

Constructive fraudulent transfer law was an important part of the Uniform Fraudulent Conveyance Act ("UFCA"),⁴⁴ promulgated in 1918, and remains an important part of its successor statute, the Uniform Fraudulent Transfer Act ("UFTA").⁴⁵ The UFTA has been widely adopted,⁴⁶ though the UFCA continues to be the law in a handful of jurisdictions, including notably New York.⁴⁷

Congress, too, has provided for the avoidance of fraudulent transfers, whether actual or constructive, in the Bankruptcy Code (and, before that, in the Code's predecessor, the Chandler Act of 1938⁴⁸). A trustee in bankruptcy is empowered to avoid fraudulent transfers under either the Code's own substantive provisions, set forth in section 548,⁴⁹ or under the UFTA or UFCA, as the case might be, through the so-called strong-arm provision of section 544(b),⁵⁰ which permits a trustee to assert the rights of unsecured creditors under state law.

The remainder of this Part I.B sets forth a relatively brief exposition of the complex constructive fraudulent transfer provisions of section 548 and the UFTA, including, in the case of section 548, its construction by the U.S. Supreme Court in the controversial *BFP* case. Part I.C then ties these fraudulent transfer provisions, in surprisingly numerous and illuminating ways, to the provisions of UCC section 9-615(f).

1. Bankruptcy Code section 548

Section 548(a)(1)(B) of the Bankruptcy Code empowers the trustee to avoid any transfer of an interest of the debtor in property if the debtor (i) received less than a reasonably equivalent value in exchange for the transfer and (ii) was either insolvent on the date of the transfer or rendered insolvent as a result of the transfer.⁵¹ These two elements of the statute are perfectly well-tailored to address harmful transfers; if either element is not present, no harm is done to creditors' interests. That is, if an insolvent debtor transfers property in exchange for a reasonably equivalent value, then creditors continue to have access to the same net amount of assets to satisfy their claims. Similarly, if a debtor transfers property for less than a reasonably equivalent value, but is not insolvent at the time of or as the result of the transfer, then the windfall to the transferee does not defeat creditors' expectations of payment.⁵²

The entirety of the amount transferred is recoverable by the trustee,⁵³ and to prevent the transferee from being unjustly deprived of the amount that it did pay to the debtor, the transferee is granted a lien on the property transferred to the extent that the transferee gave value to the debtor in exchange for the transfer.⁵⁴ The statute expressly provides for this recovery by the trustee regardless of whether the transfer, and regardless of whether the receipt of less than reasonably equivalent value, were voluntary or involuntary on the debtor's part.⁵⁵

Because the statute covers involuntary receipt of less than reasonably equivalent value, nothing in its black letter or the policy behind it prevents it from applying to foreclosures of security interests that generate proceeds lower than the value of the collateral.⁵⁶ For example, adapting the facts hypothesized above,⁵⁷ suppose that within one year prior

to the bankruptcy petition, the secured creditor forecloses on collateral and prevails at the foreclosure sale by bidding in \$400,000 of its debt. If in the trustee's estimation the property could instead have brought \$700,000, the trustee may sue to avoid the transfer to the secured party. If the trustee prevails, the secured party is required to return the entirety of the property to the estate, but is granted a lien in the amount of \$400,000.⁵⁸ The secured creditor also retains its ordinary Article 9 deficiency claim in the amount of \$600,000, that is, the difference between the whole of the debt secured and the portion of that debt bid in at foreclosure. Nothing in section 548, unlike UCC section 9-615(f), provides for the reduction of this deficiency (though in a proper case the two provisions could both apply, in which event the Bankruptcy Code would respect the operation of section 9-615(f)).⁵⁹

This recovery of the property prevents the secured party, in principle, from being able to resell it and profit from the difference between the foreclosure price and the fair market value – a marked difference from the section 9-615(f) scenario.⁶⁰ Realistically, however, if there is a market for the property, the secured party will have resold it before the trustee succeeds in recovering it as a fraudulent transfer. In such a case, the subsequent transferee will ordinarily be immune from a recovery action,⁶¹ but the secured party would remain liable for the value of the property transferred (in this case, \$700,000).⁶²

2. Uniform Fraudulent Transfer Act

Sections 4(a)(2) and 5(a) of the UFTA operate very similarly to the Bankruptcy Code provisions discussed above, except that the avoidance power is to be exercised by an individual creditor acting in its own right, rather than by a trustee representing all creditors.⁶³ The chief difference between the two sets of provisions is that the UFTA distinguishes between creditors whose claim arose before the transfer was made ("present creditors") and creditors whose claim arose afterwards ("future creditors"), and permits only present creditors to bring actions based on the debtor's being insolvent at the time of, or as the result of, the transfer.⁶⁴ Even a trustee in bankruptcy, using the strong-arm powers of Bankruptcy Code section 544(b) to avoid a transfer on such grounds under the UFTA,⁶⁵ must assert the rights of an actual present creditor who could have avoided the transfer under the UFTA.⁶⁶ Bankruptcy Code section 548, however, makes no such distinction among the classes of creditor who may bring actions, because the trustee in bankruptcy represents the interests of all creditors.

A further difference, crucial to the issues discussed in this Article, is that the UFTA, unlike the Bankruptcy Code, generally does not permit avoidance, on constructive fraudulent transfer grounds, of transfers that result from proper foreclosure proceedings.⁶⁷ Two separate sections implement this exception. First, section 3(b) deems reasonably equivalent value to have been given by a transferee in a "regularly conducted, noncollusive foreclosure sale . . . upon default under a mortgage, deed of trust or security agreement." And second, section 8(e)(2) provides that the "enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code" is not avoidable as a constructive fraudulent transfer. In large part, these two sections overlap.⁶⁸ Neither of the two sections applies, by its own terms, to foreclosures that are, respectively, collusive or not in compliance with Article 9 (for example, not conducted in a commercially reasonable manner), with the result that such transfers remain susceptible to avoidance as constructive fraudulent transfers.⁶⁹

3. The *BFP* Case

In *BFP v. Resolution Trust Corporation*,⁷⁰ a five to four majority of the U.S. Supreme Court essentially imported into Bankruptcy Code section 548 a limitation closely paralleling that of UFTA section 3(b). The court held that the consideration received from a non-collusive real estate mortgage foreclosure sale, conducted in compliance with the applicable state's foreclosure laws, is conclusively deemed to constitute the "reasonably equivalent value" required under section 548(a)(2).⁷¹ Thus, the transfer of the property pursuant to the regularly conducted sale is not avoidable as a constructive fraudulent transfer under the Bankruptcy Code.

BFP was a partnership that owned a Newport Beach, California home that was encumbered by two deeds of trust amounting to \$556,250. BFP defaulted on the first deed of trust, and the lienholder scheduled and properly noticed a foreclosure sale, at which a third party purchased the property with a bid of \$433,000. Less than one year, later BFP filed a chapter 11 petition and, acting as a debtor-in-possession, commenced an action under Bankruptcy Code section 548 to avoid the transfer of the home pursuant to the foreclosure. BFP alleged that the home was actually

worth \$725,000 at the time of the sale, that the transfer for almost \$300,000 below its worth (and \$120,000 below the amount of indebtedness) did not constitute "reasonably equivalent value," and that, because the transfer occurred while the debtor was insolvent, it constituted a constructive fraudulent transfer under section 548(a)(2).

The Supreme Court rejected BFP's arguments, holding in an opinion written by Justice Scalia that the price paid at a non-collusive, regularly conducted foreclosure sale is deemed to constitute reasonably equivalent value. In so holding, the Court rejected the approach of *Durrett v. Washington National Insurance Co.*,⁷² a Fifth Circuit case which had held that a mortgage foreclosure sale could be set aside if the price received was significantly below the fair market value of the property.⁷³ Specifically, the *Durrett* court had held that a foreclosure sale for 57% of the property's fair market value could be set aside, and had suggested in dictum that such sales for less than 70% of the fair market value should generally be set aside. The Supreme Court in *BFP* also rejected the approach of the Seventh Circuit in *In re Bundles*,⁷⁴ a case that had recognized a presumption that the price paid constituted reasonably equivalent value, but had also allowed that presumption to be rebutted based upon the totality of the circumstances, including the fair market value. The *BFP* holding, in effect, makes fair market value and most other facts irrelevant, and makes the presumption articulated in the *Bundles* case conclusive, except in the case of collusion or procedural irregularity.⁷⁵

It is unsurprising that the majority rejects fair market value as a benchmark for reasonably equivalent value; after all, market value is consistently higher than prices obtained at foreclosure sales. As the court notes, market value "is the very *antithesis* of forced-sale value."⁷⁶ But the majority also declines to use foreclosure sale prices in general as a benchmark for any particular foreclosure sale price, asserting that judgments about reasonable foreclosure sale prices are "policy determinations that the Bankruptcy Code gives us no apparent authority to make."⁷⁷ The majority viewed these judgments as particularly unworkable because "the terms for foreclosure sales are not *standard*. They vary considerably from state to state, depending upon, among other things, how the particular state values the divergent interests of debtor and creditor."⁷⁸

The majority opinion also rests on federalism concerns. The court chides the *Durrett* court for having intruded on states' power to provide certainty of title to purchasers at foreclosure sales, and for having thereby upset the "over 400 years of peaceful co-existence" that fraudulent transfer law and foreclosure law have enjoyed in Anglo-American jurisprudence.⁷⁹ But this aspect of the majority's reasoning ignores the fact that the Bankruptcy Code often undoes or interferes with rights created under state law in order to pursue bankruptcy policy. Prominent among these bankruptcy policies, as Justice Souter's dissent observes, are maximizing the value of assets and distributing that value equitably among creditors.⁸⁰ Allowing a trustee in bankruptcy to avoid foreclosure sales when the price received in those sales is low, even in the absence of collusion or procedural irregularity, directly furthers those policies, providing an ample federal basis for sometimes reversing results that state law would otherwise decline to disturb.⁸¹

Moreover, the Supreme Court's ruling adopts a reading of section 548 specifically rejected by Congress in the 1984 amendments to the Bankruptcy Code, and renders largely meaningless changes made in those same amendments to section 548 and the Code's definition of "transfer." First, the Senate bill for the 1984 amendments at one point contained a rule providing, in essence, that good faith foreclosures on real estate or other property of the debtor were deemed to provide reasonably equivalent value under section 548,⁸² but notwithstanding Congress's abandonment of this rule, the *BFP* majority has now, in effect, enacted it. And second, the 1984 amendments, as finally enacted, expanded the definition of "transfer" to include "foreclosure of the debtor's equity of redemption,"⁸³ and amended section 548 to permit avoidance of transfers made not just voluntarily but also "involuntarily," such as pursuant to a foreclosure. The clear intent of these amendments was to make foreclosure sales subject to avoidance as constructive fraudulent transfer, but the *BFP* majority frustrates this intent except in cases of collusion or procedural irregularity.⁸⁴

The majority makes no reference at all to the safe harbor rule for foreclosures appearing in section 3(b) of the UFTA,⁸⁵ a quite surprising omission given the close resemblance of the *BFP* holding to that rule. The majority might have deployed the UFTA rule as support for the reasonableness of its holding, but perhaps it shied away from doing so because the rule's presence in the UFTA also generates a negative implication about section 548. That is, section 3(b) of the UFTA shows, just as does the legislative history of the 1984 amendments to the Bankruptcy Code, that when a legislature intends foreclosure sales to be off limits to constructive fraudulent transfer recovery, it is easy for it so to state.

D. Startling Unities Beneath the Contrasts

At first glance, Article 9's low-price foreclosure rule has little to do with fraudulent transfer law's approach to foreclosure sales. The Article 9 rule is centrally concerned with the transferee's identity, while fraudulent transfer law is not. The Article 9 rule operates regardless of the mental state or actual wrongdoing of the transferee, while fraudulent transfer law refuses to shield transferees who engage in collusion. The Article 9 rule merely adjusts the secured party's deficiency, while fraudulent transfer law recovers (or, in the case of non-collusive foreclosures, refuses to recover) property from the transferee. By recovering the property transferred, fraudulent transfer law concerns itself with present rights to actual assets, while by adjusting the deficiency, the Article 9 rule concerns itself only with future possibilities of recovering assets.⁸⁶ Finally, and most obviously, the Article 9 rule is concerned only with personal property, while fraudulent transfer law covers both personal and real property, and the *BFP* decision covers only real property.

Beneath the surface, however, and in ways that have not been noticed by other commentators, the two regimes are startlingly similar. First, the Article 9 rule's concern with the identity of transferees corresponds with fraudulent transfer law's concern with collusion. In other words, the Article 9 rule's suspect parties are, in effect, treated like those who collude, because these suspect parties may lack an incentive to maximize price, and thus transfers to them may (in the absence of genuine competitive bidding by independent parties) generate the same inequitably low prices that result from collusion.⁸⁷ Viewed in this way, the idea of collusion that is simply an unimportant detail in the *BFP* case or UFTA section 3(b) is revealed to have been elevated, in section 9-615(f), to a principal triggering criterion of the rule.

The structural similarity between the two rules also shows itself at deeper levels. Both section 9-615(f) and constructive fraudulent transfer law focus on the results of the foreclosure process, rather than on the foreclosure process itself, by providing for corrections to those results when they would otherwise be inequitable.⁸⁸ Section 9-615(f) corrects an inequitable result by reducing an unduly large deficiency to an equitable amount (by reducing the deficiency by the difference between what the secured party paid and what it "should have" paid).⁸⁹ Similarly, constructive fraudulent transfer law (or, where *BFP* or UFTA section 3(b) create safe harbors, the collusion exceptions to those safe harbors) corrects an inequitable result by refusing to leave the transferee with assets worth significantly more than the price paid for those assets (by avoiding the entirety of the transfer and replacing it with a lien on the property in the amount of the value given).⁹⁰ These fraudulent transfer rules and section 9-615(f) are both skeptical of results, and this skepticism implicitly recognizes that the processes that generated those results are themselves flawed.⁹¹

The foregoing structural similarity extends further, to a deeper level still: the result-skeptical rules are exceptions to a process-based faith. That is, their collusion exceptions aside, *BFP* and UFTA section 3(b) both place faith in the foreclosure sale process itself, using adherence to the process to validate the results of that process. And their section 9-615(f) exception aside, the foreclosure rules of UCC Article 9 do exactly the same, demanding chiefly that the process simply be commercially reasonable.⁹² Thus, in sum, the two regimes correspond at the levels both of general principle and of exception.

The basic difference in turf between the Article 9 rule (which is limited to personal property) and fraudulent transfer law (which covers all property or, in the case of the *BFP* rule, only real property) remains. Indeed, as noted above, the *BFP* court rested its decision in part on the divergences nationwide among real estate foreclosure rules,⁹³ so there is little prospect of judicial extension of the *BFP* approach to personal property in the Bankruptcy Code context.⁹⁴ But there is nothing inherent or structural about this difference in turf.⁹⁵ Even if judges are reluctant to extend the safe harbor to personal property, legislatures are free to do so; in fact, the UFTA has already done so, and as noted above, Congress seriously considered doing the same in the Bankruptcy Code.⁹⁶ Conversely, the safe harbor could also be abolished in both the real and personal property contexts, because the safe harbor is not a logically necessary or inherent part of constructive fraudulent transfer law.

If one takes a broader perspective on the two rules and situates them in their respective commercial contexts, another stark difference between them seems to emerge. The Article 9 rule, like the Article 9 foreclosure rules in general, is devoted to balancing the debtor's interest in the collateral against the secured party's right to dispose of that collateral

after default. By contrast, the constructive fraudulent transfer rules are devoted to balancing the interests of one creditor against another (under state law) or of one creditor against all other creditors (under the Bankruptcy Code). In other words, the Article 9 foreclosure rules are oriented toward the debtor/creditor relationship, but the constructive fraudulent transfer rules are oriented toward the creditor/creditor relationship. However, by protecting the debtor's interest in the property, the Article 9 rules indirectly enhance the possibility of recovery by the debtor's unsecured creditors, and thus, like the constructive fraudulent transfer rules, are in fact ultimately focused on the creditor/creditor relationship. By the same token, the constructive fraudulent transfer rules may be seen as a device for protecting debtors vis-à-vis creditors, rather than creditors vis-à-vis each other, because in preventing the debtor's assets from being dissipated at less than reasonably equivalent value, they enhance the debtor's ability to retire its unsecured debt.

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Finally, it bears noting that the purchaser of the property at foreclosure in the *BFP* case was not the mortgagee but an unrelated third party, while by contrast section 9–615(f) comes into play only where the purchaser of the collateral is the secured party or a similarly suspect party.⁹⁸ If the transferee in a regularly conducted mortgage foreclosure sale were the mortgagee or a related party, and actual collusion were not proved, would *BFP* immunize the transfer from avoidance as a constructively fraudulent transfer? The opinion on its face suggests that it would, because it does not make the identity of the transferee a relevant factor, and the mere fact that the transferee is the mortgagee or a related party does not of itself amount to collusion. However, because the case of such a transferee was not before the Court, one must be cautious about drawing inferences from the Court's silence. If a transfer to the mortgagee or a related party resulted in a particularly low price, this might at least raise the specter of collusion (or, alternatively, of the foreclosure rules being inadequately protective), and under such circumstances, it could at least arguably be good policy not to immunize the transfer. This is, after all, exactly the type of reasoning that is clearly implicit in section 9–615(f).

V. Results, Process, and A Way to Think About Reform

The foregoing comparison between section 9–615(f) and constructive fraudulent transfer law is not only interesting in itself, but also useful as prelude to a further comparison that will, in Part II.B, reveal the inherent weakness of section 9–615(f) and, indeed, any other provision of law that limits itself to adjusting deficiencies. Parts II.C and D then explore two dichotomies that, together, provide a framework that future reformers should use as a guide in their efforts to craft more effective rules. Part II.A opens up this larger discussion with a brief analysis of the dynamics that one can expect from section 9–615(f) itself.

A. First-Order Costs, Benefits and Distribution

Section 9–615(f) carries an obvious potential benefit to the debtor. When the foreclosure process has been conducted in a commercially reasonable manner, but has nonetheless failed to generate an adequate price for the collateral, the rule corrects for that inadequacy.⁹⁹ It does so only in cases where the transferee is the secured party or another suspect party, but as noted above, these are the parties whose incentives are the most poorly aligned with the debtor's interest. The fact that the rule is less broadly sweeping than it might be does not impair its benefits in those cases to which it does apply.

These benefits, however, may remain merely hypothetical for many debtors, if only because the rule is expensive and uncertain for debtors to litigate. The burden of proof is on the debtor to show that the rule's various elements are met,¹⁰⁰ and the debtor will likely be able to meet this burden only by relying on expert testimony.¹⁰¹ Moreover, as more fully discussed below,¹⁰² the rule is not a bright-line one, but is instead a collection of loosely articulated standards, which are inherently subject to judicial discretion, and the outcome in litigation under which is inherently difficult to forecast.¹⁰³ The uncertainty of the outcome, combined with the expense of the litigation (not only in expert witness fees but in lawyers' time invested in making factual showings), is bound to deter lawyers from taking such cases on a contingency basis.¹⁰⁴

The rule's benefits are weak in entirely separate and more interesting ways, as well. To begin with, even the successful downward adjustment of a deficiency often will not provide any tangible benefits to the debtor, except in the perhaps unusual cases where the debtor is solvent and the deficiency is collectible.¹⁰⁵ In cases where the debtor is not solvent,

or where the deficiency is not collectible for some other reason,¹⁰⁶ the existence of a larger-than-proper deficiency is, admittedly, a cloud over the debtor's financial future,¹⁰⁷ and a psychological albatross that might indirectly constrain that very future. But these are shadowy harms, section 9–615(f)'s removal of which yields only shadowy benefits.

Moreover, the rule holds the potential to cause harm to debtors in the form of increases in the cost of credit. Prospective lenders, assessing the likelihood of enforcement costs, will recognize that section 9–615(f) will extract higher bids from them, and will factor this eventuality into their interest rates, their fees, or even their willingness to lend. A related potential cost to debtors is that, once the loan is made, it might chill suspect parties from bidding at the foreclosure sale at all. This cost is particularly significant because, in many cases, secured parties or other suspect parties are the only ones participating in the auction and, in all cases to which the rule applies, they are by hypothesis the high bidders. Any rule that risks chasing these parties from the process, or making credit more costly, arguably hurts the very debtors that it is designed to protect.

However, this harmful effect on debtors is mitigated by some of the very same factors that mitigate the rule's helpful effect on debtors. As noted above, the rule is expensive and burdensome for debtors to make use of, and creditors will be just as cognizant of this fact as will be debtors and their attorneys. In the end, then, perhaps the suspect parties will not be significantly chilled from participating in the process after all. Perhaps this explains why such a facially debtor-protective rule was adopted as part of an otherwise predominantly secured-party-oriented set of revisions.¹⁰⁸ The relative weight of these rather shadowy costs and benefits is obviously difficult to assess in the abstract, though it would be an excellent subject for empirical research, particularly if one or more U.S. jurisdictions failed to enact section 9–615(f).

Regardless of the ultimate answer to this question about benefits to debtors in general, however, one can nonetheless view the rule as achieving worthwhile distributional goals. Even if the rule harms many debtors by a slight increase in their cost of credit, and even if the aggregate of these harms outweighs the benefit to debtors from lower deficiencies, the rule can be defended as, in effect, a small tax paid by the many in order to protect the few from large misfortunes.

B. Contract versus Property: The Weakness of Any Two-Party Rule

During the Article 9 revision process, protracted discussions and negotiations of consumer issues in general took place, including consideration of a number of variations on the low-price foreclosure rule. Many of these variations consisted of alternatives to the subtrahend that section 9–615(f) now reflects: rather than reducing the deficiency to the difference between the debt secured and the range of prices paid by non-suspect parties, the deficiency might have been reduced to the difference between the debt secured and, for example, (a) an amount between the retail value and the wholesale value of the collateral, (b) the fair wholesale value of the collateral, or (c) the results of the next sale of the collateral following the foreclosure sale.¹⁰⁹

All of these proposals, with varying shades of vigor, of course address abusive deficiency actions, which one prominent commentator has called "the most fundamental problem that consumers have faced under Article 9."¹¹⁰ I submit, however, that large deficiencies are not, in fact, the most fundamental problem in this context. Instead large deficiencies are only one facet of the fundamental problem — disposition of the collateral at low prices.¹¹¹ Low price dispositions do, to be sure, lead directly to the large deficiencies on which most commentators' attention has heretofore focused, but low price dispositions also enable the creditor to capture an unfairly large profit from the resale of the collateral (or, in the absence of a resale, to enjoy continued ownership of property acquired at an unduly low price).

The difference between these two consequences of low-price foreclosures is the difference between property and contract. The problem of large deficiencies is a contract problem in that it affects the extent of the obligation of the debtor to the creditor. In sharp contrast, the problem of profiting from resale is a property problem in that it relates to ownership of an asset, including enjoyment of attendant rights such as use, alienation, and the right to exclude. The contract problem and the property problem will always coincide because both stem from the same low-price foreclosure.

Prior commentators have stressed the contract problem, seeming indeed to ignore the property problem, but I submit that the property problem is the more severe of the two. The reason for this is simply that contract rights, including the deficiency rights at issue here, are not present and reliable assets, but instead are mere claims against the debtor, the value of which may ultimately be nil. To realize upon these claims, the deficiency creditor must first obtain a judgment formalizing its deficiency, and then execute on that judgment against whatever non-exempt assets of the debtor the sheriff may be able to seize. Even if the debtor does have available assets at the beginning of this process, by the time of the sheriff's levy they may well be dissipated,¹¹² or the debtor may have filed a bankruptcy petition.¹¹³ These obstacles and uncertainties of collection are precisely the reason that the former secured party (now the deficiency creditor) took its security interest in the first place. To the extent that the collectibility of a deficiency is questionable for any of these reasons, the reduction of that deficiency is a less meaningful benefit to the debtor and, by the same token, its unduly large size is a less meaningful burden.¹¹⁴ In sum, by reducing deficiencies, 9-615(f) weakens a right of secured parties that was already, in the first instance, at best dubious.

Conversely, while the deficiency or contract question concerns the mere prospect of obtaining ownership, the property question concerns actual and present ownership. Neither section 9-615(f) nor the variations on it that the Drafting Committee discussed interfere with the secured party's new ownership of its former collateral. Returning to the illustration of section 9-615(f) given above,¹¹⁵ even after the deficiency is reduced, the secured party remains the owner of its former collateral, profiting very nicely from the acquisition of at least \$1 million worth of equipment for only \$400,000.¹¹⁶ The secured party is perfectly free, for example, to resell this property and to keep the \$600,000 profit, on top of its deficiency claim. (This prospect of profiting from resale is far from hypothetical. Secured parties in the business of selling property like the collateral will treat the collateral as their inventory, and secured parties not in that business, such as banks, will generally be eager to dispose of it. Moreover, the limited empirical work that is available tends to indicate that the profits from resales of collateral can be substantial.¹¹⁷) Section 9-615(f) does nothing about this \$600,000 profit. It only reduces the deficiency claim.

To highlight the unsatisfactory nature of this outcome, one can contrast it with the outcome that would follow from application of constructive fraudulent transfer law. As discussed above,¹¹⁸ on these facts, constructive fraudulent transfer law (where permitted to operate)¹¹⁹ would recover the entirety of the \$1 million in property value from the secured party, and in return grant the secured party a lien in the amount of only the \$400,000 that the secured party paid at the foreclosure sale. The remainder of the property value would be recoverable for the benefit of the estate (or, in a non-bankruptcy setting, the benefit of individual creditors). The result is to prevent the secured party from keeping its unfair profit, and instead to transfer the benefit of the property to the debtor's other creditors or, in some circumstances,¹²⁰ the debtor itself.

Given this inherent strength of the property-based approach of constructive fraudulent transfer law, the question arises whether it would be possible to remedy 9-615(f)'s existing weakness by supplementing it (either in its own text or by partial repeal of UFTA sections 3(b) and 8(e)(2)) with an element of avoidance based on constructive fraudulent transfer.¹²¹ Without changing the elements of section 9-615(f), one could change its effects, so that if the rule's criteria were met (that is, if there were a transfer to a suspect party pursuant to a bid significantly below the range of amounts that would have been paid by a non-suspect party), then the transfer of the property to the suspect party would be invalidated in exchange for a lien in the amount paid. Upsetting the results of foreclosure sales with avoidance of this kind is not unprecedented even under current law, because in the bankruptcy context, the *BFP* decision does not prevent Bankruptcy Code section 548 from applying to personal property foreclosures,¹²² and even where real property is concerned, it is open to question whether the *Durrett* or the *Bundles* approaches prevailing prior to *BFP* entailed any serious disruption to commerce.¹²³ Further contributing to the plausibility of a fraudulent transfer-based supplementing of section 9-615(f), some have suggested that a state's interest in the stability of title to personal property is lesser than its interest in the stability of title to real property,¹²⁴ though of course such an argument has its limits.

Even though supplementing section 9-615(f) with constructive fraudulent transfer law is possible, the question remains whether it would be advisable. I suggest that it would not be advisable, or at least that it would not be a panacea, for reasons that depend on the distinction, already explored, between process and the results of process, but also on the distinction, addressed in Part II.C below, between rules and standards.

C. Rules, Standards and Four Permutations

As the discussion above shows, supplementing section 9–615(f) with the kind of avoidance available under constructive fraudulent transfer law would enhance a currently a weak contractual remedy with the robustness of a property–based remedy. Along with this obvious benefit, however, come possible harms. First, the cost of credit may rise because prospective secured lenders will realize *ex ante* that in the event of foreclosure, they face an increased risk that their purchase of the collateral will be avoided.¹²⁵ Second, once the loan is made and foreclosure commences, the prospect of a possible avoidance may chill the parties covered by the rule from bidding in the first place. These two possible harms are the very same as those noted above in connection with section 9–615(f) itself,¹²⁶ and though they were relatively weak in that context, the greater strength of an avoidance rule can be expected to make the possible harms correspondingly greater.

These consequences exemplify phenomena occurring broadly throughout the law, explored most notably by Duncan Kennedy in terms of the distinction between two opposed modes of formulating legal directives: rules and standards. Rules are clearly defined, readily administrable by reference to a limited number of facts, and relatively rigid and determinate.¹²⁷ As a result, rules leave little room for the exercise of discretion by judges or other law administrators. Examples range from a 65–mile–per–hour speed limit, to the avoidability of contracts by one who hasn't reached age 21 (or some other pre–defined age of majority), to the avoidability of preferential transfers made within 90 days prior to the filing of a bankruptcy petition. By contrast, standards are loosely articulated, administrable only in light of detailed factual contexts, flexible, and indeterminate.¹²⁸ As a result, standards allow – and even require – a judge or other law administrator to exercise discretion in their application. Examples range from a prohibition on driving faster than is safe under the circumstances, to the avoidability of contracts by one who is mentally infirm, to a bankruptcy court's ability to dismiss a chapter 7 case on the grounds that it constitutes a substantial abuse of the provisions of that chapter.

In sum, the results flowing from rules are inherently predictable,¹²⁹ while the results flowing from standards are not, and these characteristics can help us see in a larger context the negative effects, just discussed, of section 9–615(f) (whether or not fortified by an avoidance dimension). The unpredictability of standards causes them to deter not only undesirable conduct (such as, in this case, inequitably low bids) but also desirable conduct (such as, in this case, participation in auctions by suspect parties with any bid at all and, *ex ante*, decisions to lend in the first place).¹³⁰ The as–yet unstated premise is that section 9–615(f) is a standard, and an examination of the statute's terms shows this premise clearly to be true.¹³¹ First, the baseline against which the statute measures the price paid at foreclosure is "the range of proceeds" that a disposition to a non–suspect transferee would have brought, and this concept of range inherently raises questions of upper and lower boundaries that are left to judicial discretion. Second, the statute requires that the price paid at foreclosure be "significantly below" that baseline, which is of course a nebulous invitation to the exercise of further discretion. Finally, the statute requires that the hypothetical disposition to a non–suspect transferee be a "complying" disposition, that is, one that among other things meets Article 9's requirement of commercial reasonableness, and this requirement is itself an amorphous standard.¹³²

Constructive fraudulent transfer law, too, is stated in terms of a standard rather than a rule: the crucial term "reasonably equivalent value" is inherently subject to varying interpretations in light of varying weights attributed to various facts. To take just one simple example, the fact that a car's windshield is cracked might influence one judge to hold a substantially discounted purchase price to constitute reasonably equivalent value, while the same fact might not so influence another judge. The unpredictability of results under this standard, as under section 9–615(f), carries the threat of deterring desirable conduct in the markets as well as undesirable conduct.

Motivated by concerns over negative effects such as these, William Henning has proposed applying constructive fraudulent transfer law to personal property foreclosure sales only in a carefully attenuated form. In a thoughtful and well–nuanced analysis of the Bankruptcy Code section 548 context,¹³³ he recommends measures such as reducing the pre–bankruptcy reachback period¹³⁴ from one year to three months and shortening the statute of limitations for bringing an avoidance action, as well as other circumscriptions of the avoidance power, some of which have since been enacted. These modifications might well succeed in reducing the chilling effects with which Professor Henning is concerned, but constructive fraudulent transfer law even with these modifications would remain a standard rather than a rule, and as such would continue to suffer from other disadvantages of standards in general. In particular, even

Professor Henning's attenuated fraudulent conveyance regime would remain heavily fact-intensive, and thus expensive to litigate.¹³⁵ These attributes, in turn, may lead to under-enforcement of the rule, preventing even the theoretically drastic remedy of avoidance from having its desired deterrent effect.¹³⁶

One way of ameliorating this shortcoming would be to avoid constructive fraudulent transfers based on whether the result of a foreclosure sale meets some different, brighter-line threshold than reasonably equivalent value. That is, one could replace constructive fraudulent transfer law's central standard with a rule, and this is in fact the approach that the Fifth Circuit took in the *Durrett* decision, with its dictum about comparing the foreclosure sale price to 70% of the collateral's fair market value.¹³⁷ Such an approach replaces fact-intensiveness with relative simplicity, and sweeps away uncertainty of result¹³⁸ as well as the associated chilling of market participation.

Unfortunately, the simplicity of a bright-line rule inevitably carries with it arbitrariness and other ill effects. Why, for example, should 70% of fair market value always be the benchmark, rather than 60%, 80%, or some other more interesting function of fair market value? No satisfactory answer can be given,¹³⁹ and the truth is that in some foreclosure sale cases, 70% should be reasonably equivalent value, while in others, 80% should be, and so on, so that no matter what the rule provides, it will in some cases generate wrong results. In short, rules combine over-inclusiveness and under-inclusiveness.¹⁴⁰ Moreover, the certainty of result associated with rules has its negative side, as well: it "allow[s] the proverbial 'bad man' to 'walk the line,' that is, to take conscious advantage of [the rule's] under-inclusion" ¹⁴¹ For example, if a 70% rule prevails, bad actors will purposefully bid 70% (and only 70%) in cases where reasonably equivalent value should actually be greater. By eliminating the chilling effect on good actors, one also eliminates the chilling effect on bad actors.

The choice in any given context between a rule and a standard can, in sum, present a difficult dilemma.¹⁴² In the case of foreclosure sales, the dichotomy between rules and standards is further complicated by the dichotomy, discussed earlier,¹⁴³ between process and result. Combining the two dichotomies results in four permutations of foreclosure provisions: standards based on process, standards based on result, rules based on result, and rules based on process.¹⁴⁴ Article 9's overall current approach, requiring sales to be conducted in a commercially reasonable manner, is a standard based on process,¹⁴⁵ and as discussed in Part I.A, the adoption of section 9-615(f) shows that standard to be unsatisfactory.¹⁴⁶ By contrast, section 9-615(f) itself is a standard based on result, but one that is not an adequate supplement to the overall commercial reasonableness standard, because it suffers from the litigation disincentives discussed in Part II.B and, accordingly, will be subject to the under-enforcement typical of standards discussed above.¹⁴⁷ The third permutation, rules based on result, is exemplified by the *Durrett* rule, and as discussed above, such an approach inherently suffers from arbitrariness and other ills.¹⁴⁸

One permutation remains: rules based on process. As further discussed in Part II.D, rules based on process hold the potential to directly and reliably generate the equitable results that our foreclosure system seeks, without the shortcomings of the other three permutations.

D. Renewing Faith in the Process: Reasonableness Revisited

Section 9-615(f)'s very existence suggests that our longstanding faith in Article 9's overall approach to evaluating the legitimacy of foreclosure sales has often been misplaced, and this suggestion becomes an unmistakable confession when one recalls that section 9-615(f) applies only to cases that satisfy Article 9's standard of commercial reasonableness.¹⁴⁹ By adopting section 9-615(f), the drafters have recognized that even impeccable adherence to the statutorily mandated process has not necessarily generated acceptable results. The reason for this is not any shortcoming of process-based approaches generally, but rather the shortcoming of standards as opposed to rules generally, as discussed in Part II.C. And because section 9-615(f) is itself a standard, it is bound to share these shortcomings.¹⁵⁰ An effective solution to the ills at which section 9-615(f) is aimed, as well as to other ills in the foreclosure process (including, for example, the opportunity for resale profit discussed in Part II.B, not to mention problems in the context of even non-suspect parties) lies instead in the fourth permutation generated by the two dichotomies discussed above: rules based on process. Reformers should directly shape the foreclosure process by adding certain bright-line, per se requirements, rather than making post hoc adjustments to the results generated by that process. I discuss one example of such a requirement below, but I do not view that example as being particularly important in and of itself; instead, I intend it simply to illustrate in concrete form the kind of legal directive, based on

the two dichotomies discussed above, that reformers should consider.

Reformers should consider process-based rules that are designed to further, albeit in perhaps incremental ways, the overall goals of the foreclosure process in general, chief among which is to generate a market for the collateral. The presence at a foreclosure auction of a "lively concourse of bidders" ¹⁵¹ competing with one another is the surest way of preventing the secured party or others from prevailing with an unduly low bid. Article 9 already recognizes this, though in a very weak and standard-based form. ¹⁵² That the current law is ineffectual at generating a substantial enough market is obvious not only from the adoption of section 9-615(f) itself, but also from the fact that large profits are often available upon resale by foreclosure buyers. ¹⁵³ Where was the resale buyer, after all, during the foreclosure process? Admittedly, the foreclosure market is distinct from the used goods retail market and may attract different buyers, ¹⁵⁴ but there is no categorical reason why the two markets shouldn't overlap. ¹⁵⁵ Buyers do not spontaneously generate in one process rather than another; their interest may well exist independently of venue, ¹⁵⁶ and the question is simply how to attract interested buyers to one venue or another. If the resale buyer had been brought to the table at foreclosure, then its willingness to pay the higher price would have precluded the secured party from prevailing at such a low price.

In order to further this goal of generating a more substantial market, reformers should consider requiring details of impending foreclosure auctions (and perhaps even the auction process itself) to be funneled into one or a small number of Internet sites. ¹⁵⁷ Without such an electronic funneling system, notices of foreclosure sales (and the sales themselves) are too widely dispersed for potential bidders to find it efficient to invest time and effort in locating otherwise worthwhile opportunities. With electronic funneling, by contrast, it is easy and inexpensive for sellers to reach large (or, alternatively, well-targeted) groups of potential bidders, and potential bidders' computer screens can, in effect, constitute a global used car lot, creating an ersatz aggregate inventory through which it is easy and worthwhile to browse. ¹⁵⁸ At the heart of Article 9's notion of a foreclosure auction is a "meaningful opportunity for competitive bidding," ¹⁵⁹ and an on-line funneling rule would go far toward ensuring that such a meaningful opportunity existed. In a parallel context, trustees in bankruptcy are already voluntarily advertising asset sales on a web site operated as a joint venture of the American Bankruptcy Institute and the National Association of Bankruptcy Trustees. ¹⁶⁰ The fees for posting sales at this site are low, and the fact that parties do so voluntarily is a strong indication that requiring them to do so would not be burdensome.

This idea is but one possible way of enlarging the foreclosure sale market; there are no doubt others, and I simply observe that in selecting among them, reformers should recognize the preferability of process-based rules. (For example, reformers might want to encourage bidding by requiring secured parties under specified circumstances to permit pre-sale inspections, ¹⁶¹ post-sale opportunities to arrange credit, and the like.) By articulating the on-line funneling idea I do not intend to imply that other proposals would not be worthwhile or feasible (or, on the other hand, to imply that the on-line funneling idea would not need further careful crafting). As noted above, I intend in this Part II.D simply to develop in slightly fuller form the notion of a process-based rule, and to give a sense of the promise that it holds.

Of course, not every process-based rule would improve the Article 9 foreclosure regime. Each prospective process-based rule must be carefully considered to ensure that it imposes a burden on creditors that is no greater than the benefit to debtors expected from the rule's protections. (By the same token, such rules should not be unduly protective of creditors, either. ¹⁶²) The vast variety of transactions that are subject to the Article 9 foreclosure process results in a correspondingly restricted universe of potential rules that will, across the board, meet this criterion. The process-based rules that will be workable will, then, tend to be minimalist. Although one might wish to aggressively and wholly eliminate the uncertainty of the commercial reasonableness standard, such a goal could only be achieved by eliminating the flexibility that foreclosing creditors have in their myriad transactions, and that, of course, would be disastrous as a practical matter.

In principle, however, new process-based rules would be entirely at home in the Article 9 foreclosure context. Article 9's general commercial reasonableness standard is already supplemented by a small number of process-based rules, including requirements that a secured creditor give pre-foreclosure notices and, in certain cases, post-disposition explanations of deficiencies. ¹⁶³ Article 9's foreclosure provisions also implicitly recognize the value of process-based rules in a different way: the general standard of commercial reasonableness is supplemented by a safe harbor that

deems a disposition to be commercially reasonable if it is made "in the usual manner on any recognized market" or "at the price current in any recognized market at the time of disposition."¹⁶⁴ Like all safe harbors, this per se rule frees its protected parties to some degree from the uncertainties imposed by a standard, and this one does so without imposing undue costs on the debtor. The proposals that I make in this Part II.D, though not safe harbors, are structurally similar in that they reduce the uncertainties of the overall commercial reasonableness standard without imposing undue costs.

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Conclusion

Considering its weakness and narrowness, Revised UCC section 9–615(f) provides the occasion for surprisingly broad and deep insights. The rule's very existence highlights shortcomings of Article 9's foreclosure process as a whole, and the weakness of the new rule as a remedy for those shortcomings, particularly when considered in conjunction with constructive fraudulent transfer law, highlights the difference between contract– and property–based remedies while also revealing exciting connections between the two superficially dissimilar bodies of law.

Comparing these provisions also throws into relief the dilemmas involved in the dichotomy between rules and standards and, at the same time, brings to light a separate dichotomy between legal directives based on process and legal directives based on the results of those processes. The two dichotomies, taken together, create an innovative four–permutation framework for assessing all of current foreclosure law, possible future reforms to foreclosure law and, due to the framework's freestanding theoretical integrity, potentially other areas of law, as well.

In the context of foreclosure specifically, Article 9's longstanding general directive that foreclosure sales be conducted in a commercially reasonable manner represents the first permutation, a standard based on process, and thus its laudable flexibility is accompanied by the difficulties common to all standards, notably fact–intensiveness and consequent under–enforcement. Section 9–615(f) is intended to correct some of these shortcomings, and thus to restore our faith in the foreclosure process. Unfortunately, it exemplifies the equally unsatisfactory second permutation, a standard based on results, and as such it is bound to suffer from the same difficulties. Because constructive fraudulent transfer law is so closely related to section 9–615(f), one is tempted to borrow the property–based strengths of this body of law in order to supplement the new statute, but doing so would not change its essential structural infirmity.

Courts have experimented with the third permutation, rules based on results, by replacing constructive fraudulent transfer law's standard of reasonably equivalent value with a bright–line rule, and though this approach remedies many of the infirmities of standards, it introduces unfortunate consequences of its own, notably arbitrariness and susceptibility to exploitation. I conclude that the fourth permutation, consisting of rules based on process, is the most promising avenue for restoring faith in the foreclosure system. Carefully and modestly formulated procedural requirements that supplement Article 9's existing commercial reasonableness requirement can help to generate a robust market without unduly burdening the foreclosing creditor. This market would ideally, in turn, ensure equitable results in all foreclosure cases, thus avoiding the under–enforcement that flows from the structure of section 9–615(f), and thus accomplishing the goal that section 9–615(f) fails to achieve: justifying renewed faith in the foreclosure process.

FOOTNOTES:

¹ Visiting Assistant Professor, University of Oregon School of Law. For helpful comments and conversations I thank Bruce Markell, Harry Sigman, Gail Hillebrand, Carl Bjerre, Ken Kettering, Jim Mooney, and Polly Higdon. [Back To Text](#)

² See, e.g., Black's Law Dictionary 1549 (7th ed. 1999) (defining "fair market value" as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's–length transaction"). [Back To Text](#)

³ "At a 'public sale,' it may be hoped, there will be that lively concourse of bidders which will . . . drive the price up to . . . Himalayan peaks of fair value and true worth." Donald J. Rapson, The Efficient Treatment of Deficiency Claims: Gilmore Would Have Repented, 75 Wash. U. L. Q. 491, 504 (1997) [hereinafter Rapson, Deficiency Claims]. [Back](#)

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⁴ "It may be hoped [that the auction process will generate a high price], but the hope will almost certainly be disappointed. The concourse of bidders at the typical foreclosure sale, be it ever so 'public,' is apt to be about as lively as a group of mourners at a funeral." Rapson, Deficiency Claims, supra note 2, at 504. Back To Text

⁵ Matter of Excello Press, Inc. (In re Excello Press, Inc.), 890 F.2d 896, 901 (7th Cir. 1989). Easterbrook continues, "[T]he secured party will expend every cost-justified effort because it prefers money now to judgment later. . . Add the uncertainty of recovery in litigation and this preference for cash grows stronger. That the debtor has defaulted is an indication that it is unlikely to be good for all of any judgment the creditor is able to get." Id.; see also Alan Schwartz, The Enforceability of Security Interests in Consumer Goods, 26 J. L. & Econ 117, 126-27 (1983) (discussing incentive of rational creditors to maximize sale price). Back To Text

⁶ See UCC § 9-608(a)(4) (1999). Back To Text

⁷ See UCC § 9-608(a)(4) (1999). Back To Text

⁸ Section 9-615(f) has also sometimes been called the Rapson Rule, after the rule's chief proponent, Donald J. Rapson. See generally, Clark's Secured Transactions Monthly 6 (Oct. 2000); Rapson, Deficiency Claims supra note 2. Mr. Rapson himself, however, does not embrace this term. See Donald J. Rapson, Mr. Rapson Responds to Critique of His "Rule," Clark's Secured Transactions Monthly 5, 6 (Dec. 2000) (protesting that "the reference to the 'Rapson Rule' is somewhat incorrect. Rev. UCC § 9-615(f) is actually a compromise between two more extreme views . . ."). Back To Text

⁹ Issues relating to private foreclosure sales are beyond the scope of this Article. Back To Text

¹⁰ See infra notes 16-84 and accompanying text. Back To Text

¹¹ See infra notes 85-97 and accompanying text. Back To Text

¹² 511 U.S. 531 (1994). Back To Text

¹³ See infra notes 98-107 and accompanying text. Back To Text

¹⁴ See infra notes 108-123 and accompanying text. Back To Text

¹⁵ See infra notes 124-147 and accompanying text. See generally Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976). Back To Text

¹⁶ See infra notes 148-164 and accompanying text. Back To Text

¹⁷ See UCC § 9-608(a)(4) (1999). The surplus aspect of this principle follows from the fact that a security interest is an interest in property that secures payment of an obligation. See UCC § 1-201(37) (1999) (defining security interest as "an interest in personal property or fixtures that secures payment or performance of an obligation"). The deficiency aspect of the principle follows from the simple contract law point that a debt is enforceable independently of the collateral. See, e.g., UCC § 9-601(a)(1) (1999) (providing that secured party may reduce claim to judgment). Back To Text

¹⁸ UCC § 9-610(b) (1999). Back To Text

¹⁹ UCC § 9-627(a). Back To Text

²⁰ UCC § 9-627 cmt. 2. Back To Text

²¹ See supra note 17 and accompanying text. Back To Text

²² See, e.g., Steven L. Harris & Charles W. Mooney, Jr., Filing and Enforcement Under Revised Article 9, 54 Bus. Law. 1965, 1984 n. 95 (1999). Back To Text

²³ Although the commercial reasonableness standard discussed above is by far the most important requirement that Article 9 imposes on foreclosure sales, it is not the only one. The general standard is supplemented by a small group of particularized rules, such as a requirement that the secured party give advance notice of the foreclosure to the debtor and certain other parties, and that the secured party in certain consumer-goods transactions give a post-foreclosure explanation of the way in which any deficiency was calculated. See UCC § § 9-611, 9-616 (1999). In the terminology later developed in this Article, these are process-based rules. See infra Part II.C Back To Text

²⁴ UCC § 9-615(f). Back To Text

²⁵ When a secured party bids in all or part of its indebtedness, no money changes hands; rather than paying money to itself, the secured party simply credits the debtor with, or forgives, the portion of the debt that has been bid in. See generally Rapson, Deficiency Claims, supra note 2. See also Gold Coast Asset Acquisition v. 1441 Veteran St. Co. (In re 1441 Veteran St. Co.), 144 F.3d 1288, 1292 (9th Cir. 1998) (observing that in the absence of irregularity or collusion, it is proper for a creditor to bid less than the full amount of the debt). Back To Text

²⁶ The statute is ambiguous about precisely how far to reduce the deficiency. The reduction mechanism is triggered by the amount of actual proceeds being significantly below "the range" of proceeds paid in complying dispositions, and directs that the deficiency be reduced to the amount of proceeds paid in "a" complying disposition. The question presented is, which of the range of complying dispositions does the latter clause intend?

The "surplus" aspect of the rule works similarly and presents no independent issues. For example, if the secured party bid in the entirety of its \$1 million indebtedness, but the debtor could show that commercially reasonable foreclosure sales to disinterested third parties would generally bring proceeds in the range of \$1.3 million to \$1.5 million, and if the \$1 million actual amount of proceeds is deemed to be significantly below that range, then the low-price foreclosure rule will cause the debtor to be entitled to a surplus of somewhere between \$300,000 and \$500,000. Henceforth, for ease of discussion, this Article will consider only deficiencies rather than surpluses, with the understanding that surpluses present parallel issues. Back To Text

²⁷ See UCC § 9-615(f) cmt. 6 (explaining that rule adjusts incentives in certain transactions in which "the disposition may comply with the procedural requirements of this Article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price"); see also Barkley Clark, Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default, 4 N.C. Banking Inst. 129, 177-78 (2000) (stating that the rule "only applies in circumstances where other aspects of the sale were commercially reasonable"); Timothy R. Zinnecker, The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II, 54 Bus. Law. 1737, 1745 (1999) (noting that the rule "does not subject a secured party's disposition to judicial scrutiny if the procedures are commercially reasonable") (emphasis in original). Back To Text

²⁸ See UCC § 9-626 (codifying rebuttable presumption rule for transactions other than consumer transactions, and leaving courts free to choose among rebuttable presumption rule, absolute bar rule or other approaches in consumer transactions). While the debtor bears the burden of proof in a § 9-615(f) case, the secured party bears it under the rebuttable presumption rule. See UCC § 9-626(a)(3) (providing that deficiency is reduced to extent "the secured party fails to prove" that deficiency would have existed even upon compliance with Part 6 of Article 9). Clearly the drafters did not intend to have two separate regimes covering commercially unreasonable sales. Back To Text

²⁹ Apart from the difference in burden of proof discussed supra note 27, other consequences of conducting a commercially unreasonable foreclosure sale include liability for damages caused by noncompliance with Part 6 of Article 9 and, in a transaction in which the collateral is consumer goods, the secured party's liability for a consumer penalty. See UCC § § 9-625(b), 9-625(c)(2). Back To Text

³⁰ See UCC § 9–608(a)(4) (providing that debtor is liable for any deficiency); see also Donald J. Rapson, Default and Enforcement of Security Interests under Revised Article 9, 74 Chi–Kent L. Rev. 893, 919 (1999) [hereinafter Rapson, Default and Enforcement] (describing secured party's potential for inequitable advantage on these grounds). [Back To Text](#)

³¹ Deficiency judgments are often, however, not collectible, and this fact is one reason that UCC § 9–615(f)'s benefits are less meaningful than they may seem. See infra notes 111–113 and accompanying text [Back To Text](#)

³² See UCC § 9–102(a)(62) (defining "person related to," with respect to individuals, as covering spouses and certain close relatives by blood or marriage); UCC § 9–102(a)(63) (defining "person related to," with respect to entities, as covering officers and directors, affiliates, officers and directors of affiliates, and spouses and certain close relatives to the foregoing). These definitions are closely patterned on corresponding terms in § 1.301(32) of the Uniform Consumer Credit Code, where they are used to delineate the parties who are so closely connected to a lender that the protections of holder in due course status do not apply. See Unif. Consumer Credit Code § § 1.301(32), 3.405, 7A U.L.A. 47–48, 130–32 (1974).

The foregoing definitions are also reminiscent of the Bankruptcy Code's definition of the term "insider," though the latter term is somewhat broader in that, when the person in question is an individual, the Bankruptcy Code covers partnerships in which the person is a general partner, general partners of the person, and corporations of which the person is a director, officer, or person in control. 11 U.S.C. § 31(A)(ii), (iii), (iv). It is interesting to note that the Bankruptcy Code definition concerns itself with relationships to the debtor, while 9–615(f), in sharp contrast, concerns itself with relationships to the secured party. But this distinction is merely superficial: in under both regimes, the purpose of delineating insider status is generally to impose more stringent requirements on the insider because of that status. See, e.g., 11 U.S.C. § § 502(b)(4) (disallowing claims for services of an insider in excess of a reasonable value), 547(b)(4)(B) (providing longer preference period for insiders). [Back To Text](#)

³³ See UCC § 9–102(a)(71) (defining secondary obligor as including one whose obligation is secondary). [Back To Text](#)

³⁴ See Restatement (Third) of Suretyship and Guaranty § 18 (1995). [Back To Text](#)

³⁵ The same observation applies here as above. See supra note 30. [Back To Text](#)

³⁶ In effect, the secondary obligor is able to recover amounts paid on the debtor's behalf under its right of recourse, just as the secured party is able to recover amounts lent to the debtor by means of a deficiency claim. See Rapson, Default and Enforcement, supra note 29, at 919 n.151.

If we accept this risk as one worth protecting against, the question arises why persons related to the secondary obligor are not covered by analogy to persons related to the secured party. This formalistic limitation (clearly imposed by the comma after "person related to the secured party" in clause (1) of § 9–615(f)) allows parties easily to avoid the intent of the statute. It is one way that the provision is under–inclusive, quite apart from the inherent over– and under–inclusiveness of most rules, as opposed to standards. See infra Part II.C. [Back To Text](#)

³⁷ See e.g., Robert L. Jordan, William D. Warren & Steven D. Walt, Commercial Law 302 (5th ed. 2000) ("Section 9–615(f) arguably describes an impossible case. . . . [I]t is impossible for a commercially reasonable disposition to the secured party to yield proceeds significantly below those that would have been realized in a sale to other bidders unrelated to the secured party."). [Back To Text](#)

³⁸ See UCC § 9–625(b) (providing for liability for loss caused by non–compliance with Article 9's foreclosure provisions); see also UCC § 9–626(a)(1) (imposing burden on secured party to show commercial reasonableness). [Back To Text](#)

³⁹ See infra Part II.D. [Back To Text](#)

⁴⁰ A similar point can be made about the majority opinion's reliance on state foreclosure proceedings in the BFP case. See [infra Part I.B.3. Back To Text](#)

⁴¹ 13 Eliz. c. 5 (1570), cited in H. Rep. No. 95–595, at 375 (1977). [Back To Text](#)

⁴² See *Twyne's Case*, 3 Coke 806, 76 Eng. Rep. 809, 810 (Star Ch. 1601) (listing badges of fraud). [Back To Text](#)

⁴³ See Michael J. Herbert, *Property Interests in Bankruptcy* 219 (1996). [Back To Text](#)

⁴⁴ See Unif. Fraudulent Conveyance Act, 7A U.L.A. 2 (1985). [Back To Text](#)

⁴⁵ See Unif. Fraudulent Transfer Act, 7A U.L.A. 266 (1985). [Back To Text](#)

⁴⁶ See 7A U.L.A. 9 (1999 and Supp. 2000). [Back To Text](#)

⁴⁷ See 7A U.L.A. 1 (1999 and Supp. 2000). [Back To Text](#)

⁴⁸ Act of June 22, 1938, ch. 575, 52 Stat. 840 (codified at 11 U.S.C. § 1 et seq. (1976)) (repealed 1978). [Back To Text](#)

⁴⁹ 11 U.S.C. § 548 (2000). [Back To Text](#)

⁵⁰ 11 U.S.C. § 544(b) (2000). [Back To Text](#)

⁵¹ See 11 U.S.C. § 548(a)(1)(B). Only transfers taking place within one year prior to the filing of the bankruptcy petition are susceptible to avoidance under this provision. See 11 U.S.C. § 548(a)(1). (This one-year limitation, known as a reachback period, should not be confused with a statute of limitations. See [infra note 63](#).) The trustee also may exercise this avoidance power if it can establish, as an alternative to the insolvency discussed in the text, either of two substitutes (in addition to lack of reasonably equivalent value): (a) that the debtor was engaged or about to engage in business or a transaction for which its capital was unreasonably small, or (b) that the debtor intended to incur, or believed that it would incur, debts beyond its ability to pay. See 11 U.S.C. § 548(a)(1)(B)(ii)(II), (III). [Back To Text](#)

⁵² See, e.g., [Herbert, supra note 42, at 221.](#) [Back To Text](#)

⁵³ See 11 U.S.C. § 550(a) (2000). [Back To Text](#)

⁵⁴ See 11 U.S.C. § 548(c). The amount of the lien will, accordingly, always be less than the value of the property recovered. [Back To Text](#)

⁵⁵ See 11 U.S.C. § 101(54) (defining "transfer" as being either voluntary or involuntary), 548(a)(1)(B) (covering voluntary or involuntary receipt of less than reasonably equivalent value). [Back To Text](#)

⁵⁶ As discussed [infra](#) in Part I.B.3, the U.S. Supreme Court has concluded in the BFP case that the statute should not be so applied with respect to mortgage foreclosures, but this decision was not inevitable, and in any case does not necessarily extend to foreclosures of personal property security interests. [Back To Text](#)

⁵⁷ See [supra](#) notes 24–25 and accompanying text. [Back To Text](#)

⁵⁸ This lien is different from the lien of the security interest that the secured party originally foreclosed on; the latter is extinguished by UCC § 9–617(a) and (b), and the former is granted by operation of law rather than by agreement between the parties. 11 U.S.C. § 548(c). For more on the amount of this lien, see, e.g., [William H. Henning, An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications, 63 N.C. L. Rev. 257, 279 \(1985\)](#) (discussing lost earning potential of property during time between foreclosure and trustee's resale). What of the difference between the \$700,000 in property that the secured party has to return to the trustee and the \$400,000 lien that it acquires upon avoidance? The secured party has no claim for that difference (as

opposed to its deficiency claim, discussed below) because there is no underlying debt for this amount, but merely a fleeting windfall. The situation would be different in the case, for example, of the avoidance of a preferential transfer. [Back To Text](#)

⁵⁹ See [11 U.S.C. § 502\(b\)\(1\) \(2000\)](#) (disallowing claims to extent they are "unenforceable against the debtor . . . under . . . applicable law"). [Back To Text](#)

⁶⁰ See [infra note 114–116](#) and accompanying text. [Back To Text](#)

⁶¹ See [11 U.S.C. § 550\(b\)\(1\)](#) (protecting transferee that takes for value, in good faith, and without knowledge of voidability of transfer avoided). [Back To Text](#)

⁶² See [11 U.S.C. § 550\(a\)](#) (providing trustee may recover "the property or, if the court so orders, the value of such property"). [Back To Text](#)

⁶³ See Unif. Fraudulent Transfer Act § 4(a)(2), 7A U.L.A. 301 (1985); Unif. Fraudulent Transfer Act § 5(a), 7A U.L.A. at 330. [Back To Text](#)

⁶⁴ See [id.](#) By contrast, both present and future creditors may bring actions based on the insolvency substitutes described [supra note 50](#). See generally Unif. Fraudulent Transfer Act § 4(a)(2), 7A U.L.A. at 652–53. The UFTA's four-year statute of limitations is longer than Bankruptcy Code § 548's one-year reachback period. See Unif. Fraudulent Transfer Act § 9(b), 7A U.L.A. 359. This time period is the relevant comparison, even though the one-year period under § 548 is not a statute of limitations. (Section 548 does also, of course, have a statute of limitations per se. See [11 U.S.C. § 546\(a\)](#).) [Back To Text](#)

⁶⁵ See [supra note 49](#) and accompanying text. [Back To Text](#)

⁶⁶ See [11 U.S.C. § 544\(b\)\(1\)](#). This requirement under § 544(b)(1) contrasts with the trustee's other strong-arm powers in § 544(a), which allow the trustee to assert the rights of certain hypothetical creditors.. [Back To Text](#)

⁶⁷ By contrast, the UFCA is similar to the Bankruptcy Code in that it contains no express protection from such an avoidance. Judge-made protections may, to a greater or lesser extent, protect foreclosures under the UFCA. See, e.g., [In re Verna](#), 58 B.R. 246, 252 (Bankr. C.D. Cal. 1986) (insulating foreclosure sale at price exceeding indebtedness on first trust deed which gave rise to foreclosure). [Back To Text](#)

⁶⁸ See, e.g., Frank R. Kennedy, The Uniform Fraudulent Transfer Act, 18 U.C.C. L.J. 195, 208 (1986) (recognizing the overlap). However, § 8(e)(2) covers enforcements of security interests by means other than foreclosure sale (including collection of accounts receivable or strict foreclosure), while § 3(b) does not, and § 3(b) covers real property foreclosures, while § 8(e)(2) does not (because such transactions are, of course, outside of the scope of [UCC Article 9](#)). Despite these differences, no reason appears why the two sections were not better coordinated with each other during the drafting process. [Back To Text](#)

⁶⁹ Moreover, even in cases to which the sheltering sections do apply, their sheltering effect is limited to constructive fraudulent transfers; nothing shelters foreclosure sales – even Article 9 foreclosure sales that are conducted in a commercially reasonable manner – from avoidance as actual fraudulent transfers when actual intent to hinder, delay or defraud creditors can be demonstrated. A further and very interesting question in this connection is whether low price alone is sufficient to establish actual intent to hinder, delay or defraud. See [infra note 120](#). [Back To Text](#)

⁷⁰ [511 U.S. 531 \(1994\)](#). [Back To Text](#)

⁷¹ See [BFP](#), 511 U.S. at 545. [Back To Text](#)

⁷² [621 F.2d 201 \(5th Cir. 1980\)](#). [Back To Text](#)

⁷³ 621 F.2d at 203. Durrett was decided under the Bankruptcy Act, rather than the Bankruptcy Code, but interpreted a provision very similar to § 548(a)(2) of the Bankruptcy Code. Moreover, the Durrett approach was explicitly applied to § 548(a) by the Eleventh Circuit. See In re Littleton, 888 F.2d 90, 93 (11th Cir. 1989). But see In re Madrid, 21 B.R. 424, 426–27 (B.A.P. 9th Cir. 1982) (rejecting the Durrett approach), aff'd on other grounds, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S. 833 (1984). [Back To Text](#)

⁷⁴ See Bundles v. Baker (In re Bundles), 856 F.2d 815, 824 (7th Cir. 1988). [Back To Text](#)

⁷⁵ This approach had been previously advocated by Bob Zinman, though the Court makes no reference to this fact. See Robert M. Zinman, Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers, 9 Cardozo L. Rev. 581, 602 (1987). [Back To Text](#)

⁷⁶ 511 U.S. at 537 (emphasis in original). [Back To Text](#)

⁷⁷ Id. at 540. [Back To Text](#)

⁷⁸ Id. (emphasis in original). [Back To Text](#)

⁷⁹ Id. at 542. But see Janet A. Flaccus, Pre-Petition and Post-Petition Mortgage Foreclosures and Tax Sales and the Faulty Reasoning of the Supreme Court, 51 Ark. L. Rev. 25, 35 (1998) (disputing the accuracy of this generalization). [Back To Text](#)

⁸⁰ See BFP, 511 U.S. at 563 (Souter, J., dissenting). [Back To Text](#)

⁸¹ See generally Charles J. Tabb, The Law of Bankruptcy 449 (1997). [Back To Text](#)

⁸² "A secured party or third party purchaser who obtains title to an interest of the debtor in property pursuant to a good faith, pre-petition foreclosure, power of sale, or other proceeding or provision of nonbankruptcy law permitting or providing for the realization of security upon default of the borrower under a mortgage, deed of trust, or other security agreement takes for reasonably equivalent value within the meaning of this section." S. 445, 98th Cong., 1st Sess. § 360 (1983). Surprisingly, this proposal appears not even to require that the foreclosure comply with applicable state law procedures. [Back To Text](#)

⁸³ 11 U.S.C. § 101(54) (2000). [Back To Text](#)

⁸⁴ "Prior to 1984, it was at least open to question whether § 548 could be used to invalidate even a collusive foreclosure sale It is no superfluity for Congress to clarify what had been at best unclear" BFP, 511 U.S. at 543 n.7 [Back To Text](#)

⁸⁵ See supra notes 66–68 and accompanying text. [Back To Text](#)

⁸⁶ Moreover, this possibility of recovering an asset is often highly dubious. See infra notes 111–113 and accompanying text. [Back To Text](#)

⁸⁷ See Clark's Secured Transactions Monthly, Dec. 2000 at 5 ("The hope is to preclude large deficiencies based on potentially collusive foreclosure sales"). [Back To Text](#)

⁸⁸ Constructive fraudulent transfer law, even as limited by BFP or the UFTA safe harbors, is willing to reach in and correct those results in two, though only two, situations: collusion or non-adherence to process. Section 9–615(f) is somewhat more robust in terms of the situations under which it will correct inequitable results: it recognizes that even if one has impeccably adhered to the foreclosure process, the result may nonetheless need correction. Thus, § 9–615(f) places less faith in process than does constructive fraudulent transfer law, and tacitly recognizes that the process itself may be flawed. I discuss reforming the process itself in Part II.D. [Back To Text](#)

⁸⁹ See supra notes 23–25 and accompanying text. [Back To Text](#)

⁹⁰ See supra notes 50–53 and accompanying text. [Back To Text](#)

⁹¹ Neither § 9–615(f) nor constructive fraudulent transfer law seeks, however, to correct those processes directly. Under the terminology further developed in Part II.C, both § 9–615(f) and constructive fraudulent transfer law are standards based on result rather than on process. [Back To Text](#)

⁹² See supra notes 17–22 and accompanying text. [Back To Text](#)

⁹³ See supra note 77 and accompanying text. [Back To Text](#)

⁹⁴ In fact, in one recent case, a bankruptcy court expressly refused to make such an extension. See Case v. TBAC–Prince Gardner Inc. (In re Prince Gardner Inc.), 220 B.R. 63, 66 (Bankr. E.D. Mo. 1998). The principal ground for this refusal, however, appears to have been that the sale in this case was private, while the sale in BFP was a public, and in perhaps ill–considered dictum the judge did muse without elaboration about extending BFP to titled personal property, equity securities, letters of credit or intellectual property rights. Id. at 66. See also In re Carter, 209 B.R. 732 (Bankr. D. Or.) (declining to extend BFP to forfeiture of pawned personal property). [Back To Text](#)

⁹⁵ Cf. 1 Richard R. Powell & Patrick J. Rohan, Powell on Real Property § 5.04 (2000) (noting generally that "the pressure of modern society has been strongly for assimilation and the resultant elimination of [the] line [between personal and real property law]," though the movement is far from complete); Roger Cunningham et al., The Law of Property § 1.4 (2d. ed. 1993) (concluding that classification of property as real or personal "makes little sense in the modern world and can only be understood by reference to the historical development of legal remedies for the protection of property in England"). [Back To Text](#)

⁹⁶ See supra notes 81 and accompanying text. [Back To Text](#)

⁹⁷ Justice Souter must have had in mind a similar notion of fraudulent transfer law as a debtor–protective device when he alluded to a linkage between § 548 and bankruptcy law's basic policy of ensuring a fresh start for debtors. See BFP, 511 U.S. at 563, 569 (1994). The benefit to the debtor from the recovery of the asset is most obvious in the rare case of a solvent estate and in the less rare case of non–dischargeable debts, the latter of which would otherwise impair the debtor's fresh start.

Outside of bankruptcy, where notions of discharge and fresh start are inapplicable, fraudulent transfer remains nonetheless a debtor–protective device simply because, as noted in the text, maximizing the value of the debtor's assets enhances the debtor's ability to retire its unsecured debt. [Back To Text](#)

⁹⁸ See supra notes 29–35 and accompanying text. [Back To Text](#)

⁹⁹ See supra notes 24–25 and accompanying text (showing that § 9–615(f) reduces a hypothetical deficiency from \$600,000 to somewhere between \$100,000 and \$300,000). [Back To Text](#)

¹⁰⁰ See UCC § 9–626(a)(5). See, e.g., Marion W. Benfield, Jr., Consumer Provisions in Revised Article 9, 74 Chi.–Kent L. Rev. 1255, 1280–84 (1999) (discussing burden of proof rules in foreclosure context). [Back To Text](#)

¹⁰¹ By contrast, secured parties may often be able to rely on the testimony of their own staffs. See Jean Braucher, Deadlock: Consumer Transactions Under Revised Article 9, 73 Am. Bankr. L. J. 83, 105 (1999). [Back To Text](#)

¹⁰² See infra notes 130–131 and accompanying text. [Back To Text](#)

¹⁰³ Briefly stated, the intractable standards included in § 9–615(f) include questions about "the range of proceeds" that a disposition to a non–suspect transferee would have brought, the point at which the price paid at foreclosure becomes "significantly below" that range, and exactly what it takes for the hypothetical disposition to a non–suspect transferee

to be a "complying" disposition. [Back To Text](#)

¹⁰⁴ See, e.g., [Braucher, supra note 100, at 105–06](#), 110–11 (observing that "complicated questions of fact" and "expensive proof" impair ability of consumer debtors to prevail in suit alleging lack of notice). [Back To Text](#)

¹⁰⁵ Defendants in deficiency actions are likely, of course, to be insolvent, because they have by hypothesis already defaulted on some of their indebtedness. [Back To Text](#)

¹⁰⁶ Deficiency judgments are subject to all of the difficulties in collecting judgments that impel secured parties to take collateral in the first place. See generally [Schwartz, supra note 4, at 127](#) (discussing difficulties in recovering deficiency judgments). [Back To Text](#)

¹⁰⁷ Should the debtor come into assets in the future, the judgment would be enforceable against those assets, for the duration of the statute of limitations on enforcement of judgments. See, e.g., [N.Y. C.P.L.R. § 211\(b\) \(McKinney 1990 & Supp. 2001\)](#) (providing 20–year statute of limitations for enforcement of judgments); [Rapson, Deficiency Claims, supra note 2, at 523 n.89](#) (discussing effects of deficiency judgments on debtors' economic future). [Back To Text](#)

¹⁰⁸ See [Braucher, supra note 100, at 107](#) (noting that consumer creditors do not prefer rules over standards if standard is "so weak as to be rarely invoked"). [Back To Text](#)

¹⁰⁹ See Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 *Wash. U. L.Q.* 69, 138–39 (1997); [Braucher, supra note 100, at 86](#) (supporting a credit for wholesale value). The first of the three possibilities mentioned in the text above is currently required by Connecticut law. See [Conn. Gen. Stat. Ann. § 36a–785\(g\) \(West 1996\)](#). [Back To Text](#)

¹¹⁰ [Rapson, Default and Enforcement, supra note 29, at 895](#). See also [Braucher, supra note 100, at 84](#) (referring to "large deficiencies calculated on the basis of depressed foreclosure prices" as "[t]he biggest problem for consumer debtors in secured transactions involving personal property collateral"). [Back To Text](#)

¹¹¹ See [Hillebrand, supra note 108, at 120](#) (arguing that draft revisions to Article 9 "leave unsolved the most fundamental problem that consumers have faced under Article 9 – the problem of low values on the disposition of consumer goods collateral"). [Back To Text](#)

¹¹² Of course, under proper circumstances, fraudulent transfer law can recover dissipated assets, but this cause of action itself requires the fact–, labor– and dollar–intensive litigation that is common to standards generally, as further discussed in Part II.C. [Back To Text](#)

¹¹³ Indeed, the deficiency action itself may precipitate the bankruptcy filing, particularly if the deficiency is unduly large. See [Braucher, supra note 100, at 84](#) (stating that "bankruptcy will continue to be the cheapest legal strategy" to deal with the large deficiencies at which § 9–615(f) is aimed). And it is no secret that once the debtor is in bankruptcy, deficiency creditors (like all unsecured creditors) face slim prospects of collection. The Bankruptcy Division of the Administrative Office of the United States Courts calculates that 97.1% of the non–business chapter 7 cases that were closed during the year ended September 30, 1995 were no–asset cases. See Marjorie L. Girth, *Rethinking Fairness in Bankruptcy Proceedings*, 73 *Am. Bankr. L.J.* 449, 456 n.53 (1999). More recent studies confirm the continuing accuracy of this 1995 statistic. An as–yet unpublished report prepared by the United States Department of Justice's Executive Office for the United States Trustees shows that only 3.34% of chapter 7 filings during the seven–year period between January 1, 1994 and December 31, 2000 represented asset cases. Telephone Interview with Ed Flynn, Operations Research Analyst, Executive Office for the United States Trustees (Apr. 5, 2001). [Back To Text](#)

¹¹⁴ See [supra](#) notes 105–106 and accompanying text. [Back To Text](#)

¹¹⁵ See [supra](#) notes 24–25 and accompanying text. [Back To Text](#)

¹¹⁶ Moreover, even this \$400,000 is, in a sense, to be discounted: it was not money actually paid by the secured party, but rather the extinguishing of a mere contract claim for that amount against a troubled debtor. [Back To Text](#)

¹¹⁷ See [Philip Shuchman, Profit and Default: An Archival Study of Automobile Repossessions and Resale](#), 22 *Stan. L. Rev.* 20 (1969). [Back To Text](#)

¹¹⁸ See [supra](#) notes 56–59 and accompanying text. [Back To Text](#)

¹¹⁹ As discussed above, Bankruptcy Code § 548 permits constructive fraudulent transfer law to operate on foreclosure sales, except to the extent that BFP limits its application to real property; UFTA § 3(b) insulates foreclosure sales if they are regularly conducted and non-collusive; and the text of the UFCA sets forth no such insulation. See [supra](#) Part I.B. [Back To Text](#)

¹²⁰ See [supra](#) note 96. [Back To Text](#)

¹²¹ Actual fraudulent transfer is an avoidance tool fully as robust as constructive fraudulent transfer, and nothing in § 548, the UFTA or the BFP decision prohibits avoiding the transfer resulting from even a procedurally correct foreclosure on grounds of actual fraud. (Specifically, UFTA § § 3(b) and 8(e)(2) modify only § § 4(a)(2) and 5, which are constructive fraud provisions.) The question presented, then, is whether low price alone, in a foreclosure sale, is enough to establish actual fraud, and the plain language of the statute supports an affirmative answer. UFTA § 4(b), which lists the badges of fraud that may be considered "among other factors" in determining whether actual fraud is present, includes each of the paradigmatic elements of a constructive fraud action: whether "the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred" and whether "the debtor was insolvent or became insolvent shortly after the transfer was made." Unif. Fraudulent Transfer Act § § 4(b)(8), (9), 7A U.L.A. 302 (1985). The argument runs that the establishment of either of these (like any of § 4(b)'s other badges of fraud), let alone both, could justify an avoidance. Cf. [Herbert, supra note 42, at 220](#) (observing that "there are still considerable links between the badges of actual fraud and the elements of constructive fraud").

The overall statutory scheme, however, supports much stronger contrary arguments. First, it is implausible to think that the drafters intended to immunize foreclosure sales from attack under one cause of action while leaving them vulnerable to attack under a nominally separate cause of action consisting of exactly the same elements as the first. And second, there are two arguments arising from the fact that the UFTA bars so-called future creditors from bringing constructive fraud actions based on insolvency rather than on insolvency substitutes. See [supra](#) note 63 and accompanying text. No such bar keeps future creditors from bringing actual fraud actions based on any of the badges of fraud, and as noted ante, these badges of fraud include insolvency rather than insolvency substitutes. But there is no reason to disregard constructive fraud's restrictions on future creditors merely because the elements of constructive fraud are being alleged under the rubric of actual fraud. And there is emphatically no reason to permit a future creditor, who would be barred from recovery on constructive fraud grounds even if it could prove both insolvency and less than reasonably equivalent value, to recover on actual fraud grounds by proving only one or the other of these elements.

In the bankruptcy context, a further avoidance remedy is available for preferential transfers under § 547. In assessing BFP's impact on the avoidance of mortgage foreclosure sales, commentators have suggested that these transfers might remain avoidable on these grounds. See [Basil H. Mattingly, Reestablishment of Bankruptcy Review of Oppressive Foreclosure Sales: The Interaction of Avoidance Powers as Applied to Creditor Bid-Ins](#), 50 *S.C. L. Rev.* 363, 403 (1999); Craig H. Averch and Michael J. Collins, Avoidance of Foreclosure Sales as Preferential Transfers: Another Serious Threat to Secured Creditors?, 24 *Tex. Tech. L. Rev.* 985, 1037 (1993); Flaccus, [supra](#) note 78, at 53–60. [Back To Text](#)

¹²² The BFP decision is limited to real rather than personal property, a limitation which, as discussed [supra](#) notes 92–94 and accompanying text, is not likely to be disregarded. Moreover, BFP is grounded partly on the wide variations among state real property foreclosure regimes, in the face of which the Court was reluctant to let federal law make judgments about the reasonableness of resulting sales prices; such a concern is absent from personal property law, under which the various state foreclosure regimes are very largely uniform.

The BFP decision is also unlikely to be extended to cases arising under 11 U.S.C. § 544, because BFP's concerns over federalism would militate against, rather than in favor of, interfering with the fraudulent transfer laws of the states.

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¹²³ See Averch and Collins, supra note 120, at 993, and sources cited therein; Symposium, Contemporary Issues in Bankruptcy and Corporate Law: Panel Discussion and Question–Answer Session, 61 U. Cin. L. Rev. 569, 571 (1992) (noting no discernible change in cost of credit in states following Durrett rule, because of rule's remoteness at time of loan); Philip Shuchman, Data on the Durrett Controversy, 9 Cardozo L. Rev. 605, 606 (1987) ("Reference to the relevant financial data measured from the year before Durrett through 1985, strongly suggests that the anticipated harms did not materialize; or, if to some extent, they did, the effects were short–lived."). But see Robert M. Zinman, Durrett Data: Shucking the Husks from the Grain, 9 Cardozo L. Rev. 1013 (1988) (criticizing Shuchman's study because of, among other things, its reliance on residential as opposed to commercial loan statistics). [Back To Text](#)

¹²⁴ See, e.g., Carter v. H&B Jewelry & Loan (In re Carter), 209 B.R. 732, 736 (Bankr. D. Or. 1997). [Back To Text](#)

¹²⁵ However, the remoteness of these combined eventualities at the time the loan is made may keep this factor from being important. See supra note 122. [Back To Text](#)

¹²⁶ See supra text following note 106. [Back To Text](#)

¹²⁷ See Kennedy, supra note 14, at 1685. [Back To Text](#)

¹²⁸ Id. at 1685, 1688. [Back To Text](#)

¹²⁹ In fact, when the term "rule" is used in this sense, the expression "bright–line rule" is redundant, because rules are defined by the very fact that they draw bright lines. [Back To Text](#)

¹³⁰ See Kennedy, supra note 14, at 1696. [Back To Text](#)

¹³¹ The statute does admittedly identify with bright–line clarity the parties to whom it applies, but that rule–like aspect of the statute is greatly outweighed by the standard–like nature of its other provisions examined in the text. Because of this fact, it is perhaps an unfortunate misnomer to call § 9–615(f) a "low–price foreclosure rule" rather than, say, a "low–price foreclosure standard," but in contexts other than jurisprudence the term "rule" is of course used broadly enough to include standards, too. [Back To Text](#)

¹³² See 2 Grant Gilmore, Security Interests in Personal Property § 44.5, at 1234–35 (1965) (stating that the obligation of commercial reasonableness is "a vague and fluctuating one, which cannot be meaningfully described except in terms of particular fact situations"). [Back To Text](#)

¹³³ See generally Henning, supra note 57. This piece was published before the enactment of the UFTA (with its safe harbor for foreclosure sales) and before the BFP decision. [Back To Text](#)

¹³⁴ See supra notes 50, 63. [Back To Text](#)

¹³⁵ In fact, Henning's proposal is even more fact–intensive than existing constructive fraudulent transfer law, because it overlays on those standards the question of whether avoidance would bring "a substantial benefit to the estate." Henning, supra note 57, at 285. [Back To Text](#)

¹³⁶ "[I]n *terrorem* general standards are likely to be paper tigers in practice. Uncertainty about whether the sanction will in fact materialize may lead to a lower level of actual social control than would occur if there were a well defined area within which there was a high probability of even a mild punishment. Death is likely to be an ineffective penalty for theft." Kennedy, supra note 14, at 1696. [Back To Text](#)

¹³⁷ See supra notes 71–72 and accompanying text. A bright–line focus on results is also the kind of approach urged by some during the Article 9 revision process. See supra text accompanying note 108; Braucher, supra note 100, at 107. [Back To Text](#)

¹³⁸ One of the acknowledged virtues of rules is their certainty. Kennedy, supra note 14, at 1688–89. [Back To Text](#)

¹³⁹ Justice Scalia, speaking for the BFP court, displays impatience with this arbitrariness in criticizing the Durrett approach. "Perhaps [a reasonable forced–sale price] is what the courts that follow the Durrett rule have in mind when they select 70% of fair market value as the outer limit of 'reasonably equivalent value' for foreclosable property (we have no idea where else such an arbitrary percentage could have come from)." BFP, 511 U.S. at 540.

Standards are not immune from arbitrariness, either, but their arbitrariness (or, depending on one's point of view, flexibility) resides in the way they are applied rather than the way they are written. E.g., Kennedy, supra note 14, at 1695 (contrasting "the mechanical arbitrariness of rules and the biased arbitrariness of standards"). [Back To Text](#)

¹⁴⁰ Kennedy, supra note 14, at 1689. Kennedy goes on to remark that this aspect of rules "amounts not just to licensing but to requiring official arbitrariness." Id. [Back To Text](#)

¹⁴¹ Id. at 1696. [Back To Text](#)

¹⁴² Quite apart from instrumental quandaries such as those discussed here, Kennedy shows the dilemma to be accompanied by profound ideological dimensions. These are, regrettably, beyond the scope of this Article. [Back To Text](#)

¹⁴³ See supra text following note 11; supra notes 22, 87–91 and accompanying text. [Back To Text](#)

¹⁴⁴ It is possible, and interesting, to misunderstand the two dichotomies as being one and the same thing, with standards corresponding to results and rules corresponding to process. Kennedy himself provides fodder for this misunderstanding when he writes that "[a] standard refers directly to one of the substantive objectives of the legal order." Kennedy, supra note 14, at 1688. In other words, standards are statements of results (such as good faith, due care, reasonableness and the like) that the legal system desires to achieve. One could, by the same token, understand rules as being steps that the legal system imposes in order to cause those results to come about – in other words, process directed at the results. (According to this line of reasoning, due care in driving would be the result, and driving at less than 65 miles per hour would be the process aimed at that result.) But the difference between the two dichotomies becomes clear when one examines, for example, the highly relevant case of foreclosure under UCC Article 9. Kennedy's "substantive objective of the legal order" here is surely not commercial reasonableness for its own sake but, instead, something like an equitable price that balances the interests of the debtor and the foreclosing creditor. Commercial reasonableness is therefore, in my terminology, the process designed to achieve the result of equitable price, and if (as the misunderstanding would have it) process corresponds to rules, then commercial reasonableness would have to be a rule. But commercial reasonableness is not a rule; in its flexibility and fact–specificity it is a near–paradigmatic example of a standard. See supra note 127 and accompanying text. To generalize from this example, my dichotomy of process and results has a dimension of temporality and logical causation that is irrelevant to the dichotomy of rules and standards [Back To Text](#)

¹⁴⁵ This point was well expressed by Grant Gilmore himself. See 2 Gilmore, supra note 131, § 44.5 at 1234–35 (observing that commercial reasonableness standard cannot be defined without reference to circumstances of particular disposition). [Back To Text](#)

¹⁴⁶ Standards about process are not, however, inherently weak. In fact, one scholar suggests reforming personal property foreclosure law with a standard about process that would be quite strong. See Luize Zubrow, Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives, 42 UCLA L. Rev. 445, 504 (1994) (proposing that foreclosing secured parties be held to fiduciary standards); see also 2 Gilmore, supra note 131, § 44.5 at 1232–34 (declaring that secured party is obligated to use "best efforts to see that the highest possible price is received for the collateral"). But see Edward J. Heiser, Jr. & Robert J. Flemma, Jr., Consumer Issues in the Article 9 Revision Project:

The Perspective of Consumer Lenders, 48 Consumer Fin. L.Q. Rep. 488, 491 (1994) (arguing against imposition of fiduciary obligations due to creditors' natural incentive to maximize sales price of collateral). [Back To Text](#)

¹⁴⁷ See [supra](#) notes 134–135 and accompanying text. [Back To Text](#)

¹⁴⁸ See [supra](#) notes 138–140 and accompanying text. [Back To Text](#)

¹⁴⁹ See [supra](#) note 26–27 and accompanying text. [Back To Text](#)

¹⁵⁰ Some might view § 9–615(f) as an indirect corrective to the foreclosure process itself, as opposed to a direct corrective to results of that process, because in order to avoid the reduction of deficiency that the section imposes, suspect parties may reform their behavior so as to place higher bids, or even increase advertising and take other steps to generate a more active bidding process. See Rapson, Default and Enforcement, [supra](#) note 29, at 1921 (anticipating that § 9–615(f) will "motivate secured parties to exercise more care, caution, and fairness in the manner in which they conduct foreclosure sales and attempt to pursue deficiency claims."). However, because the benefits to be gained by debtors from a claim under 9–615(f) are weak, and the burdens to debtors of obtaining those benefits are great, any corrective effects that § 9–615(f) might have on the foreclosure process generally are likely to be weaker than they should be. See [supra](#) notes 99–106 and accompanying text. [Back To Text](#)

¹⁵¹ 2 [Gilmore](#), [supra](#) note 131, § 44.6 at 1245. [Back To Text](#)

¹⁵² The statute authorizes dispositions to be either public or private and, though these terms are not defined, an Official Comment suggests that public dispositions are those at which the price is determined "after the public has had a meaningful opportunity for competitive bidding." [U.C.C. § 9–610](#) and cmt. 7. The Comment goes on to explain that the term "meaningful opportunity" is "meant to imply that some form of advertisement or public notice must precede the sale...." [Id.](#) Quite apart from the weakness of directives that appear in the Comments rather than the black letter of the statute, the reference to "some form" of advertisement is weakly open-ended, and in its open-endedness it constitutes a standard (rather than a rule) of precisely the kind that needs supplementing. [Back To Text](#)

¹⁵³ See [supra](#) note 116 and accompanying text. [Back To Text](#)

¹⁵⁴ [Rapson, Deficiency Claims](#), [supra](#) note 2, at 504 (stating that "[r]etail consumer buyers are not likely to appear for the simple reason that they can buy the same model and year car from a dealer, who will not only provide servicing, but may offer express used car warranties of condition and performance for a limited period. Financial institutions will not do so, and will even disclaim any possible implied warranties of merchantability or fitness . . ."). [Back To Text](#)

¹⁵⁵ Thus, to borrow Rapson's example, some retail consumer buyers would clearly prefer to pay a smaller amount for a car without a warranty or service contract. [Back To Text](#)

¹⁵⁶ The point about lack of spontaneous generation was made in a very different and landmark context by Louis Pasteur. See Louis Pasteur, On Spontaneous Generation, at <http://guava.phil.lehigh.edu/spon.htm>. Pasteur was addressing the origin of maggots on decaying bodies, and if the reader perceives an analogy between maggots on decaying bodies and buyers at foreclosure sales, it is not necessarily one that I intend. [Back To Text](#)

¹⁵⁷ One commentator has explored some of the related issues, while not, however, proposing that on-line advertising or bidding be required. See Michael Korybut, Online Auctions of Repossessed Collateral under Article 9, [31 Rutgers L.J.](#) 29, 54 (1999). Such a requirement might or might not be tailored to exclude various non-goods types of collateral, such as accounts receivable the value of which may depend on extensive, confidential, or "soft" information such as credit evaluations or forecasts. [Back To Text](#)

¹⁵⁸ The remarkable success of on-line venues such as eBay is a ready analogy. See Nick Wingfield, Ebay to Test Technology Linking it to Other Sites, Wall St. J., Nov. 20, 2000, at B1 (estimating that eBay controls more than 80% of online consumer auction market). [Back To Text](#)

¹⁵⁹ See supra note 151. [Back To Text](#)

¹⁶⁰ See www.bankruptcysales.com; see also John D. Penn, Beyond the Quill, 19 Am. Bankr. Inst. J. 18 (Feb. 2000) (discussing advent of this site). [Back To Text](#)

¹⁶¹ Exceptions to a pre-sale inspection requirement could be modeled on Article 9's existing exceptions to the pre-sale notice requirements. See UCC § 9-611(d). [Back To Text](#)

¹⁶² The approach taken in the BFP decision, and in UFTA sections 3(b) and 8(e)(2), stand generally as stark examples of process-based rules that violate this criterion. However, UFTA § 8(e)(2) is not free of standard-like aspects: its immunizing of "enforcement of a security interest in compliance with Article 9 . . ." from constructive fraudulent transfer attack requires a fact-intensive consideration of Article 9's commercial reasonableness standard. [Back To Text](#)

¹⁶³ See supra note 22. [Back To Text](#)

¹⁶⁴ UCC § 9-627(b)(1), (2). [Back To Text](#)

¹⁶⁵ Current law's safe harbor for recognized markets is also illuminating precedent for my on-line funneling proposal in a substantive albeit attenuated way. The safe harbor uses the volume of bidders in the market as assurance that the price obtained at foreclosure accurately reflects the collateral's value. My proposal, by in effect creating a market, would generate a volume of bidders that could provide similar albeit more modest assurances. I neither claim nor expect that the market generated by my on-line funneling proposal would approach in volume or procedure the kinds of recognized markets contemplated by the existing safe harbor. See U.C.C. § 9-627 cmt. 4 (stating that term "recognized market" refers only to markets in which essentially fungible property is traded using standard price quotations); U.C.C. § 9-610 cmt. 9 (defining "recognized market" as one in which fungible items are sold at prices that are not product of individual negotiation). [Back To Text](#)