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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

OTHA DELANEY .....

Appellant,

-vs-

FIRST FINANCIAL OF CHARLESTON, INC. ....

Respondent.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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§15-3-570

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## **STATEMENT OF ISSUES ON APPEAL**

I. BECAUSE APPELLANT'S CAUSE OF ACTION UNDER § 36-9-625(c)(2) OF THE UNIFORM COMMERCIAL CODE ACCRUED WHEN RESPONDENT DISPOSED OF THE COLLATERAL, THE COURT ERRED WHEN IT HELD THAT THIS ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS

II. BECAUSE THE REMEDY PROVIDED BY § 36-9-625(c)(2) IS REMEDIAL AND COMPENSATORY, THE COURT ERRED WHEN IT HELD THAT THE STATUTES OF LIMITATIONS PROVIDED BY §§ 15-3-540(2) OR 15-3-570 FOR AN ACTION UPON A STATUTE FOR A PENALTY OR FORFEITURE ARE APPLICABLE TO THIS CASE

III. BECAUSE THE PROVISIONS OF ARTICLE 9, PART 6 OF THE U.C.C. ARE IMPOSED BY LAW UPON EVERY SECURED TRANSACTION COVERED BY ARTICLE 9 AND BECOME TERMS OF THE SECURITY AGREEMENT, BREACH OF THE ARTICLE 9 NOTICE REQUIREMENTS IS A BREACH OF THE CONTRACT. ACCORDINGLY, THE STATUTE OF LIMITATIONS APPLICABLE TO APPELLANT'S U.C.C. CAUSE OF ACTION IS PROVIDED BY § 36-2-725

## **STATEMENT OF THE CASE**

Otha Delaney (Appellant) filed this action on October 3, 2011, alleging that the Notice of Sale of collateral that First Financial (Appellee) sent him in an attempt to comply with § 36-9-614 of South Carolina's version of the Uniform Commercial Code was defective as a matter of law. As a result, Delaney alleged that he is entitled to statutory relief pursuant to S.C. Code Ann. § 36-9-625(c)(2). Delaney, as a representative of a putative class, seeks this recovery on behalf of class members. (R. pp.18-25)

First Financial filed a motion under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure asserting a statute of limitations defense as a bar to the action because the date Delaney received the allegedly defective § 36-9-614 notice was in May, 2008, more than three years prior to the date the case was filed. (R. pp. 30-31)

On April 29, 2014, the trial court granted First Federal's motion to dismiss. (R. pp.1-8)

## **FACTS**

The facts are not disputed. The trial court held that the action is barred by the statute of limitations as a matter of law. (R. p. 8)

Appellant respectfully disagrees and argues below that the trial court committed reversible legal error in several respects.

## ARGUMENTS

### INTRODUCTION

This case involves the requirement, first imposed by the Uniform Commercial Code (hereinafter the “U.C.C.”)<sup>1</sup> in the 1960s (following similar rules in the common law of commercial relations and earlier efforts at its codification),<sup>2</sup> that a conditional seller who repossesses and disposes of collateral from a defaulting conditional buyer, provide the buyer (and guarantors) with information about the proposed disposition prior to conducting it.<sup>3</sup>

The purpose of this requirement is to permit the buyer (and guarantors) to participate in or otherwise influence the sale (disposition) in order to minimize their liability for a deficiency.<sup>4</sup>

Appellee, it is alleged, failed to provide Appellant (and putative class members) with notice of disposition of collateral compliant with relevant U.C.C. sections. As a result, Appellant sued Appellee, alleging the latter’s liability for damages pursuant to a U.C.C. section entitling a conditional buyer or guarantor, upon proof of a secured party’s disposition of repossessed collateral without, *inter alia*, compliant pre-disposition notice, to recover actual damages, and in the case of “consumer goods” transactions,<sup>5</sup> to an election between recovery of actual damages or of damages in an amount based directly on the price of the goods and the interest charged in the transaction in question.<sup>6</sup> (R. pp. 18-25)

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<sup>1</sup> Further references to the Uniform Commercial Code will be to either the S.C. Code section (*e.g.*, §36-9-101, *et seq.*), or to the Uniform Commercial Code (U.L.A.) section (*e.g.*, § 9-101, *et seq.*). South Carolina’s revised version of the Uniform Commercial Code, enacted in 2001, is virtually identical to the 1999 Uniform Code Commissioners (ULA) version enacted with only minor variations in all fifty states. *See*, Official Comment 1, S.C. Code § 36-9-101: “This Article supersedes former Uniform Commercial Code (UCC) Article 9. [T]he Comments to former Article 9 will remain of substantial historical value and interest.” Article 9, in essentially its current substance, has been the law in South Carolina, and throughout the United States, since the early 1960s. *See, e.g.*, 1962 S.C. Code § 10.9-101, *et seq.*

<sup>2</sup> Article 9 unified the law of pledges, conditional sales, chattel mortgages, trust receipts, and other security interests in personal property. *See* U.C.C. U.L.A. § 9-102(2) (1995).

<sup>3</sup> U.C.C. §§ 36-9-613 & 614.

<sup>4</sup> In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), the Supreme Court explained the purpose of the pre-disposition notice required by §§ 36-9-613 and 614. “The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner.” *Id.*, 341 S.C. at 384 and 534 S.E.2d at 695; *citing Crane v. Citicorp Nat’l Servs., Inc.*, 313 S.C. 70, 437 S.E.2d 50 (1993) and James J. White & Robert S. Summers, *Uniform Commercial Code* (hereinafter “White & Summers”), § 34-13 (1995). *See also, Cosgrove v. Citizens Automobile Finance, Inc.*, 2010 WL 3370760 (Bankr. E.D.Pa. Aug. 26, 2010) (The notice recognizes a debtor’s “forlorn hope that if he is notified, [he] will either acquire enough money to redeem the collateral or send his friends to bid for it.”) *citing Brockbank, supra*, and *quoting* White and Summers § 26-9 (2d ed. 1980). In *Crane*, the Court explained the rationale for providing notice to guarantors as well as primary debtors. *Crane, supra* at 313 S.C. at 73, 437 SE2d at 5 (Guarantors have the same interest as debtors in avoiding or minimizing a deficiency judgment.)

<sup>5</sup> “Consumer goods transaction” is a defined term in the “U.C.C.” *See*, § 36-9-102(24) “Consumer goods transaction” means a “consumer transaction in which:

- (A) an individual incurs an obligation primarily for personal, family, or household purposes; and
- (B) a security interest in consumer goods secures the obligation.”

<sup>6</sup> Section 36-9-625(c).

Appellee argued, and the trial court agreed, that the alternate damage remedy is a penalty subject to the one year or three year statute of limitations established, respectively, in § 15-3-540(2) and § 15-3-570. The trial court ruled that Appellant's cause of action under U.C.C. § 36-9-625(c)(2) for Appellee's noncompliance with the pre-disposition notice requirement in a consumer goods transaction accrued either when the defective notice was sent or received. Because both the date the notice was sent to and the date it was received by Appellant was more than three years prior to the date Appellant filed the action, the trial court granted Appellee's motion to dismiss the case. (R. pp.1- 8)

Following the trial court's denial of Appellant's timely motion under Rule 59(e), (R. pp.9-17), this appeal was noticed and filed.

### STANDARD OF REVIEW

The affirmative defense of a statute of limitations bar, based on facts pled in complaint, may be raised by a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *E.g., Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334 (4<sup>th</sup> Cir. 2009).

When reviewing the trial court's ruling on a motion to dismiss on the pleadings, the Court of Appeals must apply the same standard as the trial court, viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. A trial court must deny a motion to dismiss if the evidence, etc., yields more than one reasonable inference. *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867 (S.C. App. 2012); *Brazell v. Winsor*, 384 S.C. 512, 682 S.E.2d 824 (2004).

Furthermore, where a trial court properly finds that it has jurisdiction, but commits error in ruling on a dispositive motion, remand is unnecessary and may constitute error. *E.g., Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000) ("The Court of Appeals erred in remanding the case for lower court to decide the issue.") Thus, it is appropriate in a case where an appellate court determines clear error on the part of the lower court, that it simply enter judgment in favor of the appellant. *Id.*

### **I. BECAUSE APPELLANT'S CAUSE OF ACTION UNDER § 36-9-625(c)(2) OF THE UNIFORM COMMERCIAL CODE ACCRUED WHEN RESPONDENT DISPOSED OF THE COLLATERAL, THE COURT ERRED WHEN IT HELD THAT THIS ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS**

#### ***A. Statutes of Limitations Commence On Date of Accrual of Cause of Action***

The trial court held, and the parties agree, that a statute of limitations commences at the moment a party has a right to initiate suit.<sup>7</sup> The question of when a cause of action arises or

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<sup>7</sup> "Plaintiffs (sic) sole cause of action accrued upon receipt of the 'NOTICE OF PRIVATE SALE OF

accrues is a question of law. *Menezes v. W.L. Ross & Co., L.L.C.*, 403 S.C. 522, 744 S.E.2d 178 (2013). The standard as to when the limitations period begins to run is objective rather than subjective. *Turner v. Milliman*, 381 S.C. 101, 671 S.E.2d 636 (S.C.App. 2009) “When there is doubt as to which of two limitation laws applies in a given instance, the doubt must be resolved in favor of affording the longer period.”<sup>8</sup>

A cause of action accrues at the moment the plaintiff has a legal right to sue on it. *E.g.*, *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004), *reh’g denied* May 25, 2004; *Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 532 S.E.2d 1 (S.C.App. 2000). In analyzing a limitations defense, the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. *King v. James*, 388 S.C. 16, 694 S.E.2d 35 (S.C.App. 2010).<sup>9</sup>

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***B. Prior to the Secured Party’s Disposition of Repossessed Collateral, a Cause of Action under § 36-9-625 is Incomplete***

In the Memorandum in Support of its Motion to Dismiss, Appellee made the following statement:

In this case, there is only one date when any alleged violation of § 36-9-625(c)(2) could have occurred. As Plaintiff concedes, that day was May 2, 2008 when the notice of sale which is alleged to have been improper was sent. (*See* Plaintiff’s Complaint at para. 14.) There is no other allegation of any form of wrongdoing or violation of any statute against First Financial. Thus, even if § 15-3-540(2) is found to be applicable, the statute of limitations began to run when this notice that was sent (or shortly thereafter when Plaintiff received this notice). Plaintiff has made no allegation that this notice was received well after it was sent, and this lawsuit was filed on October 3, 2011, well over five months

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COLLATERAL.’ In the alternative, Defendant asserts that because this action accrued upon Plaintiff’s receipt of the Notice of Sale, a three year statute of limitations, if applied, still renders the Plaintiff’s action untimely as a matter of law.” The trial court base its ruling dismissing Appellant’s action on these arguments. *Order of Trial Court*, at 2, 5 & 8.

<sup>8</sup> *State v. Life Ins. Co.*, 254 S. C. 286, 175 S. E. 2d 203 (1970); *Scovill v. Johnson*, 190 S. C. 457, 3 S.E.2d 543 (1939). *See*, 26 S.C. Jur., *Limitation of Actions* § 13, *Applicable Limitations Law*.

<sup>9</sup> *See also*, 26 S.C. Jur., *Limitation of Actions* § 54 (“Under most circumstances, civil actions can be commenced only within the prescribed period after the cause of action has accrued. The general rule is that a cause of action accrues when the plaintiff has a claim to enforce, either because of a right withheld or a wrong done, and the legal right to sue upon the claim.”) *See also*, Lawrence’s *Anderson on the Uniform Commercial Code* §§ 2-725:1 & 2-725:2 (3d ed.) (Same); 31 *Williston on Contracts* § 79:14 (4th ed.) (Same); *Annot.: Solving Statutes of Limitation Problems*, 4 Am.Jur. Trials 441(Same). That rule has governed since the 1830s. *See, e.g.*, *Bank of United States v. Daniel*. 12 Pet. 32, 56, 9 L.Ed. 989 (1838); *Evans v. Gee*. 11 Pet. 80, 84, 9 L.Ed. 639 (1837). And that definition appears in dictionaries from the 19th century up until today. *See, e.g.*, 1 A. Burrill, *A Law Dictionary and Glossary* 17 (1850) (“[A]n action *accrues* when the plaintiff has a right to commence it”); *Black’s Law Dictionary* 23 (9th ed. 2009) (defining “accrue” as “[t]o come into existence as an enforceable claim or right”).

after the limitations period would have ran under § 15-3-540(2), in May of 2011. Thus, Plaintiff's claim is time-barred and should be dismissed with prejudice.

*Memorandum in Support of Defendant's Motion to Dismiss.* (R. pp. 51-52)

It is true that Appellee's "NOTICE OF PRIVATE SALE OF COLLATERAL" (hereafter the "Notice") was dated, and presumably sent, on or about May 2, 2008. It is also likely that the notice was received by Appellant shortly thereafter. However, neither the date of mailing nor the date of receipt of that Notice can logically, or legally, constitute the date on which Appellant's cause of action under § 36-9-625 accrued.

There are several reasons for this, having to do with the logic, structure, and purpose of Article 9 which will be addressed below.

***C. The Notices Required by §§ 36-9-613 & 614 are Required to be Given Prior to Disposition of Collateral Securing a Defaulted Installment Debt***

Article 9 of the Uniform Commercial Code, *Secured Transactions*, requires a secured party, after repossession but prior to disposition of collateral securing an installment debt in default, to provide written notice to the debtor and its guarantors regarding the proposed disposition. *S.C. Code Ann. Sections 36-9-610 through 9-625.*

Section 36-9-610, entitled "**Disposition of collateral after default,**" states, *inter alia*, that:

- (a) After default, a secured party may sell, lease, license, or otherwise **dispose of** any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.
- (b) **Every aspect of a disposition of collateral.** including the method, manner, time place, and other terms, must be commercially reasonable.....

*Id.* (emphasis added).

Section 36-9-611, "**Notification before disposition of collateral,**" provides, *inter alia*:

...a secured party that **disposes of collateral** under Section 36-9-610 shall send to the persons specified in subsection (c)...a reasonable authenticated **notification of disposition** ....

*S.C. Code Ann. Section 36-9-611.* (emphasis added).

Section 36-9-613, entitled "**Contents and form of notification before disposition of collateral: general,**" describes the information a secured creditor must provide to the conditional purchaser and any co-obligors/guarantors, **prior to disposing of the collateral in full** or partial satisfaction of the debt it secures. (emphasis added). *E.g., Coastal States Bank v. Hanover Homes of South Carolina, LLC*, 2014 WL 1230237, Appellate Case No. 2012-213154 (S.C.App. March 26, 2014).

Section 36-9-614 (which incorporates § 36-9-613) is entitled: “**Contents and form of notification before disposition of collateral: consumer goods transaction.**” (emphasis added).

Section 36-9-614 adds information which is required to be included in notices of disposition of collateral in “consumer-goods” transactions to the list of requirements applicable to pre-disposition notices in non-consumer-transactions as described in § 36-9-613. Otherwise, as does § 36-9-613, § 36-9-614 lists information that must be given a conditional purchaser or guarantor by a secured party **prior to** the disposition of repossessed collateral in consumer goods transactions.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), the Supreme Court explained the purpose of the pre-disposition notice required by §§ 36-9-613 and 614. “The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or **see that the sale is conducted in a commercially reasonable manner.**” *Id.*, 341 S.C. at 348 and 534 S.E.2d at 695 (emphasis added); citing *Crane v. Citicorp Nat’l Servs., Inc.*, 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) and *White & Summers*, § 34-13 (1995).

In *Crane*,<sup>10</sup> the Court considered the question, among others, whether a guarantor, as well as the principle debtor, was entitled to the pre-disposition notice after collateral was repossessed. The Court observed:

“The majority of courts have found guarantors are debtors under § 36-9-504(3) and thus entitled to notice. 9 Hawklund, *Uniform Commercial Code* § 9-105:05 n. 12 (1990); see also *Rhoten v. United Vir. Bank*, 221 Va. 222, 269 S.E.2d 781 (1980). We agree. As noted above, **one purpose of the notice is to assure the sale is conducted in a commercially-reasonable manner.** 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 27-12, at 599 (1988). Persons with liability on the underlying obligation have a **financial status in the creditor’s disposition or sale of the collateral** that is identical to the debtor’s interest - **liability for a deficiency.** *Id.* at 604. Accordingly, they are entitled to the same notice protection. *Id.*

*Crane, supra.* (emphasis added.)

In the end, whether it is the conditional purchaser unable to continue servicing the installment payments, or the guarantor of that interrupted stream of payments, the notice of proposed disposition of the collateral is critical because it allows the recipient of **compliant** notice to act so as to affect the dispositional transaction (“bidding up” the public auction or encouraging others to do so, for example).

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<sup>10</sup> Construing the pre-revision version of Article Nine (§§ 9-504 & 9-507), whose notice and damages provisions were essentially the same as the post-revision provisions (§§ 9-613, 9-614 & 9-625). See Footnote 1, *Order of Trial Court Dismissing Complaint*, at page 4. “Although the Court in *Singleton* was analyzing the provisions of former Section 9-507(1), current § 36-9-625(c)(2) embodies nearly identical language for its provisions on recovery related to improper notice of sale.”

This opportunity to influence the transaction in which the collateral is disposed of, and thus, the size of a deficiency claim for which a conditional purchaser/guarantor will be liable, is (1) the underlying reason for the Article 9 pre-disposition notice requirement, and (2) the reason the UCC provides **only** injunctive relief **prior to sale (disposition)** of the collateral, but provides **an action for damages once disposition has been accomplished**.

*Crane*, and to some extent, *Brockbank*, make clear, that the failure of a secured creditor to provide compliant notice of disposition has the potential not just to deprive the consumer of important rights related to the redemption of the collateral, but also of the ability of both consumer and guarantor to influence the size of a deficiency claim. *See, Crane, supra. Accord, 10 Anderson on the Uniform Commercial Code* § 9-504:439 (3d ed.) (citing *Crane*).<sup>11</sup>

Because a deficiency judgment is only possible **after** disposition of the collateral, it stands to reason that the cause of action for damages under § 9-625(c),<sup>12</sup> both actual and formulaic, can only accrue, and the statute of limitations can only commence, when the disposition has occurred.

***D. The U.C.C. Distinguishes Between Pre-Disposition and Post-Disposition Noncompliance with Article 9's Notice Requirements by Providing Different Remedies Based on the Time of the Secured Party's Noncompliance***

The U.C.C. distinguishes between the sorts of remedies necessary to address the failure of a creditor to comply with the default provisions of the Code, including the requirements regarding notice of disposition. As one distinguished commentator put it:

Subsection 9-507(1) sets out the remedies for the debtor...when the secured party fails to comply with the default provisions of the Code. **If the secured party has not yet acted in noncompliance** but is about to do so, or if the secured party is presently acting in noncompliance, **this section provides for injunctive relief. If the secured party has already acted in noncompliance, this section provides for damages** and, in the case of consumer goods, sets out a minimum recovery for those damages.

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<sup>11</sup> S.C. CODE ANN. "§ 36-9-101. Short title....This chapter may be cited as 'Uniform Commercial Code - Secured Transactions'....HISTORY: 1962 Code § 10.9-101; 1966 (54) 2716; 1988 Act No. 494, § 5; 2001 Act No. 67, § 12; 2013 Act No. 96, § 1, eff. July 1, 2013....OFFICIAL COMMENT j. Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions. This Article (including the accompanying conforming revisions (see Appendix I) includes several special rules for 'consumer goods,' 'consumer transactions,' and 'consumer-goods transactions.'" Each term is defined in Section 9-102. Section 9-613 (contents and form of notice of disposition) applies to all secured transaction. Section 9-614 contains additional special requirements for the contents of a notification of disposition and a "safe-harbor, plain English form" of notification, for consumer-goods transactions.

<sup>12</sup> As opposed to the cause of action provided by § 9-625(a) for injunctive relief.

Hawkland on the UCC Series § 9-507:1 - *Secured Party's Liability for Failure to Comply with this Part* (2013) (emphasis added) (citations omitted).

The **pre-disposition, injunctive remedy** is provided by § 36-9-625(a):

If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions....

while § 36-9-625(c) provides the **post-disposition damages remedies** - (c)(1) actual damages for all, or, in the case of a consumer transaction, an election of remedies - *i.e.*, (c)(1), actual damages or (c)(2), an automatic minimum recover in an amount tied directly to the size of the loan and the amount of interest charged (essentially a “liquidated damages” remedy).<sup>13</sup>

Although the revised sections (§§ 9-613 & 9-614) are worded somewhat differently, the intention of the drafters and the General Assembly enacting the relevant sections is self-evident. Prior to the sale of a debtor’s collateral, injunctive relief is the preferred remedy. Only when the disposition (sale) of the collateral has already occurred does the Code provide for damages to compensate the conditional purchaser and guarantors.

***E. The U.C.C. Contemplates Revision and Correction of Pre-Disposition Notices by Secured Parties - Sua Sponte or by Court Order Pursuant to § 36-9-625(a) - Further Evidence that the Cause of Action for Damages Under § 36-9-625(c) Cannot Accrue Prior to Disposition***

Further evidence that disposition is a prerequisite to suit for damages under either subsection

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<sup>13</sup> The trial judge ignored this direct relationship between the “cost” of the transaction to the consumer (and of the “risk” to the guarantor) and the § 9-625(c)(2) “automatic damages” remedy. “While the proposed award is based on each class member’s respective contractual obligations, this fact alone does not demonstrate that the award is remedial in nature. Conversely, this fact exhibits only that the severity of the penalty fluctuates depending on the finance charge in an effort deter noncompliance.” *Order Granting Motion to Dismiss*, at 3.

But the connection between the cost/risk and the “liquidated” damage is a classic “earmark” of a non-penal remedy, as has been recognized in our jurisprudence for many years. *See, Rex Trailer Co. v. United States*, 76 S.Ct. 219 (1956) (Rejecting claim that liquidated damages provision in statute which also contained criminal penalties constituted double jeopardy.) “The only question for our decision, then, is whether § 26(b)(1) is civil or penal, for ‘Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.’ But there is no requirement, statutory or judicial, that specific damages be shown.... The Government’s recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss.... [L]iquidated damages ‘serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable....’ And the fact that no damages are shown is not fatal.”)

of § 36-9-625(c) is supplied by Section 36-9-611, “Notification before disposition of collateral.” Official Comment Number 8 to this general expression of the pre-disposition notice requirement states:

*Failure to Conduct Notified Disposition.* Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. **Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change.** This assumes, however, that the secured party acts in good faith, the revised notification is reasonable, **and the revised plan for disposition and any attendant delay are commercially reasonable.**

*Section 36-9-611, Official Comment 8* (emphasis added).

Thus, it is clear that the drafters of the U.C.C. Article 9 notice requirements foresaw the likelihood that secured parties would on occasion find it necessary and prudent to send corrective notices - following an earlier notice which either lacked required information or which contained even *incorrect* information - prior to disposing of a conditional buyer's collateral. It is also clear that such a secured party ought thereby to be able to insulate itself from liability for damages under § 36-9-625(c), at least as far as a violation of the pre-disposition notice requirements is concerned. If corrective notice can cure the problem, no cause of action can have accrued until the creditor can no longer provide such corrective notice.

The last moment at which a secured party cannot possibly provide correct notice of the disposition is the instant when the secured party sells or otherwise unconditionally disposes of the collateral. It is at that point that “all of the essential elements of the cause of action [under § 36-9-625(c)] are in existence, that is...the cause of action is complete....” *American Agric. Chem. Co. v. Thomas*, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945). *Cited in 4 S.C.Jur. Actions - Existence of Cause of Action*, §16.

***F. The Trial Court's Finding that the Cause of Action Provided by § 36-9-625(c)(2) Accrues Upon Receipt of the Defective Notice, Irrespective of the Disposition of the Collateral, Will Lead to Absurd Results***

As Appellant argued below, the trial court's ruling that the cause of action for damages under § 36-9-625(c) accrues when the defective notice is sent or received may lead to absurd results. Among them:

Debtor owing \$70,000.00 to the lender for a note secured by a 2003 mobile home, sues under § 36-9-625(c)(2) for the full statutory damage award upon receipt of a defective notice - prior to sale of the mobile home - easily an award of \$50,000.00 - the finance charge plus 10% of the purchase price. The debtor then files a Chapter 7 bankruptcy having purchased a \$50,000.00 home with the proceeds, claiming the S.C. § 15-41-30 “Homestead Exemption” in the new home, and

discharging the debt to the lender.

Following debtor's Chapter 7 discharge, the secured party/lender (to whom debtor had "surrendered" his interest in the mobile home as part of the Ch.7 proceeding), sold the mobile home at a "private dealer auction." Imagining it was no longer required, the secured party/lender failed to send debtor a notice pursuant to § 36-9-914. Debtor files an action under § 36-9-625(c)(2) seeking statutory damages.

In this entirely plausible scenario, debtor has converted a \$70,000.00 debt into no debt, which a Chapter 7 bankruptcy could have accomplished in any case, but with the added bonus of a \$50,000.00 home thrown in as the result of a supposed pre-disposition violation of § 36-9-614. Additionally, debtor may succeed in collecting damages for the secured party's post-disposition violation(s).

Other similarly absurd, and highly inequitable, consequences are conceivable as a result of the trial court's holding that the § 36-9-625(c)(2) cause of action for the automatic damages provision accrues not at disposition, but when the defective notice is received.

This is why the U.C.C. provides injunctive relief prior to disposition, and damages only after a sale of the collateral has actually occurred. *See, e.g., Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 501 S.E.2d 725 (1998) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.") How much truer when the absurdity results from *rejecting* the "the ordinary meaning of the words used in a statute," as the trial court did in granting First Federal's motion.

**II. BECAUSE THE REMEDY PROVIDED BY § 36-9-625(c)(2) IS REMEDIAL AND COMPENSATORY, THE COURT ERRED WHEN IT HELD THAT THE STATUTES OF LIMITATIONS PROVIDED BY §§ 15-3-540(2) OR 15-3-570 FOR AN ACTION UPON A STATUTE FOR A PENALTY OR FORFEITURE ARE APPLICABLE TO THIS CASE**

***A. The Language of the U.C.C. Supports a Construction of § 36-9-625(c)(2) as Remedial and Compensatory, Rather than Punitive and Penal***

A secured party's failure to comply with Article 9's notice requirements entitles a conditional purchaser or guarantor in a "consumer goods" transaction to recover as compensation "for that failure" *either* actual damages or, in the alternative, "an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price." *Section 36-9-625(c)(2)*.

The language of the Article Nine remedial damages section for violation of the notice requirements is significant. The drafters of the U.C.C. used the terms "remedies", "damages,"

“loss,” “includ[ing] loss resulting from the debtor’s inability to obtain, or increased costs of, alternative financing,” and “damages...for its loss,” to refer to the remedies given to conditional buyers who prove that conditional vendees have failed to comply with Article 9. *S.C. Code Ann. § 36-9-625 (2001)*. The statute speaks in exclusively compensatory rather than punitive terms, “penalties” being nowhere mentioned.

The Official Comment, paragraph 3, expresses the general overall policy of the U.C.C. as it is reflected in § 36-9-625: “Damages for violation of the requirements of this Article...are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred.” This is a decidedly compensatory purpose.

Similarly, Official Comment 4 to § 36-9-625, states as follows:

*Minimum Damages in Consumer-Goods Transactions.* Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

*Section 36-9-625, Official Comment ¶ 4.*

As is clear from the title of the Comment, “Minimum Damages”, the Uniform Commercial Code Commissioners and the General Assembly intended **compensation** for the victims of violations of Article Nine’s notice requirements, as opposed to **penalties**.

Likewise, Paragraph 3 of the Official Comments to § 9-625, entitled “Damages for Noncompliance with this Article,” speaks in terms exclusively of damages. The remedial provisions of the section “set[] forth the basic remedy for failure to comply with the requirements of this Article: a damage recovery in the amount of loss caused by the noncompliance.” *Id.*

Similarly, the South Carolina Reporter to the U.C.C. states with respect to § 9-625:

Subsection (c)(2) provides that if the collateral is consumer goods the **minimum damages** a debtor or secondary obligor can recover for a secured party’s failure to comply with part 6 is an amount equal to the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

*Section 36-9-625, South Carolina Reporter’s Comment ¶ 2 (emphasis added).*

There is simply no ambiguity in the terms chosen by the drafters of the U.C.C. and the General Assembly, to wit: “remedy”, “damages” or “minimum recovery” that would permit the trial court to disregard the text, ostensibly, as the trial court put it, because:

[T]he minimal amount of actual, compensatory damages available in scenarios similar to the instant matter would make enforcement less desirable. Thus, the penalty provision incentivizes compliance with South Carolina law by providing a larger recovery otherwise not available.

*Order Granting Motion to Dismiss*, at 4. (R. p. 4)

The court was simply incorrect to suggest that the scholars who helped draft this important piece of uniform commercial legislation, and the legislature(s) that passed it, would be so cavalier and so sloppy in choosing critical terms to describe the product of their efforts.

***B. The Trial Court’s Reliance on Loose Language and “Unconsidered Dictum” was Error***

A court may not ignore plain statutory language because of the court’s perception of a different legislative purpose. “If a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (Internal quotes and citation omitted) (“[I]t is beyond this Court’s power to effect a change in the statutes enacted by the Legislature.”); *State v. Corey D.*, 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000). *See also Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (The Courts do “not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.”) Moreover, a court is not at liberty to rely on casual labels given to legislation by other courts in *dicta*, and it was error for the trial court to do so.

The main basis for the trial court’s conclusion that the § 36-9-625(c)(2) automatic damages remedy is a “penalty” as that term is used in §§ 15-3-540(2) and 570 is that “[o]n no less than three occasions, the South Carolina Supreme Court has identified this exact *provision* as awarding a ‘statutory penalty.’” *Order Granting Motion to Dismiss*, at 4 (emphasis in original). The trial court refers to three cases, *Crane v. Citicorp*, *supra*, *Singleton v. Stokes Motors, Inc.*, *supra*, and *Brockbank v. Best Capital Corp.*, *supra*. (R. p. 4)

In each of those cases, the Supreme Court uses the terms “penalty” and “damages” interchangeably when referring to the § 36-9-625(c)(2) automatic damages remedy. *Id.*<sup>14</sup> To

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<sup>14</sup> In *Crane*, the Court referred to the remedy as “compensatory damages” once, as a “statutory penalty” four times, and once simply as a “penalty.” In *Singleton*, the Court uses the term “statutory penalty” seven times, while referring to “damages” or “statutory damages” twelve times. Finally, in *Brockbank*, the Court refers to “penalty” or “penalties” three times, and “damages” four times. *See also, Rashaw v. United Consumers C.U.*, 2011 W.L. 2110806 Slip Op. at \*4 (W.D. Mo. May 26, 2011) (“Plaintiffs also exert considerable effort to identify situations in which various courts have described various parts of the UCC generally, or section 9-625 specifically, as a ‘penalty.’ The problem is that the word is amenable to multiple definitions in a variety of

characterize the Supreme Court's casual and interchangeable reference to the remedy designed to ensure compensation to consumers deprived of the U.C.C.'s prophylactic requirement of pre-disposition notice as "identify[ing] this exact *provision* as awarding a 'statutory penalty,' is to overstate the case.

[A] distinction should be drawn between "obiter *dictum*," which constitutes an aside or an unnecessary extension of comments, and considered or "judicial *dictum*" where the Court...is providing a construction of a statute to guide the future conduct of inferior courts.

*U.S. v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975). *Dictum* includes "any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion." *Black's Law Dictionary*, 454 (6th ed.1990).

It is obvious that the Supreme Court's casual use of the term "penalty," when referring to § 36-9-625(c)(2) in the cases cited by the trial court (or others), was not intended to "provid[e] a construction of a statute to guide the future conduct of inferior courts," nor was it intended to be a "statement of the law enunciated by the court...by way of illustration." *Id.*

The same point was made by the Superior Court of Pennsylvania in a case on all fours with this one.<sup>15</sup> The plaintiff, Cubler, brought a class action alleging that a secured party, TruMark Financial Credit Union, had violated Pennsylvania's version of U.C.C. § 9-614, entitling Cubler and the class he sought to represent to the statutory damages provided in U.C.C. § 9-625(c)(2).<sup>16</sup>

Like Appellee here, TruMark argued to the trial court that § 9-625's remedy was a penalty or forfeiture subject to a Pennsylvania statute of limitations governing "[a]n action upon a statute for a civil penalty or forfeiture."<sup>17</sup> The trial court, as here, granted TruMark's motion to dismiss based on the "penalty and forfeiture" statute of limitations. *Id.*

In a carefully reasoned opinion, the Pennsylvania Superior Court reviewed U.C.C. Article 9, Part 6, and concluded that the trial court's finding that § 9-625(c)(2)'s remedy is a "penalty" was without foundation. Because the *Cubler* opinion is absolutely on all fours with the instant appeal, it bears quotation at length.

In deciding this question, our role, as with all statutory interpretation, is to give effect to the intent of the Legislature. In ascertaining such intent, section headings and titles may be used as an aid, and words and phrases must be understood according to their common usage....

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contexts. The word 'is an elastic term with many different shades of meaning.'")

<sup>15</sup> *Cubler v. Trumark Fin. C.U.*, 83 A.3d 235 (Pa. 2013)

<sup>16</sup> Pennsylvania's version of the U.C.C. is identical to South Carolina's.

<sup>17</sup> *Cubler*, *supra* at 238.

[T]he drafters included this language [“in any event” and “designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted”] in the Official Comment, and removed the requirement for an aggrieved debtor/obligor [in a consumer goods transaction] to prove actual damages in order to recover statutory damages under § 9-625(c)(2), in recognition of the inherent difficulty for a claimant to quantify and prove actual damages. *See, e.g.*, 13 Pa. § 9-625(b) (providing that “[l]oss caused by a failure to comply with this chapter...may include loss resulting from the debtor’s inability to obtain, or increased costs of, alternative financing.”)....

We must provide “substantial weight” to the fact that, in drafting section 9-625, the General Assembly specifically chose to use the word “[r]emedies” in the heading of the statute. Furthermore, the relevant provisions involved in this case, 13 Pa.C.S.A. §§ 9-625(c)(2) and (e)(5), both specifically provide for “recover[y]” of “statutory damages.” *Id.* Importantly, *the language of section 9-625 does not contain any reference to penalties of any sort.* Accordingly, it would be anomalous for this Court to declare that a statute that the General Assembly has specifically designated as being *remedial*, and which expressly provides for *recovery of statutory damages*, is, in fact, a civil penalty or forfeiture.

Moreover, a determination that the statutory damages provided for in section 9-625 are intended to be compensatory and not penal in nature is supported by section 1-305 of the UCC [formerly § 1-106]. Section 1-305 provides that “neither consequential or special damages *nor penal damages may be had except as specifically provided* in this title or by other rule of law.” 3 Pa.C.S.A. § 1-305(a) (emphasis added).

Furthermore, section 9-625 provides a damages formula that is expressly linked to the aggrieved party’s *injury*, not to the degree of the offending party’s culpability, which is a feature inherent in penalties. *See, e.g.*, 13 Pa.C.S.A. § 9-625(b) (providing that “a person is liable for damages in the amount of any loss caused by a failure to comply with this division”); *id.* § 9-625(c)(2) (providing that an aggrieved [consumer] debtor/obligor is entitled to an award “not less than the credit service charge plus 10% of the principal amount of the obligation or the time price differential plus 10% of the cash price.”).

Finally, even if the imposition of statutory damages under section 9-625 may have the effect of encouraging compliance with the provisions of Article 9, the General Assembly intended such damages to serve primarily to compensate aggrieved claimants, not as a penalty against offending parties.

The trial court sought to support its determination that the General Assembly drafted section 9-625 with the intent to punish offending parties and incentivize compliance with the provisions of Article 9 of the UCC, rather than to compensate aggrieved parties for their losses, by pointing to the following Official Comment to section 9-625:

Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is...designed to ensure that every non-compliance with the requirements of Part 6 in a consumer-goods transaction results in liability, *regardless of any injury that may have resulted*.

13 Pa.C.S.A. § 9-625, cmt. ¶ 4 (emphasis added); *see also* Trial Court Opinion, 4/4/13 at 7.<sup>[18]</sup>

We find the trial court's interpretation of this Official Comment to be misguided. As stated above, the plain statutory text of section 9-625 reveals that its remedies are compensatory; the statute contains no language suggesting that it is primarily "penal." Concerning the language "regardless of any injury that may have resulted" used in the above-mentioned Official Comment, the drafters of section 9-625 did not include this language to express an intent for section 9-625 to serve as a penalty for creditor non-compliance regardless of the debtor's/obligor's injury. Rather, the drafters included this language in the Official Comment, and removed the requirement for an aggrieved [consumer] debtor/obligor to prove actual damages in order to recover statutory damages under section 9-625, in recognition of the inherent difficulty for a claimant to quantify and prove actual damages. *See, e.g.*, 13 Pa.C.S.A. § 9-625(b) (providing that "[l]oss caused by a failure to comply may include loss resulting from the debtor's inability to obtain ... alternative financing"); *accord In re Koresko*, 91 B.R. 689, 699 (Bankr.E.D.Pa. 1988) (analyzing the predecessor statute to section 6-925 and pointing out that one injury that might flow from an insufficient motor vehicle repossession notice, but is difficult for the debtor/obligor to prove, is the lost opportunity to attend the sale and affect any deficiency resulting from a sale of the vehicle for less than its fair market value).

*Cubler v. Trumark Fin. C.U.*, 83 A.3d. at 240-42 (internal citations omitted).

### **C. The U.C.C. Does Not Allow Penalties**

The trial court's ruling also runs counter to other provisions of the U.C.C. The U.C.C. provides its own rules of construction. *U.C.C. Article 1, Part 1. Short Title, Construction, Application and Subject Matter of the Act*. Importantly, among those provisions in Article 1, is Section 36-1-106, entitled "*Remedies to be Liberally Administered*":

The remedies provided by this title must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special damages *nor penal damages may be had except as specifically provided* in this title or by other rule of law.

*Section 36-1-106(a)* (emphasis added).

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<sup>18</sup> In this case, *see, Trial Court Opinion*, 4/29/13, at 3.

Neither Appellee nor the trial court has identified any part of Article 9 where penal damages have been “specifically provided” for, and of course they have not been. Further, the U.C.C. Official Comment makes clear that “remedies are to be liberally administered” but “do not include...penal damages.” *Official Comment 1 to § 36-1-106.*

The Official Comment states that another purpose of the Code is “to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit.” *Id.* This is consistent with the statutory damages calculation contained in § 36-9-625(c)(2) based on the loan amount and rate of interest charged. The formula recognizes the difficulty of calculating actual damages involving “loss resulting from the debtor’s inability to obtain ... alternative financing,” etc., (*see, In re Koresko, supra*) and factors such as the that the consumer debtor’s collateral (*e.g.*, an automobile) might well be located at a private “dealer’s auction” hundreds of miles away.

Finally, penal statutes require a strict construction. Finding an unexpressed intent to create a civil penalty in the U.C.C. sections under discussion would not only do violence to the rules of statutory construction, it would conflict with the Code’s expressed goal of “negat[ing] the possibility of unduly narrow or technical interpretations of remedial provisions,” to ensure a liberal construction and application of those provisions. *Section 36-1-106. Official Comment.*

In the face of extraordinarily clear text and Official Comments negating any legislative intent to create a penalty, but clearly expressing an intent to provide a compensatory remedy, the trial court erred by holding that the § 36-9-625 “minimum damages” is a “civil penalty or forfeiture.”

**D. A “Penalty” Is a Defined Term in the Law Which Does Not Describe the Remedy Provided by § 36-9-625(c)(2)**

Section 36-9-625(c)(2) does not constitute a “penalty.” It has long been recognized that a “penalty” is a term of art, referring to a law in which:

*‘the wrong sought to be redressed is a wrong to the public’ rather than ‘to the individual,’ that is, a law ‘punish[ing] an offense against the public justice of the state’ as opposed to ‘afford[ing] a private remedy to a person injured by the wrongful act ....’*

*Huntington v. Attrill*, 146 U.S. 657, 668-674 (1892).

*See also, Tull v. United States*, 481 U.S. 412, 422, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (Penalties are “intended to punish culpable individuals,” not “to extract compensation or restore the status quo.”) “[C]ivil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior.” A civil penalty is a “punishment by way of a pecuniary exaction

from the offender..., imposed and enforced by the state for a crime or offense against its law...without regard to the actual damage sustained, as a form of punishment.” 36 Am.Jur.2d *Forfeitures and Penalties*, § 2 (2013).

**E. *The Trial Court’s Assertion that Other Courts Have Held that the U.C.C. § 9-625(c)(2) Remedy is a “Penalty” Overstates the Facts***

The trial court cites only one decision supporting the conclusion that the § 36-9- 625(c)(2) remedy is a “penalty.” This is apparently because there is only one case supporting that conclusion.

*Beard v. Vanderbilt Mortg. & Fin., Inc.*,<sup>19</sup> an unappealed federal district court decision predicting that the state courts of Tennessee would construe § 9-625(c)(2) as a “penalty” rather than as compensation for consumer debtors, *i.e.*, as remedial, is virtually the *only* decision from *any* jurisdiction supporting the trial court’s decision. The *Beard* decision provides no analysis of Article 9, nor does the court engage in anything which might be called statutory construction. In fact, the opinion ignores overwhelming evidence of the legislature’s intent that § 9-625(c)(2) be remedial and compensatory, rather than penal. *See, Part IV, A-D, supra.*

The opinion is flawed in the very same ways as the trial court’s opinion here - it relies only on labels yet ignores plain statutory language. The *Beard* court based its prediction on *dicta* from lower Tennessee courts, in particular an intermediate appellate court case, *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 31 (Tenn. Ct.App. 1991), none of which addressed the “penalty” versus “damages” or statute of limitations issues. Instead, like our Supreme Court, the Tennessee state courts simply loosely and interchangeably labeled the Article 9 remedy “damages” and/or a “penalty.” *Beard* at \*3.

By contrast, for example, both in terms of reasoning and result, the district court in *Jenkins v. Hyundai Motor Financing Co.*, 389 F.Supp.2d 961 (S.D. Ohio 2005) held that Ohio’s version of § 9-625(c)(2)<sup>20</sup> was not subject to a one-year statute of limitations period for “an action upon a statute for a penalty or forfeiture.” *Hyundai* argued that the purpose of Ohio’s version of § 9- 625(c)(2) was “to penalize noncompliance with the statute, not to compensate injured consumers.” *Id.*, at 971.

Observing that “[m]ost legislation ‘has a dual purpose of remedying harm to the individual and deterring socially inimical business practices...,’” the court concluded that it must “determine whether *the primary purpose* of the Act is more like a penalty or a remedial action.” *Id.*, 389 F.Supp.2d at 972. Conceding that Ohio’s courts, including the Supreme

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<sup>19</sup> 2008 WL 2323235 (M.D. Tenn. June 2, 2008)

<sup>20</sup> Like Tennessee’s, Ohio’s version of Part 6 of Article 9 is identical, in all material respects, to South Carolina’s.

Court, had acknowledged the penal aspects of the statutory damage award, the *Jenkins* court nevertheless observed that § 9- 625 “include[s] both remedial and penal/forfeiture aspects.” *Id.*

The court also noted that a consumer debtor has the option under § 9-625 of *electing either* actual damages *or* minimum statutory damages. Finally, the court noted that the U.C.C.’s underlying policies include the clearly remedial goal that an “aggrieved party may be put in as good a position as if the other party had fully performed,” and the non-punitive principle that “neither consequential or special nor penal damages may be had except as specifically provided in those chapters or by other rule of law.” *Id.*<sup>21</sup>

As a result, after carefully weighing each factor, the *Jenkins* court declined to limit the salutary effect of the statute by imposing the restrictive “penalty and forfeiture” one-year limitations period in order to ensure that an “aggrieved party may be put in as good a position as if the other party had fully performed.” *Id.*, at 972.

In conclusion, the trial court’s statement in this case that “because S.C. Code Ann. § 36-9-625(c)(2) is based on a uniform UCC model statute, other courts have also examined the appropriate classification of this statutory award,” while true, does not support the result the court reached.

**III. BECAUSE THE PROVISIONS OF ARTICLE 9, PART 6 OF THE U.C.C. ARE IMPOSED BY LAW UPON EVERY SECURED TRANSACTION COVERED BY ARTICLE 9 AND BECOME TERMS OF THE SECURITY AGREEMENT, A BREACH OF THE ARTICLE 9 NOTICE REQUIREMENTS IS A BREACH OF THE CONTRACT. ACCORDINGLY, THE STATUTE OF LIMITATIONS APPLICABLE TO APPELLANT’S CAUSE OF ACTION IS PROVIDED BY U.C.C. § 36-2-725.**

The statutory damage remedy provided by U.C.C. § 36-9-625(c)(2) is an elective alternative to provable actual damages. It is nevertheless an *ex contractu* remedy, based on and arising from the contractual relationship between the parties.

Appellant’s claim arises out of a contract for the sale of an automobile. That contract contains a security agreement which was the basis for Appellee’s repossession and disposition of that automobile following Appellant’s alleged default under the terms of the contract. Compliance with the notice requirements of Article Nine of the U.C.C. is incumbent on a secured creditor enforcing its rights under a contract which contains a security agreement. Failure to comply with the requirements of Article Nine is a breach of

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<sup>21</sup> *Cf. Cubler, supra*, 83 A.2d at 241 (“Finally..., even if the imposition of statutory damages under section 9-625 may have the effect of encouraging compliance with the provisions of Article 9, the General Assembly intended such damages to serve primarily to compensate aggrieved claimants, not as a penalty against offending parties.”)

the contract. *See, Weaver v. American National Bank*, 452 So.2d 469 (Ala. 1984):

The requirements of 7-9-504(3) are imposed by law upon every secured transaction covered by Article 9 of the U.C.C. Ala. Code (1983 Supp.) 7-9-504(3). By statute, they become terms of the security agreement. Breach of the notice requirement is breach of the contract. Therefore, the action under 7-9-507(1) for damages for violation of these requirements is, in essence, a suit for breach of contract.

*Id* at 474. *See also, In re Coleman*, 2007 WL 1526651 (Bankr. N.D.Ala. May 24, 2007) where the United States Bankruptcy Court for the Northern District of Alabama recognized the applicability of *Weaver* to the revised Code:

Section 7-9A-614 is a relatively new UCC section that replaced former *Ala. Code* 7-9-504(3) when the new article took effect January 1, 2002. As yet, there is no published Alabama appellate court case law interpreting Sections 7-9A-614 and/or 7-9A-625. However, state courts previously interpreted suits arising under Section 7-9-504, along with other UCC complaints, as being contract actions.<sup>22</sup>

Coleman's notice rights under the UCC became part of the terms of the original contract between the debtor and its secured creditor, CPS. Both claims, CPS' U.C.C. deficiency claim and Coleman's U.C.C. notice claim, arose out of the same contract and the same series of transactions. *Coleman, supra* at \*4. *See also, Restatement (Second) Judgments* § 24 (1984) (Claims are part of the same cause of action when they arise out of the same transaction or series of transactions). As stated by the Eleventh Circuit in [*Wallis v. Justice Oaks [II, Ltd]*], 898 F.2d [1544,] at 1551: "Claims are part of the same cause of action when they arise out of the same transaction or series of transactions."

The cause of action provided by § 36-9-625 arises out of and is part of the same series of transactions which gives rise to the original purchase being financed and the right of the conditional buyer to repossess the collateral upon the conditional buyer's default. Accordingly, the statute of limitations applicable to the § 36-9-625 claim is provided by § 36-2-725 of the U.C.C., Sales of Goods.

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<sup>22</sup> *Coleman* involved the application of claims preclusion as the result of a debtor's failure to disclose her § 9-625(c)(2) claim in her Chapter 13 bankruptcy schedules. The bankruptcy court granted the creditor's motion to enjoin Coleman's state court § 9-625(c)(2) action.

## CONCLUSION

The cause of action given a conditional buyer and its guarantor in a consumer goods transaction for the failure of the conditional seller, following repossession of the collateral securing the debt, to provide the notice required by the Uniform Commercial Code prior to disposition of the collateral cannot possibly accrue until disposition of the collateral.

The U.C.C. contemplates revision of notices required by § 36-9-614 prior to disposition of collateral, providing clear evidence that the drafters and legislators enacting the statute intended that the cause of action in § 36-9-625 not accrue prior to disposition.

The statute of limitations for an action runs from the moment a party first has the right to bring the action. Appellant's right to sue Appellee accrued when the latter sold Appellant's motor vehicle collateral without first having provided the notice required by § 36-9-614. That date was less than three years prior to the date Appellant filed this action.

The Uniform Commercial Code expressly disclaims penalties; reserving its remedies to compensating a party to the extent necessary to make a party whole, *i.e.*, to place a party in the position it would be in had the other party fully performed its obligations under the contract. It is, therefore, contrary to the intention of the drafters of the U.C.C., as well as the legislature enacting it, to construe § 36-9-625 as a penalty.

The language of the U.C.C., including the Official Comments, militates decidedly against a construction of § 36-9-625 as a penalty. *Obiter dictum* and the use of imprecise labels by other courts provide no basis for statutory construction.

Only one court, aside from the trial court in this case, has construed § 36-9-625 as a penalty. Both the trial court here, and the single other court to agree with the trial court's conclusion, reached that conclusion with no analysis of the policies informing the statute, based on the use of superficial labels by courts not considering the issues raised by their use of such labels.

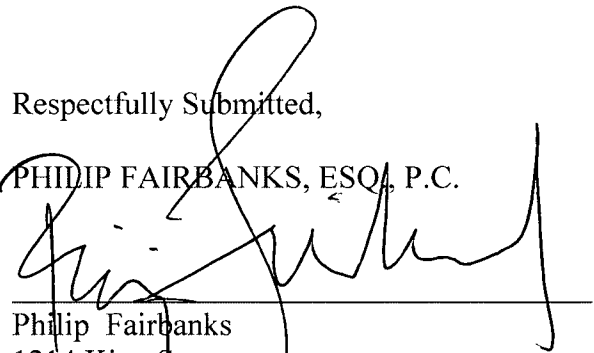
Courts considering the issue and the Restatement (Second) of Judgments hold that claims are part of the same cause of action when they arise out of the same transaction or series of transactions. The cause of action provided by § 36-9-625 arises out of and is part of the same series of transactions which gives rise to the original purchase being financed and the right of the conditional seller/secured party to repossess the collateral upon the conditional buyer's default. Accordingly, the statute of limitations applicable to the § 36-9-625 claim is provided by § 36-2-725 of the U.C.C., Sales of Goods.

For the foregoing reasons, the lower court committed reversible error when it granted Appellee's motion to dismiss Appellant's case.

Dated: February 9, 2015

Respectfully Submitted,

PHILIP FAIRBANKS, ESQ., P.C.



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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

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Case No. 2011-CP-07-7166

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OTHA DELANEY ..... Appellant,

-vs-

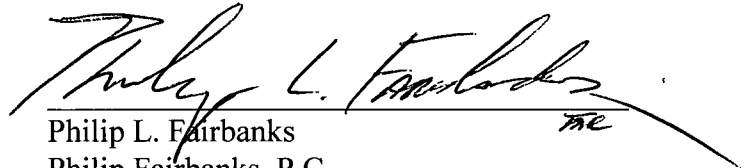
FIRST FINANCIAL OF CHARLESTON, INC. .... Respondent.

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), South Carolina Appellate Court Rules.



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Dated: February 25, 2015

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MAR 02 2015

**SC Court of Appeals**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 9, 2015, I filed the foregoing document with the Clerk of the Court, as follows:

**MOTION FOR ENLARGEMENT OF TIME TO  
SERVE AND FILE FINAL APPELLANT'S BRIEF**

and

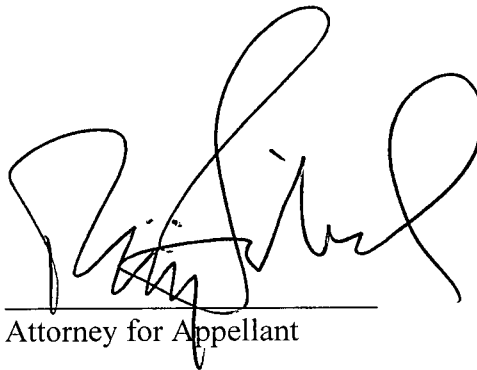
**FINAL APPELLANT'S BRIEF**

And that the foregoing documents are being served this day on:

FIRST FINANCIAL OF CHARLESTON

by placement of true copies thereof in the United States mail, first class postage pre-paid, and addressed a follows:

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