THE STATE OF SOUTH CAROLINA
In the Supreme Court
On Certiorari to the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442 (S.C. Ct. App. filed Sep. 28, 2016)

Appellate Case No. 2017-000683

OTHA DELANEY, ... PETITIONER

v.

FIRST FINANCIAL OF CHARLESTON, INC., ... RESPONDENT

PETITIONER'S INITIAL BRIEF

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1. **The Court of Appeals erred in ruling that the limitations period for Petitioner Delaney's cause of action under § 36-9-611(b) against Respondent First Financial accrued at notification of disposition rather than disposition.**

2. **Petitioner Delaney's cause of action under § 36-9-611(b) is not controlled by the one-year statute of limitations at § 15-3-570.**

STATEMENT OF THE CASE

On October 12, 2007, Petitioner Otha Delaney ("Delaney") entered into a purchase money security agreement, entitled the "Retail and Installment Sales Contract" (or "RICSA"), to finance his purchase of a used 2003 Chevrolet pick-up truck from the dealer.[1] R. p. 28-29. The pick-up truck was purchased for Delaney's own "personal, family or household use." R. p. 30 ¶ 9. The RICSA was subsequently assigned to Respondent First Financial of Charleston, Inc. ("First Financial") R. p. 22, ¶ 10. Accordingly, the RICSA created a "secured transaction" under Article 9 ("Secured Transactions") of South Carolina's Uniform Commercial Code ("UCC")[2]; the pick-up truck was "consumer-goods collateral" as defined by Article 9[3]; Delaney was the "debtor" to that transaction[4]; and, First Financial was the "secured party."[5]

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1 *See*, S.C. Code Ann. § 36-9-103 (2003) defining "purchase money security agreement."

2 "Although the South Carolina Code refers to sections of the SCUCC as 'Chapters' rather than 'Articles,' we use the term 'Article' to maintain uniformity with language used in the Uniform Commercial Code and cited authority." *Coastal Federal Credit Union v. Brown,* 417 S.C. 544, 790 S.E.2d 417 n. 3 (SC App. 2016); *see,* S.C. Code Ann. 36-9-109 (2003) defining "secured transaction."

3 *See,* S.C. Code Ann. § 36-9-102(23) (2014) defining "consumer goods"; § 36-9-102(12) defining "collateral."

4 *See,* S.C. Code Ann. § 36-9-102(28) defining "debtor."

5 *See,* S.C. Code Ann. § 36-9-102(72) defining "secured party."

Following Delaney's default under the terms of the RICSA, First Financial sent Delaney a notification entitled "Notice of Private Sale of Collateral" (the "Notice") dated May 2, 2008, notifying him of its plan to sell the repossessed collateral at a private foreclosure sale after ten days from the date of the Notice. R. p. 31. On December 15, 2008, First Financial sold the pick-up truck. R. p. 23, ¶ 12.

Delaney filed his Complaint against First Financial on October 3, 2011, approximately three years and seven months after the date of the Notice, but less than three years after First Financial's sale. R. p. 21-27. In his lawsuit Delaney asserted a single, statutory cause of action under Article 9 of the UCC, alleging that First Financial was required to send a debtor such as himself "'a reasonable authenticated notification of disposition[.]'" R. p. 24, ¶ 24, quoting S.C. Code Ann. §36-9-611(b) (2003). This section provides in relevant part: "a secured party that disposes of collateral under Section 36-9-610 shall send to [the debtor and any secondary obligor] ...a reasonable...notification of disposition."

Delaney alleged that First Financial sold his truck "without providing notice of its proposed disposition in compliance with the applicable sections of the South Carolina UCC." R. p. 26, ¶ 25. He more specifically alleged that the Notice First Financial sent to him was not "reasonable notification" as contemplated by § 36-9-611(b) because it failed to include the information specified by S.C. Code Ann. § § 36-9-613, 614 (2003), which mandate specific content for § 36-9-611(b) notifications in consumer-goods transactions. R. p. 23, ¶ 13. He sought an award under Article 9 of "minimum statutory damages" per S.C. Code Ann. § 36-9-625(c)(2) (2003), applicable to secured party non-compliance with respect to consumer-goods transactions. R. p. 23, ¶ 22.

On April 29, 2013, the trial court granted First Financial's Motion to Dismiss on grounds that Delaney's claim was untimely. R. p. 8-9. The trial court ruled that for limitations purposes,

his claim accrued at the time the secured party sent him notification before disposition, not when it subsequently disposed of the collateral. R. p. 9-10. Because the accrual event (the date of notification) occurred more than three years before Delaney filed suit, the trial court also ruled that it need not decide whether his claim is controlled by a one-year or a three-year statute of limitations as the claim was time-barred under both. R. p. 8-9. Following the trial court's subsequent denial of Delaney's reconsideration motion, he timely appealed that decision. R. p. 11-19.

In a divided panel decision filed September 28, 2016, the Court of Appeals affirmed the trial court's ruling, agreeing that a debtor's cause of action under § 36-9-611(b) accrues at the time the secured party sends the debtor notification before disposition, not at disposition. R. 184-199. ("We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral." R. p. 193.) The Court of Appeals ruled that notification is the appropriate accrual event because it did "not believe that disposition of collateral is a prerequisite [for the secured party] to be penalized for failing to give reasonable notice" as required by that section. R. p. 194.

The Court of Appeals also ruled that because the statute of limitations accrues when the secured party sends notification, it need not decide whether Delaney's claim is controlled by a three-year or a one-year limitations statute as his claim is time-barred under both. R. p. 192. The Court of Appeals recognized that if Delaney's claim accrued at disposition instead, as Delaney and the dissent maintained was the correct interpretation of the statute, his claim would still be timely under a three-year but not a one-year limitations statute. ("Under the three-year statute of limitations, Delaney's complaint was untimely filed unless the accrual date is the date First Financial sold the vehicle rather than the date of the notice of sale." R. p. 192.)

Delaney timely filed his Petition for Rehearing on November 18, 2016, which was denied by the Court of Appeals on February 16, 2017. R. p. 209-210, 235. On March 20, 2017, Delaney timey filed his Petition for Certiorari to the Court of Appeals which was granted by Order of this Court on March 28, 2018. This briefing follows.

ARGUMENT

INTRODUCTION

The facts of this case are not in dispute, and the parties and the Court of Appeals agree that Article 9 of the UCC is applicable to both Delaney's cause of action under § 36-9-611(b) and his statutory damages remedy under § 36-9-625(c)(2) as alleged in his Complaint.

As the dissent and the majority opinion recognized, whether his cause of action is time-barred turns on whether a debtor's claim accrues at the time the secured party sends notification of disposition rather than at disposition, a matter of statutory interpretation. R. p. 192. If the Court of Appeals erred in ruling that his claim accrues at notification, as Delaney respectfully submits that it did, the next question is whether his claim is controlled by a three-year or a one-year limitations statute, a question which both the trial court and the Court of Appeals found unnecessary to reach as the accrual question was dispositive of the Motion to Dismiss.[6] Inasmuch as this second question is a pure question of law as all facts including the date of sale are agreed upon as a matter of record, this Court may decide that question without remand in the interest of judicial economy.[7] Accordingly, Delaney requests this Court to rule that his § 36-9-611(b) claim

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6 *See, Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (SC 1999). "A court need not address remaining issues when resolution of a prior issue is dispositive."

7 *Wachovia Bank of S.C. v. Player*, 341 S.C. 424, 428, 535 S.E.2d 128, 130 (2000) (reversing the decision of the Court of Appeals' holding that master lacked jurisdiction, but addressing the merits of petitioner's appeal "in the interest of judicial economy"); *see also Woodson v. DLI Props., L.L.C.*, 406 S.C. 517, 528 n. 10, 753 S.E.2d 428, 434 n. 10 (2014)("While remand to the court of appeals is appropriate, in the interest of judicial economy, we address the merits of whether summary judgment in favor of Respondents was proper.") (Pleicones, J., concurring); *State v.*

was timely filed because: (1) it accrued at disposition and (2) the one-year statute at S.C. Code Ann. § 15-3-570 (2005) is inapplicable.

I. THE COURT OF APPEALS ERRED IN RULING THAT THE LIMITATIONS PERIOD FOR DELANEY'S CAUSE OF ACTION UNDER § 36-9-611(b) ACCRUES AT NOTIFICATION RATHER THAN DISPOSITION.

A. The Plain Statutory Language of § 36-9-611(b) Requires a "Secured Party that Disposes of Collateral under § 36-9-610."

Here, the Court of Appeals correctly recognized that § 36-9-611(b) provided the applicable cause of action at issue: "Delaney's complaint alleges violations of the notice required prior to disposition of goods in a consumer goods transaction. *See,* S.C. Code Ann. § 36-9-611(b)[.]" R. p. 193. Interpreting a statutory cause of action begins with an examination of the plain wording of the statute at hand, to include the statutory scheme where applicable. *Gay v. Ariail,* 381 S.C. 341, 343, 673 S.E.2d 418, 420 (SC 2010) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning."); *Allen v. S.C. Public Employee Ben. Authority,* 411 S.C. 611, 617, 769 S.E.2d 666, 670 (SC 2015) (Statutory plain language is controlling such that a court may not apply a tortured or illogical reading of the statute.); *Wade v. Berkley County,* 348 S.C. 224, 229, 559 S.E.2d 586, 588 (SC 2002) (Only when a statute's language gives rise to doubt or uncertainty as to legislative intent may the construing court search for that intent beyond the borders of the statute itself.)

Here, the statutory scheme at Article 9 permits, but does not require, a secured party to dispose of a debtor-in-default's collateral to protect its interest in the collateral: "After default, a

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Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (finding issue preserved and addressing the merits of the issue "in the interest of judicial economy.") (Pleicones, J., concurring).

secured party *may* sell, lease of otherwise dispose of any or all of the collateral[.]" § 36-9-610(a) ("*Disposition of collateral after default*".) (emphasis added.)

The following section, the source of Delaney's cause of action against First Financial, unambiguously provides in plain language:

> (b) [A] secured party *that disposes of collateral under § 36-9-610* shall send to the persons specified in subsection (c) ["the debtor" and "any secondary obligor"] *a reasonable* authenticated *notification of disposition.*

§ 36-9-611(b) ("*Notification before disposition of collateral.*") (emphasis added.)

Therefore, Delaney's cause of action under § 36-9-611(b) does not require *all* secured parties to send a reasonable notification to the defaulting debtor, or even *all* secured parties that plan to dispose of defaulting debtors' collateral under § 36-9-610, but only those secured parties "*that dispose of collateral* under Section 36-9-610." While all secured parties have the right to dispose of the defaulting debtor's collateral under § 36-9-610, it is only those that exercise their rights under this section – to become "a secured party that disposes of collateral under Section 36-9-610" – who are statutorily required to send the debtor "reasonable...notification of disposition of collateral."

Conversely, when a secured party does *not* dispose of collateral under § 36-9-610, it has no duty under the plain wording of § 36-9-611(b) to send "reasonable...notification of disposition" to anyone. Under such circumstances, the secured party cannot fail to comply with § 36-9-611(b), no matter how unreasonable the pre-disposition notification, because it simply is *not* a "secured party that disposes of collateral." Prior to disposition, the secured party may plan, wish, or intend to dispose of the debtor's collateral in the future. Until the post-notification disposition actually occurs, however, there is no "secured party that disposes of collateral under Section 36-9-610" yet

in existence.[8] As will be discussed at Argument I. B., *infra,* this in turn means that a debtor's cause of action under § 36-9-611(b) does *not* accrue for limitations purposes until there is a secured party "that disposes of collateral under § 36-9-610" against whom to assert his legal claim.

The legislature's choice of the present tense in the statutory text – "a secured party that *disposes* of collateral under § 36-9-610 shall send reasonable notification" and not the use of the conditional, such as "any secured party that *may dispose* of collateral under section 36-9-610 shall send reasonable notification" – is clear, unambiguous, and dispositive. Under the Court of Appeals' misreading of § 36-9-611(b), the section now apparently means "a secured party *that is authorized to dispose collateral under § 36-9-610 shall send the debtor reasonable notification of disposition.*" This misreading of § 36-9-611(b) was reversable error.

Delaney also submits that this misreading of the statute does not conform to the plain meaning of the caption to § 36-9-611(b): "Notification before *disposition.*" (emphasis added.) The caption is thus clear that the text involves a "notification," that applies "before" disposition, and that there must be a subsequent, post-notification "disposition" and not merely a plan for disposition – as the caption does not read: "Notification before *planned* (or "desired," "intended," "anticipated" or "proposed") disposition." UCC section captions are part of the enacted text and therefore cannot be cannot be ignored or read out of the statute. ("Section captions are a part of the text of the Uniform Commercial Code[.]" S.C. Code Ann. § 36-1-109.) Here, it would be odd for the legislature to enact a caption that expressly conforms to the textural language requiring a "a secured party that disposes of collateral" if the disposition was not an express, material element of that statute.

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[8] There are many reasons a noticed disposition does not occur, such as when the debtor timely redeems the collateral by paying off the debt. A debtor may also be allowed to cure the default by paying the arrearages and continuing to pay the debt as per the terms of the contract.

Finally, the South Carolina Reporter's Comments are consistent that the secured party's obligation to send reasonable notification is applicable only with respect to secured parties that dispose of collateral: "Section 36-9-611 imposes a notification requirement upon secured parties *who dispose of collateral under § 36-9-610.*" S.C. Reporter's Comments to § 36-9-611 (emphasis added.) While the majority opinion discusses § 36-9-611(b) at length, it never addresses the exact statutory language at issue providing "a *secured party that disposes of collateral under § 36-9-610* shall send...reasonable...notification of disposition." R. p. 193-194. Nor does it address the concept that this plain and unambiguous language is controlling on the question of accrual.

Also relevant to this case, § 36-9-611(b) does not define a "reasonable notification" or include any rules for determining reasonableness. Instead, as the Official Comments point out, the reader is to turn to the next three UCC sections to determine what is "reasonable" notification under § 36-9-611(b):

> 2. *Reasonable Notification...* The notification must be reasonable as to the manner in which it was sent, its timeliness (*i.e.*, a reasonable time before the disposition is to take place) and its content. See Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer goods transactions.)

Cmt. 2, Official Comments § 9-611.

Therefore, a debtor who alleges that the secured party failed to send him reasonable notification, because the notification's contents did not contain the information required by § § 36-9-613, 614 as Delaney has alleged in this case, must still prove all elements of his cause of action under § 36-9-611(b): (1) that there was a "secured party that disposed of collateral under § 36-9-610," (2) which failed to send him a "reasonable notification of disposition" (3) and, because in this case, the notification was unreasonable due to legally insufficient contents under § § 36-9-613, 614.

As the Official Comments to § § 36-9-613, 614 sections inform, the applicable content sections *only* apply when the secured party is required to send § 36-9-611(b) notification in the first place: "To comply *with the 'reasonable notification' of Section 9-611(b)*, the contents of a notification must be reasonable." Cmt. 2, Official Comment to UCC § 9-613. (emphasis added.) UCC § 9-614 thus "sets forth the information required for a *reasonable notification*[.]" Cmt. 2, Official Comment to UCC § 9-614. (emphasis added.) Neither § 36-9-613 nor § 614 mentions the secured party or the debtor or a secondary obligor. Unless read within the context of § 36-9-611(b)'s requirements, neither content statute imposes any obligation upon any secured party to send compliant contents to any debtor or secondary obligor. Therefore, a secured party cannot fail to comply with § § 36-9-613, 614 unless the secured party is required to comply with § 36-9-611(b) – which in turn requires "a secured party that disposes of collateral under § 36-9-610."[9]

Accordingly, Delaney submits that the Court of Appeals erred in ruling that § 36-9-611(b) does *not* require a "secured party that disposes of collateral" as a "prerequisite for [the secured party] to be penalized for failing to give [the] reasonable notice" as required by that section. R. p. 194.

B. The Statute of Limitations for Delaney's Cause of Action under § 36-9-611(b) Accrues at Disposition Because His Claim Is Not "Complete and Present" until Disposition.

South Carolina applies what the Supreme Court calls "the standard rule" for determining when a plaintiff's claim accrues:

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[9] When no disposition had occurred at the time the consumer debtor brought his case alleging the secured party's failure to provide notification consistent with UCC § § 9-613, 614, the trial court ruled that his claim seeking statutory damages for such failure was not actionable, because § § 9-613, 614 must be read "in context" of the requirements of UCC § 9-611(b), which applies only when collateral is disposed of by the secured party, and not to a "hypothetical" sale. *Vazquez v. Karjanis & Sons Motors, LLC.*, 2012 WL 696392, at * 3 (Conn. Sup. Ct., New Haven Dist., Dec. 12, 2012).

> The most helpful canon in this context is the "the standard rule" for limitations periods...Ordinarily, a limitations period commences *when the plaintiff has a complete and present cause of action.* "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can obtain relief[.]"

Green v. Brennan, ___U.S.___, 136 S.Ct. 1769, 1776 (2016) (internal citations omitted) (emphasis added); *Stephens v. Draffin,* 327 S.C. 1, 4, 488 S.E.2d 307, 309 (SC 1997) (A cause of action accrues at the moment a plaintiff has a legal right to sue on it; the law presumes damages at that point; and, the fact that substantial damages did not occur until later is immaterial to determining when the cause of action accrued or arose.); *Walsh v. Woods,* 358 S.C. 259, 264, 504 S.E.2d 548, 551 (Ct. App. 2004) ("In analyzing a limitations defense, the fundamental test for determining when a cause of action accrued is whether the party asserting the claim can maintain a legal action to enforce it. Thus a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it.") Here, Delaney's cause of action against First Financial due to its alleged non-compliance with § 36-9-611(b) was not "complete and present" until there was a "secured party that disposes of collateral under Section 36-9-610" against whom he could "maintain a legal action." *Walsh v. Woods, id.*

In addition to misreading the plain wording of the statute, the Court of Appeals' interpretation is inconsistent with Comment 8 to UCC § 9-611(b):

> 8. *Failure to Conduct Notified Disposition*...Nor does this Article prevent a secured party from electing to send a revised notification if its plan for disposition changes. 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.

Cmt. 8, Official Comments to UCC § 9-611 (emphasis added.)

This Comment makes no sense if the cause of action accrues at notification. If that were the case, the secured party would have no opportunity to send a revised, reasonable notification

when its statutory non-compliance was already "complete and present." Of particular note, the three express conditions permitting the secured party to send revised notification (secured party good faith, a revised notification that is reasonable, and a commercially reasonable plan) do *not* include the requirement that the first notification be reasonable. Therefore, under this Comment a non-reasonable, first notification may be followed by a reasonable, revised notification – provided the three conditions are all met. Since it is the disposition, and not a prior notification, that cuts of the secured party's right to send a revised notification, Comment 8 makes clear that it is the "disposition," and not the non-reasonable notification, that is the last essential event or element for the debtor's cause of action to fully accrue.

C. Official Comment 2 to § 36-9-611 Does Not Eliminate the "Disposition" Element of that Statute.

Argument I. C-D, *infra,* turns to the specific places in the UCC texts and Official Comments upon which the Court of Appeals relied in ruling that § 36-9-611(b) accrued at notification rather than the statutory text. The Court of Appeals stated it was relying upon the emphasized sentence below, found within Comment 2 of the Official Comments to UCC § 9-611, to support its position that notification is the correct accrual event:

> 2. Reasonable Notification. *This section requires a secured party who wishes to dispose of collateral to send a "reasonable authenticated notification of disposition."* The notification must be reasonable as to the manner in which it was sent, its timeliness (i.e., a reasonable time before notification), and its contents.

Cmt. 2, Official Comment to UCC § 9-611 (emphasis added.)

The Court of Appeals interpreted this sentence as authority to disregard the statutory text requiring "a secured party that disposes of collateral" and instead, to rule that the debtor's claim for damages is actionable at notification provided the secured party had the requisite intent or desire to dispose of the collateral in the future: "Comment two does not state that the secured party

must actually dispose of the collateral to be required to send reasonable notification; it *simply requires that the secured party 'wish' to dispose of collateral."* R. p. 194 (emphasis added.) And, "if the secured party initially wishes to dispose of the property, the secured party must provide the appropriate notice. Therefore, we do not believe that disposition is a prerequisite to [the secured party's] being penalized for failing to give reasonable notice." *Id.*

Delaney respectfully disagrees with this interpretation. The sentence at issue means that "reasonable notification" requires a secured party to send the appropriate notification during the time period when it "wishes" to dispose of collateral, a necessary step in meeting its statutory notification obligations which must apply "before" disposition. Otherwise, it will plainly miss its opportunity to do so. ("The notification must be reasonable as to…its timeliness (i.e., a reasonable time *before* notification[.])" Cmt. 2, Official Comment to UCC § 9-611) (emphasis added.) However, *it does not follow that failure to send reasonable notification by a secured party that merely "wishes" to dispose of collateral, absent a subsequent disposition, is sufficient to establish secured party non-compliance under § 36-9-611(b).* The text of the statute is clear that the disposition, which the secured party certainly may "wish" to occur when its sends notification, must thereafter actually occur – in order to create "a secured party that disposes of collateral under § 36-9-610."

Delaney also respectfully submits that the Court of Appeals' strained interpretation of Comment 2 is unnecessary when it can easily be interpreted consistent with the statutory language as suggested here. In any event, any interpretation inconsistent with the black letter text must yield to the express statutory language as the Official Comments are interpretive aids, but do not change

the enacted text.[10] The Court of Appeals provided no authority permitting a court to rewrite the text of UCC § 9-611 based upon its interpretation of this sentence lifted from Comment 2, or generally, for rewriting any unambiguous, UCC text.

D. The fact that a consumer debtor may seek a pre-disposition injunction under § 36-9-625(a) to restrain the sale of his collateral does not mean that his cause of action under § 36-9-611(b) accrues at notification when seeking statutory damages under § 36-9-625(c)(2).

In ruling that Delaney's § 36-9-611(b) claim accrued at notification, the majority opinion focused in part on the debtor's injunctive remedy under § 36-9-625(a) of the Article 9. In large part, this remedy is irrelevant to Delaney's claim as his Complaint does not seek injunctive relief, such as a court order enjoining the sale of his pick-up truck, nor does § 36-9-625(a) provide for the statutory damages which he does seek.

Sections such as § § 36-9-610 or 611 do not provide any remedies within the bodies of those sections; instead, all remedies are found at § 36-9-625. Therefore, Delaney seeks statutory damages under § 36-9-625(c)(2). On the other hand, § 36-9-625(a) does not provide for any type of money damages, but rather, "empowers a court to issue orders to compel a secured party to comply with the requirements of Article 9 in collecting, enforcing or disposing of collateral." S.C. Reporter's Comments to 36-9-625. (emphasis added.) This subsection provides:

> If it is established that a secured party *is not proceeding in accordance* with this chapter [Article 9], *a court may order or restrain* collection, enforcement, *or disposition of collateral* on appropriate terms and conditions.

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10 "The official comments to the UCC are not part of the UCC in the sense that they are not enacted by state legislatures adopting the UCC." 1 Anderson on the Uniform Commercial Code § 1-102.33 (3d. ed.) (Dec. 2016 update.) In applying Virginia UCC law, the Fourth Circuit noted that the Official Comments "are not binding authority upon the court;" rather, they are "instructive" and provide "valuable guidance." *Buettner v. R.W. Martin & Sons, Inc.*, 47 F.3d 116, 118 (4th Cir. 1995).

§ 36-9-625(a) (emphasis added.) As the Official Comment notes: "[U]nder subsection (a) an aggrieved person may seek injunctive relief[.]" Cmt. 2, Official Comment to UCC § 9-625.

In considering § 36-9-625(a), the Court of Appeals ruled:

> "It is clear that a party must be able to state a cause of action in order to request a court restrain disposition of the collateral. Therefore, *if Delaney could have asked a court to restrain disposition of his collateral, his cause of action* [under § 36-9-611(b)] *must have arisen upon his receipt of his noncompliant notice."*

R. p.194 (emphasis added.)

The Court of Appeals provided no UCC authority for its ruling that a debtor must be able to state a cause of action in order to request court-ordered restraint of disposition of his collateral, a ruling that is inconsistent with the language of § 36-9-625(a). In fact, the language of § 36-9-625(a), as well as the applicable Comments, indicate that the injunctive remedy permitting judicial restraint of sale of collateral applies *before* there is a cause of action under § 36-9-611(b) – since a court could not enjoin a foreclosure sale that has already taken place.[11] Therefore, when a secured party is engaged in ongoing behavior such that it "is not *proceeding in accordance* with this chapter," the "aggrieved" debtor may seek the court's intervention to compel the secured party's restraint of the sale. Accordingly, an injunction remedy under § 36-9-625(a) does *not* require the debtor to prove a statutory noncompliance by way of a consummated cause of action – only that the secured party "is not proceeding *in accordance* with this Chapter."

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11 "Section (a) would not appear to be applicable here. Under a plain meaning of the statute, that section would be applicable in circumstances where the secured party is proceeding to dispose of collateral and not in a situation where the disposition has already occurred. Since [the disposition] has already occurred, [debtor's] remedy, if it were shown that [secured party] did not comply with the requisite provisions of Article 9 [concerning UCC § 9-611(b) notification] would be an action for damages." *In re Enron,* 2005 WL 3873890, at * 9-10 (U.S.B.R. S.D.N.Y. June 16, 2005).

If, for example, the secured party were to provide notification of a proposed disposition plan that is not commercially reasonable, or if the secured party fails to send notification a reasonable time before disposition, which would prevent the debtor from being able to redeem his collateral or to find other buyers to do so, he may seek to enjoin the proposed sale which § 36-9-625(a) authorizes the court to grant.[12] If the secured party sent a notification which failed to provide information about how to redeem the collateral, admittedly necessary content information under § § 36-9-613, 614 for a § 36-9-611(b) "reasonable notification," the debtor could also seek to enjoin the sale until such information was provided, and thus compel the secured party's compliance with Article 9. These remedies could only apply *before* there is a "secured party that disposes of collateral," and thus before the cause of action under § 36-9-611(b) has accrued.

On the other hand, a consumer debtor's statutory damages remedy applies at a different point in time than when the secured party "is not proceeding in accordance" with Article 9. To recover statutory damages, he must prove that the secured party "failed [past tense] to comply with this part", that is, failed to comply with a section in Part 6 ("Default") of Article 9, such as § 36-9-611(b).

Section § 36-9-625(c)(2) provides:

> If the collateral is consumer goods, a person that *was* a debtor or secondary obligor at the time the secured party *failed to comply with this part* [*i.e,* Part 6, "Default"] may recover *for that failure* in any event in an amount not less than the credit service charge plus ten percent of the principal debt[.]

§ 36-9-625(c)(2) (emphasis added.) "Subsection (c)(2) provides a minimum, statutory damage recovery for a debtor and secondary obligor in consumer goods transaction. It is...designed to

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12 "If the secured party has failed to give proper notice prior to anticipated disposition, a court can issue a temporary restraining order prohibiting disposition for a time that is sufficient to allow an aggrieved debtor ...to redeem." *W. Lawrence, et al.,* Understanding Secured Transactions, 5th ed., § 19.01 (2012).

ensure that every noncompliance with the *requirements of Part 6* in a consumer goods transaction results in liability[.]" Cmt. 4, Official Comments to UCC § 9-625 (emphasis added.) Here, First Financial would *not* have "failed" to comply with the statutory "requirements of Part 6" at § 36-9-611(b), until and unless it was a "secured party that disposes of collateral under § 36-9-610."

Therefore, the fact that a debtor may have a remedy for pre-disposition, injunctive relief under § 36-9-625(a), authorizing court-ordered restraint of sale of upon his receipt of insufficient notification – and thus receive court-ordered secured party compliance under Article 9 – does *not* require that his post-disposition cause of action under § 36-9-611(b) accrue at notification.

II. DELANEY'S CAUSE OF ACTION UNDER § 36-9-611(b) IS NOT CONTROLLED BY THE ONE-YEAR LIMITATIONS STATUTE AT § 15-3-570.

Provided Delaney's claim under § 36-9-611(b) accrues at disposition, the next question is whether the claim is controlled by a one-year or three-year limitations statute, as Article 9 of provides no limitations provision. Here, the Court of Appeals did not reach the question of what statute to apply, since it ruled that the claim accrued at notification thus disposing of First Financial's Motion to Dismiss. R. p. 192.

The only question at remand is whether the one-year statute at § 15-3-570 applies. If so, the claim is untimely. If not, it is timely under any potentially applicable three-year statute. UCC rights and obligations are imposed *ex contractu,* whenever the debtor and the secured party enter into a contractual transaction creating a security interest in collateral. § 36-9-109. Under this view of his claim, it would be timely under S.C. Code Ann. § 36-9-530(1) (2005) for three years for "an action upon a contract, obligation or liability, express or implied[.]" If § 36-9-611(b) merely created a "statutory liability," then S.C. Code Ann. § 15-3-530(2), providing a three-year statute for an "action upon a liability created by statute other than a penalty or forfeiture" would render

his claim timely. Finally, S.C. Code Ann. § 15-3-540(2) creates a three-year statute for "an action upon a statute for penalty or forfeiture *when the action is given to the party aggrieved* or to such party and the State, except when the statute imposing it prescribes a different limitation." (emphasis added.) The only candidate for a one-year limitation period is § 15-3-570, which is limited to "an action upon a statute for penalty or forfeiture given, in whole or in part, *to any person who will prosecute for* it within one year after the commission of the offense." § 15-3-570 (emphasis added)

Delaney argued that § 36-9-611(b) is not "penal," and that his statutory damages remedy at § 36-9-625(c)(2) with respect to consumer goods was not penal because, even though it applied without proof of injury and deterred noncomplying secured conduct: (1) it also served some remedial purposes, (2) was designated "statutory damages" under the section, (3) served as a substitute for liquidated damages, and (4) may be included in the same action for actual damages under § 36-9-625(...) , such that the debtor could litigate both types of damages before electing to recover the greater remedy. [13]

This Court need not decide that issue because even if his claim is "penal," it may not be claimed by "any person who will prosecute for it," such as an informer or private attorney general. Only the debtor (and a secondary obligor which is not applicable here) is entitled to receive the "reasonable notification" required by § 36-9-611(b). *See,* § 36-9-611(c). Therefore, the debtor is

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13 Article 9 contains a provision that is sometimes called the "consumer penalty." If a secured party fails to comply with Article 9 in disposing of consumer goods, the Code permits the debtor or a secondary obligor to recover "in any event an amount not less than the credit service charge plus 10 percent of the debt[.]...Because this provision is appended onto Article 9's basic damages provision and establishes an amount recoverable "in any event," one should read the consumer penalty as a substitute for ordinary monetary damages... In other words, the section functions to a certain extent as a liquidated damages provision... The term consumer penalty is thus something of a misnomer.

W. Lawrence, et al., Understanding Secured Transactions, 5th ed., § 19.03 (2012) (emphasis added.)

the only person "aggrieved" when the secured party fails to send the requisite notification to him. Only the debtor is entitled to recover the statutory damages at § 36-9-625(c)(2). ("If the collateral is consumer goods, a person that was a debtor or secondary obligor ...may recover for that failure in any event not less than [the statutory damages formula.]") Therefore, as a person "aggrieved," Delaney would still enjoy a three-year limitations period under § 36-9-540(2).

On this point Delaney urges the Court to adopt the view of the Fourth Circuit. In *Pressley v. Tupperware Long Term Disability Plan,* 553 F.3d 334 (4th Cir. 2009), the court was required to consider the appropriate ERISA penalty under South Carolina law at § 15-3-540(2) and § 15-3-570. Since ERISA does not provide a limitations provision within that statute, federal courts are required to borrow the state's limitation statute that best applies. *Pressley,* 553 F.3d at 337. The court noted that § 15-3-540(2)'s three-year statute applied because it was limited to penal actions "'when the action is given to the party aggrieved,'" which was appropriate for the ERISA penalty at issue as only a "[plan] participant or beneficiary," could apply for the penalty, and only they were "aggrieved" by the defendant Plan's failure to provide certain information as required by the act. *Pressley,* 553 F.3d at 339. As the Fourth Circuit ruled in considering the differences between the two penal statutes:

> Section 15-3-570...was clearly intended to encompass more persons than only "the party aggrieved" (if it was meant to encompass "the party aggrieved" at all.) To apply the more general section 15-3-570, and not the more specific section 15-3-540...would contravene the "basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over the more generalized provision."

Pressley v. Tupperware Long Term Disability Plan, id. Therefor, Delaney seeks this Court's ruling that his claim was timely filed because it is not controlled by § 15-3-570.

CONCLUSION

Petitioner Otha Delaney hereby requests that this Court rule according to the arguments made herein.

Respectfully submitted,

/S/

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May 5, 2018

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Opinion No. 5442
Appellate Case No. 2017-000683

OTHA DELANEY,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	**CERTIFICATE OF SERVICE**
	)	
FIRST FINANCIAL OF CHARLESTON, INC.,	)	
	)	
Respondent.	)	

I hereby certify that I caused to be deposited this day, May 7, 2018, into the United States Mail a true and accurate copy of Petitioner Otha Delaney's Petitioner's Initial Brief to the South Carolina Supreme Court, and a Certificate of Service of same, with adequate first class postage affixed and addressed to:

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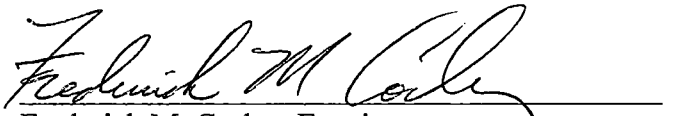

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