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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 5442 (S.C. Ct. App. filed September 28, 2016)

OTHA DELANEY, ...PETITIONER

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

We, the undersigned counsel, hereby certify that a Petition for Rehearing on behalf of Appellant Otha Delaney was made to the Court of Appeals (App. at 209), and that Appellant's Petition for Rehearing was ruled upon by that Court. App. at 235.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in ruling that the limitations period for Delaney's cause of action under § 36-9-611(b), *S.C. Code Ann.* (2003) ("*Notification of Disposition of Collateral*") begins to run at the time of notification rather than disposition.

II. Did the Court of Appeals err in failing to rule that Delaney's cause of action under § 36-9-611(b) is controlled by a three-year statute of limitations and not a one-year statute?

STATEMENT OF THE CASE

Petitioner Otha Delaney ("Delaney") is a consumer debtor to a secured contract to purchase a pickup truck, to which Respondent First Financial of Charleston ("First Financial") is the secured party. App. at 22, Compt. ¶¶ 9-10. He asserts a single, statutory cause of action under South Carolina's Uniform Commercial Code ("UCC") against First Financial for its alleged failure to send reasonable notification of disposition of collateral before it sold his repossessed truck, as required by S.C. Code Ann. § 36-9-611(b) (2003) ("*Notification before disposition of collateral.*"). App. at 23, Compt. ¶¶ 13-14, 24-25. He seeks a monetary recovery under § 36-9-625(c)(2) of the UCC in the form of a "minimum statutory damages recovery." App. at 23, Compt. ¶ 22.

Section 36-9-611(b) requires "a secured party that disposes of collateral" to "send" "the debtor" such as Delaney "a reasonable notification of disposition." Delaney alleged that the notification of disposition which First Financial sent to him was not "reasonable notification,"

inasmuch as that notification failed to comply with § § 36-9-613 and 614, which mandate specific contents for § 36-9-611(b) notifications in consumer-goods transactions. App. at 23, Compt. ¶ 13.

On April 29, 2013, the trial court granted First Financial's Motion to Dismiss on grounds that Delaney's claim was untimely. App. at 8-9. The trial court ruled that for limitations purposes, his claim arose or accrued at the time First Financial sent him an allegedly non-reasonable notification of disposition of collateral, not seven months later when it sold the truck. App. at 9-10. That decision was timely appealed.

In a divided panel decision filed September 28, 2016, the Court of Appeals affirmed the trial court's ruling, agreeing that a § 36-9-611(b) cause of action accrues at the time the secured party sends the debtor the notification of disposition of collateral, not the date of its subsequent disposition. ("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.") App. at 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 [the] reasonable notice" required by § 36-9-611. App. at 194.

Because the accrual event (the date of notification) occurred more than three years before Delaney filed suit, the Court of Appeals also ruled that it need not decide whether his claim is controlled by a one-year or a three-year statute of limitations – the claim is time-barred under both statutes – and, it affirmed dismissal on these grounds. App. at 192, 195. If, on the other hand, Delaney's claim did not accrue until disposition as Delaney and the dissent maintain, the Court of Appeals recognized the claim would still be timely under a three-year statute. ("[W]hether the action is barred depends upon when the action accrued.") App. at 192.

Following the Court of Appeals' decision Delaney filed his Petition for Reconsideration (App at 209) which was denied on February 16, 2017. App. at 235. This timely Petition for a Writ of Certiorari to the Court of Appeals follows. Delaney submits that Certiorari is appropriate under two of the five criteria governing consideration of such writs. First, the Court of Appeals' decision includes an extensive and lengthy dissent. App. at 195-199. *See,* SCARC 242(b)(2). Second, both the majority decision and the dissent involve a novel question of law and statutory construction, to wit: when does the limitations period begin to run for a debtor's cause of action against a secured party under § 36-9-611(b). *See,* SCARC 242(b)(1). This is also a novel question in that the Court of Appeals did not rely upon any on-point appellate authority from a sister State in support of its interpretation of this uniform statute.

ARGUMENT

I. THE COURT OF APPEAS ERRED IN RULING THAT THE LIMITATIONS PERIOD FOR DELANEY'S CAUSE OF ACTION UNDER § 36-9-611 BEGINS TO RUN AT THE TIME OF NOTIFICATION RATHER THAN AT DISPOSITION.

A. Delaney's Cause of Action Under § 36-9-611(b) Requires a "Secured Party that Disposes of Collateral Under Section 36-9-610" to be Actionable.

The facts in this case are not disputed. Delaney alleged that First Financial was required to comply with § 36-9-611 in sending a debtor such as himself a "'reasonable authenticated notification of disposition[.]'" App. at 24, Compt. ¶ 24, quoting § 36-9-611(b). He further alleged that First Financial sold his truck without "providing notice of its proposed disposition in compliance with applicable sections of the South Carolina UCC." App. at 26, Comp. ¶ 25.

The Court of Appeals ruled in considering Delaney's claim under § 36-9-611: "we do not believe that disposition of collateral is a prerequisite [for the secured party] to be penalized for failing to give reasonable notice." App. at 194. He respectfully submits that the Court of Appeals

erred because § 36-9-611(b) plainly, clearly and unambiguously requires a "secured party that disposes of collateral under Section 36-9-610" in order for the claim to be actionable, and thus to accrue for limitations purposes.

Interpretation of a statutory cause of action begins with an examination of the plain wording of the statute at issue, to include the statutory scheme where applicable. *Gay v. Ariel*, 673 S.E.2d 418, 420 (SC 2010) (Where a statute's language is plain and unambiguous, the rules of statutory interpretation are not needed and the court may not impose another meaning.) South Carolina's UCC, Article 9, Part 6 ("Default") includes several interlocking statutes relevant to Delaney's case.

Section 36-9-610(a) ("*Disposition of collateral after default*") permits, but does not require, a secured party to sell a debtor-in-default's collateral to protect its interest in the collateral: "After default, a secured party *may* sell, lease or otherwise dispose of any or all of the collateral[.]" § 36-9-610(a) (emphasis added.) When the secured party chooses disposition, it is required to see that every "aspect" of its disposition is "commercially reasonable."[1]

The following section – § 36-9-611 ("*Notification before disposition of collateral*"), Delaney's cause of action against First Financial – provides:

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

§ 36-9-611(b) (emphasis added.)

Reading the two sections together, the unambiguous wording of § 36-9-611(b)'s controlling phrase, "a secured party *that disposes of collateral under Section 36-9-610,*" is an express limitation or restriction upon the universe of secured parties under § 9-610 who are

[1] "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms must be commercially reasonable." § 36-9-610(b).

authorized, but not required, to dispose of collateral upon debtor default. While all secured parties have the right of disposition upon default, it is *only* those which actually exercise their rights – to become "a secured party *that disposes of collateral under Section 36-9-610*" – who are expressly required by § 9-611(b) to "send" the "debtor" "a reasonable notification of disposition."

Conversely, when a secured party does *not* dispose of the collateral, it has no duty under the plain wording of the text to send "reasonable notification of disposition" to anyone. Therefore, under the latter circumstances of no "disposition," a secured party that does *not* send the debtor a reasonable notification cannot be in violation of, or noncompliance with, § 36-9-611(b), because it is not "a secured party *that disposes of collateral under Section 36-9-610.*"

This in turn establishes that relevant to accrual, the "disposition" is an essential element of a debtor's § 36-9-611(b) cause of action. Prior to disposition – regardless whether the secured party sends the debtor a "reasonable notification," or sends a notification that is not "reasonable," or sends no notification at all – it could only be a secured party that plans, intends, wishes, or that *may* dispose of collateral in the future. But, plainly, it would not be "a secured party *that disposes of collateral under Section 36-9-610*" at the time of notification. Until the subsequent "disposition" actually occurs, there is no "secured party that disposes of collateral under Section 36-9-610" yet in existence. And, there are many instances where a noticed disposition never occurs, such as when the debtor timely redeems or is allowed to cure the default.

The legislature's use of the present tense in the text ("a secured party that *disposes* of collateral under Section 36-9-610 shall send...reasonable...notification of disposition"), 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 of disposition") is unambiguous. The

caption to § 36-9-611 is similarly clear and unambiguous: "Notification before *disposition* of collateral," not, for example, "Notification before *intended (or anticipated or desired) disposition* of collateral," and is consistent with the section text requiring disposition.

While generally, section captions are aids to South Carolina courts in statutory interpretation, this is not true for UCC section captions which are part of the enacted text, and therefore, cannot be ignored or read out of the statute. ("Section captions are a part of the text of the Uniform Commercial Code[.]") (§ 36-1-109.) Here, it would be odd for the General Assembly to enact a section caption ("Notification before *disposition*") that expressly conforms to the restriction found within the body of the text ("a secured party *that disposes of collateral* under Section 36-9-610"), if "disposition" is not material to the cause of action. Finally, the South Carolina Reporter's Comments are also consistent: "Section 36-9-611 imposes a notification requirement upon secured parties *that dispose of collateral under Section 36-9-610*." S.C. Reporter's Cmt. to § 36-9-611. (emphasis added.)

Also relevant to this case, § 36-9-611(b) does not define a "reasonable notification" or include any rules for determining whether a notification is "reasonable" under that statute. Instead, the Official Comment directs the reader to the next three sections, all addressing various "aspects" of a "reasonable notification" under § 36-9-611(b):

> 2. Reasonable Notification... The notification must be reasonable as to the manner in which it is 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 (emphasis added.)

As the Official Comment makes clear, these three statutes (§ § 36-9-612, 613, 614) are not "stand alone" or independent causes of action. They merely set forth the applicable rules with

which a § 36-9-611(b) notification must comply in order to be "reasonable." For example, the Official Comment to UCC § 9-612 provides the rules for timeliness: "*Section 9-611(b)* requires the secured party to send a 'reasonable authenticated notification....[O]ne *aspect* of a reasonable notification is its timeliness." Cmt. 2, Official Comment to UCC § 9-612. (emphasis added.) Similarly, the Official Comment to UCC § 9-613, for "contents of notifications generally," provides: "To comply with the 'reasonable authenticated notification' requirement *of Section 9-611(b)*, the contents of a notification must be reasonable." Cmt. 2, Official Comment to § 9-613. (emphasis added.) Consistent with these Comments, § 36-9-614 then lists the content rules for § 9-611(b) notifications in consumer-goods transactions: "In a consumer-goods transaction, the following rules apply: (1) A notification of disposition must provide the following information [then lists all required information, to also include all information listed in § 9-613]." § 36-9-614(1). The Official Comment instructs that UCC § 9-614 "sets forth the information required for a *reasonable notification*," again, tying UCC § 9-614 notification contents in a consumer-goods transaction to UCC § 9-611(b). Cmt. 2, Official Comment to UCC § 9-614 (emphasis added.) Section 36-9-614 is captioned: "Contents and form of notification before *disposition* of collateral," (not, for example, "Contents and form of notification before *intended disposition*.")

Therefore, the texts, captions and Comments are all consistent that compliant notification contents, as mandated by § § 36-9-613 and 614, are required for a "reasonable notification" under § 9-611(b), which in turn requires a "secured party that disposes of collateral under Section 36-9-610" to be actionable. It is further apparent that sections § § 36-9-613 and 614 cannot be read to create causes of action separate from § 9-611(b), because neither mentions the secured party, and therefore, standing alone, they do not impose any obligation upon the secured party to send § § 9-613 and 614 compliant notification in the first place. Sections 36-9-613 and

614 also do not name any person to whom that notification must be sent, such as "the debtor" or "any secondary obligor," as found within § 9-611(b). Thus *unless* read in context with § 36-9-611(b), Delaney's claim alleging that the notification First Financial sent him was not "reasonable notification," due to noncompliant contents under § § 36-9-613 or 614, would not be actionable. (Where no disposition had occurred, the court ruled that the secured party's failure to send reasonable notification to a consumer debtor as required by UCC § § 9-613 and 614 was not actionable, because such sections must be read "in context" of the "requirements" of UCC § 9-611(b), which applies when collateral is disposed of by the secured party.) (*Vasquez v. Karjanis & Sons Motors, LLC.,* 2012 WL 6965392, at * 3 (Conn. Sup. Ct. Conn, New Haven Dist., Dec. 21, 2012).

Accordingly, the Court of Appeals erred in ruling that § 36-9-611 does *not* require a "secured party that disposes of collateral under Section 36-9-610" for the debtor's cause of action to fully accrue against a secured party, and therefore, in concluding that a "disposition" is not a "prerequisite" for a legal claim of noncompliance under that statute. App. 194.

B. Delaney's Cause of Action Under § 36-9-611(b) Is Not "Complete and Present" Until Disposition.

South Carolina follows what the Supreme Court calls "the standard rule" for determining when a cause of action accrues:

> The most helpful canon in this context is '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. 1796, 1776 (2016) (internal citations omitted) (emphasis added.) *Stephens v. Draffin,* 488 S.E.2d 307, 309 (SC 1997) (Cause of action accrues at the moment when 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,* 594 S.E. 548, 551 (SC App. 2004) ("In analyzing a limitations defense, the fundamental test for determining when a cause of action has 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.")

As discussed in Argument I. A., *infra,* a debtor alleging a violation of § 36-9-611(b) would *not* have a "complete and present" cause of action until "a secured party that disposes of collateral under Section 36-9-610" is in existence. On the other hand, if the claim were to accrue at the time of the secured party's notification, it follows that the debtor has a "complete and present" claim at that time – such that the occurrence or non-occurrence of any subsequent events, including "disposition," cannot destroy his right to obtain relief.

In addition to being contrary to the language of the statute, as a practical matter this ruling means that the decision has re-written § 36-9-611(b) to greatly expand a secured party's exposure in the consumer-goods context. If a secured party is liable to the consumer debtor for damages at the time of sending notification, even if no disposition ever occurs, then any secured party that sends a notification to a consumer is at risk. If the consumer redeems his collateral prior to disposition by paying off the debt, the secured party may still be liable for statutory damages if the consumer has a colorable claim that the notification was not "reasonable." The same would apply when a secured party sends notification but where the consumer debtor is allowed to cure his default before disposition – by paying less than the full contract balance and continuing to pay off the debt over time.

For these reasons Delaney submits the Court of Appeals erred in ruling that his cause of action under § 36-9-611(b) was complete and present at the time the secured party notifies a debtor of its plan for disposition, and therefore, that the limitations period begins to run at notification.

C. Comment 2 to § 36-9-611(b) Does Not Eliminate the "Disposition" Requirement of That Statute.

Argument I.C-E turns to the three, specific places in the UCC texts and Official Comments upon which the Court of Appeals relied in reaching its conclusions contrary to Delaney's and the dissent's position. The Court of Appeals stated that it was relying upon the emphasized sentence below, found within Comment 2 of the Official Comments to UCC § 9-611, in ruling that a debtor's claim under § 36-9-611(b) arises at the time of notification. App. at 194. This Comment provides:

> 2. Reasonable Notification. This section *requires a secured party who wishes to dispose of collateral under Section 9-610 to send "a reasonable authenticated notification of disposition" to specified interested persons, subject to certain exceptions*. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before disposition), and its contents. See Section 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions.)

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

The Court of Appeals interpreted this sentence in Comment 2 as an instruction to disregard the statutory text requiring "a secured party *that disposes of collateral under Section 36-9-610*," and instead, to rule that the secured party's failure to send reasonable notification was actionable at notification based upon the secured party's intent: "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*." App. at 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.* (emphasis added.)

Delaney respectfully disagrees that this interpretation of Comment 2 to UCC § 9611 is correct. As discussed at Argument I.A, *infra*, and as the heading to Comment 2 ("*Reasonable Notification*") implies, this Comment is describing the various "aspects" of a "reasonable notification" under UCC § 9-611, including timeliness. In considering such "aspects," it is accurate to say that "if the secured party initially wishes to dispose of the property, the secured party must provide the appropriate notice." If the secured party does *not* send a reasonable notification when it "wishes" to sell the collateral, it will plainly miss its opportunity to do so. If it waits until the disposition occurs to send it – at which time it becomes a "secured party that disposes of collateral under § 36-9-610" – that notification would never be "timely" ("*i.e.*, a reasonable time before the disposition"), and thus, it would not be "reasonable." The emphasized sentence is a correct description of what the secured party is required to do for its notification to be timely, and thus "reasonable." However, *it does not follow that sending notification by a secured party that merely "wishes" to dispose of the collateral, absent subsequent disposition, is sufficient to support a noncompliance claim against the secured party under § 36-9-611(b).*

First, the Court of Appeals' interpretation of the Comment as writing the disposition out of the statute when notification is sent by a secured party that merely "wishes" to dispose of collateral, cannot be squared with the South Carolina Reporter's Comment to the same section: "Section 36-9-611 imposes a notification requirement upon secured parties *who dispose of collateral under Section 36-9-610.*" S.C. Reporter's Cmt. to § 36-0-611 (emphasis added.) Moreover, interpreting Comment 2 as writing the disposition out permits a Comment to override

the express language of the enacted text. An Official Comment is an authoritative interpretive aid in construing the UCC, but it cannot rewrite the plain, unambiguous language of the enacted text.[2] There is no UCC authority provided in the decision which permits a court to rewrite the black letter text of § 36-9-611(b) based upon this sentence lifted from Comment 2, or generally, for reliance upon any Official Comment to rewrite unambiguous, UCC text.

Delaney respectfully submits that the Court Appeals' interpretation of Comment 2 is also wrong because it conflicts with Comment 8 to the same statute:

> 8. Failure to Conduct Notified Disposition... *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.

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

Comment 8 makes no sense if the cause of action accrues at the time the non-reasonable notification was sent, and thus, the claim is "complete and present" at notification. Comment 8 explains the conditions when a secured party's "do-over" notification allows it to escape liability for sending a non-reasonable notification. Since it is the "disposition" that cuts off the secured party's right to send "revised notification" under Comment 8, this Comment makes clear that disposition is the essential event when the cause of action accrues. Accordingly, Delaney submits that the Court of Appeals erred in relying upon Comment 2 to rewrite the unambiguous language of the statutory text of § 36-9-611(b), as well as to interpret the statute to conflict with Comment 8.

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2 "The official comments to the UCC are not part of the UCC, in the sense that they are not enacted by the 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)

D. The Availability of a Debtor's Injunctive Remedy Under § 36-9-625(a) Does Not Require His Claim for Monetary Damages To Accrue at Notification.

The Court of Appeals also relied upon the equitable remedy provision of § 36-9-625(a) to support its ruling that no disposition is required for a legal claim under § 36-9-611(b) to arise, and therefore, that the limitations period runs from notification App. 193-194. Statutes such as § § 36-9-610 and 611(b) do not provide any remedy within the bodies of those sections. Instead, all remedies are found at § 36-9-625 ("*Remedies for Secured Party's Failure to Comply with this Chapter.*")

Section 36-9-625 is divided into three different remedies: First, § 36-9-625(a) provides the debtor with an equitable, *prospective*, injunctive remedy against the secured party when it "is not proceeding" in compliance with Article 9, and which permits a court to restrain the sale or collection of collateral. Second, subsections (b)-(c)(1), when combined, permit recovery of actual damages for a debtor's "loss" that is caused by the secured party's "failure to comply" with Article 9. Third, § 36-9-625(c)(2), the provision under which Delaney seeks to recover, authorizes monetary damages by permitting, under certain circumstances, his election of an alternative, "minimum statutory damages recovery" "by a person that was a debtor...at the time the secured party failed to comply with this part" – instead of requiring him prove up any actual damages or "loss." [3]

Section 36-9-625(a) provides: "If it is established that a secured party *is not proceeding* in accordance with this chapter [*i.e.,* Article 9], a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions." § 36-9-625(a). (emphasis added.) The Court of Appeals interpreted subsection (a) as follows:

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[3] These circumstances are that the secured party's failure to comply involves a consumer-goods transaction, and it must be for a noncompliance with "this part" (*i.e.,* Part 6 ("Default"), § § 36-9-601- 635) – whereas actual damages will apply to the secured party's noncompliance with any section found in Article 9.

> 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 for a court to restrain disposition of his collateral, his cause of action [under § 36-9-611(b)] must have arisen upon his receipt of the noncompliant notice.

App at 194 (emphasis added.) However, the Court of Appeals provided no UCC authority for its ruling that a debtor "must be able to state a cause of action to request a restraint of disposition."

Delaney respectfully disagrees. Section 36-9-625(a) provides *prospective,* equitable relief in order to *prevent* the harm or loss that will occur if the secured party fails to comply with Article 9, whereas he may seek a monetary recovery only upon proof that statutory noncompliance has already occurred. [4] Subsection (a) applies when the debtor does not yet have a cause of action for monetary damages under Article 9: "If the secured part *has not yet acted in noncompliance but is about to do so*, or if the secured party *is presently acting in noncompliance*, [subsection (a)] provides for injunctive relief." *Fjellin ex rel. Leonard Van Liew Living Trust v.*

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[4] For example, § 36-9-609(a) provides: "After default, a secured party may take possession of the collateral[.]" If the debtor learns the secured party plans to repossess on grounds of default, he has an equitable remedy under § 36-9-625(a) if he is *not* in default. If he meets his burden of proof, a court may "order restrain[t of] collection...of collateral." W. Lawrence, et al., *Understanding Secured Transactions,* 5th Ed. § 19.01. However, if the wrongful repossession has already occurred, he may seek to restrain further "collection" under § 36-9-625(a) by a replevin, but he may also recover money damages for the deprivation of collateral that has been caused by the secured party's noncompliant repossession. ("In such an action, the debtor may recover possession of the collateral, as well as damages for any harm done to the collateral and for loss of its use[.]") (*Id.*)

Similarly, § 36-9-610 requires that upon default a secured party may dispose of the collateral, provided "every aspect" of the sale is "commercially reasonable." If the debtor learns, for example, that the secured party plans to sell his collateral at public auction, but with no advertising of the auction to ensure a competitive price, he may seek restraint of the pending sale under § 36-9-625(a) until the secured party provides "commercially reasonable" advertising. *Id.* If the sale has already occurred, however, he can no longer equitably "restrain" or set the sale aside, but he may recover money damages for the noncompliant sale that has already occurred.

Likewise, if a debtor receives notification of disposition that the planned disposition is set for the next day, he may seek restraint of that sale under § 36-9-625(a) on grounds that the notice does not allow sufficient time to redeem or to try to find other buyers, and thus, is not "reasonable" under § 36-9-611(b). ("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 party...to redeem[.]") (*Id.*) If the sale has already occurred, however, his remedy would be limited to the money damages provisions of § 36-9-625(b)-(c)(1) in a commercial transaction, or he may elect to recover under subsection (c)(2) in a consumer transaction.

Penning, 41 F.Supp 3d 775, 780 (D. Neb. 2014), relying upon 9 Hawkland UCC § 9-507:1 (2014), interpreting former UCC § 9-507(1), "the prior version of § 9-625" (emphasis added.)

Other courts agree with this interpretation of UCC § 9-625(a). In considering a claim that the secured party disposed of collateral, after failing to send reasonable notification of disposition in violation of UCC § 9-611(b) in a commercial transaction, the court in *In re Enron, Corp.,* 2005 WL 3873890, at *9-10, (U.S.B.R. S.D.N.Y. June 16, 2005) ruled:

> [S]ection (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.* Therefore, since the First Sale has already occurred, Stonehill's remedy, if it were shown that BNP did not comply with the requisite provisions of Article 9 [concerning notification under UCC § 9-611(b)], would be an action for damages[.]

In re Enron (emphasis added.) Accord, *Commercial Sav. Bank v. Fronks Serv. Ctr.,* 2008 WL 2230067 (3d Ct. of Ohio App., June 2, 2008). In considering a claim that the secured party failed to send reasonable notification under UCC § 9-611(b), the *Commercial Sav. Bank* court of appeals ruled:

> [W]e note the plain language of [UCC § 9-625(a)] addresses remedies that can be obtained when the secured party is not proceeding in accordance with this chapter... *In our opinion, this statue governs actions presently or currently occurring,* thus causing the party to seek the court's intervention *prior to the collateral actually being collected, enforced or disposed of* by the secured party. In contrast, the filing of [secured party's] complaint [for a deficiency] as well as all court proceedings in the present case occurred after [secured party] had already taken possession of [debtor's] collateral and subsequently sold [it.]

Commercial Sav. Bank, id, at *7 (emphasis added.)

Accordingly, these cases indicate that a debtor's *pre-sale,* equitable remedy under § 36-9-625(a) permitting restraint of disposition of collateral – which may arise at any time prior to disposition including at the time of notification – does not require that a debtor also be able to state a consummated cause of action for a monetary recovery, as the Court of Appeals ruled.

E. When the Consumer Debtor Has Proved his Claim under § 36-9-611(b), He Does Not Have to Prove Any "Loss" or "Injury" To Be Awarded the Minimum, Statutory Damages Recovery Under § 36-9-625(c)(2).

Section 36-9-625(c)(2), Delaney's damages provision, provides: "if the collateral is consumer goods, a person that was a debtor at the time *the secured party failed to comply with this part* may recover for that failure *in any event* in the amount of [the statutory damages formula.]" (emphasis added.) Comment 4 of the Official Comments to UCC § 9-625 instructs as follows:

> 4. *Minimum Damages in Consumer Goods.* Subsection (c)(2) provides a minimum, statutory damages recovery for a debtor and a secondary obligor in a consumer goods transaction. It… is designed to ensure *that every noncompliance with the requirements of Part 6* in a consumer-goods transaction results in liability, *regardless of the injury that may have resulted.*

Cmt. 4, Official Comment to UCC § 9-625. (emphasis added.)

Addressing this emphasized sentence from Comment 4, the Court of Appeal ruled: "Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, *the statute of limitations can begin to run before the secure party injures the debtor by disposing of the collateral in a commercially unreasonable manner.*" App. at 194. (emphasis added.)

Delaney respectfully disagrees. First, he is not alleging that First Financial injured him "by disposing of collateral in a commercially unreasonable manner" in violation of § 36-9-610. He is alleging that First Financial violated § 36-9-611(b), as "a secured party that disposed of collateral under Section 36-9-610," without providing "reasonable notification of disposition." Second, permitting the debtor to recover under this subsection, even when he has no injury or loss, does not mean that the statute of limitations begins to run *before* the cause of action under § 36-9-611(b) is complete and present.

He interprets Comment 4 to mean this: when the consumer debtor proves "the secured party's failure to comply" with any section in Part 6 (such as § 36-9-611(b)), and therefore, when he proves all elements of his statutory cause of action, he is relieved of any additional burden of proving an injury or loss caused by the secured party's failure to comply with the section. Under such circumstances, he is entitled to the "minimum, statutory damages recovery" "*in any event.*" Therefore, under § 36-9-625(c)(2), he is *not* required to prove at least *some* minimal loss. The "minimum statutory damages recovery" thus contrasts with the debtor's recovery of actual damages under subsections (b)-(c)(1), where his recovery is for any "*loss* caused by a [secured party's] failure to comply."

However, there is nothing in the Comment which relieves the consumer debtor from fully proving the secured party's noncompliance with the applicable Part 6 section upon which his claim rests, *i.e.,* with "any noncompliance with this part." In other words, while § 36-9-625(c)(2) provides an alternative "*recovery*" provision, it does not truncate the elements or lighten the consumer debtor's burden of proof in connection with any section in Part 6, other than permitting him to recover without proving damages.[5] The Court of Appeals provided no UCC authority that a damages recovery under § 36-9-625(c)(2) also mandates an earlier accrual of any limitations period for the underlying section within Part 6 upon which that recovery rests.

F. The Court of Appeals Provided No On-Point, Appellate Authority to Support its Ruling that the Limitations Period Runs from Notification.

The Court of Appeals did not provide any on-point authority in ruling that the limitations period for § 36-9-611(b), a provision of a uniform code, begins to run at notification rather than

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[5] If it had been the legislative intent to lessen this burden with respect to consumer debtors under § 36-9-611(b), the General Assembly could have rewritten the statute to provide: "*In a consumer-goods transaction,* a secured party *that is authorized to dispose of collateral under Section 36-9-610* shall send the debtor a reasonable notification of disposition of collateral" – thus omitting the restrictive language of "a secured party that disposes of collateral under Section 36-9-610."

disposition. Instead, it cited "see generally *Rashaw v. United Consumers Credit Union,* 684 F.3d 739 (8th Cir. 2012). ('[W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.')"App. at 194.

In *Rashaw,* the court of appeals, applying Missouri law, ruled that it need not decide whether a UCC notification claim was controlled by a five-year limitations statute for "statutory liabilities," or a three-year limitations statute for "actions upon a statute for penalty or forfeiture where the action is given to the aggrieved party." *Rashaw,* 684 F.3d at 744. This was because the claims were untimely under both statutes, as all events, such as notification, had occurred more than six year before suit was filed. *Id.* Therefore, the *Rashaw* court was *not* called to decide the issue in the instant case – whether the claim accrued at the time of disposition instead, inasmuch as a later accrual event would make the claim timely filed under at least one of the two potential limitations statutes. Accordingly, the *Rashaw* court of appeals did not mention UCC § 9-611(b); it did not discuss or interpret the phrase "a secured party that disposes of collateral under UCC Section 9-610;" and, it did not alternatively consider whether the cause of action accrues at disposition.

The Court of Appeals also said it was relying upon *Erdman v. Rants,* 332 N.W.2d 441 (Sup. Ct. N.D. 1989), which the Court cites as "explaining the penalty available for failure to comply with the notice of sale requirements exists *regardless whether a commercially reasonable sale is held,* and regardless whether the debtor sustained a loss." App. at 195. (emphasis added.) In *Erdman,* the question was whether the consumer debtor could recover statutory damages, even if the resulting disposition was commercially reasonable such that he had no actual loss, for a notice violation. *Erdman* at 422. The court ruled that it did not matter whether that sale was commercially reasonable, because the debtor was permitted to recover

without proof of loss. *Id.* However, the court did *not* rule that statutory damages could be recovered when there was *no sale at all*. In fact, the court specifically provided that a disposition was a prerequisite for a statutory damages recovery, in contrast to the Court of Appeals position:

> Under the plain language of [the predecessor statute to UCC § 36-9-625(c)(2)] if a secured party does not proceed in accordance with part 5 of Article 9 [now Part 6]...*and disposition has occurred,*...and...if the collateral is consumer goods, the debtor is entitled to a minimum recovery, which is not less than the credit service charge plus ten percent of the principal amount of the debt[.]

Erdman, 332 N.W.2d at 443 (emphasis added.) Thus *Erdman* cannot not support the ruling that a violation of noncompliance with UCC § 9-611(b) accrues at the time of notification when the debtor seeks the "minimum, statutory damages recovery."

II. DELANEY'S CAUSE OF ACTION IS NOT CONTROLLED BY A ONE-YEAR STATUTE OF LIMITATIONS.

Provided Delaney's claim under § 36-9-611(b) accrues at disposition, the next question is whether the claim is controlled by a three-year limitations statute or a one-year statute, since no statute of limitations period is provided under Article 9 of the UCC. Here, the Court of Appeals did not decide which statute of limitations applied after ruling it was untimely under both. App. at 192. Similarly, this Court need not decide which statute actually applies to his claim, it needs only to eliminate any potential candidate that is shorter than three years, such as § 15-3-570.

For example, UCC rights and obligations are imposed *ex contractu,* whenever the secured party and the debtor have a contractual relationship creating a security interest under Article 9 in the collateral. *See, e.g., Coastal Fed. Credit Union v. Brown,* 790 S.E2d 417, 430-421 (SC App. 2016) (limitations period for secured party's suit for deficiency, after exercising Part 6, Article 9 rights of repossession and sale of consumer collateral, controlled by both Article 2 and Article 9.) Under this reasoning, Delaney's claim would be timely under § 15-3-530(1) for three years for "an action upon a contract, obligation or liability, express or implied[.]" South Carolina also

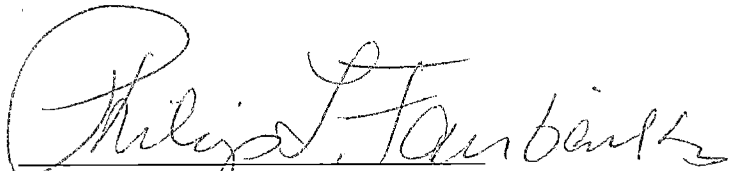
applies a three-year statute for "an action upon a liability created by statute *other than a penalty* or forfeiture." § 15-3-520(2). (emphasis added.) Finally, South Carolina applies a three-year statute for "an action upon a statute or penalty or forfeiture when the action is given *to the party aggrieved* or to such party and the State, except where the statute imposing it prescribes a different limitation." § 15-3-540(2). (emphasis added.)

The only potential, statutory candidate which creates a one-year period is § 15-3-570, which applies to "an action upon a statute or 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.*" Delaney argued that the "minimum statutory damages recovery" of § 36-9-625(c)(2) is not a "statutory penalty" because it supports some remedial purposes and may, in fact, be included within the same action for actual damages under § 36-9-625(b)-(c)(1). App. at 35-40. This Court need not decide that issue, because even if § 36-9-625(c)(2) is an "action upon a statutory penalty," it may not be claimed by "any person who will prosecute for it," such as an informer or private attorney general. A damages recovery under § 36-9-625(c)(2) is limited to "the debtor" and "any secondary obligor," *i.e.,* persons that are "aggrieved by" the secured party's failure to comply with § 36-9-611(b). Accordingly, Delaney submits that his claim is timely under any potentially applicable, three-year statute of limitations.

CONCLUSION

Delaney requests that this Court grant his Petition for Writ of Certiorari to the Court of Appeals for the reasons set forth more fully herein.

Respectfully submitted,



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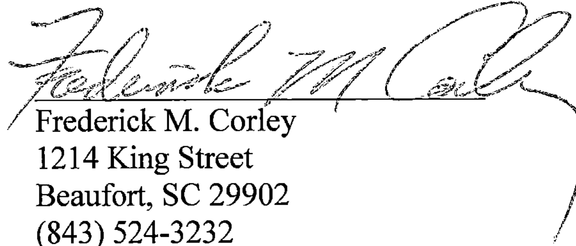

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Opinion No. 5442
Appellate Case No. 2014-000824

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

I hereby certify that I caused to be deposited this day, March 20, 2017, into the Unites States Mail a true and accurate copy of Petitioner Otha Delaney's Petition for Write Certiorari to the Court of Appeals of South Carolina, the Appendix, and a Certificate of Service of same, with adequate first class postage affixed and addressed to:

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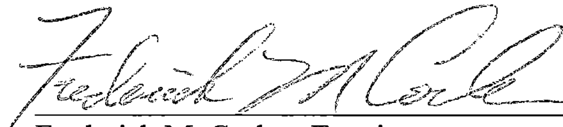

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