



SCHOOL OF LAW

MEMORANDUM

To: Drafting Committee for Amendments to the Model Tribal Secured Transactions Act
From: Stephen L. Sepinuck
Date: August 25, 2015
Re: Liability for Error

Section 9-626 of the MTSTA, like the same numbered provision of the UCC, codifies the “rebuttable-presumption rule” with respect to an action by a secured party for a deficiency in a non-consumer transaction if the secured party has failed to comply with the rules of Part 6 with respect to enforcement. It also, like the UCC, has no rule on what happens if the transaction is a consumer transaction.

The silence in the UCC on this issue in connection with a consumer transaction resulted from the last-minute collapse of negotiations regarding a variety of consumer issues. In each jurisdiction, courts are instructed to fill in the gap as a matter of common law, inferring nothing from the silence. In at least two states, courts have applied the absolute-bar rule, denying a secured party who fails to comply with Part 6 the right to recover any deficiency. *See Coxall v. Clover Commercial Corp.*, 781 N.Y.S.2d 567 (Kings Cty. Civ. Ct. 2004); *In re Downing*, 286 B.R. 900 (Bankr. W.D. Mo. 2002). In contrast, at least one state has resolved the issue legislatively, by enacting a non-uniform version of section 9-626. *See Wash. Rev. Code § 62A.9A-626* (making the rebuttable-presumption rule applicable to both consumer and non-consumer transactions).

Some Native Tribes and Nations might not have a common-law tradition or might, for other reasons, prefer to adopt a rule proactively, rather than wait for the issue to arise. Accordingly, the Drafting Committee might wish to consider amending the MTSTA to provide a rule for consumer transactions. What follows is one possible approach. It applies the absolute-bar rule to consumer transactions.

SECTION 9-626. ACTION IN WHICH DEFICIENCY OR SURPLUS IS IN ISSUE.

(a) ~~[Applicable rules if amount of deficiency or surplus in issue.]~~ In an action arising from a transaction, ~~other than a consumer transaction,~~ in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part.

(3) With respect to a consumer transaction, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the debtor and any secondary obligor will not be liable for a deficiency

~~(3)~~ Except as otherwise provided in the provisions of this [act] dealing with nonliability and limitations on liability of a secured party or secondary obligor (Section 9-628), with respect to a transaction other than a consumer transaction, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is subject to setoff for an amount as stated in the provision of this [act] dealing with damages for noncompliance (Section 9-625(b)), which may be measured by the amount recovered for conversion of collateral.

(45) For purposes of paragraph (34), the liability of the debtor or a secondary obligor is calculated on the presumption that the proceeds of disposition equal the sum of the secured obligation, expenses, and allowable attorney's fees, but the secured party may rebut the presumption.

~~(b) [Consumer transactions; no inference.] The limitation of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.~~