

Part II

Default, Repossession, and Disposition

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Part II – Default, Repossession, and Disposition

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I.	Default under South Carolina Law	

A. Enforceable Defaults

1. In a consumer transaction the only types of default that are enforceable are:
 - The consumer’s failure to make a payment as required, or
 - The consumer’s prospect of payment, performance, or realization of the collateral is significantly impaired.
 - The burden of proving significant is on the creditor.
 - Examples that may suffice as significant

impairment:

- No insurance
- Fleeing the jurisdiction
- *S.C. Code Ann. § 37-5-109*
- In non-consumer transactions almost any type of default provided in the contract may be enforceable.

B. Notice of Right to Cure

1. In the event of a default consisting only of the consumer’s failure to make a required payment, a creditor may not accelerate maturity of the unpaid balance of the obligation or repossess the collateral without having first sent a notice of right to cure. *S.C. Code Ann. § 37-5-111(1)*.

- A Notice of Right to Cure is not required if the consumer voluntarily surrenders the collateral
- *S.C. Code Ann. § 37-5-110(1)*
- In a closed-end transaction only one Notice of Right to Cure is required for the term of the obligation
- In an open-end transaction, the Notice of Right to Cure must be sent at least once during a twelve month period to enable the creditor to accelerate the balance
- *S.C. Code Ann. § 37-5-111(2)*

2. Time for Notice of Right to Cure

- The Notice of Right to Cure is ineffective if it is sent before the consumer has been in default for more than ten days and has not voluntarily surrendered the collateral.
- *S.C. Code Ann.* § 37-5-110(1).
- Example:
 - Payment is due on the 1st of the month.
 - The ten day time period begins on the 2nd.
 - The tenth day is the 11th.
 - The notice cannot be sent until after the customer

has been in default for more than ten days. That is, the notice cannot be sent before the 12th.

3. Contents of Notice of Right to Cure

- The Notice of Right to Cure must inform the consumer of the default and give him or her 20 days from the date of the notice to cure the default.
- *S.C. Code Ann.* § 37-5-111(1).
- A notice that gives less than 20 days is as if no notice has been sent at all.
- A model of a proper Notice of Right to Cure is set forth in *S.C. Code Ann.* § 37-5-110(2).

4. Service of Notice of Right to Cure

- A creditor may give notice of the right to cure by delivering the notice to the consumer or by mailing it to him or her at his or her residence.
- *S.C. Code Ann.* § 37-5-110(1).

If the consumer moves and does not notify the creditor, the creditor may send the notice to the last address provided by the consumer.

When a consumer denies receiving the notice and the creditor says it sent the notice, a question of fact is created for the court or the jury.

Foster v. Ford Motor Co., 302 S.C. 450, 395 S.E.2d 440 (1990).

- Certified mail is not required by the statute, but it may be added protection for the creditor if the consumer later claims that he or she did not receive the notice.

5. Effect of Cure

- A cure by the consumer restores the consumer to his or her rights under the agreement as though a default had not occurred.
- However, in a closed-end transaction, such as the typical automobile purchase, the consumer is not entitled to a second Notice of Right to Cure.
- In open-end transactions, like the typical credit card debt, the consumer is entitled to a Notice of Right to Cure only once in a twelve month period.
- *S.C. Code Ann.* § 37-5-111(1-2).

II. Repossession under South Carolina Law

A. Except where modified by the Consumer Protection Code or other applicable law, Article 9 of the Uniform Commercial Code (Title 36) governs the law of default, repossession and disposition in South Carolina

1. Article 9 was extensively amended in 2001, effective July 1, 2001, when adopting the 1999 Uniform Act as the law of South Carolina

2. In the provisions that follow, I intend to identify the current law and to identify consistency with or changes from prior law

B. Right to Repossession

1. Valid Security Interest

- Before a creditor is entitled to repossess collateral, the creditor must have a valid security interest in the property.
- The security interest is created by agreement of the parties and may be included in the sales agreement or in a separate agreement.
- The Truth in Lending Act requires the security interest to be disclosed in the "Federal box" of the consumer credit transaction.
- 15 U.S.C. § 1638(a)(9); 12 CFR § 226.18(m).

2. Delivery Taken

- A creditor also cannot repossess unless the debtor has taken possession. Until possession has been transferred, there is nothing to "re-possess."

- This means that a creditor cannot report a transaction as a repossession if the debtor never took possession. Rather, the creditor has a claim for breach of contract.

3. Enforceable Default

- The consumer's default must also be enforceable before the creditor can repossess the collateral.
- In consumer transactions the only enforceable defaults are:
 - The consumer's failure to make a payment when
 - Significant impairment of the collateral.
- *S.C. Code Ann.* § 37-5-109.

due, or

C. Methods of Repossession

1. Voluntary Surrender

- A Notice of Right to Cure is not required if the consumer voluntarily surrenders the collateral.
- *S.C. Code Ann.* § 37-5-111(6).
- However, taking the collateral by deception or force is not a voluntary surrender.
 - Obtaining possession through deception or

misrepresentation is not a voluntary surrender

- Leaving the car with the dealership and advising that payments would be made when the car was repaired would not constitute a voluntary surrender of the car. *Kirby v. Horne Motor Co.*, 295 S.C. 7, 366 S.E.2d 259 (Ct. App. 1989).
- Using deception to induce the consumer to leave the car with the dealership is not a voluntary surrender and may serve as the basis for a conversion claim. *Chrysler Credit Corp. v. McKinney* 38 U.C.C. Rep. Serv. 1409 (Ala.).

voluntary surrender

- Obtaining possession by threat or force is not a
 - Taking a law enforcement officer to help repossess does not make a surrender voluntary.
 - The law enforcement officer has no authority to help repossess unless the repossession is by court order.

- In fact, using a law enforcement officer may make the law enforcement agency, as well as the reposessor, liable for violating the law. *Robertson v. Cooper*, 173 S.C. 305, 175 S.E. 524 (1934)
- See also *Soldal v. Cook County, Illinois*, 506 U.S. 56, 113 S.Ct. 538 (1992); *Abbott v. Latshaw*, 164 F.3d 141 (3d Cir. 1998).
- In *Fulton v. Anchor Savings Bank, FSB*, 215 Ga. App. 456, 452 S.E.2d 208 (1994), the consumer called the police for assistance when the reposseors showed up to pick up the car. The police officer looked at the repossession paperwork and told the consumer to turn over the car. The Georgia Court of Appeals held that the surrender in this case could in no way be called voluntary.
- A consumer may be held liable for damages for injury to the collateral or for wrongfully failing to make collateral available.
- *S.C. Code Ann.* § 37-5-103(6).

2. Self-help Repossession

- A creditor may use self-help to repossess collateral so long as there is not a breach of the peace.
- *S.C. Code Ann.* §§ 36-9-609 and 37-5-112. (§ 36-9-503 prior to 7/1/01)
 - In general terms, a breach of the peace is a violation of public order, a disturbance of public tranquility, by any act or conduct inciting to violence.
 - *Jordan v. Citizens & Southern Nat. Bank*, 278 S.C. 449, 298 S.E.2d 213 (1982).
 - It is not necessary that the peace be actually broken to lay the foundation of a prosecution for this offense. If what is done is unjustifiable, tending with sufficient directness to break the peace, no more is required
 - *Lyda v. Cooper*, 169 S.C. 451, 169 S.E. 236 (1933).
- Threats or acts of force or violence are a breach of the peace.
 - Repossession after a verbal objection has been held to breach the peace. *Hollibush v. Ford Motor Credit Co.*, CCH Consumer Credit Guide, ¶ 95,487 (Wis. App. 1994).

- The verbal objection should be unequivocal. *Webber v. Farmers Chevrolet Co.*, 186 S.C. 111, 195 S.E. 139 (1938); *Fulton v. Anchor Savings Bank, FSB*, 215 Ga. App. 456, 452 S.E.2d 208 (1994).
- An equivocal objection may not be sufficient. See *Willis v. Whittle*, 82 S.C. 500, 64 S.E. 410 (1909).
- However, any manifestation of force is enough to send the question to the jury. *Childers v. Judson Mills Store Co.*, 189 S.C. 224, 200 S.E. 770 (1939) (turning the door knob to enter the house); *Lark v. Cooper Furniture Co.*, 114 S.C. 37, 102 S.E. 786 (1919); *Williams v. Tolbert*, 76 S.C. 211, 56 S.E. 908 (1907) (breaking lock on gate outside house).
 - A later uneventful repossession after the consumer threatened to shoot the creditor's agent was not a breach of the peace. *Wade v. Ford Motor Credit Co.*, CCH Consumer Credit Guide, ¶ 96,623 (Kan. App. 1983). See also *Hutchinson v. A.K. Brown Motors, Inc.*, 191 S.C. 319, 4 S.E.2d 268 (1939)
 - Likewise, a breach of the peace that occurs away from the consumer's premises and after the repossession has been accomplished is not a conversion. *Johnson v. Citizens & Southern Nat. Bank*, 278 S.C. 449, 298 S.E.2d 213 (1982).
- Taking property from inside a person's home without permission or a court order is always a breach of the peace.
- *S.C. Code Ann.* § 37-5-112.
- See also *Childers v. Judson Mills Store Co.*, 189 S.C. 224, 200 S.E. 770 (1939)

3. Claim and Delivery

- If the consumer does not voluntarily surrender the collateral and the creditor cannot take it without a breach of the peace, the creditor must use judicial process.
- The procedures for claim and delivery are set forth in *S.C. Code Ann.* §§ 15-69-10 through 15-69-210 (for Circuit Court) and §§ 22-3-1310 through 22-2-1480 (for Magistrate's Court).

D. Notice of Right to Redeem and Intended Disposition

1. Buyer's Right to Redeem

- After a legal repossession, the consumer (or other obligor) has a right to redeem the collateral.
- *S.C. Code Ann.* § 36-9-623. (former § 36-9-506 prior to 7/1/01)

- Redemption is usually accomplished by payment of the unpaid balance of the obligation, together with reasonable repossession costs
 - *S.C. Code Ann.* § 36-9-623(b)
 - A consumer cannot waive the right to redeem
 - *S.C. Code Ann.* § 36-9-624(c)
- The redemption may be made any time before a secured party:
 - has collected collateral under § 36-9-607
 - has disposed of collateral or entered into a contract for disposition under § 36-9-610
 - has accepted the collateral in full or partial satisfaction of the obligation under § 36-9-622
 - *S.C. Code Ann.* § 36-9-623(c) (former § 36-9-506 prior to 7/1/01)

2. Notice of Intended Disposition

- Parties Entitled to Notice
 - A secured party that intends to dispose of repossessed collateral under § 36-9-610 must send a reasonable authenticated notification of the disposition to:
 - the debtor
 - an secondary obligor, which includes a guarantor
 - *S.C. Code Ann.* § 36-9-611(b-c)
 - This requirement is consistent with prior law
 - *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 437 S.E.2d 50 (1993)
 - *Andrews v. von Elten & Walker, Inc.*, 315 S.C. 199, 432 S.E.2d 500 (Ct. App. 1993)
 - A pre-default waiver of this notification requirement is unenforceable in consumer transactions
 - *S.C. Code Ann.* § 36-9-602(7)
 - This notice is not required if the property is perishable or is of a type customarily sold on a recognized market
 - *S.C. Code Ann.* § 36-9-611(d)
- Contents of Notice
 - In a consumer goods transaction, the notice of disposition must include the following information:
 - a description of the debtor and the secured party

- a description of the collateral that is the subject of the intended disposition
- a statement of the method of intended disposition
- a statement that the debtor is entitled to an accounting of the unpaid indebtedness and the charge, if any, for the accounting
- a statement of the time and place of a public disposition or the time after which any other disposition is to be made
- a description of any liability for a deficiency of the person to which the notice is sent
- a telephone number from which the amount that must be paid to redeem the collateral is available
- a telephone number or address from which additional information is available

information, no particular phrasing is required

- So long as the notice contains the required information, no particular phrasing is required
- *S.C. Code Ann.* § 36-9-614(1-2)

under prior law

- These requirements are much more detailed than under prior law
- See former § 36-9-504

- Form of Notice

Section 36-9-614(3) gives an example of a form that satisfies this notice requirement when properly completed

- A notice in the form of subsection (3) is sufficient even if additional information appears at the end of the form
- A notice in the form of subsection (3) is sufficient even if it includes errors in information not required by subsection (1), unless the error is misleading regarding rights under this Chapter
- If a notice is not in the form of subsection (3), other law determines the effect of including information not required by subsection (1)
- *S.C. Code Ann.* § 36-9-614(1) and (3-6)

- Timeliness of Notice

Whether the notice provides the debtor a reasonable time to redeem before disposition is a question of fact

- In a transaction other than a consumer transaction, a notice sent after default and more than ten days before the earliest time of disposition set forth in the notice is a reasonable time
- This provides a safe harbor for non-consumer transactions
- Whether ten days notice is sufficient in a consumer transaction is a question of fact
- *S.C. Code Ann.* § 36-9-612

- This is a change from prior law which required the notice to be given a reasonable time before the date of disposition
- No specific time was specified, but most courts found ten business days to be reasonable

- Purpose of Notice
 - The purpose of the notice is to give the debtor an opportunity to discharge the debt and redeem the collateral, to produce another purchaser or to see that the sale is conducted in a commercially reasonable manner.
 - *Crane V. Citicorp Nat'l Services*, 313 S.C. 70, 437 S.E.2d 50 (1993).

E. Repossession Charges

1. A creditor may not impose any charges as a result of default by a consumer, except those authorized by the Consumer Protection Code. *S.C. Code Ann.* §§ 37-2-414 and 37-3-405.

2. Permissible Repossession Charges

- Reasonable costs to obtain possession of the collateral and prepare it for disposition. *S.C. Code Ann.* §§ 37-2-414, 37-3-405 and 36-9-615(a)(1). (former § 36-9-504)
- Reasonable attorney's fees not to exceed 15% of the unpaid debt when an outside attorney is hired. *S.C. Code Ann.* §§ 37-2-413(1) and 37-3-404(1).

3. Personal Property Not Subject to Security Interest

- Neither the creditor nor the creditor's representative is entitled to personal property that is not subject to the security interest
- Such property must be made reasonably available to the debtor
- The law does not provide for any type fee for holding this property
- *Sanders v. GMAC*, 180 S.C. 138, 185 S.E. 180 (1936)
- *Soulios v. Mills Novelty Co.*, 198 S.C. 355, 17 S.E.2d 869 (1941)

F. Effect of Illegal Repossession

1. If the creditor repossesses the collateral in violation of the provisions of the Consumer Protection Code, the creditor is

liable to the consumer for conversion. *S.C. Code Ann.* § 37-5-111(7).

2. In a conversion action, the consumer is entitled to a jury trial and can seek the full value of the collateral plus punitive damages.
3. Although a cosigner or co-debtor is entitled to notice of the right to cure, the cosigner or co-debtor does not and, generally, is not entitled to possession.
 - A cosigner or co-debtor who does not have title or the right of possession of the collateral cannot bring an action for conversion. *Crane v. Citicorp Nat'l Services*, 313 S.C. 70, 437 S.E.2d 50 (1993).
 - However, the cosigner or co-debtor may be able to bring an action for unreasonable disposition of the collateral under § 36-9-507(1). *Crane V. Citicorp Nat'l Services*, 313 S.C. 70, 437 S.E.2d 50 (1993).

III. Disposition of Repossessed Collateral

A. Commercially Reasonable Sale or Other Disposition

1. After a creditor has legally repossessed collateral and the buyer has failed to redeem it, the creditor may sell or otherwise dispose of the collateral.

2. When disposing of the collateral, the creditor must proceed in a commercially reasonable manner. *S.C. Code Ann.* § 36-9-610(a-b) (former § 36-9-504(1))

- Collection or Enforcement by Secured Party

- When the collateral consists of accounts, payment intangibles, promissory notes, or deposit accounts, the secured party may, upon default, take action to collect the account or enforce the obligation

- The secured party must act in a commercially reasonable manner

- *S.C. Code Ann.* § 36-9-607

- Disposition by Secured Party

- The secured party may dispose of the collateral at a public or a private sale

- *S.C. Code Ann.* § 36-9-610(b)

- Public Sale
- For a public sale, the consumer must be given notice of the time and place of the sale.
- *S.C. Code Ann.* § 36-9-614(3) (former § 36-9-504(3))
- Substantial compliance with the procedures of §§ 36-9-629 through 36-9-635 is conclusive that the sale was commercially reasonable

- Private Sale

- For a private sale, the consumer must be notified of the last day the collateral will be kept before it is put up for private sale.
- *S.C. Code Ann.* § 36-9-614(3) (former § 36-9-504(3)).
- the consumer does not have to be allowed to participate in a private sale.
- in the past, ten business days has almost always been held to be reasonable notice of the time the collateral will be held before a private sale.
- with the change in the law, the reasonableness of the time period is a question of fact under § 36-9-612

sale only if:

- The secured party may purchase the collateral at the
 - the sale is a public sale or
 - the collateral is of a type sold on a recognized market or the subject of widely distributed standard price quotations
- *S.C. Code Ann.* § 36-9-610(c)

- Warranties and Disclaimers

- the disposition of the collateral carries the implied warranties of:
 - title
 - possession
 - quiet enjoyment
- the secured party may disclaim or modify the implied warranties

- *S.C. Code Ann.* § 36-9-610(d-f)

- Acceptance of Collateral by Secured Party

- A secured party may accept collateral in full or partial satisfaction of the obligation only if:
 - the debtor consents to the acceptance
 - the debtor must agree to the terms of the acceptance in a record authenticated after the default or
 - the secured party sends the debtor a proposal that is unconditional or is conditioned on the preservation or maintenance of the collateral and the debtor does not object
 - the secured party does not receive a timely objection
 - generally, the objection must be received within 20 days of the notice
 - in the case of consumer goods, the collateral cannot be in the possession of the debtor, and
 - the secured party is not required to dispose of the collateral or the debtor waives the requirement
 - *S.C. Code Ann. § 36-9-620(a-d)*

- The secured party must dispose of the collateral if:
 - 60% of the cash price has been paid in the case of a purchase money security interest in consumer goods
 - 60% of the principal amount of the obligation has been paid in the case of a non-purchase money security interest in consumer goods
- *S.C. Code Ann. § 36-9-620(e)*

- The disposition must occur:
 - within 90 days after taking possession
 - within a longer period if the debtor and all secondary obligors agree after default
- *S.C. Code Ann. § 36-9-620(f)*

- A secured party may not accept collateral in partial satisfaction of the obligation in a consumer transaction
 - *S.C. Code Ann. § 36-9-620(g)*

- Acceptance of the collateral in satisfaction of the obligation has the effect of:
 - discharging the obligation to the extent agreed by the debtor
 - transferring the debtor's rights in the collateral to the secured party
 - terminating an subordinate lien
- *S.C. Code Ann. § 36-9-622*

3. Determining whether the Conduct was Commercially Reasonable

- All aspects of the sale must be commercially reasonable.
- *S.C. Code Ann.* § 36-9-610(b) (former § 36-9-504.)
- Failure to obtain the best possible price when goods are disposed of does not, within itself, make the disposition unreasonable.
- *S.C. Code Ann.* § 36-9-627(a) (former § 36-9-507(2))
 - However, a sale far below the market price may make the disposition commercially unreasonable.
 - See *Ogletree v. Brokers South, Inc.*, 192 Ga. App. 53, 383 S.E.2d 900 (1989).
 - In *Ogletree*, the plaintiff purchased a car from the defendant in November, 1986, for \$7,982.25, including \$634.75 in finance charges.
 - In February, 1987, the vehicle broke down and was taken back to defendant's lot where the plaintiff was to redeem it by paying \$95 as impound and towing fees and a \$50 installment payment.
 - On the day the plaintiff was to have picked up the vehicle, the defendant told her it had been sold.
 - The defendant did not give the plaintiff notice of its intent to sell the vehicle if she did not redeem it.
 - The Court noted that vehicle was sold for \$500 in February, 1987, at a private sale, although the defendant had paid \$2,750 for it and had sold it for \$7,982.25 in November, 1986.
 - The trial court had granted the defendant's directed verdict motion, but the Georgia Court of Appeals reversed, holding that the plaintiff had met her burden of proof in asserting a claim that the vehicle's disposition was not commercially reasonable, and the burden shifted to the defendant to prove that proper notice was provided and the disposition was commercially reasonable.

- A disposition is commercially reasonable if made:
 - in the usual manner on a recognized market
 - at the price current in a recognized market at the time of disposition
 - in conformity with reasonable commercial practices among dealers of that type property
 - *S.C. Code Ann.* § 36-9-627(b)
 - Examples:
 - Selling a car at an auto auction is usually commercially reasonable because there is a recognized market for cars and that is a common way that cars are sold on the recognized market.
 - However, one court has held that whether a "dealers only" private auction is commercially reasonable is a question of fact for the fact finder. *Ford Motor Credit Co. v. Mathis*, 660 So.2d 1273 (Miss. 1995).
 - Another court has held that whether a resale of an automobile at wholesale rather than retail is commercially reasonable is a question of fact. *Ford Motor Credit Co. v. Jackson*, 446 N.E.2d 1330 (Ill. App. 1984).

B. Remedies for Unreasonable Disposition of Collateral

1. Debtor Remedies

- If the collateral has not been disposed of, the debtor may, in a proper case, be able to obtain a restraining order preventing the disposition.
- *S.C. Code Ann.* § 36-9-625 (former § 36-9-507(1))
- If the collateral has already been disposed of, the debtor, or any other person entitled to notice, has a claim for damages caused by the failure of the creditor to proceed in a commercially reasonable manner
 - Loss may include loss resulting from the debtor's inability to obtain alternative financing
 - Or the increased cost of alternative financing
- *S.C. Code Ann.* § 36-9-625(b) (former § 36-9-507(1))
- If the collateral is consumer goods, the debtor has the right to recover an amount not less than the credit service charge (*i.e.*, the finance charge) plus ten percent of the amount of the debt or the time price differential plus ten percent of the purchase price.
- *S.C. Code Ann.* § 36-9-625(c)(2) (former § 36-9-507(1))

of disposition has been held to allow for minimum damages

- In a consumer transaction, failure to send the notice

Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000)

- See *Garza v. Brazos County Fed. Credit Union*, 603 S.W.2d 298 (Tex. Civ. App. 1980), for an example of the damages calculation.

• In *Garza*, there was no question about the fairness of the resale or the adequacy of the selling price, but the consumer never received the required notice.

• The credit union argued that the 10% applied only to the principal balance at the time of the repossession, but the court rejected the argument and awarded 10% of the original principal.

- If the debtor's deficiency is eliminated, the debtor may still recover damages for the loss of any surplus
- However, the debtor cannot otherwise recover for failure to proceed in a commercially reasonable manner
- *S.C. Code Ann.* § 36-9-625(d)

- In addition to actual damages, the debtor may recover \$500 in each case from a person that:

• fails to release control of collateral within 10 days of demand when there is no outstanding secured obligation and no commitment to make advances (§ 36-9-208)

• fails to release collateral that has been the subject of an assignment within 10 days of demand when there is no outstanding secured obligation and no commitment to make advances (§ 36-9-209)

• files a record the person is not entitled to file (§ 36-9-509(a))

• fails to file or send a termination statement as required (§ 36-9-513(a) or (c))

• fails to send an explanation of the surplus or deficiency after disposition in a consumer transaction (§ 36-9-616(b)(1) and whose failure is a part of a pattern or is consistent with a practice of noncompliance

- the explanation must be sent before or when the secured party accounts to the debtor and
- within 14 days of a request

• fails to send a consumer obligor liable for a deficiency a record waiving the deficiency within 14 days of a request (§ 36-9-616(b)(2))

• fails to provide an accounting, a list of collateral, or a statement of account (§ 36-9-210)

- *S.C. Code Ann.* § 36-9-625(e-g)

2. Limitations on Creditor Liability

- A secured party is not liable to an unknown party
- *S.C. Code Ann.* §§ 36-9-605 and 36-9-628(a-b)

- A secured party is not liable, and is entitled to a deficiency, when the secured party violates a provision applying to a consumer transaction if:
 - the secured party had a reasonable belief that the transaction was not a consumer transaction
 - and this belief was based on representations of the debtor or obligor

- A secured party is not liable for statutory minimum damages under § 36-9-625(c)(2) for failure to provide a response to a request for an explanation of a surplus or deficiency
- A secured party is not liable for statutory minimum damages under § 36-9-625(c)(2) more than once with respect to any one obligation
- *S.C. Code Ann.* § 36-9-628(c-e)

IV. Surplus, Deficiencies and Limitations on Deficiencies

A. General Rule

1. Surplus or Deficiency

- Generally, unless provided otherwise in the agreement or unless limited by law, the debtor is liable for any deficiency remaining after the reasonable disposition of the collateral and the secured party must account for any surplus
- *S.C. Code Ann.* § 36-9-615(d) (former § 36-9-504(2))

2. Failure to Proceed in a Commercially Reasonable Manner

- In a non-consumer transaction failure to give the required notice or proceed in a commercially reasonable manner does not always prevent the creditor from recovering the balance owed on the debt.
 - For example, in a non-consumer transaction failure to send the notice of intended disposition does not bar the creditor from obtaining a deficiency judgment
- Rather, it creates a rebuttable presumption that the collateral was worth the amount of indebtedness

- To rebut the presumption, the creditor must introduce evidence that the value of the collateral was worth less than the amount of the debt
 - *S.C. Code Ann.* § 36-9-626(a)
 - *See also Republic National Bank v. DLP Industries, Inc.*, 314 S.C. 108, 441 S.E.2d 827 (1994); *Mathias v. Hicks*, 294 S.C. 305, 363 S.E.2d 914 (Ct. App. 1987)

- In a consumer transaction the creditor is not entitled to a deficiency if the collateral was not disposed of in good faith and in a commercially reasonable manner
- *S.C. Code Ann.* § 37-5-103(1)
- Whether the creditor is entitled to a deficiency for failure to send the notice of disposition in a consumer transaction is for the court to determine
- *S.C. Code Ann.* § 36-9-626(b)
 - Under prior law it was a question of fact whether the conduct was reasonable when the creditor failed to send the notice of disposition
 - *Crane v. Citicorp Nat'l Services*, 313 S.C. 70, 437 S.E.2d 50 (1993)

B. Notice and Explanation of Surplus or Deficiency

1. Calculating the Surplus or Deficiency

- A secured party is to apply the cash proceeds from the disposition in the following order:
 - the reasonable expenses of retaking, holding and preparing the collateral for disposition including reasonable attorney's fees
 - the satisfaction of the obligation
 - the satisfaction of subordinate liens
- Generally, a secured party does not have to account for non-cash proceeds unless failure to do so would be commercially unreasonable
- The surplus or deficiency is calculated based on the proceeds that would have been realized in a disposition made in a commercially reasonable manner to a third party if:
 - the secured party or a related party purchases at the disposition and
 - the price realized is significantly below the range that a complying disposition to a third party would have brought
- If a junior secured party receives cash proceeds in good faith and without knowledge that the receipt violates the

rights of a senior secured party, the junior secured party takes free of the rights of the senior secured party

- *S.C. Code Ann.* § 36-9-615

2. Notice and Explanation of the Surplus or Deficiency

- A secured party in a consumer transaction who is obligated to pay a surplus or attempts in writing to collect a deficiency from a consumer must provide a written explanation of the calculation of the surplus or deficiency
- The notice and explanation must be sent before or when the secured party accounts for a surplus or makes a written demand for a deficiency or within 14 days of a request
- The explanation must contain:

deficiency
calculated

- a statement of the amount of the surplus or
- an explanation of the surplus or deficiency was
 - this explanation must include:
 - the aggregate amount of obligations secured and the amount of any rebate of unearned finance charges
 - the amount of the proceeds of the disposition
 - the aggregate amount of the obligations after deducting the proceeds
 - the amount and types of expenses
 - the amount and types of credit
 - the amount of the surplus or deficiency
 - No particular language is required
- a statement that future debits, credits and charges, including additional finance charges, may affect the amount of the surplus or the deficiency
- provides a telephone number or mailing address for additional information

including additional finance charges, may affect the amount of the surplus or the deficiency

additional information

- *S.C. Code Ann.* § 36-9-616(a-d)
- A consumer is entitled without charge to one response to a request during any 6 month period in which the secured party did not send an explanation
- The secured party may require a charge not exceeding \$25 for each additional response
- *S.C. Code Ann.* § 36-9-616(e)

C. Limitations on Deficiencies and Deficiency Charges

1. A consumer is not liable for a deficiency unless the creditor has disposed of the goods in good faith and in a commercially reasonable manner. *S.C. Code Ann.* § 37-5-103(1).

2. Credit Sellers

- If a seller repossesses or voluntarily accepts surrender of the goods that were the subject of a consumer credit sale and the cash sale price was \$1,500 or less, the consumer is not liable for a deficiency.

- The figure is subject to adjustment based on the

Consumer Price Index

- The current figure is \$4,050

- *S.C. Code Ann.* § 37-5-103(2).

In such case the seller is under no obligation to sell the goods, unless the consumer has paid at least 60% of the purchase price.

- *S.C. Code Ann.* § 36-9-620 (former § 36-9-505)

If the consumer has paid at least 60%, the creditor must dispose of the collateral under § 36-9-610 within 90 days.

- *S.C. Code Ann.* § 36-9-620(e-f) (former §

36-9-505(1))

- The rationale is that the consumer has enough equity in the collateral that a reasonable resale would result in a surplus.
- Failure to dispose of the collateral within 90 days gives the consumer a cause of action for conversion or for the statutory penalty in § 36-9-625(c)(2) (former § 36-9-507(2)). See, e.g., *Crosby v. Basin Motor Co.*, 488 P.2d 127 (N.M. App. 1971).
- The consumer, however, may modify his or her rights after default. See *Kelley v. Commercial Nat'l Bank*, 678 P.2d 620 (Kan. 1984).
- Kelley's car was repossessed and the bank notified her that her car would be sold if she did not redeem.
- Kelley asked the bank not to sell the car until they had an opportunity to negotiate a settlement. No settlement was reached and the bank sold her car.
- The court held that Kelley's request that the bank not sell the car and that it return the car to her modified her rights under § 36-9-505(1), and the bank did not have to dispose of the car within 90 days.
- If a seller repossesses or voluntarily accepts surrender of goods that were not the subject of a consumer credit sale

but in which the seller has a security interest to secure a debt arising from a sale of goods or services and the cash price was \$1,500 or less, the consumer is not liable for a deficiency.

• This figure is subject to adjustment based on the Consumer Price Index

• The current figure is \$4,050

• *S.C. Code Ann. § 37-5-103(3).*

• The seller must have an enforceable security interest to repossess such goods.

• In such case the seller's obligation regarding the disposition of the goods is governed by Article 9 of Title 36.

3. Lenders

- These limitations do not apply to lenders in the same way as to sellers.
- If a lender repossesses or voluntarily accepts surrender of goods on which the lender has a purchase money security interest, and the lender is subject to the claims and defenses against the seller under *S.C. Code Ann. § 37-3-410*, and the net proceeds of the loan paid to or for the benefit of the consumer, then the consumer is not liable for a deficiency.
- *S.C. Code Ann. § 37-5-103(4).*
- The provisions of *S.C. Code Ann. § 37-3-410* in Part I above.
- If a lender repossesses or voluntarily accepts surrender of goods that were owned by the consumer at the time of the loan and were put up as collateral to secure the loan, the lender is not prevented by this section from recovering a deficiency.

4. Action on Debt

- If a creditor would not be entitled to a deficiency under § 37-5-103 and the creditor elects to bring an action against the consumer for the debt, the creditor is not entitled to take possession of the collateral and the collateral is not subject to levy or sale on execution or similar proceedings to enforce the judgment.
- *S.C. Code Ann. § 37-5-103(7)*