

4) SURPLUS & DEFICIENCY

## a) General Rule

When a secured party conducts a sale or disposition of collateral, the amount collected will typically vary from the amount of the obligation. If the sale brings more than the underlying obligation, the secured party must account to and pay the debtor for any surplus. On the other hand, when the sale brings less than the underlying obligation, the obligor is liable for any deficiency.

## b) Exception – Certain Intangibles

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus and the obligor is not liable for any deficiency.

## c) Deficiency Judgment Sometimes not Available

If it can be established that a secured party is not proceeding with a sale in accordance with Article 9, the sale may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred, then any person entitled to notification has a right to recover from the secured party any loss caused by a failure to comply with the provisions of Article 9 (i.e., to conduct a reasonable sale).

Article 9 does not expressly address the right of a creditor to recover a deficiency judgment after violating the rules contained in Article 9 in the case of consumer goods (but for business goods, the rebuttable presumption rule applies). However, many courts have addressed the effect of the secured party's violation of such debtor protection provisions. Courts have taken three approaches, none of which can be clearly identified as the majority.

## (1) Absolute Defense

The first approach is to deny the secured creditor any deficiency if it is shown that Article 9 has been violated. For example, a security holder who sells without notice may not look to the debtor for any loss. Thus, under this approach, the debtor has an absolute defense to a secured creditor's deficiency judgment. Additionally, as set forth herein, the debtor possesses a general right to recover damages for the secured creditor's violation of Article 9.

## (2) Rebuttable Presumption Rule

A second approach applies what is known as the "rebuttable presumption" rule. Under this rule, a debtor who has not been notified of a sale has the benefit of a presumption