

CONSUMER LAW SECTION

Respectfully submits the following position on:

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SB 0551

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The Consumer Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Consumer Law Section only and is not the position of the State Bar of Michigan.

The State Bar does not have a position on this matter.

The total member of the Consumer Law Section is 1,399.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 16. The number who voted in favor of this position was 12. The number who voted against this position was 0.

## Report on Public Policy Position

**Name of Section:**

Consumer Law Section

**Contact person:**

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**Bill Number:**

SB 0551 (Booher) Commercial code; secured transactions; calculation of damages for violation of article 9 by secured party; revise, and extend rules in deficiency actions to consumer transactions. Amends secs. 9625 & 9626 of 1962 PA 174 (MCL 440.9625 & 440.9626).

**Date position was adopted:**

March 6, 2014

**Process used to take the ideological position:**

Position adopted after an electronic discussion and vote

**Number of members in the decision-making body:**

16

**Number who voted in favor and opposed to the position:**

12 Voted for position

0 Voted against position

1 Abstained from vote

3 Did not vote

**Position:**

Oppose

**Explanation of the position, including any recommended amendments:**

The Consumer Law Section of the State Bar of Michigan, opposes SB 551 as it will effectively eliminate any penalty for the creditor's failure to comply with the Uniform Commercial Code (UCC) Article 9 in consumer transactions, thereby removing any protections consumers. As proposed, SB 551 is likely to encourage secured creditors to ignore any of the protections built into Article 9 because the secured creditor will perceive that without the potential of a penalty being assessed against it if the procedures are ignored, following the procedures would be too time consuming or cumbersome.

Article 9 sets out certain requirements and procedures that the creditor must meet and take when repossessing the secured property. In writing the Uniform Commercial Code, the legislature recognized that there were differences between business parties who enter into secured transactions amongst themselves and consumers who enter into secured transactions with businesses. For example, Article 9 requires timely notice to the consumer, and that the repossessed property be sold in a commercially reasonable manner.

Michigan law, MCL 440.9625, currently insures that this will happen by providing for a penalty or disincentive to creditors who fail to comply with Article 9. The statute and current case law interpreting the statute prohibit the creditor from seeking the deficiency from the consumer if the creditor failed to comply with Article 9, such as giving notice of the sale to the consumer. In *Honor State Bank v Timber Wolf Construction*, 391 NW2d 442 (Mich App 1986), the Michigan Court of Appeals, in interpreting this section of the UCC, stated:

“The purpose of the reasonable notification requirement is threefold:

- 1) to give the debtor the opportunity to exercise his redemption rights ... ;
- 2) to afford the debtor an opportunity to bid at the sale or to encourage others to bid on the property so as to help assure a fair sale price; and
- 3) to allow the debtor to oversee every aspect of the disposition so as to maximize the price obtained.”

There is no evidence that the procedure currently required by Article 9 prohibits or diminishes the secured party’s rights. Moreover, with proper notice, we can ensure that the creditor will sell the property in a commercially reasonable manner and for the fair market price. Without the protections of notice to the consumer that currently exist, the creditor can sell the property in a manner not consistent with commercial reasonableness requirements and then seek a deficiency against the consumer who will have no effective remedy.

Recognizing that secured transactions between consumers and businesses often involve parties with unequal bargaining power in the marketplace, drafters of the uniform law included a provision, in the current law which allowed the court to adopt additional measures if necessary to protect the consumer in situations where a secured party is exercising its rights. The proposed amendment removes that authority from the court.

So the current law prevents this from happening, thereby protecting consumers. SB 551 eliminates this protection. SB 551 also in effect "overrules" Michigan case law that bars deficiencies in consumer cases when proper notice of sale is not given. In the process, it gets rid of the incentives for repossessing creditors of consumers to follow the Article 9 notice and sale rules. Under SB 551, creditors who ignore the law will simply testify that the amount they got at the sale would not have changed with notice to the consumer or whatever else they should have done, and they will get their deficiency. There is no reason to drop one of the few consumer-friendly rules in Michigan UCC case law. Accordingly, the Consumer Law Section of the State Bar of Michigan opposes SB 551.

**The text of any legislation, court rule, or administrative regulations that is the subject of or referenced in this report.**

<http://legislature.mi.gov/doc.aspx?2013-SB-0551>