Post-Repossession Notice Litigation: Small Mistakes Can Lead to Big Financial Consequences

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I. Introduction

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Companies that make and hold vehicle loans and liens may repossess the vehicles as collateral if the borrowers do not pay as promised. Generally, no advance notice of intent to repossess vehicles is required, and repossession is typically permitted immediately upon default of a loan or lease. The Uniform Commercial Code ("UCC")[1] does not define default, leaving the definition to the parties' agreement. The UCC permits repossession at any time and location, so long as the repossession does not result in a "breach of the peace."[2] The UCC, as adopted by individual states, sets forth specific requirements for post-repossession and post-sale notices. In addition, many states have statutes that require additional notices or additional information in the post-repossession and post-sale notices.

Although litigation disputing whether a vehicle owner or lessee was properly declared to be in default and litigation claiming that a particular repossession created a breach of the peace is ever-present, such litigation is usually brought by a single plaintiff, not on behalf of a class. On the other hand, litigation claiming deficiencies in post-repossession and/or post-sale notices is almost always brought on behalf of a class. In combination with the UCC's draconian formula[3] for calculating damages in such cases, class

1. This Article will discuss the UCC in general, but companies that make and hold vehicle liens and loans should be sure to check for state-by-state variations.
2. U.C.C. § 9-609(b)(2).
3. U.C.C. § 9-625.

actions alleging violations of the UCC's requirements for post-repossession and/or post-sale notices present real financial threats to companies that make and hold vehicle liens and loans.

This Article will discuss the UCC's requirements for post-repossession and post-sale notices, examples of deficiencies in these notices that most often result in litigation, and strategies that can be employed to limit the financial risks posed by class actions claiming violations of the UCC's requirements.

II. UCC Requirements for Post-Repossession and Post-Sale Notices

The UCC permits secured parties to sell collateral after default, but requires that "every aspect" of the disposition of collateral be "commercially reasonable."[4] A crucial requirement for disposing of collateral in a commercially reasonable manner is providing notification to the consumer obligor in advance of the disposition.[5] Although beyond the scope of this Article, the question of whether notice is sent sufficiently in advance of the disposition is a complicated and fact-specific one,[6] to which secured parties should pay particular attention when reviewing their policies and procedures for ensuring compliance with the UCC.

The UCC sets forth very specific requirements for the contents of post-repossession, pre-disposition notices that must be strictly complied with to avoid litigation and to ensure success in litigation that is filed.[7] Specifically, notices must: (1) describe the consumer obligor and the secured party; (2) describe the collateral; (3) state the method of the intended disposition; (4) state the consumer obligor is entitled to an accounting of the unpaid indebtedness and the charge, if any, for an accounting; (5) state the time and place of a public disposition, or the time after which any other disposition is to be made; (6) include a description of any liability for a deficiency that the recipient of the notice may face; (7) provide a telephone number that the consumer obligor can use to obtain the exact amount that must be paid to the secured party to redeem the collateral; and (8) provide a telephone number or mailing address that can be used by the consumer obligor to obtain additional information concerning the disposition and the secured obligation.[8]

The UCC states no particular phrasing is required for the post-repossession, pre-disposition notices but includes a "safe harbor" sample notice that, if followed, will be deemed to provide sufficient information to the consumer obligor to ensure commercial reasonableness.[9] If the safe harbor

4. U.C.C. § 9-610.
5. U.C.C. § 9-611.
6. U.C.C. § 9-612.
7. U.C.C. § 9-614.
8. U.C.C. §§ 9-613, 9-614.
9. U.C.C. § 9-614(2), (3).

sample is not used, the UCC explains "law other than this article" will determine whether the notice provides sufficient information to the consumer obligor to ensure commercial reasonableness.[10]

Following the disposition of the collateral, the secured party is required to send an additional notice to the consumer obligor informing the consumer obligor of either entitlement to a surplus or liability for a deficiency.[11] Once again, the UCC sets forth very specific requirements for the contents of post-sale notices.[12] Specifically, the post-sale notice must provide the following information: (1) the amount of the surplus or deficiency; (2) an explanation of how the secured party calculated the surplus or deficiency; (3) if applicable, a statement that future debits, credits, and charges, including additional credit service charges or interest, rebates, and expenses, may affect the amount of the surplus or deficiency; and (4) a telephone number or mailing address that can be used by the consumer obligor to obtain additional information regarding the transaction.[13] The post-sale notice must also provide the following information in the following order: (1) "the aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date" as set forth in the UCC provision; (2) "the amount of proceeds of the disposition;" (3) "the aggregate amount of the obligations after deducting the amount of proceeds;" (4) "the amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;" (5) "the amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1);" and (6) "the amount of the surplus or deficiency."[14]

Once again, the UCC does not require particular phrasing for the post-sale notice, but it states "complying substantially with the requirements of subsection (a) is sufficient, even if it includes minor errors that are not seriously misleading."[15] Of course, all post-sale notices are subject to the UCC's general commercial reasonableness requirement.[16]

The UCC provides for significant damages upon failure to comply with these requirements.[17] First, consumer obligors can recover damages "in the

10. U.C.C. § 9-614(6).
11. U.C.C. § 9-616.
12. *Id*.
13. U.C.C. § 9-616(a)(1).
14. U.C.C. § 9-616(c).
15. U.C.C. § 9-616(d).
16. U.C.C. § 9-610.
17. U.C.C. § 9-625.

amount of any loss caused by failure to comply" with these requirements.[18] Second, consumer obligors can recover "an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price."[19] Third, consumer obligors can recover $500 if it is established that the failure is "part of a pattern, or consistent with a practice, of noncompliance."[20] Although the official comments to the UCC emphasize that a double recovery generally should not be permitted, a case-by-case analysis of damages is usually required. In class actions of the type discussed below, these damages can mount very quickly.

III. Examples of Deficiencies in Notices that Most Often Result in Litigation

One frequent source of litigation regarding post-repossession, pre-disposition and post-sale notices emanates from the alleged inconsistencies between these notices as it pertains to the amount to be charged for specific expenses, such as repossession and storage expenses. For example, one company is currently litigating a class action in Pennsylvania federal court alleging its post-repossession, pre-disposition notices uniformly list storage charges of $25.00 per day in the redemption amount calculation, even though the post-sale notices then list $0.00 for storage charges.[21] The plaintiffs allege that the defendant purposefully overstates the redemption amount by including $25.00 per day storage charges, knowing storage charges will not actually be incurred.[22] The matter is currently stayed while the parties pursue a potential settlement on a class-wide basis. The obvious lesson from this case is to make sure charges included in the redemption amount calculation in post-repossession, pre-disposition notices will actually be incurred, thereby avoiding any inconsistencies with the post-sale notices.

In a recent case involving a slightly different type of inconsistency between the notices, a company paid several million dollars and waived deficiency balances worth thousands of additional dollars to settle a class action.[23] The action was filed by a class of Pennsylvania consumer obligors who received post-repossession, pre-disposition notices indicating that their vehicles would be sold through private sales but subsequently received post-sale notices indicating that their vehicles had been sold at a

18. U.C.C. § 9-625(c).
19. *Id*.
20. *Id*.
21. Kelly v. Santander Consumer USA, Inc., No. 20-3698, 2021 WL 518434, at *2 (E.D. Pa. Feb. 21, 2021).
22. *Id*.
23. Final Approval Order, No. 296-2020-CD (C.C.P. Jefferson Cnty. July 7, 2020).

public auction.[24] As this case demonstrates, companies that make and hold vehicle loans and liens must decide whether repossessed vehicles will be sold through public or private sales and then abide by that decision, to avoid creating inconsistencies in any subsequent notices it sends.

Another frequent source of litigation is the alleged failure of post-repossession, pre-disposition, and post-sale notices to include information required by other state statutes. For example, recently a company paid several million dollars and waived additional deficiency balances to settle a class action brought by a class of Pennsylvania consumer obligors.[25] The plaintiffs alleged, among other things, that the defendant failed to comply with the Pennsylvania Motor Vehicle Sales Finance Act,[26] which requires the post-repossession, pre-disposition notices provide for a 15-day redemption period.[27] As this case demonstrates, companies that make and hold vehicle loans and liens must review all state-specific requirements for post-repossession, pre-disposition and post-sale notices that go above and beyond the requirements of the UCC.

Similarly, another company recently paid several million dollars to settle a class action filed by a class of Ohio consumer obligors based on, among other things, a claim that the defendant failed to comply with the Ohio Retail Installment Sales Act[28] requirement that the post-repossession, pre-disposition notice provide the specific date on which a public sale of the collateral will be held.[29] The fatal flaw of the notices at issue in this action is that they stated the sales would occur "on or after" a particular date, rather than simply on a particular date.[30] Again, this demonstrates the importance of reviewing all state-specific requirements for post-repossession, pre-disposition and post-sale notices that exceed the UCC requirements.

A third defendant recently paid several million dollars and waived substantial deficiency balances to settle a class action filed by a class of Massachusetts consumer obligors.[31] The plaintiffs claimed the defendant failed

24. Dudo v. Cap. One Auto Fin., No. 296-2020-CD (C.C.P. Jefferson Cnty. July 7, 2020).
25. Final Approval Order, No. 16-6130, 2019 WL 196620 at *1 (E.D. Pa. Jan. 23, 2019).
26. 12 Pa. Cons. Stat. § 6201, *et seq.*
27. Langer v. Cap. One Auto Fin., No. 16-6130, 2019 WL 296620, at *1 (E.D. Pa. Jan. 23, 2019).
28. Ohio Rev. Code Ann. § 1317.01 *et seq.*
29. Rayburn v. Santander Consumer USA, Inc., No. 18-cv-1534 (S.D. Ohio Apr. 13, 2021); Final Judgment and Order of Dismissal with Prejudice, No. 18-cv-1534 (S.D. Ohio Apr. 13, 2021).
30. Rayburn v. Santander Consumer USA, Inc., No. 18-cv-1534 (S.D. Ohio Apr. 13, 2021).
31. Williams v. Am. Honda Fin. Corp., No. 14-cv-12859, 2016 WL 11507789, at *4 (D. Mass. Feb. 11, 2016).

to comply with Massachusetts law by calculating the deficiency balances included in post-sale notices based on the difference between the amount owed on the loan and the auction sales price, rather than the fair market value of the vehicle.[32] Under Massachusetts law, the fair market value of the vehicle must be used in this calculation.[33]

A third frequent source of litigation is the alleged failure of post-repossession, pre-disposition and post-sale notices to include information in compliance with state-specific versions of the UCC. A company recently agreed to pay millions of dollars and waived deficiency balances worth hundreds of millions of dollars to settle a class action brought by a nationwide class of consumer obligors and a class of Missouri consumer obligors.[34] The plaintiffs alleged, among other things, that the defendant violated Missouri law by including an illegal requirement in post-repossession, pre-disposition notices that redemption amounts must be paid via certified funds.[35] This case demonstrates the importance of reviewing all state-specific UCC requirements and ensuring that their post-repossession, pre-disposition and post-sale notices comply with other state-specific requirements.

A fourth frequent source of litigation arises from post-repossession, pre-disposition and post-sale notices containing charges for services not actually provided or that were incurred for commercially unreasonable prices. For example, one company is currently litigating a class action in Pennsylvania federal court alleging it overcharged consumer obligors to redeem their vehicles post-repossession.[36] Specifically, the consumer obligors claim the post-repossession, pre-disposition notices that were sent overstated the amount they needed to pay to redeem their vehicles because the defendant had contracts with repossession brokers, who added a hidden fee to the cost of repossession for facilitating the repossession.[37] The consumer obligors allege this fee is not reasonable because the defendant could have hired the repossession companies directly, without using a repossession broker and thereby increasing the cost for the consumer obligors to redeem their vehicles.[38] Stated another way, the consumer obligors claim the defendant could not legally pass the costs of using a repossession broker along to the consumer obligors.[39] In addition, the consumer obligors con-

32. *Id*.
33. Mass. Gen. Laws ch. 255B, § 20B.
34. Ally Fin. Inc. v. Haskins, No. 16JE-AC01713-01 (23rd Jud. Cir. Ct., Jefferson Cnty. Sept. 8, 2021).
35. *Id*.
36. Sorace v. Wells Fargo Bank, N.A., No. 20-cv-4318 (E.D. Pa. Nov. 23, 2021). Additionally, the consumer obligor plaintiffs allege the post-repossession, pre-disposition notices inaccurately provided that the vehicles would be sold through a private sale, when the vehicles were sold at a public auction instead.
37. *Id*.
38. *Id*.
39. *Id*.

tend the repossession brokers are not properly licensed in Pennsylvania and therefore were not properly hired by the defendant to conduct repossession broker services in Pennsylvania.[40] The matter is currently stayed while the parties pursue a potential settlement on a class-wide basis.

Similarly, in a class action discussed above, the class of consumer obligors contend the defendant included redemption and/or personal property fees in the payment amount in order to redeem their vehicles, despite the defendant having not incurred any such costs.[41] Additionally, and similar to another matter discussed above, the consumer obligors contend that the defendant allowed a third party to pass these charges along to them.[42] The simple lesson to be learned from these matters is that companies that make and hold vehicle loans and liens must ensure they do not include any charges in the redemption amounts provided to consumer obligors that were not actually incurred.

IV. Strategies to Limit Financial Risk Posed by Class Actions

As discussed above, the combination of the UCC's draconian formula for calculating damages and the fact that companies who make and hold vehicle liens and loans use form notices which are likely to repeat the same errors for many consumer obligors, cause small errors which are likely to result in very large financial consequences across a class.

To limit this financial risk, companies that make and hold vehicle liens and loans must ensure that they regularly review the requirements of the standard UCC Article 9 rules and all state specific UCC versions for deviations from the standard rules. However, reviewing the UCC is not enough. Companies must also make sure that they regularly review all other state specific statutes governing motor vehicle repossession to make sure that all additional required information is included in state specific repossession-related forms.

After reviewing all relevant statutes, companies that make and hold vehicle liens and loans must develop state specific repossession-related forms that contain all required information. These forms must then be reviewed regularly and updated to keep up with changes in legislation and developments in litigation to ensure compliance.

One tactic that has been successfully employed by some companies that make and hold vehicle liens and loans to reduce financial risk is to include arbitration agreements with class action waivers in their retail installment sales contract forms. This obviously will not reduce litigation risk for loans that are already in existence but can reduce the threat of financially crippling class action litigation going forward. Of course, before including ar-

40. *Id.*
41. Kelly, 2021 WL 518434, at *2.
42. *Id.*

bitration agreements with class action waivers in their retail installment sales contracts, companies must ensure that doing so is permitted by state law and monitor changes in the law to ensure that they remain permissible.

In the event litigation is filed on a class action basis, certain strategies should be employed to limit financial damage. One effective strategy for filing a motion to dismiss is to include a chart comparing the language of the relevant post-repossession, pre-disposition and post-sale notices to the safe harbor sample notice contained in the UCC. This strategy is obviously only recommended if the language of the relevant notices closely tracks the language of the safe harbor sample notice but, if so, such a chart serves as a powerful illustration of the defendant's compliance with the requirements of the UCC. To the extent the litigation involves additional requirements for the notices imposed by other state statutes, the chart can be expanded to compare the actual language of the notices to what is required by state law.

Another effective strategy for defending a case alleging inadequate notice is to highlight for the court that the UCC requires that the disposition of the collateral be commercially reasonable, not that it meet some impossible standard of perfection. This can be accomplished by arguing that the alleged defects in the relevant notices are technical and minor in nature and therefore do not rise to the level of making the disposition of the collateral commercially unreasonable. This can also be accomplished by making the slightly different argument that the sending of post-repossession, pre-disposition and post-sale notices is not actually the disposition of the collateral, thereby removing the commercial reasonableness standard from the sending of notices entirely.[43] However this argument is framed, it is important to repeatedly highlight for the court that companies that make and hold vehicle liens and loans cannot and should not be expected to be perfect but rather should only be expected to meet a much lower standard of reasonableness. To the extent applicable, it is also helpful to note that the consumer obligors do not allege or explain how the alleged defects in the notices at issue in the litigation adversely affected their ability to protect their rights under the UCC and other applicable state laws.

A third effective strategy for motions to dismiss is to argue that state statutes that impose additional requirements for post-repossession, pre-disposition and post-sale notices do not provide a private right of action. This argument will frequently be met with the response that other state statutes must be interpreted *in pari materia* with the state version of the UCC, which effectively means that violation of these other state statutes can be construed to be a failure to act reasonably in violation of the UCC. Still, companies litigating these actions have been successful in some cases

43. *See* Oliver-Mercer Elec. Co-op, Inc. v. Davis, 678 N.W.2d 757, 761 (N.D. 2004) ("The requirements of notice and commercial reasonableness are separate and distinct obligations.").

in limiting the requirements for post-repossession, pre-disposition and post-sale notices to those set forth in the state-specific UCC statute at issue.[44]

If a motion to dismiss is unsuccessful or is not filed, the potential for an early settlement should usually be considered, since the damages at issue are easy to calculate and often substantial, making it imperative to avoid incurring unnecessary additional attorney's fees and expenses if there is no basis to ultimately defeat the claims. Although settlement on an individual, rather than a class-wide, basis is always a possibility, that is not something that opposing counsel are frequently interested in. Careful consideration should also be given to whether the peace obtained from a class settlement is worth the additional expense, since an additional class action can and likely will be filed shortly after a settlement on an individual basis. If a settlement is being contemplated, it usually makes sense to seek a stay from the court of any litigation deadlines, once again in the interest of avoiding unnecessary attorney's fees and expenses. Although settlement is not always a company's preferred way of resolving litigation, it will sometimes be the only reasonable choice in these matters.

V. Conclusion

Companies that make and hold vehicle liens and loans face significant financial losses when consumer obligors fail to pay as agreed. The UCC gives these companies a powerful right to repossess the vehicles that serve as collateral for these loans to mitigate those losses. However, repossessing and selling these vehicles triggers requirements to provide notice to consumer obligors under the UCC and other state-specific statutes. Even minor errors or misstatements in these notices can lead to significant financial losses resulting from class-action litigation. To ensure that these litigation-related losses do not eliminate the financial benefit gained from repossessing and selling vehicles, companies that make and hold vehicle liens and loans must be very careful to regularly review changes in the law and update their repossession-related forms accordingly. Failure to do so might make such companies wish they had never repossessed and sold the vehicles in the first place.

44. *See, e.g.*, d'Happart v. First Commonwealth Bank, No. GD 20-010758, 2021 WL 3825606, at *5–7 (C.C.P. Allegheny Cnty. Aug. 25, 2021).