

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
BUSINESS LITIGATION SESSION
C.A. NO. 08-5508-BLS2

_____)
 Paul Tammaro, individually and on behalf)
 of all others similarly situated,)
)
 Plaintiff,)
)
 v.)
)
 Direct Federal Credit Union,)
)
)
 Defendant)
)
 _____)

JURY TRIAL DEMANDED

First Amended Class Action Complaint

1. Plaintiff, Paul Tammaro, brings this Amended Class Action Complaint against Direct Federal Credit Union ("Direct Federal") on his own behalf and that of all others similarly situated, seeking declaratory, injunctive and monetary relief to remedy Direct Federal's unlawful auto repossession and deficiency collection practices.

Introduction

2. Provisions of the Retail Installment Sales Act, c. 255B, §§ 20A, 20B ("RISA") and Uniform Commercial Code, c. 106, §§ 9-610 to 9-625 ("UCC") form a complementary scheme governing the repossession and subsequent sale of consumers' motor vehicles. These laws require that creditors send specific notices to borrowers

whose cars they repossess and guarantee borrowers certain rights upon repossession. When Direct Federal repossesses its borrowers' cars it sends them form notices which omit or expressly misstate their statutory rights. In addition, Direct Federal seeks greater deficiency balances from borrowers than the law allows.

3. As more particularly described below, Direct Federal sent Mr. Tammaro and similarly situated Massachusetts consumers a form Post-Repossession Notice which fails to disclose four consumer rights required by the Uniform Commercial Code:

- contact information for exercising the redemption right [§9-614(1)(C)];
- contact information for obtaining additional facts concerning the disposition of the secured obligation [§9-614(1)(D)];
- the consumer's entitlement to an accounting of any unpaid indebtedness [§9-613(1)(D)]; and
- a description of the consumer's liability for a deficiency following sale of the vehicle [§9-614(1)(B)].

4. Direct Federal also sent Mr. Tammaro and similarly situated Massachusetts consumers, from whom it sought a deficiency after sale, a form Deficiency Demand Notice that fails to comply with the requirements of the law, in that the form Notice:

- does not disclose the amount owed on the contract at the time of disposition, as required by §9-616(c)(1);
- does not contain the required telephone number to obtain additional information about the transaction, as required by §9-616(1)(D); and/or

- stated a deficiency balance calculated upon the difference between the amount realized upon sale of the repossessed vehicle and the full amount owing under the contract, instead of the difference between the full amount owing under the contract and the vehicle's fair market value, as required by c. 255B, 20B(e)(1).

Parties

5. Defendant, Direct Federal Credit Union, is a banking corporation with its usual place of business in Needham Heights, Norfolk County. At all times material hereto, Direct Federal was engaged in the business of providing financing to purchasers of automobiles in Massachusetts.

6. Plaintiff, Paul Tammaro, is an adult residing at 4 Marion Street, Cambridge, Massachusetts.

Jurisdiction and Venue

7. This court has jurisdiction to grant the relief sought pursuant to M.G.L. c. 214, §§1,5; c. 212 §3, and c. 231A, §1.

8. Venue lies in this County because Direct Federal has its principal office here and has sued Mr. Tammaro here.

Facts Pertaining To Mr. Tammaro's Transaction

9. On November 11, 2006, Mr. Tammaro entered into a retail installment sale contract (“RISC”) for the purchase of a 2005 Chrysler PT Cruiser for \$16,724.00, financing \$16,529.55 of this amount, with the RISC being simultaneously assigned to Direct Federal. A true and correct copy of the RISC is attached as Exhibit A.

10. In or about the early part of June 2007, Direct Federal caused the automobile to be repossessed.

11. On June 7, 2007, Direct Federal sent Mr. Tammaro a notice (the “Post-Repossession Notice”) advising him of the repossession and of its intent to dispose of the vehicle. A true and correct copy of the Post-Repossession Notice is attached as Exhibit B.

12. In or about late June 2007, Direct Federal sold the vehicle for \$6,600, more than \$10,000 less than Mr. Tammaro paid for it seven months previously. Direct Federal so informed Mr. Tammaro by sending him a notice (the “Deficiency Demand Notice”) dated July 10, 2007 advising him of the sale and of his obligation to pay a deficiency balance alleged to be \$10,614. A true and correct copy of the Deficiency Demand Notice is attached as Exhibit C.

13. On information and belief, Direct Federal calculated this deficiency balance in whole or in part by subtracting the amount realized upon sale of the repossessed vehicle from the full amount owing under the contract.

14. On or about April 18, 2008 Direct Federal commenced the underlying lawsuit against Mr. Tammaro seeking a deficiency of \$10,757.71, plus attorney's fees of \$2,151.54, derived by calculating 20% of the alleged deficiency.

15. According to periodically published trade estimates of the retail value of the vehicle, which estimates are generally recognized in the motor vehicle sales business, the fair market value of Mr. Tammaro's vehicle June, 2007 was at least \$4,000 dollars greater than its \$6,600 auction sale price.

16. On December 12, 2008, Mr. Tammaro made demand upon Direct Federal pursuant to M.G.L. c. 93A, § 9, on behalf of himself and all similarly situated individuals.

17. Direct Federal responded to the M.G.L. c. 93A demand by offering a sum in set off to Mr. Tammaro individually, to reduce the deficiency amount it seeks from him, but refused to offer any economic relief to class members.

Applicable Law

18. The Post Repossession Notice Direct Federal sent Mr. Tammaro is jointly required by RISA (c. 225B §20B) and the UCC (c. 106, §§9-610 to 9-625). These provisions of Massachusetts' law regulate the repossession and disposition of motor vehicles financed under Retail Installment Sales Agreements. To protect consumers'

valuable property interests in financed vehicles, RISA and the UCC impose strict and mandatory requirements on sellers and holders of Retail Installment Sales Agreements, such as Direct Federal, following a repossession.

19. RISA provides, in pertinent part in c. 255B §20(B)(d) that its provisions must be read as a complement to the UCC repossession provisions:

(d) The creditor may after gaining possession sell or otherwise dispose of the collateral. Unless displaced by the provisions of this section and section twenty A the rights and obligations of the parties, including the redemption and disposition of the collateral shall be governed by the provisions of Part 6 of Article 9 of chapter 106.

20. Before a creditor may sell a repossessed vehicle, the UCC requires that it send the borrower “a reasonable authenticated notification of disposition,” a Post-Repossession Notice as described in this Counterclaim. UCC, § 9-611.

21. Among other obligations, §§9-613 and 9-614 specify the information that must be included in a Post Repossession Notice for it to comply with the law. Section 9-613(1)(D) provides, in pertinent part, that the Notice is sufficient if it:

(D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting... .

22. Section 9-614(1) provides, in pertinent part, that “[a] notification of disposition must provide the following information”:

(A) the information specified in Section 9-613(l);

(B) a description of any liability for a deficiency of the person to which the notification is sent;

(C) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 9-623 is available; and

(D) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

23. Before a creditor may seek a deficiency, § 9-616(a) provides that the creditor must send the consumer “a writing that ... provides an explanation in accordance with subsection (c) of how the secured party calculated the surplus or deficiency... and provides a telephone number or mailing address from which additional information concerning the transaction is available.” §§ 9-616(a)(1)(B), (D).

Subsection (c) provides, in pertinent part, as follows:

(c) Required information. To comply with subsection (a)(1)(B), a writing must provide the following information in the following order:

the aggregate amount of obligations secured by the security interest under which the disposition was made....

24. RISA provides, in c. 255B §20B(e)(1), that the creditor must calculate the deficiency based upon the difference between the unpaid balance of the loan and the vehicle’s fair market value:

Deleted: auction sale price

(e) (1) If the unpaid balance of the consumer credit transaction at the time of default was two thousand dollars or more the creditor shall be entitled to recover from the debtor the deficiency, if any, resulting from deducting the fair market value of the collateral from the unpaid balance due and shall also be entitled to any reasonable repossession and storage costs, provided he has complied with all provisions of this section (emphasis added).

25. RISA further provides, in §20(B)(e)(2), that recognized evaluation reports such as the NADA Used Car Guide or Kelley Blue Book shall be presumed to establish fair market value:

(e) (2) In a proceeding for a deficiency the fair market value of the collateral shall be a question for the court to determine. Periodically published trade estimates of the retail value of goods shall, to the extent they are recognized in the particular trade or business, be presumed to be the fair market value of the collateral.

26. A creditor's failure to comply with the mandatory notice requirements of RISA and UCC §§ 9-613 and 9-614 renders it liable for statutory damages in the amount of the finance charge and 10% of the principal borrowed, pursuant to c. 106, § 9-625.

27. Failure to comply with UCC § 9-616 subjects the creditor to liability for statutory damages of \$500 if the noncompliance is part of a pattern or practice, pursuant to c. 106, § 9-625(e)(5).

Class Allegations

28. On information and belief, the RISC, attached as Exhibit A, is the standard form of Retail Installment Sale Agreement that Direct Federal has entered into with Massachusetts consumers at all material times.

29. On information and belief, the Post-Repossession Notice, attached as Exhibit B, or variants of it containing one or more of the enumerated defects described in paragraph 3, is the standard form of Post-Repossession Notice Direct Federal has sent to Massachusetts consumers since January 1, 2001, the effective date of revised Article 9 of the UCC.

30. On information and belief, the Deficiency Demand Notice, attached as Exhibit C, or variants of it containing the enumerated defects described in paragraph 4, is the standard form of Deficiency Demand Notice Direct Federal has sent to Massachusetts' consumers since January 1, 2001 as well.

31. On information and belief, Direct Federal's failure to send Mr. Tammaro and similarly situated Massachusetts borrowers a Post-Repossession Notice and, where applicable, a Deficiency Demand Notice compliant with the requirements of law is part of a pattern, or consistent with a practice, of noncompliance.

32. The class is composed of all Massachusetts residents who, since June 7, 2001:

- (a) have or had a RISC held by Direct Federal;
- (b) had their motor vehicle repossessed in Massachusetts by Direct Federal or its agents;
- (c) were sent a post-repossession notice which failed to contain one or more of the following mandated statutory disclosures:

- a telephone number from which the amount that must be paid to Direct Federal to redeem the vehicle is available;
- a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available;
- the borrower's entitlement to an accounting of any unpaid indebtedness; or
- a description of the borrower's liability for a deficiency following sale of the vehicle.

(d) against whom Direct Federal has not obtained a deficiency judgment as to such RISC as of July 31, 2008; and

(e) who has not obtained a discharge in bankruptcy applicable to any such RISC.

33. The class contains a subclass consisting of class members who meet all of the requirements of the class definition contained in paragraph 30 and to whom Direct Federal sent a Deficiency Demand Notice that:

- does not disclose the amount owed on the contract at the time of disposition;
- does not contain a telephone number identified as the number for the borrower to call to obtain additional information about the transaction; or
- states a deficiency balance calculated upon the difference between the amount realized upon sale of the repossessed vehicle and the full amount owing under the contract, instead of the difference between the full amount owing under the contract and the vehicle's fair market value.

34. Direct Federal financed more than \$392 million of auto loans in 2005-2007.

In March, 2008, the Boston Globe reported that: “the rate of auto-loan defaults recently reached a 10-year high of 3.4 percent. And one local auction company saw repossessions nearly triple last month compared with a year ago.” See

http://www.boston.com/business/personalfinance/articles/2008/03/07/entering_the_repossession_lane/?p1=Well_MostPop_Emailed6.

35. Based on Direct Federal’s loan volume and the number of auto loan defaults and auto repossessions resulting from that volume, the prospective class numbers at least in the hundreds, making joinder of all members impractical. The exact size of the proposed class and the identity of the class members are readily ascertainable from Direct Federal’s business records.

36. There are questions of law and fact common to the class, which predominate over any questions affecting only individual class members. The principal common issues with respect to the class are whether: Direct Federal’s form Post Repossession Notice(s) breaches its contract with class members; whether the Notice violates the UCC, RISA and c. 93A; and whether its practice of seeking deficiencies calculated upon the difference between the amount realized upon sale of the repossessed vehicle and the full amount owing under the contract breaches its contract with class members and violates RISA and c. 93A.

Deleted: and

37. The principal common issues with respect to the subclass is whether Direct Federal's form Deficiency Demand Notices breach its contract with class members and violate the UCC, RISA and c. 93A.

Deleted: and

38. There are no difficulties likely to be encountered by the Court in the management of this proposed class action. There are no individual questions, other than those which can be determined by ministerial inspection of Direct Federal's records, and the issues of liability are determinable entirely from the face of the operative documents.

39. Mr. Tammaro's class claims are typical of those of the class he seeks to represent, and he will fairly and adequately protect and represent the interests of the class. There is no conflict between the claims of Mr. Tammaro as class representative and the claims of the proposed class.

40. A class action is superior to other methods for the fair and efficient adjudication of this controversy. Because the damages suffered by the individual class members may be relatively small compared to the expense and burden of litigation, it would be impractical and economically unfeasible for class members to seek redress individually. In addition, it is likely that most class members are unaware that they have claims. Finally, the prosecution of separate actions by the individual class members, even if possible, would create a risk of inconsistent or varying adjudications with respect to the individual class members against Direct Federal.

41. Mr. Tammaro is represented by counsel competent and experienced in both consumer protection and class action litigation.

Causes Of Action

Count I (Violations of UCC § 9-613)

42. Direct Federal's notice violates UCC § 9-613(1)(d) because it omits the required accounting disclosure.

Count II (Violations of UCC §9-614)

43. Direct Federal's notice violates UCC § 9-614(1)(a) because it omits the required accounting disclosure required by § 9-613(1)(d).

44. Direct Federal's notice violates further violates UCC § 9-614(1) because it omits the disclosures required by the following provisions:

a description of any liability for a deficiency of the person to which the notification is sent, § 9-614(B);

a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 9-623 is available, § 9-614(C); and

a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available, § 9-614(D).

Count III
(Violations of UCC §9-616)

45. Direct Federal's notice violates UCC § 9-616(2)(a) because it omits the statement of the amount owing on the contract from which the deficiency balance was derived.

46. Direct Federal's notice further violates UCC § 9-616(2)(a) because it omits the required telephone number to obtain additional information about the transaction.

47. Direct Federal's failure to send Mr. Tammaro and class members the "explanation" of deficiency mandated by § 9-616(2)(a) is part of a pattern, or consistent with a practice, of noncompliance with that statute.

Count IV
(Violations of RISA §20B)

48. Direct Federal's notice violates RISA § 20B(d) because it omits the UCC disclosures required by UCC §§ 9-613, 9-614 and 9-616, as described in Counts I-III.

49. Direct Federal's notice violates RISA § 20B(e)(1), as does its conduct, because it seeks deficiencies calculated upon the difference between the amount realized upon sale of the repossessed vehicle and the full amount owing under the contract, instead of the difference between the full amount owing under the contract and the vehicle's fair market value.

Count V

(Breach of Contract)

50. Direct Federal's form RISC promises that "you [the borrower] will be liable for any deficiency, to the extent allowed by law."

51. Direct Federal's form RISC promises that, upon disposing of the vehicle after repossession, Direct Federal will "give you [the borrower] any notices required by applicable law."

52. Direct Federal's various violations of the UCC and RISA constitute separate and independent breaches of contract.

**Count VI
(Violation of Chapter 93A)**

53. By engaging in the conduct complained of, Direct Federal engaged in unfair and deceptive acts and practices, in violation of M.G.L. c. 93A.

54. Direct Federal's unfair and deceptive practices include, without limitation:

- a. Collecting a debt in an unfair, deceptive or unreasonable manner in violation of G.L. c. 93 § 49.
- b. Breaching its duty of good faith in violation of G.L. c. 106 § 1-202.
- c. Engaging in unconscionable practices in the collection of a claim arising from a contract in violation of G.L. c. 106 § 2A-108(2); and

d. Failing to provide Mr. Tammaro with the rights and disclosures mandated by RISA and the UCC.

55. Direct Federal performed the actions described herein willfully and knowingly, or with reckless disregard of applicable law, all within the meaning of G.L. c. 93A § 9.

**Count VII
(Declaratory Judgment)**

56. Pursuant to M.G.L. c. 231A, § 1, Mr. Tammaro and class members seek a declaration that Direct Federal's conduct violates RISA and the UCC as alleged in Counts I-IV, constitutes breach of contract as alleged in Count V, and violates c. 93A, as alleged in Count VI.

Prayer For Relief

WHEREFORE, Mr. Tammaro respectfully prays for relief as follows:

A. For an order certifying this case as a class action;

B. For a declaration that Direct Federal's calculation of deficiency balances due under Retail Installment Sale Agreements based upon the difference between the amount realized upon sale of the repossessed vehicle and the full amount owing under the contract violates c. 255B, § 20B(e)(1) and that class members are entitled to recalculation of such balances using the fair market value of the vehicle at the time of sale instead of the amount realized from the sale, and to whatever individual rights they have to pursue remedies therefor;

B. For an order preliminarily and permanently enjoining Direct Federal from engaging in the practices challenged herein;

C. For statutory damages for each class member pursuant to UCC § 9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member's contract;

D. For statutory damages for each sub-class member pursuant to UCC § 9-625(e)(5) in the amount of \$500;

E. For statutory damages for each class member pursuant to c. 93A, § 9 in the amount of \$25;

F. For an award of attorney's fees, costs and expenses pursuant to c. 93A, § 9;

G. For pre-judgment interest to the extent permitted by law; and

H. For such other and further relief as the Court may deem just and proper.

Demand For Jury Trial

Mr. Tamaro demands a trial by jury of all issues so triable.

Respectfully submitted,

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