

*Litigation and class action lawsuits against credit unions alleging defective Notices of Disposition (Notice of Sale or Notice of Intent to Sell Property) and defective Notices of Deficiency have resulted in settlements into the millions of dollars.*



## Emerging Litigation Trends

Class action lawsuits alleging defective Notices of Disposition (Notice of Sale or Notice of Intent to sell repossessed collateral and defective Notices of Deficiency) can significantly impact credit unions.

The **Notice of Disposition** – required by UCC 9-613 / 9-614 - has been the primary cause of litigation issues. This notice references that the credit union has repossessed the property and notifies the member that the property will be sold.

Also problematic in litigation has been **the Notice of Deficiency Balance** – UCC 9-616 - which must explain that the repossessed property has been sold and that the member still owes for the balance due on the loan.

## Common Collection Letter Issues

- Notices contain inaccurate information
- Credit union staff removes sections of content that they deem no important or redundant
- Specifics regarding the sale of collateral does not appropriately establish if the sale is public or private Notices do not reference the member's right to an accounting of the amount due
- Outside attorneys used have not discovered deficiencies
- Language and procedures do not follow the requirements of the applicable state
- Improper order, or missing, items in the Notices of Deficiency

## Typical Scenario

- Member goes into default on a loan secured by a vehicle, and the credit union repossesses the collateral. Credit union sends a letter to notify the member that the vehicle will be sold
- After the sale, credit union sends a letter notifying the member of the deficiency balance to be paid. Credit union pursues legal action to collect the deficiency
- Member hires an attorney to represent him / her in the legal proceedings, and the attorney discovers the defects in the Notice of Disposition and Notice of Deficiency letters
- Member sues, or countersues the credit union for violations of the state Uniform Commercial Code (UCC) Article 9
- Lawsuit becomes a class action consisting of all the borrowers that received defective notices over the course of as many as six years
- Credit union incurs defense costs in addition to potential damages or penalties

Some lawsuits have focused on improper classification of how repossessed vehicles are being sold. If the Notice of Disposition letter indicates “public and/or private sale” then you may not be compliant. State laws require the sale to be disclosed as a “public sale” or a “private sale.”

Dealer-only auctions are usually considered private sales. Public sales could include auctions open to the public, selling vehicles in the credit union’s parking lot, or internet sales that are open to the public. Public sales need additional disclosure information including date, time and place. Vehicle sales changing from one type (e.g., Public) to the other (e.g., Private) likely require a second Notice of Disposition.

## Potential Credit Union Damages or Penalties

Under UCC9-625 and 9-626 (which vary by state), these potential damages or penalties exist:

- Waiving any remaining deficiency balance
- Returning any payments of deficiency balances
- Statutory penalties such as \$500 or more for each impacted member
- Return of service charges (some interpret this to be interest paid)
- Return of 10% of the principal amount of the original debt

In fact, one class action lawsuit example resulted in settlement in **excess of \$5 million**.



## Risk Mitigation Questions / Tips

- Do you **regularly review** your collection letters?
- Do **Notices of Disposition** contain the **eight required items**? Are you using the exemplar safe-harbor language?
  - Are you properly classifying your sales of repossessed property as “public sale” or a “private sale”?
  - Cannot be both a public and private sale.
  - Public sale requires a date, time and place.
  - Easiest option is a private sale after the specific date as there is no re-disclosure needed if changes to date or some other type of private sale.
  - You may need to re-disclose if the vehicle doesn’t sell.
- Do **Notices of Deficiency** contain the **six required items**, in the required order?
- Do you follow the same process for all types of collateral?
- Have you considered your specific **state(s) requirements** which can have additional requirements?
- Is additional language required when sending notices to borrowers who have filed bankruptcy?
- If relying on an attorney, have you requested and received a **written legal opinion** that the components of your collection letters are meeting the requirements of UCC Article 9, sections 9-613, 9-614, and 9-616?
- Are **employees adequately trained** on how to properly complete and follow the requirement notices?

# Collection Letter Litigation

## Commonly Asked Question:

### Which state applies if the credit union is located in one state and the member is in another?

It really depends; therefore, you should consult with your legal counsel. A court may consider where the credit union's main location is located; if they have a branch in the other state; where the loan was made; where the borrowers lived at the time of the loan; where the repossession occurred; where the borrower lived at time of repossession; where the collateral was sold.

## Notice of Disposition – UCC 9-614

Minimum Requirements	Optional Safe Harbor Language
1. 9-613(1)(A) describes the debtor and the secured party;	[Name and address of secured party] [Date] NOTICE OF OUR PLAN TO SELL PROPERTY [Name and address of any obligor who is also a debtor] Subject: [Identification of Transaction]
2. 9-613(1)(B) describes the collateral that is the subject of the intend disposition;	We have your [described collateral], because you broke promises in our agreement.
3. 9-613(1)(C) state the method of intended disposition;	<b>[For a public disposition:]</b> We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows: Date: _____ Time: _____ Place: _____ You may attend the sale and bring bidders if you want.
4. 9-613(1)(E) states the time and place of a public disposition or the time after which any other disposition is to be made.	<b>[For a private disposition:]</b> We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.
5. 9-614(1)(B) a description of any liability for a deficiency of the person to which the notification is sent;	The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.
6. 9-614(1)(C) a telephone number from which the amount that must be paid to the secured party to redeem collateral under Section 9-623 is available;	You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].
7. 9-613(1)(D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting;	If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] (or write us at [secured party's address]) and request a written explanation. [We will charge you \$___ for the explanation if we sent you another written explanation of the amount you owe us in the last six months.]
8. 9-614(1)(D) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.	If you need more information about the sale call us at [telephone number] (or write us at [secured party's address]).

Interested in learning more about Collection Letters and related risks?

Contact CUNA Mutual Group Risk Consultants at 800.637.2676 or [riskconsultant@cunamutual.com](mailto:riskconsultant@cunamutual.com)

## Notice of Deficiency – UCC 9-616

To comply with subsection (a)(1)(B), a writing must 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:
  - (A) if the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or
  - (B) if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before the disposition;
- (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.**



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