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signed 5-19-03
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:

KRISTIN KAE GOWIN,

DEBTOR.

CASE NO. 99-40019-13
CHAPTER 13

KRISTIN KAE GOWIN,

PLAINTIFF,

ADV. NO. 99-7125

v.

AUTOS, INC.,

DEFENDANT.

MEMORANDUM OF DECISION

This proceeding is before the Court for decision following a bench trial. The plaintiff-debtor (“the Debtor”) appeared by counsel Fred W. Schwinn of the Consumer Law Center, P.A., formerly of Topeka, Kansas, but now of Livermore, California. Defendant Autos, Inc. (“Autos”), appeared by counsel Richard F. Hayse of Morris, Laing, Evans, Brock & Kennedy, Topeka, Kansas. The Court has heard the evidence, reviewed the relevant materials, and is now ready to rule.

This proceeding arose from the Debtor’s purchase of a car from Autos, Autos’ financing of the sale, and Autos’ subsequent repossession and resale of the car. The Court previously granted the Debtor partial summary judgment for Autos’ violation of §3-307¹ of the Kansas Uniform Consumer Credit Code (“the U3C”) by its use of a prohibited negotiable instrument in a consumer credit sale.

¹K.S.A. 16a-3-307.

The Court denied summary judgment on six additional claims made by the Debtor; the trial concerned these claims. The Debtor's additional claims were that Autos: (1) violated U3C §3-202 by omitting from the note a notice of rights in the transaction; (2) violated U3C §5-110 and -111 by failing to give her notice of a right to cure payment defaults before repossessing the car; (3) violated §9-504(3)² of the Kansas Uniform Commercial Code ("UCC") by failing to give her notice before it resold the car; (4) violated UCC §9-504(2) by failing to account to her for a surplus it realized in the resale; (5) converted the surplus Autos realized when it resold the car; and (6) violated §626(a) and (b)(3)³ of the Kansas Consumer Protection Act ("KCPA") by failing to inform her before the sale that the car she was buying had been formerly branded "salvage." Because the events in this case occurred before July 1, 2001, the provisions of Article 9 in effect before that date ("Old Article 9") are applicable.⁴

FACTS

On December 11, 1998, the Debtor bought a car from Autos on credit for \$2,995 plus Kansas sales tax of \$184.19, and a finance charge of \$290.81. The transaction was completed with at least three documents, a "Retail Sales Contract, Disclosure Statement, & Security Agreement" ("the Financing Agreement"), a promissory note ("the Note"), and a "Kansas Used Vehicle Sales Contract" ("the Sales Contract"). The Financing Agreement said the Debtor was making a \$600 down payment,

²K.S.A. 84-9-504(3) (Furse 1996).

³K.S.A. 2002 Supp. 50-626(a) & (b)(3). K.S.A. 50-626 was amended by 2000 Kan. Sess. L. ch. 167, §1, effective July 1, 2000, but these portions of the statute were not changed.

⁴The rest of the references in this opinion to Article 9 of the Kansas UCC are to the provisions of Old Article 9. *See* 2000 Kan. Sess. L. ch. 142 (adopting Revised Article 9 in Kansas, effective July 1, 2001).

but in fact, she paid only \$200 down and signed the Note for the other \$400. The Sales Contract also showed \$600 in a box labeled “Less total down payment,” but “Pd 200 12/11” was written over the box’s label. The Note indicated that the Debtor was to pay \$200 on December 17 and another \$200 on December 24, and contained a space for an interest rate that was left blank. The Debtor never made these payments.

Shortly after the sale, the car needed some repairs. An electrical problem was fixed on December 17 for \$90.75, and a steering problem was fixed on December 21 for \$174. Autos paid for these repairs.

At the time of the sale, Autos did not have a title for the car. When Autos received a title (which states that it was issued on December 22, 1998), the title was marked “Formerly salvage” at the top, and contained the statement, “This vehicle is no longer titled as a non-highway vehicle due to vehicle being salvaged or totaled.” No evidence was presented to show why the car was “formerly salvage,” or that Autos knew about the salvage notations before it received this title. No evidence was presented to show that the condition of the car gave any indication its title would show it had ever been salvaged or totaled. Autos completed the “first re-assignment by licensed dealer” portion on the back of the title as needed to transfer the title to the Debtor, but never gave it to her. Autos never told the Debtor about the salvage notations on the title. When Autos filled in the re-assignment portion of the title, it believed a sale had occurred, and intended to deliver the title to the Debtor. Sometime later, Autos decided that no sale occurred because it did not receive either of the \$200 payments required by the Note.

According to an Autos salesman, Ronny Uel Cheatham, he phoned the Debtor after either the

first or second missed payment on the Note. He claimed she told him on the phone that she could not pay for the car, wanted out of the deal, and would bring the car back to Autos; he said he agreed to this arrangement. He made no written notes about this alleged conversation. Mr. Cheatham testified that when the Debtor did not return the car, Autos sent agents to look for it. Around January 2, 1999, the agents found the car, with a flat tire, parked on a street several blocks from the address the Debtor had given them when she bought the car. The agents took the car back to Autos' lot. Before this repossession, Autos did not demand that the Debtor return the car or give her any notice of a right to cure payment defaults.

The Debtor testified that the only conversation she had with Autos' agents after the sale was to seek repairs for the car's electrical and steering problems. She denied discussing or offering to surrender the car to Autos. She testified that although she did not talk to Autos about it, she was in fact not satisfied with the car, and by the time she filed a Chapter 13 bankruptcy petition on January 6, 1999, she did not want to pay for the car and had no desire to keep it. The Debtor said she last saw the car on January 1, parked with a flat tire near her boyfriend's home, but was aware it had disappeared from there before she filed for bankruptcy. When she bought the car, the Debtor was living at the address she gave Autos, but later moved to her boyfriend's home.

The Debtor filed a Chapter 13 plan along with her bankruptcy petition. Her plan provided that she would surrender the car to Autos upon confirmation. Without seeking or obtaining stay relief, Autos sold the car to a third party around the end of January 1999 for \$500 more than the Debtor had agreed to pay for it. The Debtor's plan was confirmed in April 1999, before either of the deadlines for creditors to file proofs of claim had expired. Autos never filed a proof of claim in the bankruptcy case,

and has taken no collection action against the Debtor since it repossessed the car.

In December 1999, the Debtor filed this adversary proceeding, asserting claims under the federal Truth in Lending Act, the U3C, the UCC, and the KCPA, along with a claim for conversion. She later abandoned her claims under the Truth in Lending Act, but moved for summary judgment on her claims under the Kansas statutes and for conversion. The Court granted only partial summary judgment, treating the Note and the Financing Agreement as part of one consumer credit transaction under the U3C. As indicated above, the Court concluded the use of the Note in the transaction violated the prohibition in U3C §3-307 against the use of a negotiable instrument in a consumer credit sale.

DISCUSSION AND CONCLUSIONS

1. Autos' Affirmative Defenses

Autos asserts two affirmative defenses to the Debtor's claims. If successful, either of them would defeat all the Debtor's claims. Consequently, the Court will consider them first.

a. Plan confirmation as bar to Debtor's claims

Autos' first affirmative defense is that the Debtor was not entitled to bring this action because she did not list any claims against Autos as assets in her bankruptcy schedules, and neither her plan nor the order confirming the plan reserved the right to pursue them. This argument essentially repeats one made earlier in this case in a motion to dismiss or abstain that Autos filed before it answered the Debtor's complaint. In response to that motion, the Debtor disclosed that her counsel had contacted the Chapter 13 trustee about these claims and reached an agreement, subject to approval by the Court, that any recovery on the claims beyond attorney fees and related costs would be split evenly between

the Debtor and the bankruptcy estate. The Court denied Autos' motion at a hearing on March 2, 2000, and an order to that effect was entered a short time later. A more thorough explanation of the Court's reasons for rejecting this defense seems to be called for now.

The Court notes that the Debtor did list the car in her schedules as an asset, and provided in her Chapter 13 plan that she would surrender the car to Autos upon confirmation. This indicates that when she filed for bankruptcy and filed her plan, she was unaware that Autos had repossessed the car, and so was not yet aware that she had any causes of action against Autos arising from the repossession. Furthermore, the order confirming the Debtor's plan, like all this Court's Chapter 13 confirmation orders, provided that property of the estate would not re-vest in the Debtor until the Court approved the trustee's final report and account. This prevented any property of the estate from vesting in the Debtor on confirmation as it otherwise would have under 11 U.S.C.A. §1327(b). Consequently, the Debtor could not deliberately fail to disclose an asset in order to keep it all for herself.

The cases Autos cites to support its argument here were all Chapter 11 cases,⁵ proceedings that are not governed by the short time frames for proposing plans and obtaining confirmation that apply in Chapter 13. Because, as it did in this case, the Court often confirms Chapter 13 plans before the deadlines for filing proofs of claims have passed, the Court would be hesitant to hold that debtors' objections to claims or their counterclaims against creditors are barred by plan confirmation. Nevertheless, the Court has found a number of decisions in Chapter 13 cases ruling that plan

⁵See *D&K Properties Crystal Lake v. Mutual Life Ins. Co. of New York*, 112 F.3d 257 (7th Cir. 1997); *Harstad v. First American Bank*, 39 F.3d 898, 901-05 (8th Cir. 1994); *Kelley v. South Bay Bank*, 199 B.R. 698 (9th Cir. BAP 1996).

confirmation barred the debtor's post-confirmation litigation against a creditor; in all of those cases, though, the defendant-creditors had filed proofs of claim before confirmation, the debtors' plans had provided for payment to the creditors, and the post-confirmation litigation attacked the allowed amount of the creditors' claims.⁶ So even if the Court might otherwise agree with these Chapter 13 decisions, they are distinguishable from this case. Autos filed no proof of claim, so there was no filed claim for the Debtor to object to before confirmation, the Debtor's plan proposed to surrender the car to Autos, not to pay Autos any money, and the causes of action asserted in this proceeding do not attack Autos' lien on the car or conflict with the Debtor's surrender of the car to Autos under her plan. The Debtor's plan merely provided that she would relinquish possession of the car, not that she would relinquish any causes of action arising out of her transaction with Autos or Autos' resale of the car. Even assuming a Chapter 13 debtor would have authority under §554 of the Bankruptcy Code to abandon claims like the Debtor is making here, nothing about her plan or the confirmation order indicates that she did so.

Autos states that the reason for the rule making plan confirmation bar a debtor's subsequent lawsuit against a creditor is that "permitting debtors to conceal the possibility of suits until after confirmation of their plans would serve to deprive the creditors of a share of any eventual recovery."⁷ But that will not happen here. The Chapter 13 trustee has authorized the Debtor's attorney to pursue

⁶See *Snow v. Countrywide Home Loans, Inc. (In re Snow)*, 270 B.R. 38, 40-41 (D. Md. 2001); *American General Finance, Inc., v. Tippins (In re Tippins)*, 221 BR. 11, 23 (Bankr. N.D. Ala. 1998); *Marlow v. Sweet Antiques (In re Marlow)*, 216 B.R. 975, 979 (Bankr. N.D. Ala. 1998) (in addition, deadline for claims objections set on trustee's motion expired before debtor filed preference action against creditor); *In re Bernard*, 189 B.R. 1017, 1019 (Bankr. N.D. Ga. 1996) (in addition, deadline for claims objections set by confirmation order expired before debtor attacked creditor's claim).

⁷Trial brief of defendant, pleading no. 60, at 5.

this action on behalf of the bankruptcy estate and agreed, subject to Court approval, that the Debtor and the estate will share in any recovery from Autos.

For these reasons, the Court concludes that the order confirming the Debtor's Chapter 13 plan did not preclude her from pursuing the claims she has asserted against Autos in this proceeding.

b. Defense under Article 2 of the Uniform Commercial Code

On the merits of the Debtor's claims, Autos relies on Article 2—Sales of the UCC, arguing it had the right to resell the car under K.S.A. 84-2-703, -706, and other provisions. Autos concedes that it gave the Debtor no notice of default and right to cure, gave her no notice that it was going to sell the car, and retained the additional money the subsequent buyer agreed to pay for the car. Thus, if this defense is not available to Autos, it has admitted it failed to comply with a number of otherwise applicable statutes. The Court notes that Autos does not rely on any facet of K.S.A. 8-135 as a defense to the Debtor's claims against it.

Under Article 2 of the UCC, Autos first points out that it was not only a secured party in its transaction with the Debtor, but also a "seller" under §2-103(d),⁸ which defines "seller" as "a person who sells or contracts to sell goods." As a seller, Autos argues it could rely on UCC §2-703, titled "Seller's remedies in general," which provides in pertinent part:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected . . . , the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided . . . ;
- (c) proceed under the next section respecting goods still unidentified to the

⁸K.S.A. 84-2-103(d).

contract;

- (d) resell and recover any damages as hereafter provided (section 84-2-706);
- (e) recover damages for nonacceptance . . . or in a proper case the price . . . ;
- (f) cancel.⁹

Then, Autos turns to UCC §2-706, which provides in pertinent part: “(1) Under the conditions stated in section 84-2-703 on seller’s remedies, the seller may resell the goods concerned

(6) The seller is not accountable to the buyer for any profit made on any resale. . . .”¹⁰

Official UCC Comment 1 to §2-706 states that: “The only condition precedent to the seller’s right of resale under subsection (1) is a breach by the buyer within the section on seller’s remedies in general or insolvency.” However, although Autos seems to overlook it, the buyer’s insolvency is a circumstance not covered by §2-703. Instead, it is covered by §2-702, which provides:

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash . . . and stop delivery under this article (section 84-2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer’s fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller’s right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article Successful reclamation of goods excludes all other remedies with respect to them.¹¹

The Kansas Comment, 1996, to §2-702 adds:

1. This section provides a seller with special remedies upon discovery that the buyer is insolvent. Since insolvency is not itself a breach, the seller will not have the remedies provided in section 84-2-703. . . .

2. Subsection (2) applies when the goods are already in the hands of an insolvent buyer

⁹K.S.A. 84-2-703.

¹⁰K.S.A. 84-2-706(1) & (6).

¹¹K.S.A. 84-2-702.

and gives the seller a limited right to reclaim the goods. Passage of title is irrelevant. Instead, an unpaid seller on credit may reclaim the goods only if the buyer was insolvent when it received the goods and if the seller demands reclamation within ten days after the buyer receives the goods. . . . Since reclamation of the goods amounts to preferential treatment as against the buyer's other creditors, subsection (3) bars all other remedies when the seller successfully reclaims.

The Court notes there is another circumstance under Article 2 where a seller has the right to reclaim goods from a buyer after delivery, but that is when the buyer used a check to pay money due on or before delivery of the goods and the check is later dishonored.¹² That circumstance does not exist in this case.

The fate of Autos' defense depends on the true legal basis for its recovery of the Debtor's car. Under §2-702, discovery of the Debtor's insolvency would have given Autos the right to reclaim the car from her for a short time after she received it. Perhaps peaceably recovering a car from a public street would be permissible under this provision, but Autos has not alleged that it reclaimed the Debtor's car under §2-702, and offered no proof that it made the required demand on the Debtor. Instead, it argues that it was entitled to the remedies available under §2-703. But the remedies under that provision do not include any right to recover goods from the buyer after they have been delivered. Subsections (a), (b), and (c) of §2-703 all address situations where the goods have not yet been delivered to the buyer, subsection (d) assumes the seller has the goods, subsection (e) allows a monetary recovery, and subsection (f) simply allows the seller to cancel the contract. None of them say anything about the seller having any right to recover goods from the buyer. Section 2-702, by contrast,

¹²See K.S.A. 84-2-507(2); Comment 2 of Kansas Comment, 1996, to 84-2-507; K.S.A. 84-2-511(3).

does concern the seller's ability to recover goods from the buyer after delivery, based on the buyer's insolvency.

The Court is convinced that the Debtor's voluntary return of the car was necessary for her to have revoked her acceptance of the car or to have repudiated the sale so that §2-703 would be applicable. Even assuming that the Court were to accept Mr. Cheatham's assertion that the Debtor told him she intended to return the car to Autos, the fact remains that she did not do so. Mr. Cheatham did not say that the Debtor agreed that Autos could come pick up the car. Instead, Autos simply waited about a week after the alleged conversation and then, making no attempt to contact the Debtor to clarify her intentions, Autos had its agents cruise the streets looking for the car, and they found and repossessed it without talking to the Debtor. This simply is not enough to establish that the Debtor chose to rescind the sale.

The only payment that the Debtor was required to make before Autos completed the sale by delivering the car to her was the \$200 down payment; Autos accepted the Note in place of the additional \$400 that the Financing Agreement and the Sales Contract showed she was to pay. Even after the Debtor had defaulted by failing to make the first \$200 payment on the Note, Autos demonstrated its belief that the sale was complete by paying for repairs to the car and filling out the assignment of the title to the Debtor. In short, the sale was complete when Autos delivered the car to the Debtor on December 11, 1998, and the Court finds nothing in Article 2 that gave Autos the right to retake possession of the car without the Debtor's consent. The Court concludes that Autos was not exercising any rights it had as a "seller" under Article 2, but instead was exercising its rights as a secured creditor under the Financing Agreement and §9-503 of Old Article 9 of the UCC when it

repossessed the car from the street after the Debtor defaulted on her payment obligations.

2. The Debtor's Claims

Having concluded that Autos' affirmative defenses do not protect it from the Debtor's claims, the Court will now address whether the Debtor has shown that she is entitled to recover on those claims.

a. Uniform Consumer Credit Code

(1) The use of a negotiable instrument

As indicated, the Court determined in its summary judgment ruling that Autos' violated U3C §3-307 by using the negotiable Note in the transaction. Because the Debtor's next claim also concerns the Note, however, the Court will discuss that claim before determining the penalty it will impose for this violation.

(2) The omitted notice to consumer

Section 3-202 of the U3C¹³ requires a written agreement that is to be signed by a consumer and that evidences a "consumer credit transaction" like the car sale involved here to contain a "clear, conspicuous, and printed notice" similar to the following:

NOTICE TO CONSUMER: 1. Do not sign this agreement before you read it.
2. You are entitled to a copy of this agreement. 3. You may prepay the unpaid balance at any time without penalty.

While the Note did not contain this warning, the Financing Agreement did, so the aim of this provision was at least partially fulfilled. The Debtor could have recognized that the notice would apply to the

¹³K.S.A. 16a-3-202.

Note as well as the Financing Agreement. On the whole, though, the Court believes that the failure to include the notice on the Note constituted a technical violation of U3C §3-202.

(3) Punishment for violations of the U3C based on the Note

Section 5-201 of the U3C provides in pertinent part:

(1) If a creditor has violated the provisions of this act applying to . . . certain negotiable instruments (section 16a-3-307), . . . the consumer has a cause of action to recover actual damages and in addition . . . to recover from the person violating such provisions of this act a penalty in an amount determined by the court not less than \$100 nor more than \$1,000.

. . . .

(8) In an action in which it is found that a creditor has violated any provision of K.S.A. 16a-1-101 through 16a-9-102 [that is, the entire U3C], and amendments thereto, the court shall award to the consumer the costs of the action and to the consumer's attorneys their reasonable fees. Reasonable attorney's fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the consumer.¹⁴

At the time Autos sold the car to the Debtor, U3C §5-203 provided in pertinent part:

(1) Except as otherwise provided in this section, a creditor who, in violation of the provisions of the rules and regulations adopted by the administrator pursuant to K.S.A. 16a-6-117, fails to disclose information to a person entitled to the information under the provisions of K.S.A. 16a-1-101 through 16a-9-102, and amendments thereto, is liable to that person in an amount equal to the sum of:

(a) Twice the amount of the finance charge in connection with the transaction, but the liability pursuant to this paragraph shall be not less than \$100 or more than \$1,000; and

(b) in the case of a successful action to enforce the liability under paragraph (a), the costs of the action together with reasonable attorney's fees as determined by the court.¹⁵

The Debtor has not suggested or shown that she suffered any actual damages as a result of Autos' use

¹⁴K.S.A. 16a-5-201(1) & (8).

¹⁵K.S.A. 16a-5-203(1) (Furse 1995); *see also* 1999 Kan. Sess. L., ch. 107, §26 (eff. July 1, 1999) (raising penalty range to \$200 to \$2,000).

of the prohibited Note, so she is only entitled to a penalty of \$100 to \$1,000 under §5-201(1) for Autos' use of the Note. The finance charge in the transaction was \$290.81, so the Debtor would appear to be entitled to recover \$581.62 under §5-203(1)(a) for Autos' failure to include the notice in the Note.¹⁶

Under the circumstances, however, the Court believes that §3-307's complete prohibition against the use of the Note should control over any other deficiencies in the content of the Note, so the Debtor should recover only under §5-201 as a result of Autos' use of the Note. Nevertheless, although the Court would be inclined to award the \$100 minimum penalty under §5-201(1) because Autos was trying to help the Debtor out by agreeing to accept the Note in lieu of the full down payment it had apparently been expecting from her and its use of the Note caused her no actual harm, the Court will increase the penalty to \$300 because the omission of the notice might have been an added, albeit technical, violation of the U3C. In any event, the Debtor is entitled to costs and attorney fees under §5-201(8) because of the Note.

(4) Failure to send notice of right to cure before repossessing car

Two sections of the U3C provide that when a consumer defaults on an installment payment obligation, the creditor has a one-time obligation to send a notice of the right to cure the default before it can repossess any collateral securing the debt. Specifically, §5-110 provides, in pertinent part:

(1) After a consumer has been in default for 10 days for failure to make a required payment in a consumer credit transaction payable in installments, a creditor may give the

¹⁶In the final pretrial order, Autos had asserted, without explanation, that no penalty was provided for a violation of U3C §3-202, but the assertion was not repeated in its trial brief or in its presentation at trial, so the Court concludes Autos has abandoned the argument.

consumer the notice described in this section. . . .

(2) The notice shall be in writing and shall conspicuously state: The name, address, and telephone number of the creditor to which payment is to be made, a brief description of the credit transaction, the consumer's right to cure the default, the amount of the payment and date by which payment must be made to cure the default and the consumer's possible liability for reasonable costs of collection. . . .¹⁷

Section 5-111 adds, in pertinent part:

(2) Except as provided in subsection (3), after a default consisting only of the consumer's failure to make a required payment in a consumer credit transaction payable in installments, a creditor may neither accelerate maturity of the unpaid balance of the obligation nor take possession of collateral because of that default until twenty (20) days after a notice of the consumer's right to cure (section 16a-5-110) is given. Until twenty (20) days after the notice is given, the consumer may cure all defaults consisting of a failure to make the required payments by tendering the amount of all unpaid sums due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges. Cure restores the consumer to his rights under the agreement as though the defaults had not occurred.

(3) With respect to defaults on the same obligation after a creditor has once given a notice of consumer's right to cure (section 16a-5-110), this section gives the consumer no right to cure and imposes no limitation on the creditor's right to proceed against the consumer or the collateral.¹⁸

Autos has conceded that it failed to comply with these provisions before it repossessed the Debtor's car. Because the Court has concluded Autos' allegation that the Debtor voluntarily rescinded their transaction is wrong, Autos' violation of these provisions makes it subject to the penalty under U3C §5-203(1)(a) of twice the finance charge in the transaction, \$581.62, plus costs and reasonable attorney fees under §5-203(1)(b).

b. Old Article 9 of the Uniform Commercial Code

In light of the Court's rejection of Autos' rescission-of-the-sale defense, Autos' repossession

¹⁷K.S.A. 16a-5-110(1) & (2).

¹⁸K.S.A. 16a-5-111(2) & (3).

and disposition of the car was permissible only because of its security interest in the car. Besides the applicable U3C provisions discussed above, Autos' rights as a secured creditor were governed by the provisions of Old Article 9 of the UCC. The Debtor contends that Autos violated part of Old Article 9 §9-504. It provided in pertinent part:

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . .

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. . . . Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. . . .¹⁹

Again, Autos concedes that it did not give the Debtor any notice about its resale of the car, and did not account to her for the surplus it received in the resale.

Remedies available for violations of §9-504(2) and (3) were specified by Old Article 9 §9-507, which provided in pertinent part:

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.²⁰

The Kansas Comment, 1996, to this provision stated that: "The last sentence of the subsection

¹⁹K.S.A. 84-9-504(2) & (3) (Furse 1996).

²⁰K.S.A. 84-9-507(1) (Furse 1996).

provides for a minimum civil penalty where consumer goods are involved. . . . [T]he penalty equals the entire original finance charge plus ten percent of the amount financed in the case of ordinary loans, or the time price differential plus ten percent of the cash price for purchase money security interests.” As the Court understands it, then, this means the Debtor can to recover the greater of any actual loss she suffered because of Autos’ violations of §9-504 or the minimum civil penalty, but not both.

Through her Chapter 13 plan and her testimony at trial, the Debtor demonstrated that she intended to surrender the car to Autos once her plan was confirmed and did not intend to use the car in the interim, so she essentially conceded she suffered no loss as a result of Autos’ wrongful repossession of the car. This also shows that she would not have made any effort to redeem or otherwise recover the car if Autos had given her notice of its intended resale. No evidence was presented to show that the resale price Autos received for the car was inadequate. Instead, the only actual damage the Debtor suffered as a result of Autos’ failure to comply with §9-504(2) and (3) of Old Article 9 was the loss of the \$500 surplus that Autos received in the resale of the car. Because this case involved a purchase money security interest, the time-price-differential measure for the minimum civil penalty would apply. The price of the car was \$2,995; ten percent of that is \$299.50. The time price differential is the extra amount the Debtor was charged because she would be paying over time; here, the only additional amount Autos charged was the finance charge of \$290.81.²¹ The sum of these two items is \$590.31. Because the minimum penalty fixed by the statutory formula exceeds the Debtor’s actual damages, she is entitled to recover \$590.31 for Autos’ violations of Old Article 9.

²¹The Debtor’s calculation of this civil penalty mistakenly included as part of the finance charge the state sales tax imposed on the transaction.

c. Conversion

Although Autos' repossession and resale of the car amounted to conversion, the Debtor's Chapter 13 plan and her trial testimony made clear that she suffered no damages as a result except for the loss of the \$500 resale surplus. While Autos acted wrongfully, the Court believes Autos' actions were not so blameworthy as to justify an award of punitive damages against it. Furthermore, because the penalty provided for the violations of Old Article 9 adequately compensate the Debtor for the loss of the \$500 surplus, the Court concludes it would not be equitable under the circumstances to award her additional damages for the conversion of the car.

d. The Kansas Consumer Protection Act

The Debtor claims that Autos committed a deceptive business practice in violation of KCPA §626(a) and (b)(3) by failing to inform her that the car's title was "formerly branded salvage" before selling the car to her. KCPA §626(a) prohibits "any deceptive act or practice in connection with a consumer transaction"²² and §626(b)(3) provides that "the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact"²³ is a deceptive act or practice. While it is true that Autos did not inform the Debtor before the sale that the car she was buying was "formerly salvage," the evidence showed that Autos did not have the car's title until about ten days after the sale. None of the evidence presented indicated that Autos knew before it received the title that the car had ever had a salvage title, or that the condition of the car would necessarily have revealed that fact. Apparently, for example, a salvage title is issued to an insurance company when it recovers a stolen car

²²K.S.A. 2002 Supp. 50-626(a).

²³K.S.A. 2002 Supp. 50-626(b)(3).

for which it has already paid its insured. As the Court explained in its summary judgment ruling, Autos had to know about the salvage title in order to have willfully concealed it.²⁴ The Court therefore will deny any relief on the Debtor's claim under KCPA §626(a) and (b)(3).

3. Summary

As explained above, the Court concludes that Autos' affirmative defenses based on the order confirming the Debtor's Chapter 13 plan and on Article 2 of the UCC must be rejected. The Court further concludes that the Debtor is entitled to recover from Autos: (1) \$300 plus costs and attorney fees for the U3C violations surrounding the Note; (2) \$581.62 plus costs and attorney fees for the failure to send notice of the right to cure before repossessing the car; and (3) \$590.31 for the violations of Old Article 9 of the UCC. The Court concludes, however, that the Debtor is not entitled to recover anything on her claims for conversion and for violation of the KCPA.

The Debtor's attorney will need to submit time and billing records and any other materials necessary to establish what fees are properly attributable to the recoveries awarded above that include attorney fees, and to show that the fees are reasonable. He should do so no later than June 30, 2003. Autos will then have until July 14 to submit any objection it may have to the requested fees.

²⁴For ease of reference, the explanation is restated here. Under the KCPA, a creditor has not violated §626(b)(3) unless it "purposefully withheld relevant information or misstated facts with the intention of deceiving [the debtor]." *Gonzales v. Associates Financial Serv. Co.*, 266 Kan. 141, 166 (1998) (affirming summary judgment for creditor under §626(b)(2) & (3) because no such showing in record). The Kansas Judicial Council has indicated that a trial court instructing a jury should give the following definition for "willful conduct": "An act performed with a designed purpose or intent on the part of a person to do wrong or to cause an injury to another is a willful act." *Pattern Instructions Kansas—Civil*, 3d, 103.04 (1999). The Kansas Supreme Court approved this definition in *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 74 (1988).

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of May, 2003.

JAMES A. PUSATERI
BANKRUPTCY JUDGE