

# **“DON’T TAKE IT” SHOUTS THE DEBTOR: BREACH OF THE PEACE GUIDELINES IN SELF- HELP REPOSSESSIONS**

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## **ABSTRACT**

*Because of the recession, the number of vehicle repossessions in the United States rose 9 percent in 2007 and another 12 percent in 2008 to a total of 1.67 million repossessions.<sup>1</sup> Because of this, some businesses have turned to using GPS technology to assist in repossessions. However, this can backfire.*

*National news was made in March, 2010, when a Texas man who had been fired from a car dealership in Texas managed to cause the starters of more than 100 vehicles that had been sold by his former employer to be disabled and the cars’ horns to go off. The GPS system remotely disabled starters and also had a feature that allowed the horns of the cars to be activated allowing repossessors to find cars the owners had hidden.<sup>2</sup>*

*Other than the obvious practical advantage of convenience, why are businesses that finance automobile purchases interested in using GPS technology to aid in vehicle repossessions? Another practical reason is shown in a 2009 Associated Press report about three repossession men from Ascension Recovery in Alabama being involved in shootings (with 2 fatalities) during repossessions in the first half of 2009. This led the sheriff where one of the fatalities happened to demand new legislation in an attempt to reduce fatal occurrences.<sup>3</sup>*

*There is also a legal rule why financial businesses want to use self-help repossession without confrontations. This paper will explore those cases that have addressed this issue to ascertain current guidelines and review whether the legal rule should be changed.*

## **INTRODUCTION**

After default by the debtor, the Uniform Commercial Code secured transactions provisions allow a secured party to take the collateral without judicial process<sup>4</sup> so long as there is no “breach of the peace”.<sup>5</sup> But the question is, exactly what repossession actions do not breach the peace.

## **GUIDELINES FROM RECENT CASES**

In a 2007 Illinois case<sup>6</sup> repossession agents took the leased Ford Explorer from the debtor’s locked garage. The debtor then sued the secured party for damages resulting from the wrongful repossession. The trial court granted Ford’s motion to dismiss and the plaintiff appealed.

Although the case involved a lease under U.C.C. Article 2A rather than a secured transaction under U.C.C. Article 9, the wording of the pertinent sections is the same. That is, the repossession must be done “without breach of the peace”. The court felt that the “seminal case” was Chrysler Credit Corp. v. Koontz.<sup>7</sup> There, in an Article 9 case, the debtor heard the car being repossessed in his front yard. Dressed only in his underwear, he ran outside and shouted, “Don’t take it.” The repossessors ignored him and took the car.

The Koontz court held the “protection of a debtor’s private property rights and society’s interest in tranquility must be balanced against the efficiency and reduced costs for both debtors and creditors if self-help” repossession is used. The court stated that for there to be a breach, actual violence is not necessary, but the probability of violence before or at the time of the repossession is sufficient. The court noted that the term itself “connotes conduct which incites or is likely to incite immediate public turbulence or which leads to or is likely to lead to an immediate loss of public order and tranquility.” The court determined that whether a repossession provokes a breach “depends on the accompanying circumstances of each particular case.” The court decided that the debtor’s protest in his underwear did not suggest violence either before or at the time of the repossession and thus there was no breach of peace during the repossession.

The Koontz court then decided whether the trespass by itself constituted a breach of the peace where the debtor had given notice to Chrysler that it was not allowed on his property. It took note of five cases in which repossession of cars from private driveways (even from under a carport) were held not to be breaches of the peace. However, in several other cases, breaches of the peace were found where the repossession occurred by cutting a chain or removing a cracked window pane. The court concluded that so long as no “gates, barricades, doors, enclosures, buildings, or chains were breached or cut” then no breach of the peace had happened.

The Pantoja-Cahue court then turned to Tennessee and Alabama cases<sup>8</sup> indicating that a breach of peace is highly likely if the repossession involves an “unauthorized entry into a closed or locked garage” even where the debtor was not home at the time. Based upon that reasoning and Koontz, the Pantoja-Cahue court indicated that the trial court had committed error by dismissing the count where the car had been repossessed from a locked garage and remanded the case.

An Alabama couple sued the reposessor for wrongful repossession when he towed their SUV with his truck.<sup>9</sup> The husband allegedly grabbed onto the side of the SUV, yelling and banging on the truck, as it drove away. He claimed his leg was injured in the process and his cat was run over. After the trial court granted summary judgment to the reposessor, the couple appealed.

The court noted that the Uniform Commercial Code treatise by White and Summers states that the debtor’s argument becomes weaker as the location of the repossession moves away from the residence “to the yard, the driveway and finally the public street.” The court noted cases that held there was no breach of peace where the secured party parked behind the debtor’s car in order to prevent the car from leaving the creditor’s lot and where the debtor voiced an objection only after the tow truck had towed the repossessed car from its parking spot.<sup>10</sup> The court examined other cases holding there was a breach of peace where the debtor refused to leave the car and where the debtor who had hung onto the side of the tow truck was thrown from it as it pulled away. Considering the evidence that the debtor was banging on the side of the tow truck while it was still in his driveway most favorably to the debtor, the court remanded the case for a jury to determine whether a breach of peace had occurred.

In a case of mistaken vehicle identity, the debtor’s brother and sister-in-law had a one year newer white Ford Expedition than the debtor.<sup>11</sup> The reposessor went to the brother’s address. Unseen by him, the sister-in-law had put her 6 and 10 year olds into the Expedition and backed it onto the street. She then left it there while she moved her mother-in-law’s car back into the driveway and took the keys into the house. While she was in the house, the reposessor towed the Expedition away. As the sister-in-law was calling 911 about her missing children, the reposessor noticed the kids were in the vehicle and immediately returned them to their house. The reposessor settled the children’s claims but disputed those of the parents.

The parents cited a Florida case in which the court stated that an objection by the debtor before the vehicle had been removed resulted in the repossession no longer being peaceful and without a breach of the peace. It also referred to an Indiana case in which the court held that if the repossession was “verbally or otherwise contested at the actual time of and in the immediate vicinity . . . by the defaulting party or other person in control of the chattel, secured party must desist and pursue his remedy in court.” Since the mistaken identity repossession occurred without objection or confrontation, the court held there was no breach of the peace.

One reposessor called the debtor several times at 4:00 a.m. and then entered the debtor’s secured building and started banging and kicking on the debtor’s door. This caused the debtor’s husband to arm himself with a bat.<sup>12</sup> When the husband asked who was at the door, the reposessor said “This is Legal Investigations. I am Officer White. Come to the door.” When the couple refused, the reposessor said he would file auto theft charges. The debtors then gave him the car keys but he was unable to start the car and towed it two days later. The court, referring to Koontz, refused to dismiss the wrongful repossession claim because the alleged police officer impersonation and kicking of the door indicated the probability of violence that “infected” the repossession by towing two days later.

From these recent cases, some current guidelines can be drawn as to what does and does not constitute a breach of the peace:

#### Actions that Constitute a Breach

1. Breaching or cutting: gates, barricades, doors, enclosures, buildings, or chains.<sup>13</sup>
2. Debtor’s verbal objection at actual time and place of repossession.<sup>14</sup>
3. Impersonating a police officer, or
4. Kicking at the debtor’s door.<sup>15</sup>

#### Actions that Do Not Constitute a Breach

1. Debtor shouting while in his underwear, or
2. Trespass alone.<sup>16</sup>
3. Blocking debtor’s car with the secured party’s car, or
4. Debtor voices objection only after the car was towed from the parking space.<sup>17</sup>

### **CONCLUSION**

The dilemma for repossessors and secured parties is the concern that the debtor will verbally object during the repossession such that there is a breach of the peace. It is likely that the desire of repossessors to thus avoid any type of verbal objection by the debtor led to all of the Alabama repossessions (in which there were shootings and two fatalities) to be attempted in the middle of the night, including one at 2:30 a.m.<sup>18</sup> (This concern undoubtedly also contributes to the use of the GPS devices which remotely disable starters.) Given that a mere verbal objection by the debtor can be a breach of the peace and the serious, sometimes fatal, consequence of trying to avoid such an objection by repossessing in the middle of the night, it is time to amend the Uniform Commercial Code (1) to limit self-help repossessions to being accomplished during times other than the middle of the night, (2) to require that local law enforcement be contacted before repossessors go to work, as proposed by Alabama Sheriff Lovette<sup>19</sup>, and (3) to require repossessors and/or secured parties to cease the repossession and instead pursue the remedy in court if there is a verbal objection by the debtor at the time of the repossession. Even if one

fatality were prevented by such an amendment, it would be worth the additional costs to the secured parties.

## REFERENCES

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<sup>1</sup> Reeves, Jay, Violence Between Repo Men, Car Owners on the Rise, Associated Press, February 27, 2009 at <http://news.yahoo.com/s/ap/20090227>.

<sup>2</sup> Carlton, Jeff, Texan Accused of Disabling 100 Cars Over Internet, Associated Press, March 18, 2010, at <http://news.yahoo.com/s/ap/20100317>.

<sup>3</sup> Reeves, *supra*, note 1, at 1.

<sup>4</sup> U.C.C. § 9-609(a)(1) (2008).

<sup>5</sup> U.C.C. § 9-609(b)(2) (2008).

<sup>6</sup> Pantoja-Cahue v. Ford Motor Credit Co., 872 N.E. 2d 1039 (App. Ct. Ill. 2007).

<sup>7</sup> Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171 (App. Ct. Ill. 1996).

<sup>8</sup> Pantoja-Cahue v. Ford Motor Credit Co., 872 N.E. 2d 1039, at 1045 (App. Ct. Ill. 2007).

<sup>9</sup> Callaway v. Whittenton, 892 So. 2d 852 (Ala. 2003).

<sup>10</sup> *Id.* at 857.

<sup>11</sup> Chapa v. Traciers & Assoc., Inc., 267 S.W. 3d 386 (Tex. App. 2008).

<sup>12</sup> Fleming-Dudley v. Legal Investigations, Inc., 2007 U.S. Dist. LEXIS 21653.

<sup>13</sup> *See* case cited *supra* note 6.

<sup>14</sup> *See* case cited *supra* note 11.

<sup>15</sup> *See* case cited *supra* note 12.

<sup>16</sup> *See* case cited *supra* note 6.

<sup>17</sup> *See* case cited *supra* note 9.

<sup>18</sup> Reeves, *supra*, note 1 at 1.

<sup>19</sup> *Id.* at 1.