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DISPATCHES FROM THE TRENCHES

A Little Something About Breaching the Peace

By Kenneth P. Weinberg

Most lessors who have had one or more deals go bad are familiar with the magical words "breaching the peace." This legal concept can come into play when a lessee breaches its obligations under a lease and the lessor desires to repossess the leased equipment and sell it to recoup some of its losses. If the underlying lease transaction constitutes a loan, rather than a true lease, Article 9 of the Uniform Commercial Code places various requirements on the lessor. One of these requirements is that a lessor can only repossess the leased equipment if it can do so without breaching the peace. As will be discussed in more detail below, what constitutes a breach of the peace is a somewhat hazy area of the law that depends on the facts and circumstances of each case. This issue of Dispatches from the Trenches provides some guidelines that may be useful for lessors when repossessing equipment.

Two additional points are noteworthy. First, a lessor cannot insulate itself by merely relying on a repo-company and if the repo-company breaches the peace, the lessor may be liable. The official comments to Revised Article 9 recommend that courts "hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of the collateral." Second, even if the underlying transaction should be treated as true lease, prudent lessors will still want to avoid breaching the peace since no one can predict with certainty whether a court will accurately characterize a transaction as a true lease and since breaching the peace may be looked upon unfavorably by courts even when the underlying transaction is outside the scope of Article 9.

Article 9, Section 609 of the Uniform Commercial Code ("UCC") establishes a lessor's right to exercise self-help when reclaiming property from a lessee who has failed to make timely and adequate payments for the property. This notion of self-help means that the lessor can retake the property in default without resorting to a judicial process involving lawyers, courts, marshals, and the like. However, the right to self-help is limited by the requirement that the lessor proceed in a manner that will not result in a "breach of the peace".ⁱ Unfortunately, the UCC offers no definition of this phrase and official comments to the UCC make clear that the drafters intentionally left the phrase undefined because they wanted the concept to be developed by the courts on a case-by-case basis. Although this omission creates a gray area for lessors trying to establish what actions are permissible when repossession of collateral becomes necessary, the following examples will help clarify the analysis employed by various courts when determining whether a breach of the peace has occurred, which will in turn enable the lessor to establish prudent and effective repossession policies. Of course, the answer to the question of what constitutes a breach of the peace necessarily varies among jurisdictions. Nonetheless, there are some common themes expressed by many jurisdictions and those themes are outlined below.

One area in which most, if not all, courts agree is that security agreements or leases purporting to "waive" breach of the peace claims in advance are not worth the paper they are printed on. In fact, Article 9 of the Uniform Commercial Code specifically makes such waivers unenforceable.ⁱⁱ In other words, courts will not allow the lessor to insert a clause into a lease which contains a promise from the lessee not to sue the lessor for a breach of the peace should repossession become necessary. There is even some support that the mere inclusion of such a clause can invalidate the entire agreement.ⁱⁱⁱ

Another area in which courts in different states have been consistent in their analysis of claims involving breach of the peace is that violence, or *even the perception of violence*, occurring during repossession will invariably result in an action for breach of the peace. In *Deavers v. Standridge*,^{iv} the Georgia Court of Appeals ruled that the offensive and insulting language used by a seller as he repossessed a car was "sufficiently provocative of violence to constitute a breach of the peace." In *Harris Truck & Trailer Sales v. Foote*,^v the Tennessee Court of Appeals found no breach of the peace when the seller repossessed a truck from a private truck terminal and a key factor in this case was the lack of actual or potential violence during the repossession.

Many courts have held that if the lessee begins actively protesting while the lessor attempts to repossess the equipment, the repossession should stop immediately and the lessor should leave the premises.^{vi} The reason for this interpretation is that once a lessee begins protesting, the

possibility of violence increases. The perception of violence may be found even when the party attempting to repossess the equipment behaves in a non-threatening manner. In one case, a woman awoke at 5 A.M. to find that her car was being repossessed from her driveway. She protested the repossession and called the police to sort out the problem. A Georgia court of appeals determined that even though the men performing the repossession were "polite, unabusive, and unprofane", the fact that they continued the repossession despite the woman's protests created a "hostile environment that could have led to a breach of the peace".^{vii}

Some states have ruled that protests of third parties such as a spouse or children will effectively preclude a lessor from exercising self-help repossession.^{viii} While not all states follow this analysis, the safest practice for a lessor is to cease repossession efforts when confronted with a protesting lessee or third party.

When the equipment to be repossessed is located on property belonging to a third-party, courts are more likely to find a breach of the peace, especially if the circumstances surrounding the repossession are unusual (i.e. repossessions at odd hours, or in remote places, etc.).^{ix} This analysis, too, turns on the likelihood of violence occurring during the repossession.

A mere trespass, such as going onto a lessee's driveway and repossessing a vehicle, is typically not considered a breach of the peace.^x However, when the equipment is enclosed in some way, however, such as within a fenced-in area, the lessor's right to self-help is severely limited.^{xi} In fact, "[a]ny unauthorized entry into a closed dwelling is probably a breach of the peace."^{xii} One reason for this is the inherent possibility of violence that accompanies such unauthorized entries. Another reason is that an unauthorized entry may expose other property to theft at the hands of third parties. For example, cutting through a chain link fence in order to gain access to the equipment located within the fenced-in area would expose all other property within that fenced-in area to the possibility of theft.^{xiii}

In the event that the lessee voluntarily allows the repossession to occur, or simply remains peaceful and voices no protest, the repossessing party should establish a verifiable paper trail to prevent subsequent claims of breach of the peace. Having the lessee, as well as any witnesses present, sign a letter of consent allowing the repossession may offer the lessor some protection against lawsuits down the road. If the lessee initially consents to the repossession, then changes its mind and begins protesting after the lessor has seized the equipment, most courts will rule that the lessor is free to continue the repossession without fear of a breach of the peace complaint.^{xiv}

In many jurisdictions, deceptive tactics used to gain access to, or control of, equipment that is to be repossessed may subject the lessor to liability. One example is *Ford Motor Credit Co. v.*

Byrd, where a creditor employing such methods was held liable for the tort of conversion (a legal term that basically means "theft").^{xv}

If a lessor breaches the peace while repossessing equipment, it "may be liable for trespass, conversion, assault and battery and other torts."^{xvi} Damages may include both compensatory as well as punitive damages.^{xvii} There is substantial case law supporting the notion that lessors are responsible for any torts they commit if a breach of the peace occurs.^{xviii} Lessors should therefore take appropriate steps to ensure that any employees or independent agents used in repossession actions are following the correct procedures, and that they are aware of the significant ramifications that follow from not adhering to those procedures.

An additional liability issue to consider relates to the lessee's personal property that is not part of the leased equipment. When repossessing equipment that may contain additional property of the lessee, the lessor must make sure to check the equipment thoroughly for any personal property not subject to the repossession action. Even if a lessor successfully repossesses equipment without breach of the peace, that lessor may still be liable for damages if the equipment contained personal belongings in the trailer of the truck or within other compartments.^{xix} Obtaining a signed release from the lessee, indicating that there is no personal property within the equipment, can protect the lessor from subsequent actions.

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ⁱ UCC §9-609(b)(2).

ⁱⁱ UCC §9-602(6).

ⁱⁱⁱ See Barkley Clark: The Law of Secured Transactions Under the Uniform Commercial Code, 435[2][b][I](rev. ed. 2004)

^{iv} 242 S.E.2d 131 (Ga. Ct. App. 1978)

^v 460 S.W.2d 460 (Tenn. Ct. App. 1968).

^{vi} See e.g. Hester v. Bandy, 627 So. 2d 833 (Miss. 1993).

^{vii} Fulton v. Anchor Savings Bank, FSB, 452 S.E.2d 208 (Ga. Ct. App. 1994).

^{viii} See e.g. Freeman v. General Motors Acceptance Corp., 171 S.E. 63 (N.C. 1933).

^{ix} See e.g. Salisbury Livestock Co. v. Colorado Central Credit Union, 793 P.2d 470 (Wyo. 1990) (repossession occurred at 5 A.M. in a remote area on third-party property, increasing the likelihood of violence).

^x See e.g. Hester, 627 So. 2d at 840.

^{xi} See e.g. Laurel Coal Co. v. Walter E. Heller & Co., Inc., 539 F.Supp 1006 (W.D.Pa. 1982); Rogers v. Allis-Chalmers Credit Corp., 679 F.2d 138 (8th cir. 1982).

^{xii} Barkley Clark: The Law of Secured Transactions Under the Uniform Commercial Code, ¶ 4.05[2][b][i], (rev. ed. 2004) (citing Girard v. Anderson, 257 N.W. 400 (Iowa 1934); also citing Gulf Oil Corp. v. Smithey, 426 S.W.2d 262 (Tex. Ct. App. 1968)).

^{xiii} See e.g. Laurel Coal Co., 539 F.Supp 1006; Martin v. Dorn Equipment Co. Inc., 821 P.2d 1025 (Mont. 1991).

^{xiv} Jordan v. Citizens and Southern Nat'l Bank of South Carolina, 298 S.E.2d 213 (S.C. 1982).

^{xv} 351 So. 2d 557 (Ala. 1977).

^{xvi} McCall v. Owens, 820 S.W.2d at 752.

^{xvii} Big Three Motors, Inc. v. Rutherford, 432 So. 2d 483 (Ala. 1983).

^{xviii} General Electric Credit Corp. v. Timbrook, 291 S.E.2d 383, 385 (W. Va. 1982) (citing Cox v. Stuart, 157 So. 460 (Ala. 1934); Thrasher v. First Nat'l Bank, 288 So. 2d 288, 289 (Fla. Dist. Ct. App. 1974); Whisenhunt v. Allen Parker Co., 168 S.E.2d 827 (Ga. Ct. App. 1969); Childers v. Judson Mills Store Co., 200 S.E. 770 (S.C. 1939).

^{xix} Peoples Bank v. Sanders, 40 U.C.C. Rep. 1078 (Tenn. Ct. App. 1984).