**Repossession of Collateral**

Welcome to this podcast on Repossession of Collateral brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is the nature of foreclosure of a security interest and, in particular, the right of a secured creditor to obtain possession of collateral after default. Like in many areas of the law a thorough understanding of secured transactions requires you to use the correct vocabulary relevant to the topic. Here we are using the rules set forth in the Uniform Commercial Code Article 9, though some of the basic concepts obtain their meaning from other law. This podcast primarily focuses on repossession of collateral arising from a security interest created under Article 9, and leaves for other study foreclosure of real estate mortgages.

The basic concepts associated with repossession are: replevin, self-help, receiver, breach of the peace, and trespass. Familiarity with these concepts will help you understand what actions a secured creditor can and cannot take under Article 9.

Let’s begin. Replevin is simply a cause of action filed in court by a claimant for possession of property. Recall that the creation of a security interest attaches a sort of invisible string binding payment of the stated obligation to the specified collateral. In the event that a debtor does not pay the obligation, we call this a default, a secured party may file a court action for replevin of the collateral. Simply put, section 9-609 entitles a secured party to possession of the collateral upon default. In order to obtain possession under the Code, the secured party may use judicial process by filing for replevin. Once granted, the sheriff will take the writ to the debtor and obtain possession of the collateral on behalf of the secured creditor. Of course, filing a replevin will involve a default by the debtor followed by the filing of a complaint by the creditor, notice to the debtor, a hearing with the judge, issuance of a writ and, finally, levy on the collateral. This process may well involve a month to complete, depending upon the speed with which courts are able to hear matters locally. It is important to remember that the debtor is entitled to possession of the collateral, even in the face of a default, until a secured party has exercised its right to take possession in the way permitted by Article 9.

Well, this seems like a lengthy process, right? In light of this known time impediment to obtaining possession upon default, 9-609 also provides a limited right of a creditor to self-help. A secured creditor is able to obtain possession of the collateral without judicial process if he can proceed without a breach of the peace. You may be familiar with the concept of breach of the peace from other law, but other definitions, including the criminal standard of public disturbance, do not apply here. In general, a breach of the peace for purposes of Article 9 is any situation where the attempted repossession of the collateral would tend to provoke others to violence, but often times an oral protest by the debtor will suffice as a breach of the peace. The difficulty lies in what situations a breach of the peace is deemed to occur. This is a factual determination made by courts ultimately. It is easy to appreciate that it is difficult to give advice to clients who desire to exercise self-help when it depends upon the facts. It is worth advising clients, though, that comment 3 to 9-609 states that the secured party is responsible for actions of others taken on the secured party’s behalf, including those independent contractors who are engaged to take possession of the collateral. Meaning, a secured party should be very careful who it sends to take possession of collateral. A secured party that violates Article 9 is responsible for all losses.

So, what does this mean when it comes to repossession of personal property? Suppose that I purchase a clarinet for my young son Marshall from Music City on credit with Music City taking a security interest in the clarinet to secure payment of $50 per month over three years for the clarinet. In the event that I failed to pay for the clarinet as promised, Article 9 would permit Music City to enforce its security interest by taking possession of the clarinet, either through judicial or non-judicial means. This is commonly called foreclosure. Music City can proceed by judicial means by seeking replevin of the clarinet. Whether Music City can proceed by non-judicial means will depend upon whether their efforts to repossess the clarinet result in a breach of the peace. Let’s look at several possibilities.

In hypothetical #1, Music City’s representative comes to my home and asks for the clarinet. If I collect the clarinet from Marshall and give it to Music City, the secured creditor will obtain possession without a breach of the peace.

In hypothetical #2, Music City’s representative comes to my home and asks for the clarinet. If I protest the repossession and tell the representative to leave my property, the representative must leave or potentially face a claim of trespass. At this time, the secured party probably cannot obtain possession by non-judicial means without incurring liability for losses because it seems doing so will be a breach of the peace.

In hypothetical #3, Music City’s representative comes to my home and asks for the clarinet. I protest the repossession and tell the representative to leave my property. The representative shoves me to the side, and seeing the clarinet on the dining room table, he grabs it and runs while I yell angrily at him. This would constitute a breach of the peace and it is an impermissible repossession subjecting the creditor to liability on several fronts, including Article 9, trespass, and perhaps even civil and criminal assault.

In hypothetical #4, Music City’s representative comes to my home and asks for the clarinet. The representative brings a police officer with him. The police officer advises me to turn over the clarinet. I pack up the clarinet and hand it over to the police officer. Most courts would hold that the officer’s participation in the repossession would constitute a breach of the peace, rather than the officer simply being present to maintain order. Meaning, self-help must be done privately, not with the help of public officials.

It is worth noting that attorneys should counsel clients carefully that participate in repossessions because Comment 3 to 9-609 explains that a secured party is responsible for the actions of others, even independent contractors. In one case, a Utah repossession agent engaged in a high-speed chase in an attempt to repossess a Lincoln Navigator vehicle. During the chase, the driver, a mother of three, was killed when her vehicle hit a tree. Not only does this constitute a breach of the peace under Article 9, but the repossession agent was sentenced criminally for up to 15 years in the death of the mother. Applying Comment 3, the creditor who hired the repo agent appears to have liability in the death of the mother, though this outcome was not part of the reported case.

While self-help is often connected with tangible collateral, such as cars, machinery and, perhaps, clarinets, self-help is also available to secured creditors with respect to accounts as collateral. Recall that an account is simply a right to payment of a monetary obligation. Section 9-607 and 9-406 collectively provide a self-help remedy to a secured creditor with respect to accounts. The secured creditor can send the account debtor a notice in writing directing the account debtor to make payments to the secured creditor. An account debtor in this situation can only discharge its obligation by paying the secured party.

Let’s presume that Music City granted a security interest in its accounts receivable for music lessons to First Bank. In the event that Music City defaults on its obligation to pay First Bank, the secured creditor might seek repossession of the accounts. First Bank, so long as it knew the identity of the account debtors, would send a notice directing payment to it. For instance, if I owed Music City money for clarinet lessons for Marshall, I would need to pay First Bank the amount due on the lessons.

In summary, there are several types of repossessions that could occur. Of course, a debtor might voluntarily surrender collateral upon default. A secured creditor might proceed under 9-609 by self-help if he can do so without breaching the peace. Alternatively, the secured creditor would need to file for replevin through judicial process. It is of note, that sometimes a secured creditor can request the court to appoint a receiver to supervise the collateral in the event that the collateral is of a type where immediate possession is not feasible. Obtaining possession, though, is most often the first stage of the secured creditor’s remedy. Possession is understood as temporary. In many cases, the collateral will then be sold to satisfy the debt.

At this point, you should be able to identify and describe the judicial as well as the non-judicial means that secured creditors can use to take possession of collateral upon a default. You should also be able to recognize some of the scenarios that would involve a breach of the peace, but realize that the factual nature of the determination might prevent self-help by a secured creditor.

I hope you’ve enjoyed this podcast on Repossession of Collateral.

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