


WRONGFUL REPOSSESSION AND DEFICIENCY BALANCES:

HOW TO STAY OUT OF TROUBLE WHEN ENFORCING YOUR AUTO LIENS

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ISSUE:What constitutes a breach of the peace?

First and Farmers Bank of Somerset v. Henderson

• FACTS


- Bank repossessed a speed boat.
- Brought a deputy Sheriff, in full uniform, with them to keep the peace.
- Henderson showed up and raised a “clear and vehement verbal objection” to the repossession and went to call his lawyer.
- Deputy went over to prevent a fight.
- Bank drove off with the boat while debtor was calling his lawyer.

Result: Compensatory, emotional distress, and punitive damages to the debtor.

LESSONS

- KRS 355.9-503 allows self-help repossession without a court order if no breach of the peace.
- If you are proceeding by self-help, you cannot involve law enforcement.
- Because the debtor verbally objected and went to call his lawyer, repossession constituted a breach of the peace.





ISSUE: Who is liable for a breach
of the peace?

Patterson v. Blair

• FACTS


- Dealership quoted wrong amount to pay off the vehicle.
- Buyer refused to pay the difference.
- Dealer employee pulled up to buyer, knocked on his window, demanded that he exit the vehicle and, when buyer refused, pulled a gun and shot out his tires.

Result: Dealer liable for actions of the employee.

LESSONS



- Even criminal conduct during the course of a repossession can be imputed to the employer under certain circumstances.
- Was the action foreseeable?
- Was the employee acting to further the business of his employer?



ISSUE: Can your right to
repossess without notice be
waived?

Zorin Properties v. Denney

• FACTS


- Creditor sent letter saying that equipment was going to be repossessed on or after February 18.
- Creditor repossessed equipment on February 13, 5 days earlier than it said, without notice.
- Debtor sued for wrongful repossession on theory that letter waived standard contractual nonwaiver provision.

Result: Creditor won based on the contract language, but the Court suggests the result might be different if this had been a consumer contract.



LESSON

Be extremely careful in promising in writing that you will forbear any of your contractual rights. If you do, follow through on your representation, as it may be binding in a consumer case.



ISSUE: When is a repo sale public or private?

Ford Motor Credit Company v. Hall

• FACTS


- Creditor sold repossessed car at auction but sent out a “private sale” notice that the vehicle would be sold on or after 10 days.
- Debtor claimed that the auction sale was a public sale, requiring that he be given notice of the date, time, and place of the sale.
- Trial Court determined that creditor violated KRS 355.9-504 by sending a “private sale” notice when the vehicle was sold at a public auction.

Result: Reversed and remanded to determine if the auction was truly a public sale.



LESSON

A vehicle auction can be a private sale if only dealers are invited and allowed to attend. (i.e., The general public is not invited and cannot attend.)



ISSUE: Can you require a debtor to waive a wrongful repossession claim?

Ford Motor Credit v. Swarens

• FACTS

- Ford collectors claimed debtor was behind on payments; he wasn't.
- Two months later they came again claiming he was delinquent; again he proved he was not.
- Two months later they showed up again; this time the debtor said he was tired of them showing up, would show them no more records, showed them his shotgun, and told them to leave.
- The Ford collectors left but told the debtor they were experienced in repossessions and would repossess his vehicle at some point.

- **FACTS cont.**

- Two months later they repossessed the vehicle from the parking lot; debtor had to hitchhike home after working a full day at the plant.
- **THE DEBTOR WAS NEVER BEHIND ON PAYMENTS;** Ford claimed a computer error.
- The next day, Ford admitted the mistake, apologized, and offered the vehicle back, but only if he signed a waiver promising he wouldn't sue.
- Debtor refused to sign, didn't get his vehicle back, and Ford sold it.

Result: Compensatory and punitive damages to the debtor.

LESSONS

- If return of the vehicle is warranted, give it back without any pre-conditions.
- Computer error is no excuse.





ISSUE: Can you repossess even if payments are current?

• FACTS

- Debtors owned a mobile diner financed by bank.
- Debtors never missed a payment but had substantial checking overdrafts; debtor resigned his job with the Army; was in trouble with their landlord; and had a second lien placed on the diner.
- Bank officer told debtor that it would go along with her rehabilitation efforts, but only if all her other creditors would also go along.

- **FACTS cont.**

- Bank brought a replevin action and repossessed the diner.

Result: Bank held it was entitled to possession due to clause allowing it to declare a default and accelerate if it felt “insecure”.

LESSONS



- Non-payment default enforceable if contract so provides.
- Check your contract language before enforcing a non-payment default and consult your lawyer.
- Some contracts have this language, but many do not.



ISSUE: Should you accept late payments?

Catron v. Citizens Union Bank

• FACTS

- Bank accelerated the loan despite having accepted late payments in the past.

Result: Bank did not waive right to declare a default under the nonwaiver provisions of its loan documents.

LESSONS



- Don't send money back even if it is late and even if it does not cure the default. It might be the last money you ever see.
- Virtually all loan documents have nonwaiver provisions and Kentucky courts will enforce them;
- Do, however, send a letter to the debtor advising that the payment is insufficient to cure the default and that legal action will continue.



ANY QUESTIONS?

● Presentation By



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CHRISTOPHER M. HILL has practiced law in Kentucky for more than 4 decades. Throughout his legal career his primary focus has been in the area of mortgage default. He founded his firm in 1999 with the goal of providing first -class legal services to banks and mortgage lenders . He lectures frequently on subjects of interest to mortgage servicers and has been lead counsel on numerous significant appellate decisions in the mortgage default area.

Mr. Hill was admitted to the Kentucky bar in 1982, and the Ohio bar in 2002. He is also admitted to practice before the U.S. Supreme Court; U.S. Court of Appeals, Third and Sixth Circuits; U.S. District Courts, Eastern and Western Districts of Kentucky, Northern District of Ohio, Northern and Southern Districts of Indiana, and Eastern District of Tennessee.