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Don't Fear the Repo: UCC an Unlikely Ally in Personal Injury Cases

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The "Repo Man" has become a caricature in modern day American folklore. With television shows like "Repo Wars" and "Operation Repo" glorifying the dangerous life of the repossession agent, it is no wonder that one often hears stories of violence carried out by these agents. Can this result in a viable personal injury lawsuit?

The instincts of a well-trained personal injury attorney dictate that unless the "Repo Man" has considerable assets, a lawsuit against the towing company or the lender that sent these agents to a vehicle owner's property would be futile because: (a) employers of independent contractors are generally not liable for injuries to a third party, and (b) an insurance company would likely disclaim coverage against this intentional (and possibly criminal) assault.

These instincts would be wrong. The answer lies deep in the murkier recesses of your law library, within the unopened, now dusty copy of the Uniform Commercial Code (UCC): The lender can be held liable. Pursuant to the UCC and decisional law, the bank that caused the dispatch of the repossession agents is a secured party in the transaction. As the secured party, if the bank exercises its "self-help" remedy, it has a non-delegable duty to effect the repossession without breach of the peace and is directly liable for the actions of the agent.

Pursuant to UCC Article 9-609, after a default, a secured party may take possession of collateral:

1. Pursuant to judicial process; or
2. Without judicial process, if it proceeds without breach of the peace.

New York state courts have held that this section imposes a "non-delegable duty" upon a secured party to keep the peace in the course of a repossession. See *General Motors Acceptance Corp. v. Vucich*, 15 A.D.3d 106 (3d Dept. 2005) (*Vucich*).

In *Vucich*, the plaintiff purchased a vehicle pursuant to a contract with General Motors Acceptance Corp. (GMAC). When the plaintiff defaulted, GMAC hired a recovery company to repossess the vehicle. This led to a physical altercation. The plaintiff sued GMAC and the towing company for, among other things, breach of peace in violation of the UCC more than two years after the incident. The court in *Vucich* was called upon to consider the applicable statute of limitations. Under normal circumstances, the one-year statute of limitations for intentional assault would apply.

The court noted, however, that the UCC "impose[s] a nondelegable duty on GMAC as a secured creditor to keep the peace in the course of a repossession" where there is normally no liability on the part of the employer of an independent contractor. *Vucich*, 15 A.D.3d, supra at 109. Since the liability was created or imposed by statute, CPLR 214(2) prescribes a three-year statute of limitations period. Id.

Subsequent to its decision on *Vucich*, the Third Department was again called upon in this same matter to determine whether its earlier decision determined that the defendants "breached the peace." *General Motors Acceptance Corp. v. Vucich*, 31 A.D.3d 864, 864-865 (3d Dept. 2006)(*Vucich II*). The court left open the question as to whether the repossession agent acted in self-defense. Id.

Breach of Peace

The question of what will constitute a "breach of peace" in New York State has gone, until recently, unanswered. In fact, the Official Comment to New York UCC §9-609 explains, "[L]ike former Section 9-503, this section does not define or explain the conduct that will constitute a breach of peace, leaving that matter for continuing development by the courts." McKinneys Consolidated Laws of New York Annotated, Uniform Commercial Code §9-609, Official Comment 3.

In 2014, a federal court sitting in New York State directly addressed the issue. In *Boles v. County of Montgomery*, 2014 WL 582259 (NDNY 2014) (Sharpe, Chief Judge), the District Court sitting in New York

was interpreting the New York Uniform Commercial Code. *Boles*, supra at *8-*9. In *Boles*, the defendants attempted to repossess the plaintiff's truck pursuant to a bank order. Id. at *1. During the course of the repossession the plaintiff alleged that he verbally objected and a physical altercation ensued. Id. at *1-*2. The plaintiff in *Boles* brought suit against the lender and repossession agents for violating New York State's UCC by unlawfully repossessing the truck.

The Boles court interpreted New York State UCC 9-609 and specifically addressed "breach of peace." The court held, "[i]t is clear that a mere verbal objection to the removal of property constitutes a breach of the peace." *Boles*, supra at *9. In support of this definition, the Boles court relied upon a federal case from the U.S. Court of Appeals for the Sixth Circuit interpreting the exact same statutory language in the context of a repossession action, *Hensley v. Gassman*, 693 F.3d 681, 689-90 (6th Cir. 2012)("an objection, particularly when it is accompanied by physical obstruction, is the debtor's most powerful (and lawful) tool in fending off an improper repossession because it constitutes a breach of the peace requiring a creditor to abandon his efforts to repossess"), and upon secondary sources including 4 James J. White & Robert S. Summers, Uniform Commercial Code §34-8 at 447 (6th ed. 2010)("the debtor's opposition, however slight and even if merely oral, normally makes any entry or seizure a breach of the peace").

The Boles decision was a bold step toward defining "breach of peace" in New York. Before *Boles*, the New York courts interpreted "breach of peace" only in the context of disorderly conduct. For instance, *Vucich II* cites *People v. Perry*, 265 N.Y. 362 (1934), a criminal Court of Appeals matter defining "breach of the peace" in the context of disorderly conduct, "[a] breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community." (citing *People v. Most*, 171 N.Y. 423, 429 (1902)). *Vucich II* also cites *Cherno v. Bank of Babylon*, 54 Misc.2d 277 (Sup. Ct. Nassau Cty. 1967) aff'd 29 A.D.2d 767 (2d Dept. 1968).

In *Cherno*, the defendant bank entered the premises of a debtor in default to obtain collateral.*Cherno*, 54 Misc.2d supra at 278-279. The entrance was made by use of a key from a locksmith. The Cherno court held, as a matter of law, there was no breach of the peace based upon the breaking into property with unauthorized use of a key. Until *Boles*, New York state jurisprudence never clearly defined the contours of the "breach of peace" in the context of the UCC.

The Boles interpretation is sound in law and in policy: It is rooted in the approach taken by the other states that have interpreted this UCC provision, see e.g., Lawrence's Anderson on the Uniform Commercial Code, 11 Anderson UCC §9-609:11 (3d. ed.), "Caselaw is clear that if the debtor threatens to physically prevent the repossession, the secured party must not proceed with the repossession." Citing *Mississippi: Hester v. Bandy*, 627 So.2d 833, 24 UCC Rep. Serv.2d 1344 (Miss. 1993) (in observing repossession, debtor yelled at repossessors hooking car up to tow truck, chased after them, but fell in ditch; threat of physical violence by debtor enough to make repossession breach of peace); *Nebraska: State v. Trackwell*, 235 Neb. 845, 14 UCC Rep. Serv. 2d 331 (1990) (debtor's grabbing on to vehicle being repossessed is sufficient to make repossession

breach of peace). See also *Illinois: Williams v. Republic Recovery Service*, 72 UCC Rep. Serv. 2d 907 (N.D. Ill. 2010) ("the repossessor does not need to successfully repossess the vehicle before 810 ILCS 5/9-609(b)(2) is implicated; rather, the repossessor must use a procedure to do so that does not involve a breach of the peace").

The clear line drawn by the Boles "mere objections" definition may go a long way to prevent violence and injury. Additionally, the need for the court to determine "who threw the first punch" would be all but eliminated.

On the other hand, this interpretation of the UCC may unfairly burden a secured party with additional steps of securing property requiring court intervention and could unnecessarily backlog the court's docket.

Buyer Beware

There is a good reason for the dearth of jurisprudence on this issue: Most of these cases necessarily end up in mandatory arbitration. Usually, upon securing the lien in the first place, the banks insert a "mandatory arbitration clause" into their preprinted security agreements. These are notoriously difficult to break, and it often means that the fate of your client will lie not with a jury, but an independent arbitrator at an extrajudicial institution.

Most agreements will have in place something subjecting "all matters arising out of this contract" to mandatory arbitration. The question, which has not been answered by the courts of New York, is whether criminal conduct, or an intentional assault/battery type situation, was contemplated at the time of the meeting of the minds and falls under the "arising out of this contract" clause.

Conclusion

In the realm of personal injury law, the Uniform Commercial Code is seldom referred to as authority, but it is always nice to see an old friend from law school.