



OFFICE OF THE STATE ATTORNEY

FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY
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STATE MEMORANDUM OF LAW

PRIVATE-PARTY SELF-HELP REPOSSESSIONS AND THE LIMITS OF LAW ENFORCEMENT INVOLVEMENT

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The following is a synopsis of legal authority regarding the repossession of property without judicial process, and the actions of law enforcement officers called to the scene of a repossession. Both the Florida Statutes and court interpretations rely on several factors.

First, a creditor/secured party may only engage in a lawful, self-help repossession if it is “peaceable and without a breach of the peace.” If a debtor objects (orally or otherwise) to a self-help repossession prior to its completion, and the creditor/secured party continues with the repossession, said repossession constitutes a “breach of the peace” and is not lawfully supported by the Florida Statutes.

Second, a self-help repossession is legally considered “complete” when a licensed recovery agent is in “control, custody, and possession” of such repossessed property. Property that is being repossessed shall be considered to be in the control, custody, and possession of a recovery agent if the property being repossessed is secured in preparation for transport from the site of the recovery by means of being attached to or placed on the towing or other transport vehicle or if the property being repossessed is being operated or about to be operated by an employee of the recovery agency. Once a *lawful* self-help repossession has been completed, ownership of the property legally transfers to the creditor/secured party.

Third, law enforcement officers are not considered “state actors” during a self-help repossession if they act only to “keep the peace.” However, officers cross the line if they affirmatively intervene to aid the creditor. Assisting in effectuating a self-help repossession or intimidating a debtor to cause him or her to acquiesce in the repossession may subject officers to liability if the rights of the debtor are violated.

Lastly, factors that law enforcement officers should consider/evaluate when called to the scene of a self-help repossession include (but are not limited to):

- The presence/absence of evidence regarding a creditor’s right to repossess the property at issue (e.g. name/identification of the repossession agent; Florida-based repossession license number; name of lien holder/bank authorizing the repossession; contradictory paperwork from the debtor);
- Whether the property in question, upon arrival, meets the legal definition of “control, custody, and possession” under the Florida Statutes;
- Any/all statements made by either the debtor or creditor regarding when (if, at all) the debtor made an objection to the self-help repossession (e.g. pre- or post-completion of the repossession); and
- Any/all independent evidence revealing whether an objection was made by the debtor prior to the completion of the repossession (i.e. video-recorded footage of the entire repossession; independent eyewitness statements).

Each agency should develop its own protocol and procedures in light of the statutes and case law on this issue. Whether the repossession was completed without a breach of the peace can only be determined on a case-by-case basis.

Q: WHEN AND HOW MAY A SECURED PARTY TAKE POSSESSION OF COLLATERAL?

- **F.S. § 679.609: SECURED PARTY’S RIGHT TO TAKE POSSESSION AFTER DEFAULT**
 - (1) After default, a secured party:
 - (a) May take possession of the collateral . . .
 - (2) A secured party may proceed under subsection (1):
 - (a) Pursuant to judicial process; or
 - (b) Without judicial process, if it proceeds without a breach of the peace.¹
- **UCC COMMENT #3 – Judicial Process; Breach of Peace**

Subsection (b) permits a secured party to proceed under this section without judicial process if it does so “without breach of the peace.” . . . [T]his section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. In considering whether a secured party has engaged in a breach of the peace, however, courts should 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 collateral.

This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A number of cases have held that a repossessing secured party’s use of a law-enforcement officer without the benefit of judicial process constituted a failure to comply with former section 9-503.

Q: WHAT CONSTITUTES A “BREACH OF THE PEACE?”

- **In re 53 Foot Trawler Pegasus, 2008 WL 4938345 (M.D. Fla. 2008) (internal citations omitted)**
 - “The test to determine whether a breach of the peace has occurred is whether there was entry by the creditor upon the debtor’s premises; and whether the debtor or one acting on his behalf consented to the entry and possession.”
 - “Consent must be freely given to enter the property of a debtor in order to repossess; the debtor may revoke the right to self-help repossession by objecting to the repossession.”
- **Nixon v. Halpin, 620 So.2d 796, 798 (Fla. 4th DCA 1993)**
 - “The owner of the vehicle had a right to object to [creditor’s] attempted repossession of the collateral. If [creditor] had not already peaceably removed the vehicle when the owner objected, its continuation with the attempt at repossession was no longer “peaceable and without a breach of the peace.”

Q: HOW MAY A DEBTOR “OBJECT” TO A REPOSSESSION?

- **4 White, Summers, & Hillman, Uniform Commercial Code § 34-18 (6th Ed. 2018)**
 - “The debtor’s opposition [to a private party repossession without judicial process], however slight and even if merely oral, normally makes any entry or seizure a breach of the peace.”
- **In re 53 Foot Trawler Pegasus, 2008 WL 4938345 (M.D. Fla. 2008) (quoting In re MacLeod, 118 B.R. 1, 2-3 (Bkrtcy D.N.H. 1990))**
 - “The [self-help repossession] statute makes it clear that a creditor runs the risk of serious liability if he proceeds with a self-help repossession when there is a serious objection by the debtor. If the strong arm of the law is needed, then the creditor must secure judicial intervention when a police officer is carrying out or sanctioning the repossession.”

¹ A private-party repossession authorized under F.S. §679.609(2)(b) is often referred to as a “self-help repossession.”

- 9 A.L.R. 1180 (Originally published in 1920)
 - “By the great weight of authority it is held that where the buyer of property upon conditional sale makes default in his payments and by the terms of the agreement the seller is authorized in such event, to retake the property, he is entitled under this power to repossess himself of the property if he can do so peaceably, but if the buyer objects and protests against the seller’s retaking the property, and obstructs him in so doing, it is the duty of the seller to resort to legal process to enforce his rights to repossession. He is not entitled to use force, and he is guilty of an assault and battery or of trespass, as the case may be, if he does so.”

Q: WHEN DOES LEGAL OWNERSHIP OF COLLATERAL PASS TO A CREDITOR?

- In re Kalter, 292 F.3d 1350, 1359-60 (11th Cir. 2002)
 - “At a bare minimum, then, § 319.28 recognizes when ownership [of property] transfers, which in this circumstances is upon [lawful] repossession.”
 - “We conclude, therefore, that Fla. Stat. § 319.28 recognizes that ownership passes when the creditor [lawfully] repossesses the vehicle.”

Q: WHAT IS THE DEFINITION OF “REPOSSESSION?”

- F.S. § 493.6101 (re: Repossession Services)
 - **DEFINITIONS**
 - (22) “Repossession” means the recovery of a motor vehicle . . . by an individual who is authorized by the legal owner, lienholder, or lessor to recover, or to collect money payment in lieu of recovery of, that which has been sold or leased under a security agreement that contains a repossession clause. . . .

Q: WHEN IS A “REPOSSESSION” CONSIDERED COMPLETE?

- F.S. § 493.6101 (re: Repossession Services)
 - **DEFINITIONS**
 - (22) . . . A repossession is complete when a licensed recovery agent is in control, custody, and possession of such repossessed property. . . .

Q: WHEN IS REPOSSESSED PROPERTY CONSIDERED TO BE IN THE “CONTROL, CUSTODY, AND POSSESSION” OF A LICENSED RECOVERY AGENT?

- F.S. § 493.6101 (re: Repossession Services)
 - **DEFINITIONS**
 - (22) . . . Property that is being repossessed shall be considered to be in the control, custody, and possession of a recovery agent if the property being repossessed is secured in preparation for transport from the site of the recovery by means of being attached to or placed on the towing or other transport vehicle or if the property being repossessed is being operated or about to be operated by an employee of the recovery agency.*

* *This language was added to F.S. § 493.6101(22) on July 1, 2013. Below is the language found in the Florida House of Representatives Final Bill Analysis regarding the added language:*

- *Fla. Staff Analysis, H.R. 7023, 2013 Leg. 2-3 (Fla. May 17, 2013)*

Recovery Agents: Repossession, ch. 492, F.S.

Currently, s. 493.6101(22) defines the term “repossession.” The definition includes the following statement:

A repossession is complete when a licensed recovery agent is in control, custody, and possession of such repossessed property.

Control, custody, and possession of a vehicle or other equipment is a legal concept with respect to the act of repossession because it identifies that moment at which the person conducting the repossession has taken active possession and command of the property being repossessed.

Persons engaged in the repossession of vehicles and other equipment are licensed under ch. 493, F.S. Recovery agents have primary responsibility for the repossession of vehicles and equipment as a result of defaulted loans. Repossession is conducted under the provisions and authority of the Uniform Commercial Code. The Code establishes a secured party's right to take possession after default and stipulates that repossession can proceed without judicial process if the party proceeds without breach of the peace. The application of a breach of the peace is removed if a lawful repossession is conducted.(FN1)

FN1: The DACS 2013 Legislative Proposal, Division of Licencing, Short Title – Defining “Control, Custody, and Possession” as that Phrase Relates to Property Recovery, 12-18-2012, page 4, copy available in subcommittee files. The DACS commentary notes that “Therefore, by including a technical definition of control, custody, and possession in the statute, we have provided a standard and a benchmark that can be applied both by the recovery industry as well as by law enforcement agents when they are called to get involved in a repossession.”

The bill revises the definition of repossession to specify when a recovery agent actually has active possession and command of a recovered vehicle or other equipment, that is, when the repossession is complete. The bill specifies that property is considered to be in the control, custody, and possession of a recovery agent if the vehicle or equipment has been secured in preparation for transport from the site of the recovery by means of having been attached to or placed on the towing transport vehicle or if the vehicle or equipment being recovered is being operated or about to be operated by an employee of the recovery agency.

Q: WHEN ARE GOVERNMENT OFFICIALS (WHO PERFORM DISCRETIONARY FUNCTIONS) PROTECTED BY QUALIFIED IMMUNITY FROM LIABILITY FOR CIVIL DAMAGES IN [42 U.S.C.A.] § 1983 ACTIONS?

- *The [United States Supreme] Court held that government officials performing discretionary functions are protected by qualified immunity from liability for civil damages in section 1983 actions unless a reasonable person would have known that the questionable conduct violated clearly established law.*
 - Brescher v. Pirez, 696 So.2d 370, 373 (Fla. 4th DCA 1997)(citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
- *The defense of qualified immunity, however, is a question of law to be decided by the court. ... It turns on the “‘objective’ legal reasonableness’ of the action ... in light of the legal rules that were ‘clearly established’ at the time it was taken.”*
 - Brescher v. Pirez, 696 So.2d 370, 374 (Fla. 4th DCA 1997)(citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)).
- *A government official’s conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.*
 - Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)(quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))

- We also have previously noted that qualified immunity “shields ‘all but the plainly incompetent or those who knowingly violate the law.’”
 - Brescher v. Pirez, 696 So.2d 370, 373 (Fla. 4th DCA 1997)(internal citations omitted)
- Implicit in the qualified immunity doctrine is a recognition that police officers, acting reasonably, may err. The concept of immunity thus acknowledges that it is better to risk some error and possible injury from such error than not to decide or act at all
 - Dunigan v. Noble, 390 F.3d 486, 491 (6th Cir. 2004)(citation and internal quotation marks omitted)

Q: WHAT IS PROHIBITED CONDUCT FOR LAW ENFORCEMENT UNDER 42 U.S.C.A. § 1983 (RE: PRIVATE-PARTY, SELF-HELP REPOSSESSIONS)?

- Action taken by private individuals may be “under color of state law” where there is “significant” state involvement in the action.
 - Mann v. Hillsborough County Sheriff’s Office, 946 F.Supp. 962, 966 (M.D. Fla. 1996) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 932 (1982)).
- These circuits are in agreement as to the law: officers are not state actors during a private repossession if they act only to keep the peace, but they cross the line if they affirmatively intervene to aid the reposessor. . . “[w]hen an officer begins to take a more active hand in the repossession, and as such involvement becomes increasingly critical, a point may be reached at which police assistance at the scene of a private possession may cause the repossession to take on the character of state action.
 - Marcus v. McCollum, 394 F.3d 813, 818 (10th Cir. 2004)
- At some point, as the police involvement becomes increasingly important, repossession by private individuals assumes the character of state action. This is explained in Harris v. City of Roseburg, 664 F.2d 1121, 1127 (9th Cir. 1981):

[T]here may be a deprivation within the meaning of § 1983 not only when there has been an actual “taking” of property by a police officer, but also when the officer assists in effectuating a repossession over the objection of a debtor or so intimidates a debtor as to cause him to refrain from exercising his legal right to resist a repossession. While mere acquiescence by the police to “stand by in case of trouble” is insufficient to convert a repossession into state action, police intervention and aid in the repossession does constitute state action.

- Mann, 946 F.Supp. at 967.
- The Supreme Court’s Decision in Soldal, which was decided in 1992, confirms that state actors violate the Fourth Amendment by taking an active role in private evictions and repossessions when there is no apparent legal basis for such action.
 - Hensley v. Gassman, 693 F.3d 681, 694 (6th Cir. 2012)(citation omitted)
- **LEGAL DISCUSSION RE: “SPECTRUM OF POLICE INVOLVEMENT AT THE SCENE OF A REPOSSESSION”**
 - See Barrett v. Harwood, 189 F.3d 297, 302-03 (2nd Cir. 1999)
 - See Hensley v. Gassman, 693 F.3d 681, 689-94 (6th Cir. 2012)