SELF-HELP ≈ UNDER COLOR OF LAW

Common problems in self-help repossession arise when there is a "breach of the peace" or a repossession "under color of law".

The secured creditor who cannot achieve self-help without a breach of the peace knows that its ordinary recourse is to proceed judicially – that is, to file a lawsuit seeking possession of the collateral, and usually, a money judgment as well. If the lawsuit is properly filed and the necessary requirements are met, a writ for the possession of the creditor's collateral will usually issue even before the creditor has a money judgment.

All too frequently, however, the fear of a breach of peace may suggest to an inexperienced creditor that it might be wise to have some local law enforcement officers on hand at a repossession to ensure that no breach of peace occurs. This measure sounds like a very laudable one at first blush. After all, the creditor is entitled to repossession of its collateral due to the debtor's default for at least two reasons. The debtor has agreed by contract that the creditor may repossess in this situation, and the law, under § 9-503 Uniform Commercial Code, ensures that the creditor may use the remedy of self-help repossession without going to court – so long as the peace is not breached.

What then is so terrible about asking a local officer whose patrol area is involved, or a local deputy sheriff of the jurisdiction, to go along with the repossession agent to avoid any possibility of violence being perpetrated upon the repossession agent by the recalcitrant debtor?

We now venture into the rarefied air of constitutional law. Even though the creditor's motive is a good one – to prevent injury to persons or property -- the use of a law enforcement officer at the site of a self-help repossession without court order constitutes "deprivation of property without due process" under the Fourteenth Amendment of the United States Constitution. That is because the presence of a uniformed officer of the law has been held to constitute sufficient state involvement to constitute "state action". In other words, you cannot cloak your repossession effort in the guise of a judicially approved enforcement of the law without first having complied with due process procedures mandated by law. Those procedures are meant to protect the rights of the parties, against whom you seek enforcement, from abuses of power by the state. The courts will not only refuse to recognize the validity of any actions taken under the state's auspices (i.e., "under color of law") without state approval, but may also punish a creditor severely for having done so.

Courts have uniformly held that the normal self-help repossession by a creditor does not constitute "state action" simply because the jurisdiction involved has enacted a law (§ 9-503 of the Uniform Commercial Code) recognizing self-help repossession. These cases correctly hold that the normal self-help repossession is simply the enforcement of the contract between the creditor and the debtor without state intervention, although the state allows (and may even encourage) self-help remedies. To put it another way, self-help is not unconstitutional and does not violate the Fourteenth Amendment, because no state action is involved.

To take what would otherwise be a self-help repossession, however, and engage a uniformed officer of the state as part of the process, does constitute state action. As such, it triggers the due process requirements of the Fourteenth Amendment, which are meant to protect citizens from the power of the state. Courts have therefore held that the mere presence of that ultimate symbol of the state's power, a law enforcement officer, because it allows a repossession to take place despite the debtor's protest, constitutes breach of the peace.