

Question 8 – February 2016 – Selected Answer 1

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1.

A secured creditor can reclaim possession of collateral when certain requirements are met, such as when notices are duly given. In Texas, repossession is allowed as long as there is no breach of the peace by the reposessor. Breach of the peace usually means using deceptive practices, such as repossessing against owner's objections, and using force or threat. Texas courts have held that a secured creditor is strictly liable for its employee's breach of the peace, as well as when an Independent Contractor breaches the peace. This is a duty owed to the debtor that cannot be delegated by the creditor. If there is any violation of the repossession requirements, such as when an independent contractor breaches the peace, any further measure such as repossession or future sale of the collateral is held invalid, and the debtor is entitled to actual damages as well as punitive damages against the creditor even if the creditor himself did not breach the peace or was not negligent.

Here, even though Bank had the right to repossess the collateral seized by Butch (collateral secured by the security agreement), it had to do so in accordance with the law. Butch's figure (being a "physically imposing man") along with his misleading and abusive attitude will most likely constitute a breach of the peace. Here, he carried a baseball bat and wore a police officer outfit - even though he was not a cop - most likely with the intent of scaring Modern's owner, which is not legally permitted. The owner yelled at Butch and specifically told him not to touch any property in the store. Butch ignored the protests and removed the collateral anyways.

A Texas court will likely find that Butch breached the peace during this repossession. Bank may try to raise a defense that because Butch is an independent contractor, Bank should not be liable for its actions. The fact that Butch is an independent contractor will not matter under Texas law, and Bank will be strictly liable for Butch's actions. Bank can claim that Modern waived any rights it had against Bank when it signed the security agreement. A Texas court will likely find the waiver unconscionable and against public policy. Bank will thus likely have to return the collateral seized by Butch and will be liable to Modern for any damages Modern suffered, as well as any punitive damages the court decides to impose.

2.

A secured creditor can reclaim possession of collateral when certain requirements are met, such as when notices are duly given. In Texas, repossession is allowed as long as there is no breach of the peace by the reposessor. Breach of the peace usually means using deceptive practices, such as repossessing against owner's objections, and using force or threat. Texas courts have held that a secured creditor is strictly liable for its employee's breach of the peace. This is a duty owed to the debtor that cannot be delegated by the creditor. When there is any violation of the repossession requirements, such as when an independent contractor breaches the peace, any further measure such as repossession or future sale of the collateral is held invalid, and the debtor is entitled to actual damages as well as punitive damages against the creditor.

Here, the vans were owned by Modern and were considered "equipment" because they were used for business delivery. As such, they were covered by the security agreement signed between Bank and Modern. Bank's employees had thus the right to go repossess the vans as long as they did not breach the peace. Here, they saw one van parked in an unlocked parking lot owned by Modern and that was "easily accessible" to Bank's employees. The other two vans were parked on the city street adjacent to the parking lot. All the employee's did was jump-start the vans and drive them to a lot where Bank kept repossessed vehicles. They did not use deceptive practices, there was no yelling, use of force or threatening. The fact that they repossessed the van late in the evening, or while no one was around to object, will likely not be enough for a finding that the employees breached the peace.

Modern can claim that the waiver he gave in the security agreement is not valid, because any waiver to be valid should have been given after default. That will likely be the case, but because there was no breach of the peace here, Bank will likely have been entitled to repossess the vans. Thus, Modern will likely not be able to recover any damages against Bank.

1. Modern likely has multiple claims against Bank for conversion, wrongful repossession (breach of the peace). He may seek actual damages, and potentially punitive damages. Bank will likely defend based on the waiver signed in the security agreement. Bank will likely also claim they are free from liability because Butch was an independent contractor. However, these defenses will likely fail and Bank will be held liable to Modern.

The first issue is whether Modern has any claims against Bank with regard to the collateral seized by Butch.

Under article 9 of the Texas Uniform Commercial Code ("UCC"), a secured creditor may seek repossession of collateral upon default without resorting to the judicial process. However, such repossession must not breach the peace. A breach of the peace takes place when a person carrying out the repossession gives the impression of being a police officer or otherwise uses force against the debtor in order to reclaim the collateral. Additionally, any time a debtor is present during a repossession and specifically demands that the reposessor stop what he is doing, if the reposessor continues, he has breached the peace. A person who wrongfully repossesses collateral by breaching the peace is liable for conversion of the goods, including any actual damages that result from the acts. Additionally, if the collateral is ultimately sold, a rebuttable presumption is raised the proceeds were equal to the amount owed.

Here, according to the facts, Bank had a valid security interest in all of Modern's inventory, equipment and supplies. The facts also stipulate that Bank had a lawfully perfected security interest in the Collateral and that Modern had defaulted. Further, Bank gave all the required notices to Modern before taking proper steps to repossess the collateral. Thus, up to this point, Bank had acted lawfully.

However, Butch, the independent contractor hired by Modern, entered into Modern's store carrying a baseball bat and wearing police-style clothing. This is a breach of the peace because Butch was giving the impression that he was a police officer. Further, the fact that he was carrying a baseball bat was wrongfully threatening because it was likely intended to show that if the debtor sought to thwart the repo, he would be attacked with a baseball bat. Note that the fact that Butch was a "physically imposing man" does not alone establish any breach of the peace.

Additionally, Modern's owner specifically yelled at Butch not to touch any property in the store and locked himself in the store bathroom out of fear of Butch. Because Butch continued to remove all of the covered collateral, he again breached the peace. Therefore, because Butch was hired by Bank, Modern would have multiple claims against Bank based on Butch's actions. He could seek to recover actual damages, including the value of the collateral, and potentially mental anguish and/or punitive damages.

The second issue is what defenses Bank may raise.

Under the recent Texas case law, repossession is a non-delegable duty. That is, although a creditor may hire an independent contractor to pursue the repossession, the creditor will still be held liable for the wrongful acts of that independent contractor. Additionally, in a security agreement, a debtor cannot waive his right to pursue a claim against a creditor who wrongfully repossesses his collateral.

Here, Bank will likely argue that Butch was merely an independent contractor and that there was no agency or employee relationship involved which may otherwise give rise to vicarious liability. However, this argument will likely fail because, as discussed above, Texas courts will still hold Bank liable for the wrongful actions of Butch, regardless of his status as an independent contract.

Additionally, Bank will likely argue that it is not liable for any damages because Modern waived the rights to damages that might result from Bank's actions when it signed the security agreement in connection with the loan provided by Bank. However, again, such a waiver is not valid in Texas. Thus, a court will not likely find that Bank is free from any liability.

Therefore, although the Bank may raise multiple defenses, they will likely fail, and Modern will likely prevail.

2. Modern likely does not have any remedies against Bank with regard to the Collateral seized by Bank's employees.

At issue is whether Bank's employees lawfully repossessed the three vans.

The rules regarding the requirements for a secured creditor to repossess collateral as well as liability that may result from a wrongful repossession are discussed in "1" above.

First, here, it is likely that the three vans were covered by the security agreement. This is because the security agreement specifically described equipment and the facts indicate that the Vans were exclusively used for business deliveries. Equipment includes collateral that is solely used for the purposes of running a business, so the vans likely qualify.

Second, there is nothing in the facts that indicate that the Bank's employees acted wrongful. They seized the vans when no one from Modern was around to object (unlike Butch). Modern may argue that they trespassed onto Modern property to repossess one of the vans, however Bank will correctly argue that a person may lawfully commit a trespass such as this one when seeking to reacquire goods after a debtor defaults.

As to the other two vans, they were simply parked on a city street, so there is no trespass argument that Modern could make. Additionally, the fact that the employees jumpstarted the vans does not make their actions illegal. Modern may claim a right of redemption in the vans, however, again Bank will correctly argue that such a right is extinguished upon the lawful repossession of the collateral by a creditor.

Therefore, although Modern may make claims against Bank's employees for breaching the peace or otherwise acting wrongfully in repossessing the vans, it is unlikely that such claims will succeed.

(1) Remedies against Bank based on Butch's Actions

Modern can seek damages and penalties against the Bank based on Butch's actions. The issue here is whether Butch breached the peace and whether the Bank would be liable for Butch's actions.

Generally, secured parties are entitled to repossess the property, there are few regulations regarding the physical act of going to the property and reclaiming the property. However, the law provides that an party repossessing the collateral must not breach the peace. "Breach of the peace" is not really defined, but case law suggests what is and is not a breach of the peace. For example, it is not a breach of the peace to step onto someone's property to reclaim the property or to trick the person into driving the collateral to your facility so that they can collect a non-existent "prize." But, it IS a breach of the peace to continue repossessing an item after the debtor has told the reposessor to stop or to leave the property. This is because the law wants to protect the debtor and the reposessor from an escalating situation. Thus, the law puts the burden on the reposessor not to breach the peace and to cease repossession efforts if the debtor asks.

Here, Butch entered the store carrying a baseball bat and wearing police-style clothing. Additionally, Butch is an imposing looking person. Owner became afraid and yelled at Butch not to touch any property. At that point, Butch was required to cease the repossession effort (but he may probably already breached the peace by carrying a baseball bat into the store). However, Butch did not stop and he removed all of the collateral from the store. The fact that the Owner was so scared that he locked himself inside the restroom does not mean that Butch was in the clear. Butch was required to stop the repossession, and he did not. Thus, Butch was in violation of the law, and because Butch was in violation of the law, the Bank may be held liable.

The Bank may defend itself by claiming that Butch was an independent contract, and his actions cannot be imputed to the bank. Under the old law, secured parties were not necessarily liable for the actions of independent contractors during their repossession efforts. However, recent court decisions have changed this course. This is because the courts want the repossessors and secured parties to truly heed the no-breach-of-the-peace rule. Thus, today, the Bank would be held liable to Modern for Butch's actions, and the Bank's defense fails.

Furthermore, the waiver of damages provision does not apply to the breach of peace action. While the waiver may effectuate a waiver of physical damage to the vehicles as a result of towing, a court likely will not enforce the waiver to release the Bank from liability stemming from a breach of the peace.

The UCC provides a remedy scheme that allows Butch to recover actual damages, a statutory fine, and possibly even the return of the collateral. Modern may also recover attorneys fees and court costs.

(2) Remedies against the Bank based on its Employee's actions

Modern likely has no viable claim against Bank and can seek no remedies. Modern may attempt to claim that the Bank employees also breached the peace by entering Modern's property to seize a van and by jumpstarting the other two vans. However, unlike Butch, the Bank employees did not breach the peace, and the Bank has a viable defense in that regard.

Under the law relating to breach of the peace as described above in section (1), the employees seized the property when no one was there to object. One of the vans was located in an unlocked parking lot and easily accessible. Because of the ease of accessibility and the fact that no one was around to object, they likely did not breach the peace. However, there are some circumstances where actions similar to this may be a breach of the peace. For example, if they attempted to repossess in a residential area and entered the debtor's garage, that would probably be a breach of the peace because the neighbors may confront the repossessors (or harm them while thinking they are thieves) and the situation would escalate. In that situation, it could be a breach. But in this case, it likely is not. The other two vans were parked on the city street adjacent to the parking lot. There are no facts to indicate that this would breach the peace. Because all three vans were seized peacefully and without a breach, Modern does not have any claims against the bank based on the repossession efforts and cannot seek any remedies.