

# Actions to Recover Personal Property

## I. By a non-secured party

### A. Conversion (Forced Sale). Essential elements:

1. Plaintiff is owner (or person entitled to possession)
2. Defendant wrongfully took or retained  
Wrongful retention requires demand for return, even if due date specified.
3. FMV (Plaintiff's opinion testimony sufficient)

### B. Action to Recover

1. Essential elements:
  - a) Plaintiff is owner (or person entitled to possession)
  - b) Property was wrongfully taken or retained
  - c) Defendant has possession of property  
If not, plaintiff may amend complaint to seek money damages for conversion.
  - d) Damages necessary to return plaintiff to original position: return of property, compensation for injury to property, and costs associated with loss of use.
2. Claim and delivery: Ancillary remedy sought by plaintiff from CSC to take immediate possession of property pending trial; rare in small claims.

## II. By a secured party

### A. SP is either a lender (L) or a seller of property on credit (S).

### B. Essential Elements

1. Valid security agreement
2. Applicable to property sought to be recovered
3. Debtor defaulted in manner triggering right to repossess

### C. Essential Element #1: Valid Security Agreement

1. Authenticated by debtor
2. Description of property sufficient to allow identification
3. Writing sufficient to indicate intention to create security interest
4. If *consumer credit*, must be dated. *Consumer credit* definition:

- a) S in ordinary course of business regularly extends credit,
- b) buyer is natural person,
- c) goods or services are purchased for personal, family, household, or agricultural purposes,
- d) debt is payable in installments or finance charge imposed,
- e) and amount does not exceed \$75,0000.

**D. Essential Element #2: SA applies to particular property sought to be recovered.**

1. RISA (GS Ch. 25A) limits S in consumer credit sales (NOT lenders) to
  - a) Collateral
  - b) Previous purchases not yet paid off
  - c) Personal property to which goods are installed (\$300+)
  - d) MV to which repairs are made (\$100 +)
  - e) Property sold for use in agricultural business
2. SI taken in property other than that above is void.
3. FIFO rule applies to allocation of payments to collateral purchased from same seller over time. S has burden of proof on proper allocation.
4. RISA applies only to sellers; for loans, federal regulation provides SI in household goods other than *purchase money security interest* is unfair trade practice. *Purchase money security interest* is interest taken in property purchased with money obtained from loan.

**E. SP's Rights on Buyer's Default**

1. May repossess without court order if no breach of peace.
2. Effect of breach of peace is to render repossession wrongful. Consequences of wrongful repossession are that SP may be liable for conversion, civil trespass, or even criminal charges.
3. Factors relevant to whether repossession caused breach of peace:
  - a) Location
  - b) D's express or constructive consent
  - c) Reactions of third parties
  - d) Type of premises entered
  - e) Use of deception by creditor
4. SP can elect to sue for \$ or repossession; not required to repossess.

### III. What happens after repossession

#### A. Generally, SP has option of sale or keeping goods in full satisfaction of debt.

1. Debtor must agree to decision not to sell, either by signing agreement or by failing to object to notice of intent to keep within 20 days
2. Consumer goods/60% of debt paid: SP must sell property within 90 days.

#### B. Sale of repossessed property

1. Statute requires notice to debtor of sale, and notice must be given in commercially reasonable manner, in terms of timing, content, and manner in which it is sent.  
Consumer goods: GS 25-9-614 spells out required contents of notice.
2. Debtor has right to redeem property at any point prior to sale.
  - a) Amount owed, expenses, and attorney fees (if SA provides) required for redemption.
  - b) Effect of acceleration clause: D must pay full amount of debt to redeem property.
3. Sale must be conducted in commercially reasonable manner "in every aspect."
  - a) Whether sale meets CRM standard depends on facts; guiding star is reasonable efforts to obtain best price.
  - b) Whether sale is CR may include consideration of time, place, price obtained for goods, amount of publicity, other broad range of factors.
  - c) May require S to make reasonable efforts to prepare property for sale.
  - d) S may elect public sale (auction, with notice to general public) or private sale (all others). S is allowed to purchase property only at public sale unless fair price is capable of objective determination.

#### C. Post-sale

1. Proceeds allocated in order to a) expenses, b) debt to S, c) debt to other SPs, & d) surplus to D.
2. Consumer goods: S must provide written accounting to D.

#### D. Action for deficiency

1. If proceeds are insufficient for expenses & debt to S, S may bring action for \$ owed ("action for deficiency").
2. Essential elements:
  - a) S gave D proper written notice of disposition of property

- b) Sale was conducted in CRM
- c) Amount of remaining debt
- 3. Consequence of failure to conduct CR sale: Rebuttable presumption that value of property was at least equivalent to amount of debt.

**E. D's Remedies for Creditor's Violation of Rules**

- 1. 60% Rule: action for conversion
- 2. Any actual damages debtor is able to prove
- 3. Consumer goods: liquidated damages of not less than total finance charge plus 10% principal
- 4. Treble damages if B proves unfair or deceptive practice
- 5. \$500 penalty for
  - a) Creditor who refuses to provide statement of amount owed or list of collateral securing debt in response to written request, or
  - b) Creditor who fails to account for proceeds of sale and who has a pattern of noncompliance.

**IV. Rights of Third Parties**

**A. SP may be able to repossess property from 3<sup>rd</sup> parties if SP has a *perfected security interest*.**

**B. Perfection may occur in four ways:**

- 1. By filing financing statement with Secretary of State.
- 2. A purchase money security interest is automatically perfected.
- 3. In the case of motor vehicles, by filing a lien with DMV.
- 4. Creditor retains possession of property (e.g., pawnbroker)

**C. Priority rules for perfected security interests:**

- 1. Purchase money security interest prevails over all others.
- 2. First to perfect wins otherwise.
- 3. Perfected interest wins over unperfected interest.

**D. Special rule for consumer goods: A "good faith purchaser" of consumer goods who purchases from a buyer takes free of a security interest in the goods if**

- 1. The GFP did not know there was a security interest in the goods;
- 2. The GFP paid for the goods;
- 3. The goods were for the GFP's personal use;
- 4. The GFP bought the goods before a financing statement was filed.