

SCHEDULE FOR DAY 3

- 8:30 Checking-In
- 8:45 Actions to Recover Possession
- 9:45 Break
- 10:00 The Struggle for Fairness & Other Information About the Mind of a Judge
- 11:30 Mock Trials
- 12:30 Adjourn

OBJECTIVES FOR DAY 3

We're aiming for three goals as we complete the seminar today: First, we'll be learning some basic rules about deciding actions to recover possession of personal property. Next, we'll become familiar with some extraordinarily important information about how to help your brain make decisions like a judge. Finally, we'll run through some mock trials as a way of reviewing and solidifying what we've learned

CHECKING IN

<p>C H E C K I N G I N</p> <p>Have we come a long way, baby?</p>	<hr/> <hr/> <hr/> <hr/> <hr/>
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More Resources on Bias and Other Cognitive Distortions

To learn more about the Implicit Associations Test and to try a test yourself, go to <https://implicit.harvard.edu>

The California Administrative Office of the Courts website contains a superlative three-video series on judicial bias. That website also offers the screensaver we mentioned in class for download.

<http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm>

The National Center for State Courts website offers several good resources, including a Primer on Implicit Bias and a narrated video on Social Cognition and Decision-Making. Both of these are excellent.

http://www.ncsconline.org/D_Research/ref/implicit.html

Also available at the NCSC website is a summary of that organization's final report on implicit bias and judicial education, including detailed reference material and specific recommendations.

If you'd like to share the "invisible gorilla" clip with others, you can find it at <http://www.youtube.com/watch?v=2pK0BQ9CUHk>

A much longer and more detailed exploration of judicial bias, including inquiry into bias as a function of interaction between judge and jury is *Judicial Bias* by Donald C. Nugent at 42 Clev. St. L. Rev. 1 (1994).

Hot off the presses is a law review article, "Implicit Bias in the Courtroom," published by Jerry Kang and 7 other leading authorities in the field in 59 UCLA L. Rev. 1124 (2012).

Hands down, the authoritative book about decision-making in a broad context from the neuro-psychological point of view is the dense-but-fascinating book Thinking, Fast and Slow (2011) by Nobel prizewinner Daniel Kahneman.

Other readable and rewarding books about the brain and behavior are:

The Emotional Life of Your Brain: How Its Unique Patterns Affect the Way You Think, Feel, and Live—and How You Can Change Them, R. Davidson (2012)

Mindsight: The New Science of Personal Transformation, D. Siegel (2010)

The Mind and the Brain: Neuroplasticity and the Power of Mental Force, J. Schwartz (2002)

**OUTLINE ON ACTIONS TO RECOVER POSSESSION OF
PERSONAL PROPERTY AND CONVERSION**

I. Conversion

- A. May be brought when personal property is wrongfully taken or retained.
- B. Forced sale.
- C. Remedy is monetary award of value of property when wrongfully taken plus 8% interest from date of unlawful taking.
- D. Plaintiff must prove that
 1. He is the owner of property or bailee.
 2. the property was
 - a) wrongfully taken or
 - b) taken with his permission but wrongfully retained and plaintiff demanded its return
 3. Defendant is person who wrongfully took or retained.
 4. Fair market value of the property at the time it was wrongfully taken or detained.
- E. Statute of limitations is 3 years from time property wrongfully taken or retained.

II. Action To Recover Possession of Personal Property When Plaintiff is Not a Secured Party

- A. May be brought when personal property is wrongfully taken or wrongfully retained.
- B. Alternative remedy to conversion; plaintiff elects to sue for conversion or to recover possession of personal property.
- C. Remedy is return of property taken plus a monetary amount for damage to the property and loss of use of the property while it was in defendant's possession.
- D. Plaintiff must prove that
 1. He is the owner of property or bailee.
 2. That the property was
 - a) wrongfully taken from him or
 - b) taken with his permission but wrongfully retained and plaintiff demanded its return.
 3. That defendant is the person in possession of the property.
 4. The amount of damages, if any, for loss of use and damage to the property.
- E. Statute of limitations is 3 years from time property taken or wrongfully retained.
- F. In a commercial situation, this action or conversion arises when lessee does not return rented personal property.

III. Action To Recover Possession When Plaintiff is a Secured Party.

- A. Seller who sells goods on credit or lender who lends money may have buyer or borrower sign a written contract called a "security agreement" whereby seller or

lender, who is called the “secured party” takes a “security interest” in buyer’s or borrower’s (referred to as debtor) personal property.

- B. “Security interest” means the secured party may take possession of the secured goods upon debtor’s default.
- C. Secured party may repossess goods without a court proceeding if he can do so without breach of peace or he may file action to recover possession as a secured party. Secured party may without removal, render equipment inoperable. [G.S. 25-9-609]
- D. Security agreement must
 - 1. Be in writing,
 - 2. Include a description of the property,
 - a) Description of property sufficient if it reasonably identifies what is described.
 - b) For consumer transactions in security agreements created on or after July 1, 2001 insufficient to describe by type only. [G.S. 25-9-108(e)]
 - 3. Be authenticated [signed] by the debtor, and
 - 4. If seller-buyer contract, be dated.
- E. Plaintiff must prove
 - 1. Existence of valid security agreement;
 - 2. Security interest was taken in property sought to be recovered; and
 - 3. Default in payment by debtor.
- F. Amount of money owed on debt is not in issue and need not be proved.
- G. Remedy sought is possession of secured property; no money damages are sought.
- H. Statute of limitations is usually ten years because it is on a sealed instrument; if the security agreement or underlying note is not under seal, the statute of limitations is three years.
- I. Once secured party has repossessed goods (either on own or through court proceeding), secured party must follow UCC (G.S. Ch. 25, Article 9) in disposing of property.
 - 1. If less than 60% of debt has been paid, secured party may keep goods in full satisfaction of debt (but he must notify debtor who must consent to the proposal either by response or by failing to respond to secured party within 20 days after notification sent) or he may sell goods and then seek a deficiency.
 - 2. If 60% or more of cash price or loan has been paid, secured party must sell consumer goods within 90 days unless debtor authenticates a written statement after default allowing secured party to keep goods in satisfaction of debt. [G.S. 25-9-620 and 25-9-624]
 - 3. Sale may be at either public or private sale but must proceed in commercially reasonable manner with regard to method, manner, time, place, and other terms.[G.S. 25-9-610]
 - a) Secured party may purchase at public sale.
 - b) Secured party may purchase at private sale only if collateral is of kind that is customarily sold on recognized market or subject of widely distributed standard price quotations.

- c) Fact that a greater amount could have been obtained by a sale at a different time or by a different method is not of itself sufficient to preclude the secured party from establishing that the sale was made in a commercially reasonable manner. [G.S. 25-9-627]
 - d) Disposition is commercially reasonable if made in the usual manner on any recognized market; at the price current in any recognized market; or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.
- 4. Secured party must send to debtor a reasonable authenticated notice of the time and place of any public sale and reasonable notice of the time after which the property will be sold at a private sale. [G.S. 25-9-611]
 - a) For consumer goods, magistrate must find that notice is sent within a reasonable time. No statutory time is provided. [G.S. 25-9-612]
 - b) The statute sets out requirements for the notice and a statutory form notice. [G.S. 25-9-614] The notice must:
 - (1) Describe the debtor and secured party.
 - (2) Describe the collateral that is the subject of the disposition.
 - (3) State the method of intended disposition.
 - (4) State that the debtor is entitled to an accounting of the unpaid indebtedness and state the charge, if any, for the the accounting.
 - (5) State the time and place of a public sale or the time after which any other disposition is to be made.
 - (6) A description of any liability for a deficiency.
 - (7) Telephone number from which amount that must be paid to redeem the collateral is available.
 - (8) Telephone number or mailing address from which additional information about the disposition and obligation secured is available.
 - c) Provides that a particular phrasing is not required.
- 5. Debtor may redeem goods at any time before sale by paying full amount of debt owed on goods (not just payments missed) plus expenses reasonably incurred in repossessing, holding and preparing goods for disposal. [G.S. 25-9-623]
- J. Secured party disburses proceeds of the sale as follows:
 - 1. Keeps reasonable expenses of retaking and selling goods;
 - 2. Applies proceeds to satisfaction of debt due to secured party.
 - 3. Applies proceeds to satisfaction of subordinate security agreements if receive authenticated demand.
 - 4. If any proceeds remaining, gives surplus to debtor.
- K. Amount of surplus or deficiency is calculated based on the amount of proceeds that would have been realized in a disposition complying with statute to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if one of those persons is the purchaser or if the price paid is significantly below the range of proceeds that a complying disposition to a person other than the secured party, relative, or secondary obligor would have brought.

1. Essentially, the magistrate should give greater scrutiny to cases when the secured party purchased the property.
 2. Notice of surplus or deficiency.
 - a) When debtor is entitled to surplus or is liable for deficiency, secured party must send an explanation to debtor after disposition of collateral and before paying any surplus or making a demand for payment of a deficiency.
 - b) Explanation must
 - (1) State the amount of the surplus or deficiency.
 - (2) Provide an explanation of how secured party calculated the surplus or deficiency.
 - (3) State that future debits may affect amount of surplus or deficiency.
 - (4) Provide a telephone number or mailing address from which additional information is available.
 - c) G.S. 25-9-616(c) specifies how the secured party must explain the calculation.
 - (1) Aggregate amount of obligations secured by security interest under which property sold.
 - (2) Amount of proceeds of disposition.
 - (3) Aggregate amount of obligations after deducting amount of proceeds.
 - (4) Amount and types of expenses..
 - (5) Amount of credits including rebates on interest or credit service charges.
 - (6) Amount of surplus or deficiency.
- L. If debt not fully satisfied by sale, secured party may file for the deficiency (amount still owed after applying sale proceeds to debt).
1. This is done by a separate lawsuit for money owed.
 2. See subsection K. above for calculation of deficiency if secured party or relative is purchaser.
 3. In action to recover deficiency secured party has burden of proving that sale was conducted in commercially reasonable manner; if not held in commercially reasonable manner, presumed secured property worth amount of debt owed. [*ITT-Industrial Credit Co. v. Milo-Concrete Co.*, 31 N.C. App. 450 (1976)]
- M. Damages to debtor for seller's failure to dispose of property properly:
1. If secured party fails to comply with statute, debtor has right to recover greater of actual damages proved or without proving any actual damages may recover the finance charge imposed plus 10% of the principal amount of the debt. [G.S. 25-9-625(c)]
 2. G.S. 25-9-210 requires a secured party to respond to a request for an accounting or list of collateral from debtor and debtor may recover damages and \$500 from secured party that, without reasonable cause, fails to comply with a request. [G.S. 25-9-625(f)]
 3. Debtor may recover \$500 if creditor fails to send an explanation of the calculation of deficiency or surplus where failure is part of pattern, or consistent with a practice, of noncompliance. [G.S. 25-9-625(e)(5)]

- N. Special rules about security agreements for consumer sales are found in the outline on the Retail Installment Sales Act that follows this outline.

[Name and address of secured party]

[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]

Subject: [Identification of Transaction]

We have your [describe collateral], because you broke promises in our agreement.

[For a public disposition:]

We will sell [describe collateral] _ at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____

Time: _____

Place: _____

You may attend the sale and bring bidders if you want.

[For a private disposition:]

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] or write us at [secured party's address] and request a written explanation. [We will charge you \$_____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at [telephone number] or write us at [secured party's address].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:

[Names of all other debtors and obligors, if any]

* A notification in the form of the above language, is sufficient even if additional information appears at the end of the form and even if it includes errors in information not required by law, unless the error is misleading with respect to rights arising under Article 9 of the U.C.C.

RETAIL INSTALLMENT SALES ACT (G.S. CH. 25A)

I. Coverage of RISA.

- A. Scope of act— applies to all consumer credit sales. Does not apply to bona fide direct loan in which lender makes direct loan to borrower and lender not regularly engaged in sale of goods or services (e.g., buyer borrows \$500 from Financial Credit and uses money to buy TV from Acme Appliance Co.). Does not apply to sale in which buyer purchases goods or services by a credit card issued by someone other than seller (e.g., purchaser using Master Charge card).
- B. Definitions
 - 1. Consumer credit sale.
 - a) Sale of goods or services in which
 - (1) seller who in ordinary course of business regularly extends or arranges for extension of credit;
 - (2) buyer is a natural person;
 - (3) goods or services purchased primarily for personal, family, household or agricultural purpose;
 - (4) debt representing the price is payable in four or more installments or a finance charge is imposed; and
 - (5) amount financed not more than \$25,000.
 - b) Sale includes some rent to own contracts.
 - 2. Finance charge.
 - a) Sum of all charges payable directly or indirectly by buyer and imposed by seller as incident to extension of credit.
 - b) Includes interest, time-price differential, service or carrying charge, loan fee, fee for credit report.
 - c) Does not including some insurance charges.

II. Terms of Consumer Credit Contracts

- A. Maximum finance charge rates.
 - 1. 24% per annum where amount financed less than \$1,500;
 - 2. 22% where amount financed \$1,500 to \$1,999;
 - 3. 20% where amount financed \$2,000 to \$2,999;
 - 4. 18% where amount financed \$3,000 to \$25,000;
 - 5. 1 1/2% per month for revolving charge accounts.
- B. Consumer credit installment sale contract must be in writing, dated and signed by buyer.
- C. Seller may take security interest (collateral) only in following:
 - 1. Property sold;
 - 2. Property previously sold by seller to buyer and in which seller still has security interest;
 - 3. Personal property to which property sold is installed if amount financed more than \$300;

4. Real property to which property sold affixed, if amount financed more than \$1,000;
 5. Motor vehicle to which repairs made, if amount financed more than \$100.
 6. Any property used for agricultural purposes, if the property sold is to be used in the operation of an agricultural business.
- D. Security interest taken in other property void and not enforceable.
- E. Application of payments when seller makes a subsequent sale to buyer and takes a security agreements in goods previously sold or consolidates two or more consumer credit contracts--payments made after second or subsequent purchase applied first to finance charges, then to oldest item purchased; when that item is paid for payments applied to next oldest item purchased and so forth. (Called first-in, first-out method).
- F. Default charges—if installment past due for at least 10 days default charge of not more than 5% of payment due or \$6 whichever is less may be imposed. Can be imposed only one time for each default. Waived unless within 45 days of default, charge collected or written notice of charge sent buyer.
- G. Contract must provide for complete payment within 42 months if amount financed less than \$1,500 or 64 months if amount financed \$1,500 to \$2,499.
- H. Referral sales of any kind are void. (E.g., where price or rebate conditional on procurement of prospective customers or of additional sales.)

III. Remedies and penalties

- A. If contract requires payment of finance charge not more than two times in excess of permissible charge, seller not permitted to recover any finance charge and seller liable to buyer in amount twice that of finance charge actually received by seller and reasonably attorney's fees incurred by buyer. However, if excess charge results from accidental or good faith error, seller liable only for amount by which finance charge exceeds permissible rate.
- B. If contract requires payment of finance charge more than two times that permitted, contract is void. Buyer may retain goods without any liability and seller not entitled to recover anything under contract.