

# LEGAL ISSUES RELATED TO REPOSSESSIONS

District Court Judges Special Topic Seminar  
April 2018

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COMPLAINT TO RECOVER POSSESSION OF PERSONAL PROPERTY		STATE OF NORTH CAROLINA	
<input type="checkbox"/> PLAINTIFF A SECURED PARTY <input type="checkbox"/> PLAINTIFF NOT A SECURED PARTY		In The General Court Of Justice District Court Choose Small Claims	
<p>The defendant is a resident of the county named above. I have a security interest in the personal property described in the attached security agreement. The total current value of the property is as shown below. The defendant has defaulted in the payment of the debt which the property secures or has otherwise breached the terms of the security agreement giving me the right to claim immediate possession of the property described below. I demand recovery of this property and reimbursement for court costs.</p>		<p>When Plaintiff is a Secured Party</p>	
<p>The defendant is a resident of the county named above. This defendant has in bad faith possession the personal property described below which belongs to me. I am entitled to immediate possession of the property and the defendant has refused or declined to return it to me. The defendant has unduly kept possession of this property since the date listed below and has therefore deprived me of its use. The damage due me for the loss of use and physical damage to the property is set out below. I demand recovery of this property and damages in the total amount set out below, plus interest and reimbursement for court costs.</p>		<p>When Plaintiff is Not a Secured Party</p>	
<p>Property Description: [Text Box]</p>		<p>Property Description: [Text Box]</p>	
<p>Value: [Text Box]</p>		<p>Value: [Text Box]</p>	
<p>Damage Due For Loss of Use: [Text Box]</p>		<p>Damage Due For Loss of Use: [Text Box]</p>	
<p>Physical Damage To Property: [Text Box]</p>		<p>Physical Damage To Property: [Text Box]</p>	
<p>Total Amount Of Damages: [Text Box]</p>		<p>Total Amount Of Damages: [Text Box]</p>	

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Mostly Article 9, but also Ch. 20 for motor vehicles, RSA, CFA, and a little GS 75-1.1 & 6-21.2 for seasoning.



A Witchy Brew

Purchase

Security Interest

Default

Repossession

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### WHO OWNS THE CAR?

Sam Seller agrees to sell Betty Buyer a (very old) car for \$400. Betty pays \$200 and drives the car home, promising to return tomorrow with the rest of the money. When she doesn't return, Sam goes to her house and repossesses the car.

What's the legal term for Sam's action?

In an action for conversion, who wins & why?

Betty wins because she is the owner of the car.

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### RULE FOR MOTOR VEHICLES

- UCC applies to determine ownership of motor vehicles when issue is commercial: vehicles held for inventory or as collateral for secured transactions (including UTP claim for wrongful repossession). *Ownership passes when goods are delivered.*
- Motor Vehicle Act (MVA/GS Ch. 20) applies when issue involves tort law or liability insurance coverage. *Ownership passes when title is assigned and MV is delivered.*

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### RETENTION OF TITLE?

Sam argues that he's entitled to recover possession of the car from Betty even if she IS the legal owner, based on his retention of the title. He even tells you that the parties agreed that he would hold on to the title until she finished paying for the car. So, it wasn't larceny—just a little self-help repo!

Is this a good defense to Betty's action for conversion?

No. Retention of title alone does not create an enforceable SI under Art. 9.

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**A SECURITY INTEREST ATTACHES WHEN**

- Value has been given (e.g., debtor makes a down payment);
- The debtor has rights in the collateral (e.g., takes it home);
- There is a valid security agreement.

GS 25-9-203

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**Valid security agreement.**

- Written
- Authenticated by debtor
- Describing collateral
- Indicating intention to create SA
- Dated (if consumer credit contract)

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**SAM HAS A DOCUMENT TO SHOW YOU**

*March 16, 1989*

*I, Betty Buyer, in agreement with Sam Seller for a loan of \$200.00 to purchase a 1967 Ford truck, will repay the sum of \$200 plus interest to Sam Seller. He will keep the title until full amount is paid in 60 days from above date. I will be the sole operator of this truck.*

*Sign—Betty Buyer*

*Witness: Lita Patterson*

**Is this a security agreement?**

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## PERFECTION

- A security agreement gives the SP rights against the debtor.
- A security interest must be perfected to be enforceable against 3<sup>rd</sup> parties. Perfection is concerned with notice of the SP's interest in the collateral.
- Perfection usually = financing statement, but we are more concerned with two exceptions to that rule:
  - Purchase money security interest (PMSI) is automatically perfected.
  - Security interest in motor vehicle is perfected by having interest noted on title by DMV.



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## DEFAULT TRIGGERS RIGHT TO REPOSSESS

Not defined by UCC.

Look to specific language of security agreement.

May be limited by other consumer protection legislation.

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## NO ELECTION OF REMEDIES REQUIRED

The secured party may

sue on the debt

repossess the property.

These rights are cumulative and may be exercised simultaneously.

But double recovery not allowed.

GS 25-9-601

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PEACEFUL SELF-HELP

- Allowed by GS 25-9-609
- Prior notification to debtor not required.
- Must not cause breach of peace.



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BREACH OF THE PEACE?

- Sam decides to repossess the car when Betty defaults on her monthly payment. He hires a professional repo company to take the car from her driveway in the middle of the night. Betty's neighbor hears the truck, looks out his bedroom window, and believes the car is being stolen. He calls first Betty and then the police to alert them to the theft. By the time he meets Betty in the street the tow truck is long gone. When the police arrive, other neighbors have been awakened and come outside. Confusion reigns.

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BREACH OF THE PEACE?

Confrontation = Breach of the Peace.

No confrontation? Consider

- (1) Where the repossession took place,
- (2) The debtor's express or constructive consent,
- (3) The reactions of third parties,
- (4) The type of premises entered, and
- (5) The creditor's use of deception.

Giles v. First Virginia Credit Servs., Inc., 149 N.C. App. 89, 100, 560 S.E.2d 557, 565 (2002)

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## BREACH OF THE PEACE?

**But note re:** (2) The debtor's express or constructive consent...

GS 25-9-603: Parties may agree to standards related to rights and duties so long as not manifestly unreasonable, but not to "the duty under GS 25-9-609 to refrain from breaching the peace."

See also GS 25-9-602(6): Debtor may not waive rule limiting repossession to that accomplished without breach of peace.



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## RIGHT TO REPO, GONE WRONG

Eley v. Mid/East Acceptance, 171 NC App 368 (2005), (Herdford Co.)

"Conversion may occur when a valid repossession of collateral results in an incidental taking of other property, unless the loan agreement includes the debtor's consent to the incidental taking."



\$455 x 3 = \$1365 + \$1562.50 atty fees + add'l fees for appeal

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## ACTION TO RECOVER POSSESSION OF SECURED PROPERTY

Essential elements:

- 1) Valid security agreement
- 2) Applicable to property sought to be recovered
- 3) Default by debtor in manner triggering right to repossess

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## RISA (GS CH. 25A)

Seller arranges financing in ordinary course of business for consumer who is natural person, where goods or services are purchased primarily for personal, family, household, or agricultural purpose, and debt is payable in four or more installments OR involves finance charge.

• JB pp. 81-84, 128-129, Tab 1 in Notebook (Module 5)

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## IS IT RISA?

- You accept the kind invitation of your child's college to pay this semester's tuition in four easy installment payments for a \$35 fee.
- You buy a used car from Fast Eddie's Used Cars, and you accept Fast Eddie's kind invitation to finance your purchase through Fast Eddie's Financing, which is right next door.
- You charge TicketMaster tickets to your VISA card.
- You take out a loan from Friendly Finance Company.
- Tommy's Tires LLC. finances new furniture for the customer waiting room through the seller, Friendly Furniture.
- You use your Sears charge card to buy a new washing machine at Sears.
- You delay paying for your new computer by qualifying for a same-as-cash financing deal offered by the seller—no financing charge!
- You rent a really nice TV and living room furniture through Rent-It-Here. After 36 months, the stuff will belong to you, upon payment of a small fee.
- You buy a washing machine at Sears, but instead of using your Sears charge card, you take advantage of Sears' offer to help arranging credit through General Credit Co.

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## SO WHAT IF IT'S RISA?

- Deliberate violation is UTP.
- Finance charge defined broadly to include all costs of delayed payment, and charging too much can result in serious penalty.
- Court has broad discretion to craft remedy for unconscionable clause.
- Special provisions for home-solicitation sales.
- Provides various consumer-friendly rules such as right to receipts and statements of account, limited late & deferral fees, prepayment permitted and rebate of interest charges required, etc.
- FIFO allocation of payment rule.
- Requires award of attorney fees to prevailing party.
- Limits permissible collateral.

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Who Wins?

ABC Appliance Company sells Betty a washing machine and dryer, arranging in-store financing for both. The security agreement also lists Betty's microwave and Keurig CoffeeMaker. When she misses a payment, ABC seeks to recover all four items, producing a written security agreement and proving default.

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ABC gets only the washer & dryer.

Essential elements:

- 1) Valid security agreement
- 2) Applicable to property sought to be recovered
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GS Ch. 25A-23: Retail Installment Sales Act  
 In a consumer credit sale, the property eligible to be collateral is limited, and does not include property already owned by the debtor (subject to certain exceptions).  
 An attempt to take a security interest in ineligible property is void.

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SAME FACTS, EXCEPT ABC ALSO SOLD BETTY THE MICROWAVE & KUERIG

4/1/2017	Microwave	\$125	• Total amount paid: \$175
8/1/2017	Keurig	\$99	• Principal/interest: \$130/\$45
12/1/2017	Washer/Dryer	\$500	

Monthly payments beginning 5/1: \$25 with \$5 going to interest.  
 Defaults on 2/1/2018.

• RISA 25A-27 re allocation of payments:  
**FIFO**  
 RESULT: No security interest in microwave

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### Who Wins?

Friendly Finance Company loans Betty \$1500, taking a security interest in her washing machine and dryer, dishwasher, large-screen TV, and microwave. When she misses a payment, Friendly Finance seeks to recover all four items, producing a written security agreement and proving default.

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### ACTION TO RECOVER POSSESSION OF SECURED PROPERTY

- Essential elements:
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### NC CONSUMER FINANCE ACT

- Governs loans made by finance companies for \$15,000 or less.
- Important provisions about
  - Maximum interest rates
  - Late fees, deferral charges, processing fees, etc.
  - Limits duration of loan period
  - Special provisions for military servicemembers
  - Post-judgment interest limited to 8%
  - Does not permit attorney fees
  - Provides that UTP is violation of Act.

GS Ch. 53, Art. 15

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### PENALTY FOR VIOLATION

- Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation is void, and the licensee or any other party in violation shall not collect, receive, or retain any principal or charges whatsoever with respect to the loan.
- GS 53-166(d)

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### 16 C.F.R. 444.2(A)(4)

- It is an UTP for lender to take "a nonpossessory security interest in household goods other than a purchase money security interest."
- Household goods: Clothing, furniture, appliances, one radio and one television, linens, china crockery, kitchenware, and personal effects of the consumer and his or her dependents, provided that the following are not included within the scope of the term *household goods*:
  - (1) Works of art;
  - (2) Electronic entertainment equipment (except one television and one radio);
  - (3) Items acquired as antiques; and
  - (4) Jewelry (except wedding rings).

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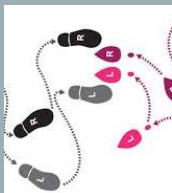
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THREE  
DOIN' THE TWO-STEP



Non-PMSI in household goods by lender is an UTP under 16 CFR 444.

UTP violates CFA.

Violation of CFA voids loan contract.

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DEFAULT

- Not defined in UCC, but instead left to parties to define in SA.
- Waiver sometimes an issue, but NC courts are attentive to non-waiver provisions in SA.
- Calculation of amount required to avoid default sometimes affected by consumer protection rules related to other fees. E.g., RISA prohibits multiple late fees being assessed when debtor has made only one late payment.

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