

Repossessions (6th ed. 2005)

Contents

2006 Supplement Contents

CD-Rom Contents xxxv

Chapter 1

Introduction

1.1 About This Manual. 1
 1.1.1 Overview 1
 1.1.2 Scope of This Manual. 2
 1.1.3 Pleadings 2
 1.1.4 Material Available on the CD-Rom. 3
 1.1.5 Clearinghouse Citations 3
 1.1.6 Web-Based Text Search Feature 3
1.2 Other Resources. 3
 1.2.1 Researching UCC Law 3
 1.2.2 Researching State Consumer Credit Laws 4
 1.2.3 Researching Bankruptcy Law. 4
1.3 Handling Repossession Cases. 4
 1.3.1 Why Repossession Cases Are Important 4
 1.3.2 Establishing a Repossession Practice. 5
1.4 Analyzing a Repossession Case 5
 1.4.1 Introduction 5
 1.4.2 What Law Applies? 5
 1.4.3 Does the Creditor Have an Enforceable Security Interest? 5
 1.4.4 Was the Consumer in Default? 6
 1.4.5 Was the Self-Help Repossession Conducted Properly? 6
 1.4.6 Did the Creditor Afford the Consumer the Right to Reinstate or Redeem
 and Notify the Consumer of the Repossession Sale? 6
 1.4.7 Did the Creditor Dispose of the Collateral Properly? 7
 1.4.8 Has the Creditor Correctly Computed and Informed the Consumer of the
 Deficiency or Surplus? 7
 1.4.9 Is the Creditor Barred from Recovering a Deficiency Judgment? 8
 1.4.10 What Remedies Are Available? 8
 1.4.11 Special Issues in Mobile Home Repossessions 8
 1.4.12 Repossession of Leased Property 9
 1.4.13 Advising the Client Facing Repossession 9

Chapter 2

Scope and Sources of Law

2.1 Introduction 11
2.2 Scope of UCC Article 9. 11
 2.2.1 Overview 11
 2.2.2 Article 9 Applies to Secured Transactions No Matter How Structured. 11
 2.2.3 Exclusions from Article 9 12
 2.2.4 Consensual Liens Versus Statutory Liens 13
 2.2.5 Personalty Versus Realty 13

Repossessions

2.2.5.1	General	13
2.2.5.2	Security Interests in Obligations Secured by Real Estate	13
2.2.5.3	When Collateral Includes Both Personalty and Realty	14
2.2.6	Security Interests Versus True Leases	14
2.2.7	Consignments	15
2.2.8	Article 9's Coverage of Assignments	15
2.2.8.1	General	15
2.2.8.2	Annuity Contracts and Tort Settlements	15
2.3	History of Article 9	17
2.3.1	Drafting and Enactment	17
2.3.2	Changes Made by Revised Article 9	17
2.3.3	Expanded Scope of Revised Article 9	18
2.3.4	Effective Date of Revised Article 9	19
2.4	Substantive Overview of Article 9	20
2.4.1	Basics of Article 9	20
2.4.2	Definitions Under Revised Article 9	21
2.4.2.1	Consumer Transactions and Consumer-Goods Transactions	21
2.4.2.2	Debtor, Obligor, and Secondary Obligor	22
2.4.2.3	Public Sale	22
2.4.2.4	Account, Account Debtor, Chattel Paper, General Intangible, Payment Intangible, and Instrument	22
2.5	Overview of Other Laws Affecting Repossessions	23
2.5.1	Other UCC Articles	23
2.5.1.1	UCC Article 2A	23
2.5.1.2	The Good Faith Requirement of Article 1	24
2.5.1.3	Article 3's Treatment of Cosigners	24
2.5.2	State Consumer Credit Legislation	24
2.5.2.1	Types of Statutes	24
2.5.2.2	UCC Does Not Preempt State Consumer Credit Laws	25
2.5.2.3	Scope of State Consumer Credit Laws	26
2.5.2.4	Remedies	27
2.5.3	Other State and Federal Statutes Relevant to Repossession	27
2.5.3.1	State Deceptive Practices (UDAP) Statutes	27
2.5.3.2	Federal Civil Rights Law	28
2.5.3.3	Truth in Lending and Consumer Leasing Acts	28
2.5.3.4	Fair Debt Collection Practices Act	29
2.5.3.5	State Debt Collection Laws	29
2.5.3.6	U.S. Bankruptcy Code	29
2.5.3.7	State Lien Laws	30
2.5.3.8	Replevin Laws	30
2.5.3.9	State Foreclosure Law	30
2.5.3.10	Rent-to-Own Legislation and State Leasing Statutes	30
2.5.4	Common Law Doctrines Applicable to Repossessions	30
2.5.4.1	Common Law Tort Claims	30
2.5.4.2	The Law of Bailments	31
2.5.4.2.1	Creation of a bailment	31
2.5.4.2.2	Duties of a bailee	33
2.5.4.2.3	Repossession by a bailor	34
2.5.4.2.4	Remedies in bailment cases	34
2.5.4.2.5	Distinguishing a bailment from a security interest	35
2.5.4.3	Common Law of the Pledge	35
2.6	Choice of Laws	36
2.6.1	Introduction	36
2.6.2	If the Contract Does Not Have a Choice of Law Clause	36
2.6.3	If the Contract Contains a Choice of Law Clause	38

Contents

2.6.4 Choice of Law Clauses Under Revised Article 1 39
2.6.5 Choice of Law Under Non-UCC Statutes 39
2.7 Preemption by Federal Law 40

Chapter 3

Enforceable Security Interests

3.1 Valid Security Interest As Precondition to Seizure of Personal Property 41
3.2 Elements of a Valid Security Interest 41
3.2.1 Uniform Standards Except for Security Interests Created by Possession or Control of Collateral 41
3.2.1.1 Basic Requirements 41
3.2.1.2 Signed Agreement Unnecessary for Possessory Security Interests, Deposit Accounts, and Certain Commercial Collateral 42
3.2.1.2.1 Possessory security interests 42
3.2.1.2.2 Deposit accounts and other collateral for which “control” is sufficient 42
3.2.2 Written Agreement Must Specifically Grant Security Interest 43
3.2.2.1 Agreement Must Be a Written or Electronic Document 43
3.2.2.2 Agreement Must Specifically Grant the Security Interest 43
3.2.2.3 Is Truth in Lending Disclosure an Adequate Grant? 45
3.2.3 Debtor Must Sign or Otherwise Authenticate the Agreement 46
3.2.3.1 General 46
3.2.3.2 What Is a Valid Authentication? 47
3.2.3.3 When Signatory Is Not Collateral’s Owner or Sole Owner 47
3.2.4 Unchecked Boxes, Blanks, and Amendments 48
3.2.5 Creditor Must Give Value 49
3.2.6 Debtor Must Have Rights in Collateral 49
3.2.7 Security Agreement Must Identify the Collateral 50
3.2.7.1 General Rule 50
3.2.7.2 Relationship to Collateral’s Description in the Financing Statement 53
3.2.7.3 When Identification of Collateral Is Accidentally Omitted 54
3.2.7.4 Relationship to Truth in Lending Disclosure of Security Interest 55
3.2.8 Security Interest Must Not Be Otherwise Prohibited 56
3.2.9 Perfection of Security Interest Is Not Necessary 56
3.3 Continued Enforceability After Security Interest Created 57
3.3.1 Introduction 57
3.3.2 Secured Party’s Interest in Proceeds of Collateral 57
3.3.3 When Debtor Transfers Collateral to Third Party 58
3.3.3.1 General 58
3.3.3.2 Creditors with Unperfected Security Interests 59
3.3.3.3 Creditors Whose Interests Are Automatically Perfected 59
3.3.3.4 Perfection by Filing Financing Statement or Indicating Lien on Certificate of Title 59
3.3.4 Refinancing of Indebtedness 60
3.3.5 Assignment of Security Agreement 61
3.3.6 When Underlying Obligation Is Extinguished 61
3.4 Non-Purchase Money Security Interests 62
3.4.1 Nature and Abuses 62
3.4.2 FTC Rule Prohibits Non-Purchase Money Security Interests in Household Goods 62
3.4.2.1 Introduction 62
3.4.2.2 FTC Definition of Household Goods 63
3.4.2.2.1 Items that are household goods 63

Repossessions

- 3.4.2.2.2 Limited exceptions for electronic equipment, jewelry, antiques, and art 63
- 3.4.2.2.3 Other items that are not household goods 64
- 3.4.2.2.4 Comparison to Bankruptcy Code 64
- 3.4.2.3 Creditors and Debtors Covered by the Rule. 65
- 3.4.2.4 Creditor Attempts to Evade the FTC Rule. 65
- 3.4.2.5 Remedies for FTC Rule Violations. 66
- 3.4.3 Other Restrictions on Non-Purchase Money Security Interests. 67
- 3.4.4 Unfairness, Unconscionability, and Related Challenges. 70
- 3.4.5 Does Description Adequately Identify Non-Purchase Money Collateral. 71
 - 3.4.5.1 Introduction 71
 - 3.4.5.2 Does Collateral Description Distinguish After-Acquired Property? 71
 - 3.4.5.2.1 The UCC limitation on after-acquired property as collateral 71
 - 3.4.5.2.2 Loan collateral must be distinguished from after-acquired property 72
 - 3.4.5.3 Identification of Televisions, Radios, Musical Instruments, and Antiques 72
 - 3.4.5.4 Distinguishing Between Debtor’s Property and That Owned by Other Household Members 73
- 3.4.6 Effect of Refinancing on Purchase Money Status. 73
- 3.5 Automobiles and Mobile Homes As Collateral 73
 - 3.5.1 Introduction 73
 - 3.5.2 Minimum Requirements for Creation of Security Interests in Motor Vehicles and Mobile Homes 73
 - 3.5.3 Security Interests in Property Added to the Vehicle or Mobile Home 74
 - 3.5.3.1 Property Pre-Dating the Security Agreement 74
 - 3.5.3.2 Property Added After the Security Agreement Is Signed (Accessions) 75
 - 3.5.4 Insurance Proceeds and Trade-Ins 76
 - 3.5.5 Automobile Title Pawns 77
 - 3.5.5.1 Nature of Auto Title Pawn Transactions 77
 - 3.5.5.2 Does Article 9 Apply to an Auto Pawn? 77
 - 3.5.5.3 Has the Lender Created an Enforceable Article 9 Security Interest? 78
 - 3.5.5.4 Creation and Perfection of Security Interest Under an Auto Title Pawn Statute 79
 - 3.5.5.5 Consumer’s Post-Repossession Rights Under Article 9 80
 - 3.5.5.6 Applicability of Article 9 Post-Repossession Rights When Other Pawn Statute Applies 80
 - 3.5.5.7 Post-Repossession Rights Under State Auto Title Pawn Statutes 81
 - 3.5.6 Future and Antecedent Advances; Force-Placed Automobile Insurance 82
 - 3.5.7 Retention of Certificate of Title by Seller 82
- 3.6 Credit Card Issuer’s Interest in Goods Purchased with Card 85
 - 3.6.1 Introduction 85
 - 3.6.2 Is There a Valid Security Agreement? 85
 - 3.6.2.1 UCC Requirements 85
 - 3.6.2.2 Can the Store Produce the Necessary Records? 87
 - 3.6.3 Is the Collateral Adequately Described? 87
 - 3.6.4 Determining Which Collateral Is Paid Off First 87
 - 3.6.5 State Laws Prohibiting Credit Card Security Interests 88
 - 3.6.6 False Threats to Enforce Credit Card Security Interests 89
- 3.7 Series of Purchases from the Same Merchant 89
 - 3.7.1 Introduction 89
 - 3.7.2 Cross-Collateral Clauses 89

Contents

3.7.3 Consolidation of Several Credit Sales 90

3.7.4 Methods of Allocating Consumer Payments to Multiple Purchases. 91

 3.7.4.1 Pro Rata Allocation of Payments 91

 3.7.4.2 Allocation of Payments Under Article 9 92

3.8 Refinancings and Consolidations 92

 3.8.1 Introduction. 92

 3.8.2 Article 9 Requirements to Preserve Prior Collateral in a Refinancing 92

 3.8.2.1 Does the Security Interest Survive Automatically? 92

 3.8.2.2 When Security Interest Must Be Created Anew 93

 3.8.3 FTC Credit Practices Rule’s Restrictions on Non-Purchase Money Security Interests Generally Inapplicable 93

 3.8.4 State Law Restrictions on Non-Purchase Money Security Interests After Refinancing 94

 3.8.5 Status of Purchase Money Security Interest After Refinancing for Purposes of Perfection and Priority 96

3.9 Future Advance and Antecedent Debt Clauses. 96

 3.9.1 General. 96

 3.9.2 FTC Rule Restricts Future Advance and Antecedent Debt Clauses in Loans to Purchase Household Goods. 97

 3.9.3 Truth in Lending Implications 97

 3.9.4 Enforceability of Future Advance Clauses 97

 3.9.5 Judicial Reluctance to Enforce Antecedent Debt Clauses 100

3.10 Consumer Remedies 100

 3.10.1 Remedies for Mere Inclusion of Invalid Security Interest 100

 3.10.1.1 Introduction 100

 3.10.1.2 Sale of Credit Property Insurance on Invalid Collateral 101

 3.10.1.3 Unnecessary Filing Fees or Non-Filing Insurance 101

 3.10.1.4 Overinclusive Description of Collateral 101

 3.10.2 Remedies for Threats to Enforce an Invalid Security Interest 102

 3.10.3 Remedies for Enforcement of Invalid Security Interests 102

Chapter 4

Default As Precondition to Seizure

4.1 Default and Acceleration 103

 4.1.1 Default As Precondition to Repossession 103

 4.1.2 Under the UCC the Definition of Default Is Determined by Agreement . . . 103

 4.1.3 Relationship of Default and Acceleration 104

 4.1.4 Agreement to Accelerate Required; Strict Construction of Grounds to Accelerate 105

 4.1.5 Validity Under the UCC of Contractual Grounds for Acceleration 105

 4.1.6 UCC Restricts Acceleration at Will or When Creditor Insecure 106

 4.1.6.1 General 106

 4.1.6.2 When Acceleration Is in Bad Faith 107

 4.1.7 When Consumer Does Not Waive Notice of Debt’s Acceleration 108

 4.1.8 Contract Provisions Waiving Debtor’s Right to Notice of Acceleration . . . 109

 4.1.8.1 Waiver of Notice Usually Found Valid 109

 4.1.8.2 Waiver Provisions Strictly Construed 109

 4.1.8.3 When Notice Required Despite Waiver 109

 4.1.8.4 Waiver Provisions May Be Unconscionable or Violate State Deceptive Practices Statutes 109

4.2 State and Federal Credit Statutes May Limit Grounds for Default and Acceleration 110

 4.2.1 Distinction from Right to Cure Laws 110

 4.2.2 Federal Limitations 110

 4.2.3 State Law Limitations 111

Repossessions

4.3	Creditor's Waiver of Right to Declare Default	112
4.3.1	Habitual Acceptance of Late Payments Prevents Sudden Acceleration.	112
4.3.2	Other Creditor Conduct Preventing Acceleration	115
4.3.3	Effect of Contractual Antiwaiver Provisions	116
4.4	Creditor's Obligation to Seek Credit Insurance Payments Before Declaring Default	117
4.5	Yo-Yo (Spot Delivery) Sales	117
4.5.1	Yo-Yo Transactions Explained	117
4.5.2	The Yo-Yo Transaction and Repossessions Law.	118
4.5.3	Article 9 Applies If No Valid Contingency Clause Included or Contingency Does Not Occur	119
4.5.3.1	Introduction	119
4.5.3.2	Sale Must Be Explicitly Made Contingent	119
4.5.3.2.1	Absent contingency agreement dealer has no rights outside of Article 9.	119
4.5.3.2.2	Contingency clause must be in writing.	119
4.5.3.2.3	Absence of dealer signature does not create a valid contingency.	120
4.5.3.3	Contingency Clause May Not Be Binding on Consumer	120
4.5.3.3.1	Does contingency clause comply with state law?.	120
4.5.3.3.2	When contingency clause placed in a separate document or conflicts with other loan terms	120
4.5.3.4	Have the Exact Conditions Allowing Cancellation Occurred?.	121
4.5.4	Condition Subsequent Versus Condition Precedent Transactions.	122
4.5.5	Article 9 Applicable When Nominal Condition Precedent Contains Characteristics of a Condition Subsequent Transaction	123
4.5.5.1	Characteristics Inconsistent with a Condition Precedent Sale.	123
4.5.5.2	Inconsistent Characteristics Indicate a Condition Subsequent Sale	124
4.5.6	Repossession Implications When Dealer Retains Only a Security Interest	125
4.5.6.1	Are There Grounds to Repossess?	125
4.5.6.1.1	When contract does not specify failure to obtain financing as grounds for default	125
4.5.6.1.2	When state law limits grounds for default	125
4.5.6.1.3	Allegations of credit application falsification.	126
4.5.6.2	Article 9 and Other Violations Regarding the Manner of Seizure.	126
4.5.6.3	Notice, Sale and Other Requirements After Dealer Recovers the Vehicle.	127
4.5.7	Implications When Article 9 Does Not Apply.	127
4.6	Relationship of Default to Consumer's Defenses or Counterclaims	128
4.6.1	Introduction	128
4.6.2	If Consumer's Obligation Is Extinguished.	129
4.6.3	Seller's Breach of Contract May Prevent Default.	129
4.6.3.1	UCC § 2-717 Right to Deduct Payments.	129
4.6.3.1.1	Consumers may prevent default by deducting damages from payments.	129
4.6.3.1.2	Potential consequences of stopping payments	130
4.6.3.2	Against Which Payments May Damage Claims Be Deducted?	130
4.6.3.3	Consumer Must Notify the Seller.	131
4.6.3.4	Damages That May Be Deducted; Relationship to Third Party Lender	131
4.6.4	Consumer's Revocation of Acceptance May Prevent a Default.	132
4.6.4.1	General	132
4.6.4.2	Consumer May Have a Superior Security Interest in the Collateral	132
4.6.4.3	Revocation of Acceptance After Repossession	133
4.6.5	If Debtor's Payment Is Conditioned on Creditor's Performance	134

Contents

4.6.6 Effect of Debtor’s Counterclaims. 134

4.7 Unconscionable and Bad Faith Acceleration 134

4.8 The Right to Cure a Default 136

4.8.1 Introduction 136

4.8.2 State Statutory Rights to Cure 136

4.8.2.1 General 136

4.8.2.2 The Notice Requirement 137

4.8.2.3 Effect of Federal and State Electronic Signature Laws on State
Right to Cure Statutes 137

4.8.2.3.1 Coverage 137

4.8.2.3.2 Requirements for electronic notices if E-Sign applies. . . 138

4.8.2.3.3 Requirements for electronic notices if UETA applies . . . 139

4.8.2.3.4 Manner of delivery of notices under E-Sign and UETA . 140

4.8.2.4 Implications of Creditor Noncompliance with Right to Cure. 140

4.8.3 Federal Right to Cure for Mobile Home First Mortgage Loans 140

4.8.3.1 General 140

4.8.3.2 When Consumer Has Right to Cure 140

4.8.3.3 Predicting Whether Creditor Will Provide Right to Cure 141

4.8.3.4 What Mobile Home Creditors Are Covered by the OTS Rules? . . 141

4.8.3.5 Mobile Home Creditor’s Liability for Failure to Provide Right to
Cure 142

4.8.3.6 Does Credit Agreement Obfuscate Right to Cure, Leading to
Statutory Damages? 142

4.8.4 Creditor’s Voluntary Grant of Right to Cure 143

4.9 Remedies 144

4.9.1 Punitive Damages Under a Tort Theory 144

4.9.2 Other Remedies 144

Chapter 5

Replevin

5.1 Overview 145

5.1.1 Why Creditors Use Replevin 145

5.1.2 Creditors Must Comply Strictly with Replevin Procedures 146

5.1.3 Elements of Replevin Action 147

5.1.4 Overview of Replevin Procedures 153

5.1.5 Debtor Strategies 153

5.2 Application of Replevin Statutes to Mobile Home Seizures 154

5.2.1 Introduction 154

5.2.2 Implications of Treatment of Mobile Homes As Realty or Personality 156

5.2.3 Mobile Home Title-Purging Statutes 157

5.2.4 State Statutes Specifying How Mobile Homes Are Treated in Credit
Transactions 158

5.2.5 Other State Statutes 159

5.2.6 Whether Mobile Home Is Treated As Realty in Absence of State Statute . 160

5.3 Constitutional Standards Controlling Writ of Replevin 162

5.3.1 General 162

5.3.2 Due Process 162

5.3.3 Unreasonable Search and Seizure 163

5.3.4 State Constitutional Provisions 164

5.4 Challenging *Ex Parte* Writs of Replevin 164

5.4.1 Introduction 164

5.4.2 Does State Authorize *Ex Parte* Writs? 164

5.4.3 Challenging the Constitutionality of Writ of Replevin Procedures 165

5.4.4 Stated Grounds for Seeking Writ *Ex Parte* 166

5.4.5 The Affidavit and Complaint 167

Repossessions

5.4.6	Judicial Supervision of the Writ	169
5.4.7	The Post-Seizure Hearing.	169
5.4.8	Debtor's Consent to the Seizure	169
5.4.9	Debtor Remedies	170
5.4.9.1	Remedies Based on Unconstitutional Process	170
5.4.9.2	Remedies Based on Violation of State Law	170
5.5	Challenging Writ of Replevin at Hearing Prior to or Immediately After Seizure . .	171
5.5.1	Introduction	171
5.5.2	Right to a Hearing	171
5.5.3	The Court's Jurisdiction to Issue Writ	172
5.5.4	Has a Complaint Been Filed?	172
5.5.5	Debtor's Substantive Defenses and Counterclaims	173
5.5.6	Attorney Fees	175
5.6	Creditor's Bond and Debtor's Counter-Bond	175
5.6.1	Challenging the Creditor's Bond	175
5.6.2	Posting a Counter-Bond.	177
5.7	Debtor Resistance to Sheriff's Seizure of Collateral	177
5.8	The Trial on the Merits	178
5.8.1	Consumer's Substantive Defenses and Counterclaims	178
5.8.1.1	Raising Defenses	178
5.8.1.2	Can the Defendant Raise Counterclaims?	178
5.8.1.3	Remedies for Wrongful Replevin	180
5.8.2	Creditor's Failure to Pursue Replevin Action	181

Chapter 6

Self-Help Repossession

6.1	Introduction	183
6.2	Representing the Client Before Repossession.	183
6.2.1	Voluntary Surrender	183
6.2.2	Other Pre-Repossession Options	185
6.2.3	False Threats to Repossess.	185
6.2.4	Resisting Repossession Attempts.	185
6.2.4.1	When Clients Should Object	185
6.2.4.2	Evaluating the Risk That Creditor Will Criminally Prosecute Debtor Resisting Repossession.	186
6.2.4.3	Possible Civil Liability for Resisting Repossession	188
6.3	Bars to Repossession	188
6.3.1	General.	188
6.3.2	Statutes Prohibiting Repossession	188
6.3.3	Limits on Self-Help Seizure of Mobile Homes	190
6.3.4	Limits on Seizure of Other Specific Types of Goods	190
6.3.5	Specially Protected Debtors	191
6.3.5.1	Military Personnel and Their Dependents	191
6.3.5.2	Native Americans	193
6.3.6	Due Process and Fourth Amendment Considerations	195
6.3.6.1	No State Action in Typical Self-Help Repossession.	195
6.3.6.2	When Government Is Creditor	196
6.3.6.3	When Government Official Assists in Self-Help Repossession. . . .	196
6.3.6.4	Fourth Amendment Issues.	199
6.3.6.5	Private Remedies for Constitutional Violations	199
6.4	Repossession Must Not Breach the Peace	200
6.4.1	Introduction.	200
6.4.2	Bodily Force and Threats.	201
6.4.3	Repossession Despite Consumer's Objection Breaches the Peace	203
6.4.4	Trespass	204

Contents

6.4.4.1 General 204
6.4.4.2 Public Street or Private Driveway. 204
6.4.4.3 Residence 206
6.4.4.4 Place of Business or Employment 206
6.4.5 Use of a Police Officer 207
6.4.6 Deception, Trickery, or Stealth 207
6.5 Other Self-Help Repossession Restrictions 209
6.5.1 Method of Seizure 209
6.5.2 Notice of Repossession 209
6.5.3 Creditor’s Agreement Not to Repossess 210
6.6 Electronic Repossessions 210
6.6.1 Nature of Electronic Car Disabling 210
6.6.2 Is Electronic Disablement an Article 9 Repossession? 210
6.6.3 Breach of the Peace in Electronic Repossessions 211
6.6.4 Creditor Is Liable for Electronic Disablement in Absence of Default 212
6.6.5 Debt Collection Violations 212
6.6.6 Creditor’s Duty to Care for Vehicle After Disabling It 213
6.6.7 Is the Use of Electronic Repossession an Unfair Practice?. 213
6.6.8 Electronic Repossession Barred When Repossession Is Barred. 214
6.6.9 Truth in Lending and Credit Discrimination Issues. 214
6.6.10 State Credit Statutes 215
6.6.11 Credit Repair Laws 215
6.6.12 State Regulation of Electronic Disablement Devices 215
6.6.13 Deception and Non-Disclosure 215
6.6.14 Creditor’s Duties After Electronic Repossession 215
6.6.15 Electronic Self-Help for Computer Software 216

Chapter 7

Unsecured Personal Property Taken with Repossession

7.1 Description of the Problem 217
7.2 Steps to Take Prior to Bringing Legal Action 217
7.2.1 Demanding Return of the Property 217
7.2.2 Documenting What Property Was Seized or Damaged and by Whom 218
7.2.3 Creditor Conditions As to Return of Unsecured Property 218
7.3 Legal Claims Against Creditor for Seizing Unsecured Property 218
7.3.1 Common Law Tort Claims 218
7.3.1.1 Conversion Action If Unsecured Personalty Is Not Returned 218
7.3.1.2 Negligence Action If Personal Property Is Not Returned 220
7.3.1.3 Trespass Action Even If Unsecured Personalty Is Returned 220
7.3.1.4 Negligence Action If Unsecured Property Is Damaged 221
7.3.1.5 Compensatory Damages 221
7.3.1.6 Creditor Liability for Acts of Repossessor 221
7.3.1.7 Punitive Damages Recoverable 221
7.3.2 UCC Remedies 222
7.3.3 FDCPA, Other Statutory Sources of Damages 222
7.3.4 Evidence and Proof Issues 223
7.4 Contractual Limitations on Creditor’s Liability for Seizure of Unsecured
Property 223
7.4.1 Limitations on Creditor Liability for Property Eventually Returned 223
7.4.2 Waiver of Creditor’s Liability for Seizure of Unsecured Property Never
Returned 224
7.4.3 Conflict with State Law 225
7.5 State Statutory Requirements When Unsecured Personal Property Is
Reposessed 225

Using Bankruptcy to Prevent Repossessions

8.1 Introduction 227

 8.1.1 Relevance of Bankruptcy to Repossessions 227

 8.1.2 Summary of This Chapter 227

 8.1.3 Potential Changes to the Bankruptcy Laws May Affect Your Clients’
 Legal Rights 228

8.2 Obtaining the Automatic Stay 228

 8.2.1 Stays Obtained by Filing for Bankruptcy 228

 8.2.1.1 The Automatic Stay 228

 8.2.1.2 The Codebtor Stay 229

 8.2.2 Purpose of the Automatic Stay 230

 8.2.3 Duration of the Automatic Stay 230

 8.2.3.1 General Rule 230

 8.2.3.2 Limitations Based on Repeat Filings 230

 8.2.4 Scope of the Automatic Stay 231

 8.2.4.1 Stay of Legal Proceedings 231

 8.2.4.2 Stay of Acts Directed at Debtor’s Property (Including
 Repossession) 232

 8.2.4.2.1 In general 232

 8.2.4.2.2 Protection against creditor “freezes” and set-offs 233

 8.2.5 Notice of the Automatic Stay 235

 8.2.6 Enforcing the Stay 236

 8.2.6.1 Remedies for Violations of the Stay 236

 8.2.6.2 Violations of the Stay by Government Entities 239

 8.2.6.3 Procedure 240

 8.2.7 Proceedings Seeking Relief from Stay 240

 8.2.7.1 Overview 240

 8.2.7.2 Form of Proceeding 240

 8.2.7.3 Time Limits for Court Actions 241

 8.2.7.4 Grounds for Relief from Stay 241

 8.2.7.5 Debtor and Trustee Must Be Named As Indispensable Parties 244

 8.2.7.6 Debtor Must Conduct Speedy Discovery 244

 8.2.7.7 Raising Defenses in Response to a Motion for Relief from Stay 245

 8.2.7.8 Burden of Proof 246

 8.2.7.9 Valuing Collateral to Determine Creditor’s Protection and
 Debtor’s Equity 246

 8.2.7.10 Stays Pending Appeal 246

 8.2.7.11 Restrictions on Repetitive Filings of Bankruptcy Petitions 247

8.3 Turnover of Property 247

 8.3.1 General Rule 247

 8.3.2 Scope 248

 8.3.3 Procedure 249

 8.3.4 Issues of Possession After Turnover 250

8.4 Exempt Property and Debtor’s Powers of Avoidance 250

 8.4.1 Exempt Property 250

 8.4.2 General Transfer and Lien Avoidance Principles 251

 8.4.3 Power to Avoid Non-Possessory, Non-Purchase Money Security Interests 252

 8.4.4 Power to Avoid Judicial Liens 254

 8.4.5 Debtor’s Right to Use Trustee’s Avoiding Powers 255

 8.4.5.1 Only Involuntary Transfers Covered 255

 8.4.5.2 Strong-Arm Clause 255

 8.4.5.3 Preferences 256

 8.4.5.4 Fraudulent Conveyances 257

 8.4.5.5 Limitations on Debtor’s Use of Trustee’s Avoiding Powers 258

Contents

8.4.6 Procedure for Use of Avoiding Powers	258
8.5 Debtor’s Right to Redeem Secured Property in Chapter 7 Cases.	259
8.5.1 Purpose.	259
8.5.2 Limitations	259
8.5.3 Redemption by Payment in Installments.	260
8.5.4 Redemption in Practice	261
8.6 Chapter 13 Provisions Affecting Secured Claims	262
8.6.1 Allowed Secured Claims	262
8.6.2 Modification of Secured Creditor’s Rights	263
8.6.2.1 In General	263
8.6.2.2 Requirement of Adequate Protection.	263
8.6.2.3 Allowed Secured Claims Provided for by the Plan	264
8.6.2.4 Determining the Amount of an Allowed Secured Claim.	265
8.6.2.4.1 Procedure	265
8.6.2.4.2 Valuing motor vehicles	267
8.6.2.4.3 Valuing property other than automobiles	268
8.6.2.4.4 Computation of value	268
8.6.3 Right to Cure Defaults on Long-Term Debts.	270
8.7 Use of Section 506 to Reduce or Eliminate Liens	273
8.7.1 In General.	273
8.7.2 Restrictions on Applicability of Sections 506 and 1325(a)(5).	273
8.7.3 Home-Secured Loans	274
8.8 Reaffirmation and Security Interests That Survive Bankruptcy	275
8.8.1 The Reaffirmation Process	275
8.8.2 Reaffirmation and Store Credit Cards	278
8.8.2.1 Secured or Unsecured Debt?	278
8.8.2.2 Responding to Lender Abuses	280
8.8.2.3 Ignoring the Claimed Security Interest	281
8.9 Debtor’s Statement of Intention Regarding Secured Property	282
8.9.1 Requirements of Section 521(2)	282
8.9.2 Relief from the Stay Based on Noncompliance with Statement of Intention	284
8.9.2.1 Introduction	284
8.9.2.2 Stay Relief Under Section 362(h)	284
8.9.2.3 Stay Relief Under Section 521(a)(6)	284
8.10 Rent-to-Own Transactions in Bankruptcy	285
8.11 When the Repo Man Files Bankruptcy	286

Chapter 9

**Disposition of Repossessed Collateral Other Than by Creditor’s Sale:
Reinstatement, Redemption, Strict Foreclosure, Sheriff’s Sale, and
Consumer’s Sale**

9.1 Introduction	287
9.2 Right to Reinstate Contract	287
9.2.1 Comparison of Right to Reinstate with Right to Redeem and Right to Cure	287
9.2.2 Notice of Right to Reinstate	288
9.2.3 Limits on Right to Reinstate	289
9.3 Redemption of Collateral	289
9.3.1 Nature, Advantages, and Disadvantages of Redemption	289
9.3.2 Absolute Right Until Disposition	290
9.3.3 Debtor’s Continued Ownership of the Collateral During the Redemption Period	290
9.3.4 Who Can Redeem?	291

Repossessions

9.3.5 Notice of Right to Redeem. 291

9.3.6 Determination of Redemption Amount. 293

 9.3.6.1 Components of the Redemption Amount 293

 9.3.6.2 Requiring the Creditor to Disclose the Redemption Amount. 293

 9.3.6.3 Acceleration and the Redemption Amount. 294

 9.3.6.4 Multiple Items of Collateral. 295

9.3.7 Tender 295

9.3.8 Remedies for Secured Party’s Refusal to Accept Redemption Amount . . . 295

9.3.9 Waiver 296

9.4 Strict Foreclosure: Creditor’s Retention of Collateral 296

 9.4.1 Deficiency Precluded. 296

 9.4.2 The 60% Rule: When Is Strict Foreclosure Allowed? 297

 9.4.3 Procedural Steps to Effect Strict Foreclosure. 298

 9.4.3.1 Overview 298

 9.4.3.2 The Debtor’s Consent. 298

 9.4.3.2.1 Overview 298

 9.4.3.2.2 Consenting by authenticating an agreement 298

 9.4.3.2.3 Consenting by failing to object to a proposal 298

 9.4.3.2.4 Timing requirements and possession of the collateral . . . 299

 9.4.3.2.5 Should the debtor object? 299

 9.4.3.2.6 Consequences of debtor’s objection. 300

 9.4.3.3 Notification of Other Parties 300

 9.4.4 Consequences of Failure to Comply with Strict Foreclosure Requirements. . 300

 9.4.5 Partial Strict Foreclosure 301

 9.4.6 Good Faith and Deception in Strict Foreclosure. 301

9.5 Judicial Sale of Collateral. 302

9.6 Sale of Collateral by Debtor 303

 9.6.1 Introduction 303

 9.6.2 Automobiles 303

 9.6.3 Mobile Homes 304

 9.6.3.1 Introduction 304

 9.6.3.2 Using Transfer Agreements 304

 9.6.3.3 Selling on Consignment 305

Chapter 10

Creditor’s Sale of the Collateral

10.1 Creditor Must Sell, Lease, or Otherwise Dispose of Collateral 307

 10.1.1 Introduction 307

 10.1.2 Leases of Repossessed Collateral. 307

 10.1.3 Other Disposition of Collateral 307

10.2 Commercial Reasonableness Standard. 308

 10.2.1 Every Aspect of the Sale Must Be Commercially Reasonable 308

 10.2.2 Factors in Determining Commercial Reasonableness. 308

 10.2.3 Duty of Commercial Reasonableness Is Not Waivable 310

 10.2.4 Burden of Proof 311

 10.2.5 Question of Law or Fact 312

10.3 Creditor’s Duties Toward Collateral 313

 10.3.1 Duty to Safeguard. 313

 10.3.2 Use of Collateral. 313

 10.3.3 Duty to Recondition 314

 10.3.4 Preservation of Warranties 315

10.4 Notice of Sale. 316

 10.4.1 Importance of Notice. 316

 10.4.2 Who Must Send Notice 317

 10.4.3 Manner of Sending Notice 317

Contents

10.4.4	Who Must Receive Notice	318
10.4.5	Waiver of Notice	321
10.4.5.1	Debtor’s Waiver of Notice	321
10.4.5.2	Guarantor’s Waiver of Notice	323
10.4.6	Timing of Notice	324
10.4.7	Notice Sent But Not Received	326
10.4.8	Written Requirement	328
10.4.9	Content of Notice	330
10.4.9.1	Summary of Required Content of Notice	330
10.4.9.2	Description of the Debtor and the Secured Party	330
10.4.9.3	Description of the Collateral	331
10.4.9.4	Method of Intended Disposition	331
10.4.9.5	Entitlement to Accounting	332
10.4.9.6	Time and Place of Public Sale or Time After Which Private Sale Will Be Held	332
10.4.9.7	Description of Recipient’s Liability for Deficiency	334
10.4.9.8	Telephone Number to Learn Redemption Amount	334
10.4.9.9	Telephone Number or Address for Additional Information	335
10.4.9.10	Model Form	335
10.4.9.11	Standard of Accuracy	335
10.4.10	When Notice Not Required; Meaning of “Recognized Market”	337
10.4.11	Remedies for Notice Violations	338
10.5	Timing of Sale	339
10.5.1	Unreasonable Delay	339
10.5.2	Constructive Strict Foreclosure and Other Remedies for Excessive Delay	341
10.5.3	Rushed Sale	341
10.6	Public Versus Private Sale	342
10.6.1	Determining If the Sale Is Public or Private	342
10.6.2	Choice Between Public and Private Sale	343
10.7	Requirements for a Commercially Reasonable Sale	344
10.7.1	Introduction	344
10.7.2	Manner of Conducting an Auction	344
10.7.3	Sold to Highest Offer	345
10.7.4	Location of Sale	345
10.7.5	Adequate Advertisement	346
10.7.6	Methods Other Than Public Advertising to Attract Buyers	348
10.7.7	Availability of Collateral for Inspection	349
10.7.8	Requirements for Private Sales	349
10.7.9	Good Faith Bargaining Requirement	350
10.8	Sale Price and Commercial Reasonableness	350
10.8.1	Is a Low Sale Price a Sufficient Basis for a Finding of Commercial Unreasonableness?	350
10.8.2	Using Pricing Guides and Internet Resources to Establish Market Value	354
10.8.3	Other Methods to Establish Market Value	356
10.9	Purchase by Creditor	357
10.9.1	Creditor May Not Purchase at Private Sale	357
10.9.2	Is the Sale Truly Public?	358
10.9.3	Was the Sale at Which the Creditor Purchased the Collateral Commercially Reasonable?	358
10.9.4	Special Rules for Credit to Debtor After Low-Price Sale to Insider	359
10.9.5	Repurchase (Recourse) Agreements	360
10.9.5.1	Does Transferring the Obligation or the Collateral Back to the Dealer Constitute the Article 9 Disposition?	360
10.9.5.2	Requirements If Dealer Assumes Secured Party’s Rights and Duties	361

Repossessions

10.9.5.3 Requirements If Transfer of Collateral Back to Dealer
Constitutes the Article 9 Disposition 361

10.10 Wholesale Disposition 361

10.10.1 UCC Language 361

10.10.2 Case Law on Wholesale Disposition. 362

10.10.3 FTC Precedent 362

10.10.4 Private, Non-Auction Wholesale Disposition 363

10.10.5 Dealer Justifications for Wholesale Disposition 363

10.10.6 “Dealer Only” Auto Auctions. 364

10.10.6.1 Commercial Reasonableness of “Dealer Only” Auction 364

10.10.6.2 Type of Notice to Be Provided When Sale Is by Dealer Only
Auction. 366

10.11 “Churning”: Revolving Repossession Schemes 368

10.11.1 Revolving Repossession Schemes and the Sale of Used Cars 368

10.11.2 Class Actions May Offer Best Relief in Widespread Churning Schemes. . . 368

10.12 Rights of Purchasers at Repossession Sales 370

Chapter 11

Determining the Deficiency or Surplus

11.1 General Rules Regarding Deficiency or Surplus 373

11.1.1 Consumer’s Right to Surplus and Liability for Deficiency 373

11.1.2 Calculations May Reveal Consumer’s Right to a Surplus. 373

11.1.2.1 Right to Surplus After Sale of Collateral 373

11.1.2.2 Right to Surplus When Creditor Retains Collateral (Strict
Foreclosure) 374

11.1.2.3 Consumer Remedies for Creditor’s Failure to Pay Surplus 375

11.2 Creditor’s Duty to Provide Explanation to Consumer of Calculation of
Deficiency or Surplus. 375

11.2.1 Explanation Required. 375

11.2.2 When and to Whom Must the Secured Party Send the Explanation? 376

11.2.3 Form and Content of Explanation 376

11.2.4 Remedies for Failure to Comply 377

11.3 Calculating the Deficiency or Surplus 377

11.3.1 Introduction 377

11.3.2 The Balance Due on the Debt 378

11.3.2.1 The Remainder Due on the Debt Before Adjustments 378

11.3.2.2 Unearned Interest Rebates 378

11.3.2.2.1 Acceleration treated as prepayment in computing
rebates 378

11.3.2.2.2 Computing rebates 379

11.3.2.2.3 The effect of the consumer’s waiver of the right to a
rebate 380

11.3.2.2.4 Consumer remedies for failure to rebate unearned
interest 380

11.3.2.3 Interest and Penalties After Acceleration 380

11.3.2.4 Force-Placed Insurance Premiums. 380

11.3.2.5 Credits to the Consumer for Insurance Claim Payments 381

11.3.3 Insurance Rebates 382

11.3.3.1 Introduction. 382

11.3.3.2 Determining What Insurance the Consumer Has Purchased. 382

11.3.3.3 Canceling the Insurance and Calculating the Rebate 382

11.3.4 Credit to Consumer for Collateral’s Value. 383

11.3.4.1 Method of Determining Value 383

11.3.4.2 Determining the Collateral’s Sale Price 384

11.3.4.2.1 General 384

Contents

11.3.4.2.2 Adjusting the sale price to reflect a subsequent purchaser's trade-in 385

11.3.5 Determining the Collateral's Value After Disposition to an Insider 385

11.3.5.1 Special Rule for Determining Value 385

11.3.5.2 Who Is an Insider? 386

11.3.5.3 Who Is the Secured Party? 387

11.3.5.4 Price to Be Credited to Buyer 388

11.3.5.5 Burden of Proof 388

11.3.5.5.1 Introduction 388

11.3.5.5.2 Burden of proof for consumer transactions in uniform states 388

11.3.5.5.3 Burden of proof for non-consumer transactions and in non-uniform states 389

11.3.5.5.4 Proving section 9-615(f) issues 389

11.3.5.6 Other Claims When Collateral Is Sold to an Insider 390

11.3.6 Consumer's Liability for Repossession-Related Expenses 390

11.3.6.1 Expenses of Seizing and Storing the Collateral 390

11.3.6.2 Expenses of Reconditioning or Repairing the Collateral 391

11.3.6.2.1 When such expenses are valid 391

11.3.6.2.2 Computing creditor expenses 391

11.3.6.3 Selling Expenses 392

11.3.6.4 Attorney Fees 393

Chapter 12

Defending a Deficiency Action

12.1 Introduction 395

12.1.1 Importance of Defending a Deficiency Action 395

12.1.2 How to Approach Defending a Deficiency Action 395

12.2 Creditor's Right to a Deficiency 396

12.2.1 General 396

12.2.2 Creditor Can Both Seize Collateral and Sue on Debt 397

12.3 No Deficiency When Underlying Debt Is Extinguished 398

12.3.1 General 398

12.3.2 Payment to Assignee 398

12.3.3 Creditor's Promise to Accept Collateral in Satisfaction of Debt 399

12.3.4 No Deficiency After Revocation of Acceptance 399

12.4 State Anti-Deficiency Statutes 400

12.4.1 Overview 400

12.4.2 Dollar Limitations on Anti-Deficiency Statutes 402

12.4.3 Are Consumer Loans or Only Credit Sales Covered? 403

12.4.4 Type of Goods Covered 404

12.4.5 The Illinois Statute's Scope 404

12.4.6 Excessive Damage to the Collateral May Give Rise to a Creditor Cause of Action 404

12.4.7 Effect of Anti-Deficiency Statute on Foreclosure of Property Pursuant to a Judgment Lien 405

12.4.8 Has the Creditor Made an Election? 405

12.4.9 Remedies Under Anti-Deficiency Judgment Statutes 405

12.5 Creditor's Actions May Amount to Strict Foreclosure and Preclude a Deficiency 406

12.5.1 Introduction 406

12.5.2 Constructive Strict Foreclosure Under Former Article 9 406

12.5.3 Overview of Constructive Strict Foreclosure Under Revised Article 9 406

12.5.4 Creditor's Sale of Collateral to Itself 407

12.5.5 Wrongful Use of Collateral 407

Repossessions

12.5.6	Abandoning Collateral As Worthless	408
12.5.7	Delay in Sale of Collateral	408
12.5.8	Other Legal Theories in Constructive Strict Foreclosure Situations	410
12.5.8.1	Creditor's Conduct As Absolute Bar	410
12.5.8.2	Waiver and Estoppel	410
12.5.8.3	Accord and Satisfaction	411
12.5.8.4	Rescission and Satisfaction	412
12.6	Defective Disposition As Defense to Deficiency Action.	413
12.6.1	Creditor's Burden and Overview of Consumer Remedies When Burden Not Met	413
12.6.1.1	Burden on Creditor to Prove All Aspects of Sale Commercially Reasonable	413
12.6.1.2	Impact of Defective Disposition on Right to Deficiency	416
12.6.2	The Absolute Bar Approach	417
12.6.2.1	States Adopting the Absolute Bar Rule	417
12.6.2.2	Violations Triggering the Absolute Bar	417
12.6.2.3	Operation of the Absolute Bar Rule	418
12.6.2.4	Justification for the Absolute Bar Rule	418
12.6.3	The Rebuttable Presumption Theory	419
12.6.3.1	General.	419
12.6.3.2	Distinguishing Rebuttable Presumption Precedent in Arguing for an Absolute Bar Approach.	419
12.6.3.3	Operation of the Rebuttable Presumption Approach.	420
12.6.4	The Set-Off Theory	421
12.6.5	State-by-State Survey	421
12.6.6	Effect on Right to Deficiency of Failure to Send Explanation of Calculations	431
12.6.7	Special Protections Against Deficiency Judgments Under Navajo Law	432
12.7	Statute of Limitations for Creditor's Deficiency Claim.	433
12.8	Procedural Defenses and State Notice Requirements	434
12.8.1	Is the Plaintiff the Correct Party?.	434
12.8.2	Special Notice Requirements As Precondition to a Deficiency	435
12.8.3	Special Pleading and Venue Requirements	436
12.8.4	Creditor's Disregard of Its Own Arbitration Clause	437
12.9	Cosigners and Other Sureties' Defenses to Deficiency Action.	437
12.9.1	Introduction	437
12.9.1.1	Nature of Cosigner's Liability	437
12.9.1.2	Cosigner's Right to Assert Defenses the Principal Obligor Could Assert.	438
12.9.1.3	Special Defenses and Protections for Cosigners	438
12.9.2	Cosigner Definition Under Article 3.	439
12.9.2.1	Introduction.	439
12.9.2.2	Definition of Accommodation Party Under 1990 and 2002 Versions of Article 3.	439
12.9.2.3	Definitions Under Pre-1990 Version of Article 3.	440
12.9.3	Defenses Available to Cosigners Under Article 3.	441
12.9.3.1	General.	441
12.9.3.2	1990 Version of Article 3	441
12.9.3.2.1	Extension of due date	441
12.9.3.2.2	Modification of terms of obligation	441
12.9.3.2.3	Creditor's impairment of collateral	441
12.9.3.2.4	Release of principal obligor	442
12.9.3.2.5	Waiver	442

Contents

12.9.3.2.6 Defenses when accommodation party's status is unknown to creditor	442
12.9.3.3 Defenses Under 2002 Revisions to Article 3	442
12.9.3.4 Defenses in New York and South Carolina.	443
12.9.3.4.1 Payment extensions and other modifications of terms	443
12.9.3.4.2 Impairment of collateral as defense to deficiency.	443
12.9.3.4.3 Reservation of rights may defeat these defenses	444
12.9.4 Defenses Available to Cosigners Under the Common Law.	444
12.9.4.1 Relevance of Common Law Rules	444
12.9.4.2 Discharge of Guarantor Under Common Law Rules	444
12.9.4.3 Creditor's Failure to Reveal Risks of Guarantee As Defense to Deficiency.	445
12.9.5 Cosigners' Rights Under UCC Articles 1 and 9.	446
12.9.5.1 Cosigner's Right to Notice of Sale and a Commercially Reasonable Disposition of the Collateral	446
12.9.5.1.1 Cosigners as "secondary obligors" under Article 9	446
12.9.5.1.2 Cosigners' rights after repossession.	446
12.9.5.2 Creditor's Duty of Good Faith to Surety	447
12.9.6 Creditor's Duty to Disclose Risks to Cosigner.	447
12.9.6.1 Federal Trade Commission Cosigner Requirements	447
12.9.6.2 State Cosigner Statutes	448
12.9.7 Surety's Claims Against the Principal Debtor	449
12.10 Raising Defenses to FDIC or RTC Deficiency Actions.	449

Chapter 13

Affirmative Consumer Remedies in Repossession Cases

13.1 Introduction	453
13.2 UCC § 9-625 Remedies	453
13.2.1 In General	453
13.2.2 Injunctive Relief.	454
13.2.3 Actual Damages	454
13.2.3.1 Availability of Actual Damages	454
13.2.3.2 Calculation of Actual Damages	455
13.2.4 Statutory Damages Under UCC § 9-625(c)(2)	455
13.2.4.1 Overview	455
13.2.4.2 Violations Leading to Statutory Damages.	456
13.2.4.3 Are Statutory Damages Available for Violation of Non-UCC Requirements?.	457
13.2.4.4 Who May Seek Statutory Damages?.	457
13.2.4.5 Statutory Damages Available Only If Collateral Is Consumer Goods	457
13.2.4.6 Calculation of Statutory Damages.	458
13.2.5 Supplemental \$500 Damages for Miscellaneous Violations	459
13.2.6 Class Actions, Multiple Statutory Damages, and Interrelation with Other Damage Awards	459
13.2.6.1 Class Actions	459
13.2.6.2 Multiple Statutory Damages.	460
13.2.6.3 Can the Consumer Recover Both UCC Statutory Damages and Statutory Damages Under Non-UCC Law?.	461
13.2.7 Barring a Deficiency and Recovering UCC Actual and Statutory Damages	461
13.2.7.1 Overview	461
13.2.7.2 Effect on Actual and Statutory Damages When Debtor Has Defeated Deficiency Claim in Non-Consumer Transaction or in Non-Uniform State.	461

Repossessions

- 13.2.7.3 Effect on Actual and Statutory Damages When Debtor Has Defeated Deficiency Claim in Consumer Transaction in Uniform State 462
- 13.2.7.4 When State Law Specifically Bars Deficiency. 463
- 13.2.7.5 Practical Considerations 463
- 13.2.8 Statute of Limitations for Claims Under § 9-625 464
- 13.3 Remedies for Violation of UCC’s Good Faith Requirement 465
- 13.4 UDAP, RICO, and Unconscionability 467
 - 13.4.1 Overview of UDAP Remedy 467
 - 13.4.2 UDAP Statutes’ Coverage of Repossession Practices 467
 - 13.4.2.1 Importance of Examining the Statutory Language 467
 - 13.4.2.2 Determining If UDAP Statute Applies to Repossession and Collection Practices 468
 - 13.4.2.3 Determining If UDAP Statute Applies to Credit Transactions 468
 - 13.4.3 Unfair and Deceptive Repossession Practices 469
 - 13.4.3.1 Specific Practices Found Unfair or Deceptive 469
 - 13.4.3.2 Violation of Other Statute As Basis for UDAP Violation 471
 - 13.4.3.3 Contractual Creditor Remedy Provisions As UDAP Violations 471
 - 13.4.4 RICO 472
 - 13.4.5 Unconscionability 473
- 13.5 Laws Regulating Repossessions, Collections, or Credit 473
 - 13.5.1 The Federal Fair Debt Collection Practices Act 473
 - 13.5.1.1 Overview 473
 - 13.5.1.2 FDCPA Provisions Specifically Covering Repossession Companies 474
 - 13.5.1.2.1 Scope 474
 - 13.5.1.2.2 Seizing collateral without present right to the property 474
 - 13.5.1.2.3 Threatening repossession without a present intent to repossess 475
 - 13.5.1.2.4 Repossession of property exempt by law from seizure 475
 - 13.5.1.3 Applicability of Other FDCPA Provisions to Repossession Practices 475
 - 13.5.2 State Debt Collection Laws 477
 - 13.5.3 Truth in Lending Act. 477
 - 13.5.4 State Consumer Credit Statutes 478
 - 13.5.4.1 Types of Statutes 478
 - 13.5.4.2 Scope 478
 - 13.5.4.3 Interrelation with the UCC 478
 - 13.5.4.4 Remedies 479
 - 13.5.5 State Limits on Professional Repossessors. 479
- 13.6 Common Law Tort and Replevin 480
 - 13.6.1 Overview of Tort Claims 480
 - 13.6.2 Conversion and Trespass to Chattels 480
 - 13.6.3 Negligence. 486
 - 13.6.4 Breach of Duty of Good Faith 486
 - 13.6.5 Other Potential Tort Causes of Action 486
 - 13.6.6 Actual Damages in Tort 488
 - 13.6.7 Punitive Damages 489
 - 13.6.8 Debtor’s Replevin of Wrongfully Seized Property 492
- 13.7 Civil Rights Violations and Constitutional Remedies. 493
 - 13.7.1 General 493
 - 13.7.2 Potential Defendants in Civil Rights Actions. 494
 - 13.7.3 State Constitutional Provisions 496
- 13.8 U.S. Bankruptcy Code 497

Contents

13.9 Consumer Remedies Based on Claims or Counterclaims Not Related to the
Repossession 497
13.9.1 Types of Claims to Raise 497
13.9.2 Raising Seller-Related Claims Against the Creditor 497
13.10 Creditor Defenses 499
13.10.1 Debtor’s Consent As Defense to Wrongful Repossession 499
13.10.2 Debtor’s Contractual Waiver of Action for Wrongful Repossession 500
13.10.3 Contractual Waivers of Consumer’s Right to Sue for Personal Property
Taken with the Collateral 501
13.10.4 Creditor’s Liability for the Acts of Repossessors 501
13.10.4.1 *Respondeat Superior* 501
13.10.4.2 When Repossessor Is an Independent Contractor 501
13.10.4.2.1 Care in repossession of collateral as a non-delegable
duty 501
13.10.4.2.2 Creditor’s failure to exercise care in selecting a
contractor 502
13.10.4.2.3 Creditor liability based on other statutes 503
13.10.4.3 Liability of Repossession Company or Other Third Parties 503
13.11 Litigation Issues 504
13.11.1 Pleadings and Discovery 504
13.11.2 Arbitration Clauses 504
13.11.3 *Voir Dire* 505
13.11.4 Settlement 505

Chapter 14

Consumer Leases

14.1 General 507
14.1.1 Scope of This Chapter 507
14.1.2 When Is a Lease Covered by UCC Article 9? 507
14.1.2.1 Introduction 507
14.1.2.2 History of UCC Definition of Security Interest 508
14.1.2.3 Standards for Distinguishing Between Security Interest and
Lease 508
14.1.3 Applicable Law When Article 9 Does Not Apply 510
14.1.3.1 UCC Article 2A 510
14.1.3.2 The Federal Consumer Leasing Act 511
14.1.3.3 State Consumer Statutes Governing Leases 511
14.1.3.4 State Deceptive Practices and Debt Collection Statutes 512
14.2 Automobile Leases 513
14.2.1 Introduction 513
14.2.2 Does Article 9 or Article 2A Regulate Lease Repossessions? 513
14.2.2.1 General 513
14.2.2.2 Closed-End Automobile Leases 513
14.2.2.3 Open-End Automobile Leases 514
14.2.2.4 Rent-to-Own Automobile Transactions 514
14.2.3 Types of Default Leading to Lessor’s Right to Repossess 515
14.2.3.1 Lease Agreement Defines What Conduct Results in Default 515
14.2.3.2 Not All Defaults Justify Repossession 515
14.2.3.3 Limits on Lessor’s Ability to Accelerate Lease Payments 515
14.2.3.4 Other State Law Restrictions on When Lessor Can Repossess
the Vehicle 516
14.2.3.5 Protections for Lessees in Military Service 516
14.2.3.5.1 Protection against self-help repossession 516
14.2.3.5.2 Right to seek stay of enforcement of lease 516
14.2.4 Right to Cure Default or Reinstate Lease 516

Repossessions

14.2.5	Repossession Must Not Breach the Peace	517
14.2.6	Sale of Leased Vehicle After Repossession	517
14.2.7	Understanding How Lessors Compute Consumers' Default and Early Termination Liability	518
14.2.7.1	Introduction.	518
14.2.7.2	Identifying the Method Specified in the Lease	519
14.2.7.3	Understanding the Method Disclosed in the Lease.	519
14.2.7.3.1	Reading the formula	519
14.2.7.3.2	Lessor's core damage, expressed as difference between actual and paid-in depreciation	520
14.2.7.3.3	The adjusted lease balance method	520
14.2.7.3.4	Calculations based on remaining lease payments and the residual value	521
14.2.7.3.5	Two formulas produce the same results	521
14.2.7.4	Actual Liability Computations Often Deviate from Method Required by the Lease	522
14.2.7.5	Identifying the Method Actually Used to Compute Early Termination Liability	523
14.2.7.6	Consumer Remedies When Early Termination Computation Not Performed As Specified in the Lease.	523
14.2.8	Excessive Residual Values and Inadequate Realized Values	524
14.2.8.1	General.	524
14.2.8.2	Realized Value Must Exceed the Residual Value.	524
14.2.8.3	Lessor Arguments That Consumer Bears Risk of Low Realized Value at Early Termination	524
14.2.8.4	Inflated Residual Values	525
14.2.8.5	Manufacturer "Supported" Residual Values	526
14.2.8.6	Rationale to Use Sale Price to Determine Realized Value.	527
14.2.8.7	Does Regulation M Condone Use of a Realized Value?	527
14.2.8.8	Method of Determining Realized Value	528
14.2.8.9	The Realized Value and Double Counting of Excess Use and Wear Charges	529
14.2.8.10	Selling Expenses Should Not Be Charged to the Lessee	529
14.2.8.11	When Formula Fails to Provide Credit for Realized Value	529
14.2.9	Other Limitations on Early Termination Charges	529
14.2.9.1	Extra Penalties.	529
14.2.9.2	Failure to Credit the Security Deposit	530
14.2.9.3	Taxes Not Paid to Taxing Authority	530
14.2.9.4	Has the Lessor Properly Rebated All Unearned Charges?	530
14.2.9.4.1	Implications of including charges in the adjusted capitalized cost instead of rent	530
14.2.9.4.2	Fictitious agreed-upon value of the vehicle at lease inception.	530
14.2.9.4.3	Acquisition costs, reserves, and other components of the adjusted capitalized cost.	531
14.2.9.4.4	Failure to fully apply rebate to rent charges	531
14.2.9.5	Rebate of Third Party Charges	532
14.2.9.6	Limits on Consumer Liability After Vehicle Loss	533
14.2.9.7	Limits on Early Termination Charges for Servicemembers	533
14.2.10	Consumer Remedies When Lessors Seek Unreasonable Early Termination or Default Charges.	533
14.2.10.1	UCC Article 2A.	533
14.2.10.2	Federal Consumer Leasing Act.	534
14.2.10.3	Common Law Contract Principles.	535
14.2.10.4	State Leasing Statutes	535

Contents

14.2.10.5 Installment Sales Statutes. 535

14.2.11 Other Defenses Against the Lessor’s Claim for an Early Termination
Penalty 536

14.2.11.1 Statute of Limitations for Lessor’s Collection of Early
Termination Liability. 536

14.2.11.2 Is the Real Party in Interest Bringing the Suit. 536

14.2.11.3 Raising Other Claims and Defenses Against the Lessor’s
Collection Action 536

14.3 Rent-to-Own Transactions. 537

14.3.1 Introduction 537

14.3.2 Does Article 9 Apply?. 537

14.3.2.1 Has State Enacted a Statute Exempting RTO Transactions from
Article 9? 537

14.3.2.2 If RTO Transactions Are Not Explicitly Exempt, Do They Meet
Article 9’s Coverage Requirements? 539

14.3.3 Do State Credit Laws Apply to RTO Transactions? 541

14.3.3.1 Interrelationship of RTO and State Credit Laws 541

14.3.3.2 Applicability of State Credit Laws to RTO When RTO Not
Explicitly Exempted 541

14.3.3.3 Application of Federal Consumer Leasing and Truth in Lending
Acts to RTO 543

14.3.3.4 Application of Article 2A 544

14.3.4 Limitations on Seizure of RTO Goods 544

14.3.5 Right of Reinstatement 546

14.3.6 RTO Company and Consumer Liability After Repossession. 546

Chapter 15

Liens

15.1 Introduction 549

15.2 Common Law Liens 550

15.3 Construction of Lien Statutes 551

15.4 Persons Who May Claim a Lien on Property. 552

15.5 Services and Costs That May Establish a Lien. 553

15.5.1 Introduction 553

15.5.2 Labor and Skill. 553

15.5.3 Enhancement of Value of Property. 554

15.5.4 Lien Is for Reasonable Charges or Agreed-Upon Charges 555

15.6 Property That May Be Subject to a Lien. 556

15.6.1 Types of Property Specified by Statute. 556

15.6.2 A Lien Exists Only on the Property upon Which Work Has Been
Performed 557

15.7 Consumer Must Consent to the Services. 557

15.7.1 General 557

15.7.2 What Constitutes Valid Consent?. 558

15.7.3 Parties Who May Consent 559

15.7.4 Constable’s Storage of Evicted Tenant’s Property Without Tenant’s
Consent Does Not Create Warehouseman’s Lien 561

15.8 The Lienholder’s Surrender of the Lien Property May Extinguish the Lien. 562

15.8.1 When Surrender of Possession Extinguishes Lien. 562

15.8.2 When Surrender of Possession Does Not Extinguish Lien 563

15.9 Lienholder’s Waiver of Lien 564

15.10 Consumer’s Tender As Dissolving a Lien 566

15.11 Lien Sales. 566

15.12 Conduct of Sale. 568

15.13 Constitutional Attacks on Enforcement of Liens 568

Repossessions

15.14 Consumer Remedies 572
 15.14.1 Conversion 572
 15.14.2 Obtaining Release of the Property 573
 15.14.3 UDAP Remedies 573
 15.14.4 Remedies When Lienholder Damages Property 574
 15.14.5 Other Remedies 574

Appendix A

Selected Uniform Commercial Code Provisions

A.1 Introduction 575
A.2 Selected Provisions of Article 1 Relating to Consumer Repossessions. 575
 A.2.1 Introduction 575
 A.2.2 Pre-2001 Version of Article 1 576
 A.2.3 2001 Revised Version of Article 1 590
A.3 Selected Provisions of Article 2A Relating to Consumer Repossessions 610
A.4 Selected Provisions of Article 3 Relating to Consumer Repossessions. 625
 A.4.1 Introduction 625
 A.4.2 1990 Version of Article 3 626
 A.4.3 2002 Revised Version of Article 3 632
A.5 Article 9 641
 A.5.1 Selected Provisions of Revised Article 9 Relating to Consumer
 Repossessions. 641
 A.5.2 Conversion Tables 735
 A.5.2.1 Table of Disposition of Sections in Former Article 9 and Other
 Code Sections. 735
 A.5.2.2 Table Indicating Sources or Derivations of New Article 9
 Sections and Conforming Amendments 737
 A.5.2.3 Conforming Amendments to Other Code Sections and
 Comments 740

Appendix B

Summary of State Repossession Laws 741

Appendix C

Federal Statutes and Regulations Relevant to Repossession

C.1 Selected Provisions of the Fair Debt Collection Practices Act, 15 U.S.C. §§
 1692–1692o. 777
C.2 Federal Rebate Statute, 15 U.S.C. § 1615. 777
C.3 Selected Provisions of the Servicemembers Civil Relief Act, 50 U.S.C.
 App. §§ 501–596 778
C.4 Federal Trade Commission Credit Practices Rule, 16 C.F.R. Part 444 788
C.5 Regulations for Federally-Related Mortgagees, 12 C.F.R. Part 590. 789

Appendix D

Sample Answer and Counterclaims; Complaint to Enjoin Sale; Section
1983 Complaint

D.1 Sample Answer and Counterclaims to Deficiency Action 793
D.2 Additional Counterclaims and Defenses Based on UCC Section 9-615(f) 799
D.3 Sample Complaint to Enjoin Sale 799
D.4 Sample Complaint Alleging Violation of 42 U.S.C. § 1983, Conversion, and
 Breach of Peace. 800

Contents

Appendix E	Sample Automobile Repossession Discovery and Request for Admissions	
	E.1 Sample First Set of Interrogatories	803
	E.2 Sample Document Request	806
	E.3 Sample Supplemental Interrogatories for Dealer Only Auto Auction	807
	E.4 Sample Second Document Request	809
	E.5 Sample Request for Admissions Regarding Vehicle Valuation	809
Appendix F	Repossession and Related Pleadings Found on the CD-Rom	811
	Index	815
	Quick Reference to Consumer Credit and Sales Legal Practice Series . . .	855
	About the Companion CD-Rom	871