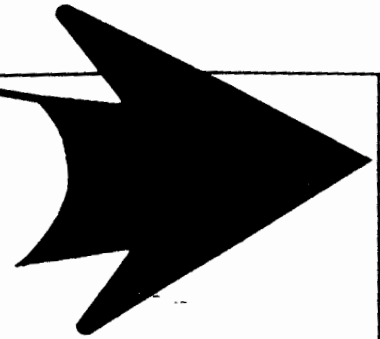


THE ARROW

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SELF HELP *Part Two* — UNDER COLOR OF LAW

In the last issue of *The Arrow*, we addressed a common problem in the area of self-help repossession -- what constitutes "breach of the peace" so as to make self-help repossession wrongful. We now turn to another common blunder in self-help repossessions -- the so called self-help repossession "under color of law."

The secured creditor who cannot achieve self-help without a breach of the peace knows that its ordinary recourse in such a situation is to proceed judicially -- that is, to file a lawsuit seeking possession of the collateral, and usually, a money judgement as well. If the lawsuit is properly filed and the necessary requirements met, a writ for the possession of the creditor's collateral can usually issue even before the creditor has a money judgement.

All too frequently, however, the fear of a breach of peace may suggest to an inexperienced creditor that it might be wise to have some local law enforcement officers on hand at a repossession to ensure no breach of peace does occur. This seems like a very

laudable goal at first blush -- even sound preventive medicine. After all, the creditor is entitled to repossession of its collateral due to the debtor's default for at least two reasons. The debtor has agreed by contract that the creditor may repossess in this situation, and the law, in the form of the Uniform Commercial Code, Section 9-503, ensures that the creditor may use the remedy of self-help repossession without going to court -- so long as the peace is not breached.

So what is so terrible about asking the local officer whose patrol area is involved, or the local deputy sheriff of the jurisdiction, to go along with the repossession agent in order to avoid any possibility of violence being perpetrated upon the repossession agent by the recalcitrant debtor?

Well, gentle readers, we now venture into the rarefied air of constitutional law. Even though the creditor's motive is a good one -- to prevent injury to persons or property -- the use of a law enforcement officer at the site of a self-help repossession without court or-

der constitutes "deprivation of property without due process" under the Fourteenth Amendment of the United States Constitution. This is because the presence of a uniformed officer of the law has been held to constitute sufficient state involvement to constitute state action. In other words, you can't cloak your repossession effort in the guise of a judicially approved enforcement of the law without having complied with the due process procedures mandated by law. Those procedures are meant to protect the rights of the parties against whom you seek enforcement from the abuse of power by the state. The courts will not only refuse to recognize the validity of any actions taken under the state's auspices (i.e., "under color of law") without state approval, but may also punish a creditor severely for having done so.

Courts have uniformly held that the normal self-help repossession by a creditor does not constitute "state action" simply because the jurisdiction involved has enacted a law (§9 503 of the Uniform Commer

cial Code) recognizing self-help repossession. These cases correctly hold that the normal self-help repossession is simply the enforcement of the contract between the creditor and the debtor without state intervention, although the state allows (and may even encourage) the self-help remedy. To put it in another way, self-help is not unconstitutional and does not violate the Fourteenth Amendment, because no state action is involved.

To take what would otherwise be a self-help repossession, however, and employ a uniformed officer of the state as part of the process, does constitute state action. As such, it triggers the due process requirements of the Fourteenth Amendment, which are meant to protect citizens from the power of the state. Courts have therefore held that the mere presence of that ultimate symbol of the state's power, a law enforcement officer, because it allows a repossession to take place despite the debtor's protest, constitutes breach of the peace.

The accompanying article, in an effort to make all this less abstract through the employment of examples, offers a quiz to our readers to test your understanding of this concept. □

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