

Actions to Recover Personal Property

Forms: Complaint Form CVM-202/*Complaint to Recover Possession of Personal Property*
 Judgment Form CVM-400/*Judgment in Action to Recover Money or Personal Property*

Applicable Law: GS Ch. 25, Art. 9/*Secured Transactions*

 GS Ch. 25A/*Retail Installment Sales Act*

 GS Ch. 53, Art. 15/*NC Consumer Finance Act*



Definitions

Collateral: Property pledged to secure debt

Secured party (SP): Seller or lender entitled to repossess collateral if debtor defaults

Security agreement: Written document evidencing debtor's agreement to secured party's repossession of collateral in event of default

Purchase money security interest: Collateral purchased with money lent by SP

Consumer credit transaction: Purchase of collateral financed by seller



Essential Elements of Action to Recover Personal Property as a Secured Party

___ The existence of a valid security agreement.

___ That the security agreement created a security interest in the specific property at issue.

___ The debtor defaulted.

Essential Element #1: Valid Security Agreement

- Authenticated by debtor: Usually this means signed, but other methods of authentication are also acceptable. Example: electronic signature.
- Description of property sufficient to allow identification.

- Writing sufficient to indicate intention to create security interest
- If the agreement involves the extension of *consumer credit*, the document must be dated.

A consumer credit transaction is one involving:

- ✓ seller who in ordinary course of business regularly extends credit,
- ✓ buyer is natural person,
- ✓ goods or services are purchased for personal, family, household, or agricultural purposes,
- ✓ debt is payable in installments or finance charge imposed,
- ✓ amount does not exceed \$75,000.

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

Essential Element #3: Debtor defaulted in manner triggering right to repossess.

Rights of Secured Party on Buyer's Default

May repossess without court order if no breach of peace.

Q: What is the effect of breach of peace?

A: It renders repossession wrongful. Consequences of wrongful repossession are that SP may be liable for conversion, civil trespass, or even criminal charges.

Q: What factors should I consider in determining whether repossession caused breach of peace?

- A: Location
- Debtor's express or constructive consent
- Reactions of third parties

- Type of premises entered
- Use of deception by creditor

NOTE: A secured party always has the option of sue for \$ or repossession; not required to repossess.

What Happens after Repossession

Sell or Keep?

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

Debtor must agree to decision not to sell, either by

- signing agreement or
- by failing to object to notice of intent to keep within 20 days

Consumer goods/60% of debt paid: SP must sell property within 90 days.

Statutory requirements for sale of repossessed property:

- Debtor is entitled to notice of sale,
Notice must be given in commercially reasonable manner (timing, content, and manner sent)

Consumer goods: GS 25-9-614 spells out required contents of notice.

- Debtor has right to redeem property at any point prior to sale.
Amount owed, expenses, and attorney fees (if SA provides) required for redemption.

Effect of acceleration clause: D must pay full amount of debt to redeem property.

- Sale must be conducted in commercially reasonable manner “in every aspect.”
Whether sale meets CRM standard depends on facts; guiding star is reasonable efforts to obtain best price.

Whether sale is CR may include consideration of time, place, price obtained for goods, amount of publicity, other broad range of factors.

May require S to make reasonable efforts to prepare property for sale.

S may elect public sale (auction, with notice to general public) or private sale (all others). S is allowed to purchase property only at public sale unless fair price is capable of objective determination.

Post-sale

- Proceeds allocated in order to expenses,
debt to S,
debt to other SPs,
surplus to D.
- Consumer goods: S must provide written accounting to D.

Action for deficiency

If proceeds of sale are insufficient for expenses & debt to seller, seller may bring action for \$ owed ("action for deficiency").

Essential elements:

- ~S gave D proper written notice of disposition of property
- ~Sale was conducted in CRM
- ~Amount of remaining debt

Defense

Failure to conduct CR sale → Rebuttable presumption that value of property was at least equivalent to amount of debt.

D's Remedies for Creditor's Violation of Rules

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

Rights of Third Parties

SP may be able to repossess property from 3rd parties if SP has a *perfected* security interest.

Perfection may occur in four ways:

- By filing financing statement with Secretary of State.
- A purchase money security interest is automatically perfected.

- In the case of motor vehicles, by filing a lien with DMV.
- Creditor retains possession of property (e.g., pawnbroker)

Priority rules for perfected security interests:

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

Special rule for consumer goods

A “good faith purchaser” of consumer goods who purchases from a buyer takes free of a security interest in the goods if

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