What To Do When Peaceable Repossession is Not Possible

By Michael W. Dunagan

Dealer Question: *I know that as a car creditor with a lien on a vehicle, I can peaceably repossess the vehicle when the contract is in default. Occasionally, a debtor will hide the vehicle or lock it up in a garage where I can't repossess it. I've contacted our local police department for help, but they tell me they can't get involved without a court order. What are my next steps when a peaceable repossession is not possible?*

Answer: The Uniform Commercial Code (the Texas version is known as the Texas Business and Commerce Code) provides that the holder of a security interest in collateral can upon default peaceably repossess the collateral without any type of legal process. The key word here is "peaceably."

Court cases have held that the refusal of a debtor to relinquish possession of collateral takes the situation out of the realm of peaceable. If a repossession can't be accomplished peaceably (that is, with the permission of the debtor, or without the knowledge of the debtor and without breaching the peace), then it will be necessary to obtain an order (or "writ") from an appropriate court.

Law enforcement officers have generally been trained that they can't order a debtor to turn over collateral to the creditor without a court order. A creditor, being a private citizen, can peaceably repossess collateral without a court order. A law enforcement officer, by virtue of his or her position, is, in the eyes of the law, a government official. The U.S. Constitution forbids governments or government officials (except in a few emergency situations) from taking property from a citizen without due process of law. Due process of law is accomplished in this situation by applying for relief from a court.

On those occasions when self-help repossession is not available to the vehicle lien holder, such as when the collateral is hidden or locked up and the debtor refuses to return it or when

repossession cannot be accomplished without breaking and entering or other breach of the peace, the creditor may have no alternative but to turn to the court system to enforce his or her rights to the collateral. The most appropriate remedy for a secured creditor seeking court-ordered return of collateral is referred to in Texas as sequestration (in some states the process is referred to as replevin).

Sequestration is a process by which a court, upon suit being filed and upon being presented with evidence of certain required conditions, can order the collateral to be seized by a constable or sheriff and held pending final judicial determination of the ownership rights to the collateral.

Recourse to sequestration involves the use of the officers empowered by the state (as opposed to self-help repossession), so constitutional due process considerations arise, and strict compliance with legal procedures is required.

To obtain a writ of sequestration, the secured creditor must show that he or she is legally entitled to possession of the property and that the party in possession will "conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county during the suit." A bond must also be posted, in an amount set by the court, before a writ will issue.

Once a judge is satisfied that the creditor is entitled to an order of possession, he or she will sign an order for the clerk of the court to issue the writ of sequestration. The order will also specify the amount of bond that is to be posted by the creditor. Court rules require bonds to be at least the amount of the value of the property plus costs. Some courts will allow local individuals with non-exempt real property to post signature bonds. Other may require a corporate surety bond or a cash bond.

After the bond is received and approved by the court clerk, the writ is issued and sent to the sheriff or constable instructing the officer to take possession of the property. Sequestration is only a temporary taking process, so the secured creditor must go forward with obtaining a final judgment awarding ultimate possession. However, once property is taken by an officer with a writ, many defaulting debtors don’t respond to the suit. If the debtor doesn’t respond, the creditor is entitled to take a default judgment.

Once the officer takes possession of the property, the creditor can ask the court to grant it possession after ten days, absent the filing of a counter-bond by the debtor. While it is rare for a

debtor to file a counter-bond, the court could award possession to the debtor pending a final determination of the legal rights of the parties.

Because of the technical procedural due process requirements of sequestration, it will usually be necessary for an attorney to prepare the appropriate pleadings and affidavits. Justice-of-the-Peace courts have the authority to issue emergency orders, including writs of sequestration, but not all J.P.s will undertake to handle a sequestration. Some will allow individuals without attorneys to file suits seeking sequestration writs in their courts. Some even provide forms for creditors to fill out. Justice courts have jurisdiction in cases where the value of the collateral does not exceed $10,000.00.

It has been our experience that most J.P.s, choose not to get involved in issuing writs. To determine whether your local J.P. will process a sequestration action and whether the lien holder can file without an attorney, call the justice court and ask the judge or civil clerk.

If the value of the vehicle exceeds $10,000, it will be necessary to file the action in a county or district court. Generally, representation of an attorney will be required at that level.

We occasionally run into situations where debtors simply refuse to honor the officer's demand for possession under the writ. It is then necessary to file an action in the court seeking to have the debtor held in contempt of court. This process requires additional procedural steps and thus adds to the expense of the process.

While our discussion up to now has involved lien holders obtaining possession from debtors after default, the sequestration process can be used whenever a third party is wrongfully in possession of collateral and refuses to return it. Examples would include someone who has "bought" the vehicle from the debtor without clearing the lien; a third party holding a vehicle to secure some type of obligation owed by the debtor that is not superior to the vehicle lien; and a person claiming a wrongful mechanic's or storage lien (see my article *Fraudulent Mechanic's Lien Claims Still Concern Car Creditors* in the February, 2016 issue of **Texas Dealer** for more about steps to take when confronted with a questionable lien claim).

Finally, a practical consideration about sequestration: When neither the debtor nor the vehicle can be found, this remedy is of little value. The writ must be served upon the debtor (or a person in illegal possession of the property). The sheriff or constable attempting to serve the writ

will typically not provide skip-tracing services, and will rely on the creditor to supply a valid address.

Conclusion: Given the cost and time restraints of the sequestration process, self-help repossession is still the most desirable way to retake collateral. But when peaceable repossession is unavailable, sequestration is the safest and best remedy for a car creditor.

(Editor's Note: This article is taken from ***Texas Automobile Repossession: A Lien Holder's Legal Guide,*** *with the permission of the author.* ***The book is available from TIADA.)***