

TEN CARDINAL RULES FOR A PROPER REPOSSESSION

by Franklin Drake

Introduction: Creditors too often expose themselves needlessly to disgruntled debtors' claims for wrongful repossession. Avoiding the legal expense of defending such claims is just a matter of correct procedures and common sense. Here are 10 common sins and how to stay righteous.

I. BE SURE YOU REALLY DO HAVE AN ENFORCEABLE LIEN ON THE GOODS!

A. The law (GS §25-9-203(1)(a)) requires 3 things to create a valid, enforceable security interest. Miss any one of them, and you have nothing but a signature loan.

1. The pledge of security must be a record ("I hereby give you a security interest in my (describe goods)" is enough); and
2. It must be signed or authenticated by the "debtor" - meaning everyone who has an ownership interest in the goods, not just your member. Ex.: spouse, cosigner, etc., and
3. It must contain a description of the collateral.

B. CUMIS sells a "Loanliner Plus" product that fails to provide a description of the collateral on the agreement the debtor signs. Some CU's are booking "secured" loans where a debtor does not sign the Advance Request Voucher, where the only description of the collateral ever appears. This courts disaster.

1. Vigilant bankruptcy Trustees are detecting the flaw and scrutinizing every CU's claims to try to catch flawed paperwork, and then either deny Ch. 13 secured status or seize the collateral in a Ch. 7.
2. Solution: Either of 2:
 - a. have the debtor(s) sign a pledge containing the goods' description (like the Advance Request Voucher) BEFORE disbursing, OR
 - b. make the loan proceeds check to the debtor and the seller, but include language of pledge above the endorsement and a description on the front of the check, like this:

"Member grants the Credit Union a security interest in the item described on the face of this check, to secure all member's present & future debts"

and then DESCRIBE THE GOODS
ON THE CHECK “FOR” LINE,
preferably by year, make & VIN.

- C. Understand the difference between having a lien and having the lien perfected. Even if a lien is UNperfected, a CU can still repossess, even titled items, if all of the following are true:
1. The security agreement has all 3 required elements;
 2. The goods are still owned by the debtor(s);
 3. The goods have not been pledged to another lender who has perfected its lien and whose balance is equal to greater than the goods are worth.
 4. The debtor has not bankrupted and the lien has not been avoided.
- D. How to perfect a lien:
1. If the item is titled, get on the title. The DMV titles cars. DENR titles pleasure boats. FAA titles airplanes. USCG titles commercial vessels.
 2. If the item is NOT titled, file a UCC-1 in the County where the debtor lives AND with the NC Sec’y of State. NC no longer has a dual filing requirement. No UCC-1? File the original security agreement.
 3. The “boat-motor-trailer” combination fools too many CU’s. This requires 4 steps to get it right:
 - a. The boat is titled by the DENR, so get your boat lien perfected there; and
 - b. The trailer is titled by the DMV, so get your trailer lien perfected there; and
 - c. The outboard motor is a consumer “chattel”, meaning you are automatically perfected. If in doubt, file a UCC-1 with the NC SOS.
- E. Why to perfect a lien:
1. You are protected if the debtor tries to sell your collateral or pledge it to another lender. Your lien follows the goods into the buyer’ hands, allowing you to repo it from him, if you can find it.
 2. Your lien is safe from an aggressive bankruptcy Trustee or debtors’ att’y, who will avoid (i.e. wipe out) your lien & repo rights if she can.
- F. What if you have a lien listed on the title (or a UCC- 1 filed) but your security interest is flawed? You have no lien. DO NOT REPOSSESS.

1. Perfection without a valid underlying security agreement is like a house without a foundation. It will not stand any stress or scrutiny.
 2. Either induce the debtor to return to your office to sign corrective documents or treat it like the unsecured lien that it really is.
- G. What if the debtor moves to another state and takes your titled collateral with him? Watch out. You can become “de-perfected”.
1. If you perfect your lien in the debtor’s home state by appearing on the certificate of title, and the debtor then goes into a new state and has a new title issued at any time without your lien appearing, you lose your perfection, regardless of when that new titling occurs.
 2. If you are perfected in the debtor’s home state as above, and the debtor removes your titled collateral to a new state, and re-registers it after the four month period, (i.e., gets new tags), then you could lose your perfection even though he did not get a new title in the new state.
 3. If you are perfected in the debtor’s home state by appearing on the title, and he removes your collateral to a new state for less than four months, and within that four month period re-registers the collateral without getting a new title, your lien perfection continues until the end of the four month period from the date of removal.
 4. Keep tabs on your collateral first to keep perfected, and second to be able to take it if you must repo it.

II. BE SURE THE ACCOUNT IS IN DEFAULT AND YOU HAVE NOT WAIVED THAT DEFAULT, BEFORE YOU REPOSSESS!

- A. If an account is in default of payment, make sure no one at the CU has cut a deal with the debtor or has accepted late payments.
1. If you have given the debtor x days to make up a delinquency, give him through the very last day before repo’ing. Otherwise a repo is wrongful per se.
 2. If you have declared an account in default, “block” it from accepting any further payments, including payroll deductions.
- B. Verify the account has not accumulated a history of late payments. Exasperation with chronic delinquency is not grounds to repo.
1. If the debtor has historically paid late, first send him a written warning, demanding strict adherence to the letter of the contract, and telling him you will repo the next “day late or dollar short”.

2. After the letter is delivered, repo the **very next time** the account is late or short - no excuses.
- C. Beware of declaring a default for anything other than failure of payment. No debtor ever thinks an account is in default so long as his payments reach you by the contract “grace date”.
1. Lack of insurance is a classic non-payment default, but hound him to get coverage before repo’ing.
 2. Do your contracts have a cross-default clause? Use it only if you are ready to hear from his lawyer, or after you have first heard from your own.
 3. Does the debtor have credit life or credit accident & health coverage? Do whatever you must to get a claim filed before you repo from an ill or disabled debtor or from his widow.
- D. Does your contract contain a “right to cure” provision? If it does, or if the state the debtor is in requires it (like W.Va.), be sure you follow all the notice requirements and his cure period has expired before repo’ing.
1. In NC, if your contract is silent, then it’s a business decision whether to send him a cure notice, not a legal requirement.
 2. Don’t send him a right-to-cure letter but then repossess before the deadline to cure has expired. That’s a wrongful repo.
 3. If the debtor’s state requires a right-to-cure (e.g., W. Va., Wis., Cal.) kiss your deficiency good-bye if you fail to send it,
- III. IS THE DEBTOR BANKRUPT, OR IS SHE ABOUT TO FILE? BEWARE OF REPOSSESSION WHEN THE SMELL OF BANKRUPTCY IS IN THE AIR!
- A. If the debtor threatens to file, press him for details of his lawyer’s name. Take seriously the threats from an attorney.
1. “I am filing” is an impossible statement; either he has filed or he has not. If he has, he will have a file no. Get it.
 2. All Bankruptcy Courts are available through PACER. Learn to check PACER routinely before repo’ing collateral.
- B. Make sure a threatening debtor has not filed before you repo. Some Courts are ferocious in punishing creditors who repo just after a debtor’s petition is filed.
1. Beware Ch. 13 “Circular Letters” - often a debtor’s at-Cy sends them out before a petition is filed, to fool you into thinking you cannot repo.

2. The fact that you have not yet received a paper Notice of Bankruptcy does not mean you are safe. Oral or informal notice by any means is enough to stop you.
- C. If the debtor has bankrupted - STOP. Hire a lawyer to get you permission to repo or to engineer a voluntary surrender.
- D. If first you repo, then the debtor files and then he demands his car back - STOP. Do not return the car until consulting your own lawyer first.
1. In a Ch. 7, you do not have to give it back at all.
 2. In a Ch. 13, you may be entitled to 100% fully secured treatment in the plan before returning car. Demand proof of insurance, obtain a condition report.
 3. You should never have to return a “third” car or a teenager’s car. Call your lawyer.
- IV. SELF-HELP REPOSSESS ONLY AS A LAST RESORT, NOT AS A NIGHTTIME SPORT!
- A. Voluntary surrender - the very best way to repossess.
1. Always try to accomplish a voluntary surrender first, but do not promise or hint at a waiver of deficiency unless you mean it. If you mean it, follow it up in writing.
 2. Consider deficiency waiver seriously, to induce debtor to surrender, especially the deficiency is likely to be small and legal fees will make collection uneconomical, or if the debtor has no real assets subject to execution.
 - a. Collateral with low value, like old cars, can thus still prove worthwhile to repossess.
 - b. If your collateral is scattered, or disassembled, sometimes this is the best way to collect it all, and thus obtain the highest possible resale price.
 3. If the collateral is a car and is voluntarily surrendered by the debtor, while the debtor is still present, go through the car and return all of his personal items, and create an inventory **while you do it**.
 - a. Give back everything in the car except accessions (i.e., everything mounted by **the flimsiest screws**), even the papers under the seat.

- b. Make the debtor sign a receipt that he got all of his personal property back. Include a provision where he waives any notice of resale.
 - c. Try to make the debtor make a voluntary surrender to a CU employee rather than a third-party, lest the CU be charged with alleged theft by its agent of personal property in the car.
 - 4. If the debtor won't voluntarily surrender, carefully document in the file his reason for refusal.
- B. Involuntary surrender - doing it the hard way. Here is where the average lender makes the clumsiest, most expensive mistakes.
 - 1. Is the defendant in the active military service?
 - 2. If he is, was the contract made or the first payment made after he joined the service? If not, consult your lawyer regarding the Servicemembers' Civil Relief Act.
 - 3. If a decision is made to involuntarily repossess, begin documenting your file as if a lawyer for the debtor, a judge, and a jury will be reading everything in it.
 - a. Check the file for irregular circumstances that would appear unfair to a layman if we were to repossess - crippled, widowed, disabled veteran, etc.
 - b. Never "breach the peace", even technically. Make sure the debtor has not threatened violence if we enter the property to repossess. Do not repossess if there is any hint of violence or if the debtor forbids you to repossess, even weakly. **Never** use physical force against the debtor or anyone else to repossess.
 - c. Never use any peace officer, uniformed or not, on duty or off, to assist a repossession - "under color of law"
 - d. Repossess like a cat burglar - silently, in the middle of the night.
 - e. After taking the collateral, tell the police, so that a theft will not be reported.
 - f. Take nothing else of the debtor's when you repossess the collateral, like the customer's television in the back seat, unless it is unavoidable.
 - 4. Repossession pitfalls - even if the debtor has been discharged in bankruptcy, you still must repossess quietly, professionally, and for solid business reasons.

- a. Wrong serial numbers; debtors have been known to buy similar automobiles, but then the lender repossesses the wrong one.
 - b. Return all personal property in the collateral to the debtor instantly. Either leave it on the site, or box it up and return it to him the same day of the repossession by UPS. DO NOT TRASH IT!
 - c. “Under color of law” - if the police pull up and the debtor sees them, leave. Come back and steal it later.
5. Entry on private property not owned by the debtor - if the property owner objects, there is no way you could peacefully repossess, even by theft, without running an unacceptable risk of a counter-suit or claim of 2nd degree trespass. Leave it alone and get a Writ.
- a. Third parties typically demand back lot rent for mobile homes on their property when you seek to repossess it. Frequently this is simply extortion by a family member of the debtor. Sometimes it is cheaper simply to pay a little extortion than it is to litigate and win regarding spurious lot rent claims.
 - b. Mechanics’ liens do come ahead of your security interest, so long as the mechanic holds onto the car. Pay up, or abandon the collateral.

V. TREAT THAT REPOSSESSED COLLATERAL LIKE IT IS YOUR OWN MOTHER’S PERSONAL PROPERTY!

- A. The collateral probably represents the best hope you have of recovering any significant part of the money the CU had loaned. Maximize your potential proceeds. NC debtors cannot be wage-garnished, so deficiency collection is a doubtful prospect.
- 1. Appearances are much more important than reality. Don’t be seen driving a repo’d convertible home for a date.
 - 2. Use your imagination to sell offbeat collateral like classic cars, not just the lobby bulletin board.
- B. Post-repossession handling - as important as a neat, clean repossession.
- 1. Safe storage; protect and insure the collateral, or give up the deficiency if it is lost or destroyed, Fenced lots are safe. Your parking lot is not. If necessary, lock it in the President’s garage.
 - 2. Disgruntled debtors have been known to steal the car back or destroy it where it stands, so change the locks and hide it. If anything happens to it, it will be your fault, period.

3. Reconditioning - Do not throw good money after bad, but if a small expense would significantly increase the collateral's value, spend the money.
 - a. Protect the collateral from the weather - antifreeze, garaging, etc.
 - b. Insure it against loss, theft or damage and let no one use it until it is sold.
 - c. If a non-running car can be made to run - even poorly - at minimal cost, spend the money.
4. Redemption: the debtor can redeem (that is, fully pay off the account) the collateral up to the very instant of sale,
 - a. If the debtor hints at redemption, cooperate with him, but you are not required to refinance the debt.
 - b. Do not let an opportunity at redemption go by simply because it will take the debtor two extra days beyond the sale date to come up with the full price.
 - c. Resist the temptation to sell the repo before his redemption rights have expired. It is guaranteed he will try to redeem if it is sold prematurely,

VI. GET THE REPOSSESSION NOTICES RIGHT, AND THEN SELL THE COLLATERAL ACCORDING TO THE TERMS OF THE LAST NOTICE YOU SENT THE DEBTOR!

- A. Send accurate repossession letters to the debtor and everyone else with a security interest or ownership interest in the collateral.
 1. Send the notices by regular and certified mail to be truly careful.
 2. Send the right notice for the right sale. Tell the debtor how you will sell it, and then do what you tell him. If you change the anticipated sale method, then send out a new notice.
 - a. You cannot use a "one-size-fits-all" Notice, because it does not. It must say either that it will be a private sale after a specific date, or that it will be a public sale at a designated date time & place.
 - b. You are NOT required to send a "sale results" notice. I recommend against them.
 - c. NEVER let a sale notice go out to a bankrupted debtor telling him he will be liable for any deficiency. He will not, and your letter saying so violates the Bankruptcy Stay.

3. Send it to the last known address of the debtor and to all other interested parties, not just the address on the contract.
4. Send separate notices, separately addressed, in separate envelopes to each debtor or interest-holder individually.
5. Send copies of the notices to all junior and senior lien-holders, and to the debtor at his job.

B. Public sale - common but maybe not the most profitable.

1. Repossession letter must announce actual date, time and place of anticipated sale, and the sale must occur at that date, time and place, unless a new corrected notice is sent out reasonably before the new sale date.
2. Sales at auto auctions of repossessed cars may not be PUBLIC sales, unless the public can bid on them.
 - a. Send out a PRIVATE sale notice if you anticipate selling at an auto auction where the public CANNOT bid.
 - b. Send out a PUBLIC sale notice if you choose to sell at an auction where the public CAN bid.
3. Advertisement - not required specifically, but no commercially reasonable sale could happen without it normally, public or private.
 - a. The more advertisement, the better - within reason.
 - b. Also be sure to advertise in the debtor's own hometown newspaper, even if it is a weekly.
4. At public sales, the lender can bid.

C. Private sale - beware the "nose test".

1. Never sell at a private sale to a CU employee. No one will ever believe that it was not a "sweetheart" deal.
2. Collect lots of bids - the more the better, but at least 3.
3. Advertise widely, especially if the collateral is specialized equipment, and do it in "targeted" publications,
4. Make sure the repossession notice does not cite a specific date, time and place of sale. If it does, you have likely sent a public sale notice, not a private sale notice.

- D. Never mind sending notices of the result of the sale, unless you think the debtor will then pay you off because he is about to lose all worthwhile benefits of CU membership for causing you a loss. Either dun him for the deficiency, sue him for it, go after co-debtor(s), or write it off.

VII. DOCUMENT EVERY STEP OF THE REPO AND RESALE HISTORY IN YOUR FILE, IN DETAIL.

- A. Presume every word you write will be read by a hostile, suspicious, angry reader, and you will keep better records.
 - 1. Keep snide remarks off the records. The debtor can get mean, but you cannot.
 - 2. Do not create personal “desk files” or “black lists”. They are guaranteed to haunt you someday. To destroy them exposes you personally to nasty civil (and perhaps criminal) penalties.
- B. Become a packrat. Keep copies of everything. Keep all refused, returned certified mail envelopes. Print out all collection notes if they are about to be deleted.
- C. Find out if the CU has written policies about how & when to pursue collateral, co-debtors, deficiencies, etc, and follow them - unless the conflict with this outline.
- D. In exceptional cases, consider secretly recording phone conversations with hostile debtors. Our office has the capability, and it is not illegal in NC for 1 party to a conversation to record the conversation without the other parties’ knowledge.
- E. Behave as if all your calls to the debtor ARE being secretly recorded by the debtor. Often they are.
 - 1. Most debtors have telephone extensions in their homes. Another person can always be listening.
 - 2. Never contradict verbally anything you tell the debtor in writing, unless you expect to answer for it.

VIII. FIGURE THE DEFICIENCY CALCULATION RIGHT; DO NOT INCLUDE COSTS THAT ARE NOT PROPERLY RECOVERABLE, AND DO NOT OMIT THOSE THAT ARE!

- A. Exhaust all available avenues of payment before pursuing the debtor with the deficiency.
 - 1. Insurance rebates - be sure to get a rebate for all unearned premiums, and credit it to the account balance.
 - 2. Rebate all unearned finance charges as of the repo date, provide any extension fee refund due and deduct these from the deficiency balance.

3. Squeeze co-makers - they are frequently family members, and are often an excellent way to make the debtor pay up.
 - a. repo'ing first makes them believe you have exhausted all other avenues first.
 - b. Make sure they truly are co-debtors and not volunteer payors - like parents. You could violate the privacy provisions of the NC Consumer Protection Act.
 4. Are there shares on deposit you can freeze or offset?
- B. Proper deficiency elements - if the debtor is solvent, be sure to also add in all the expenses you are entitled to.
1. Late charges.
 2. Repossession Expenses:
 - a. Repossessor's fee, IF you paid it to an outside agent, not a CU employee.
 - b. Towing and storage.
 - c. Reconditioning and clean-up.
 - d. Advertisements.
 - e. Insurance against loss or injury - often the most forgotten element of repo expenses.
 - f. Postage expenses.
- C. "Second sale" proceeds - sometimes a lender will buy collateral at a public sale, but then later resell it privately on its own account. Although you are not obliged to, best practice is to credit the debtor with any net proceeds of the second sale over the first, to give him every available credit, reduce your charge off, and inoculate yourself against a claim of a sweetheart deal.
- IX. NEVER TRY TO DEAL WITH A LAWYER REPRESENTING A DEBTOR OR THE DEBTOR'S SPOUSE, WHETHER IN BANKRUPTCY COURT, DIVORCE COURT OR OUTSIDE COURT!
- A. That lawyer is not your friend. She will mislead you, or more likely allow you to mislead yourself.
 - B. Do not attempt to try to argue what the law says or what your rights are. That is why there are creditor's attorneys.

- C. Never send copies of anything from your file, without consulting your counsel first.
 - D. If you receive a document request from a divorce attorney, get a subpoena from her first, before providing anything at all,
 - E. Take any threat of litigation seriously. Call your lawyer.
- X. UNDERSTAND THE CONSEQUENCES OF FAILURE TO FOLLOW THESE RULES!
- A. Risks of Failure - Loss of Deficiency and Payment of Statutory Penalties.
 - 1. Failure to send notice - receipt is irrelevant, but you cannot collect the deficiency from any debtor to whom you failed to send an accurate Notice of Repossession and Intent to Resell.
 - 2. Breach of the peace and use of police - either will cancel your deficiency and will also likely open you up to a civil lawsuit. Even if you win the suit, you lose, because lawyers are expensive.
 - 3. Failure to conduct a commercially reasonable resale the entire process of the resale, including time, place, method and manner must all be reasonable. A low price alone does not invalidate a sale, but it is some evidence toward commercial unreasonableness. If the Court or a jury finds it unreasonable, the deficiency is lost.
 - B. If you conduct a commercially unreasonable sale, not only is the deficiency lost but you can be made also to pay to the debtor, all of the finance charge plus 10% of the cash purchase price, if the collateral was consumer goods, as a statutory penalty, whether by a Counterclaim or an independent lawsuit.

Summary:

Do it right and you will have a simple deficiency lawsuit upon which you can seek judgment and execution. Do it wrong, and you will lose your right to collect a deficiency, or worse, sink into a legal quagmire. **Your only escape route will be paved with the Credit Union's money.**

[Credit Union Letterhead]

[Name and address of CU]

[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]

Subject: [Identification of Transaction by account number and contract name]

We have your [described collateral], because you broke promises in our agreement.

[] We will sell [describe collateral) at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: _____

Time: _____

Place: _____

You may attend the sale and bring bidders if you want.

[] We will sell [described collateral] at private sale sometime after [date). A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount due on the account. If we get less money that is due on the account you

[] I will*

[] will not**

still owe us the difference. If we get more money than is due on the account, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount due on the account (not just the past due payments), including our expenses. To learn the exact amount you can pay to get it back, call us at [telephone number].

If you want us to explain to you in writing how we have figured the amount due on the account, you may call us at [telephone number] or write us at [secured party's address] and request a written explanation. [We will charge you \$ _____ for the explanation if we sent you another written explanation of the amount due on the account within the last six months.]

If you need more information about the sale, call us at [telephone number] or write us at [secured party's address].

We are sending this notice to the following other people who have an interest in [described collateral] or who owe money under your agreement:

[Names of all other debtors and obligors, if any)

* (in which case, the purpose of this communication is to collect a debt)

** (if discharged under Title 11 of the United States Code)

[Credit Union Letterhead]

[Name and address of CU]

[Date]

**ACCOUNTING OF DEFICIENCY OR SURPLUS AFTER RESALE OF
REPOSSESSED COLLATERAL**

[Name and address of any obligor who is also a debtor]

Subject: [Identification of Transaction by account number and contract name]

We have sold your [described collateral], according to our rights in our agreement. Here is how we calculate the balance on the account:

| | | | |
|--|---|----|-------|
| 1. Total amount of debt secured by collateral: | | \$ | _____ |
| 2. Rebate of unearned interest, calculated as of | - | | _____ |
| [here insert date] | | | _____ |
| 3. Resale amount: | - | | _____ |
| 4. Aggregate amount of obligations after deducting proceeds: | | | _____ |
| 5. Amount of repossession expenses: | + | | _____ |
| 6. Amount of other credits including rebates of interest or credit service charges, if any: | - | | _____ |
| 7. Total amount of | | \$ | _____ |
| [] surplus | | | |
| [] deficiency* | | | |
| | | | _____ |

This notice is provided to you in compliance with NCGS 25-9-616.

*Unless discharged per Title 11 United States Code, the purpose of this communication is to collect a debt.