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Breach of the Peace and New Mexico's Uniform Commercial Code

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BREACH OF THE PEACE AND NEW MEXICO'S UNIFORM COMMERCIAL CODE

New Mexico's version of the Uniform Commercial Code, following the language of the 1958 Official Text, allows a secured party to retake possession of his security without legal process providing he does so without breaching the peace. Section 50A-9-503, New Mexico Statutes Annotated, reads as follows:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504 [50A-9-504].[1]

Prior uniform legislation, the Uniform Trust Receipts Act[2] and the Uniform Conditional Sales Act,[3] similarly granted the secured party the right to repossess if he could do so without breaching the peace, and similarly, in granting the right, did so without defining "breach of the peace." Whatever precedent is available will have to come from jurisdictions outside New Mexico. New Mexico, not having decided the issue, is free to pick and choose the best precedents from other jurisdictions, or, indeed, to strike out on its own with a new approach. In those cases where a debtor has been successful in estab-

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1. N.M. Stat. Ann. § 50A-9-503 (1953).

New Mexico's version of the Uniform Commercial Code, N.M. Stat. Ann. §§ 50A-1-101 to -9-507 (1953), is based on the 1958 Official Text, promulgated jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

All references to New Mexico's version of the Code, often designated UCC both in footnotes and text, will omit the full statutory citation. Citations to "Comments" are those accompanying the 1958 Official Text.

2.

> An entruster entitled to possession under the terms of the trust receipt or of Subsection 1 may take such possession without legal process, whenever that is possible without breach of the peace.

N.M. Laws 1947, ch. 151, § 6(2), repealed by N.M. Laws 1961, ch. 96, § 10-102.

3. The Uniform Conditional Sales Act was never enacted in New Mexico.

For the pertinent language of the Act, see Uniform Conditional Sales Act § 16.

lishing a breach of the peace by a secured party in the process of repossessing, the recovery often has been substantial.[4]

Courts which have dealt with the issue of a breach of the peace while retaking possession of collateral have been vague in their efforts to define what breach of the peace means. Perhaps the best definition, though far from adequate, can be found in *Webber v. Farmers Chevrolet Co.*,[5] in which the court states:

> In general terms, a breach of the peace is a violation of public order, a disturbance of public tranquility, by an act or conduct inciting to violence.
>
> * * * *
>
> It is not necessary that the peace be actually broken to lay the foundation of a prosecution for this offense. If what is done is unjustifiable, tending with sufficient directness to break the peace, no more is required.[6]

Within the terms of the *Webber* definition, New Mexico is free to move in any direction deemed wise by its courts. In fact, the definition is so broad that it sets no meaningful limit or standard which can be followed.

Cases will arise in which it is clear that a breach did occur—repossessing a piano from the debtor's locked home while the debtor was absent,[7] personal injuries to the possessor of collateral resulting from a scuffle after the secured party was refused access to the collateral,[8] or, when it appears that there will be violence or force un-

4. Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 Minn. L. Rev. 205, 211 (1962).

5. 186 S.C. 111, 195 S.E. 139 (1938).

6. *Id.* at 113, 195 S.E. at 141.

For other definitions of the term see Devincenzi v. Faulkner, 174 Cal. App. 2d 250, 344 P.2d 322 (1st Dist. Ct. App. 1959): Breach of peace refers primarily to a disturbance of public peace and tranquility, and not every violation of a statute is a breach of peace; Flores v. City and County of Denver, 122 Colo. 71, 220 P.2d 373, 376 (1950): "Breach of the peace has often been defined as, 'a disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.'"

7. Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934) (forcible entry though specifically permitted in the contract of sale); see also Renaire Corp. v. Vaughn, 142 A.2d 148, 150 (D.C. 1958) (trespass): "While the contract gave the vendor the right to enter upon the premises it did not expressly give the right to break in in order to enter and we refuse to hold that it impliedly gave that right."

8. C.I.T. Corp. v. Brewer, 146 Fla. 247, 200 So. 910 (1941) (assault and battery); *accord*, Silverstin v. Kohler & Chase, 181 Cal. 51, 183 Pac. 451 (1919) (assault and battery).

When the scuffle occurs after the secured party has obtained possession of the col-

less the debtor yields.[9] Other cases will occur where clearly no breach takes place—when the secured party is invited onto the debtor's premises by the debtor's wife and she permits him to take the collateral,[10] or when the secured party repossesses an automobile parked on a public street.[11] In the absence of force, no breach of peace results when the retaking occurs on private property without

lateral, but has not left the debtor's premises, no breach of peace results. See, *e.g.*, Westerman v. Oregon Automobile Credit Corp., 168 Ore. 216, 122 P.2d 435, 443 (1942):

> In this case, although there was a refusal to consent, there was no physical obstruction. No violence would have occurred if plaintiff had not interfered after defendants had taken possession. The taking of possession was in fact consummated by defendants without assault, battery, or intimidation and during the absence of the plaintiff.

9. See, *e.g.*, Manhattan Credit Co. v. Brewer, 232 Ark. 976, 341 S.W.2d 765 (1961) (conversion); Freeman v. General Motors Acceptance Corp., 205 N.C. 257, 258, 171 S.E. 63, 64 (1933) (trespass):

> Where there is such a show of force as to create a reasonable apprehension in the mind of one in possession of premises that he must yield to avoid a breach of the peace, and he does so yield, this is yielding upon force, and constitutes forcible trespass.

Recovery against the secured party in the *Manhattan* case was allowed because the secured party disregarded the debtor's objection to the retaking of the car and *force* would have to have been used to prevent the taking. Recovery was allowed in the *Freeman* case since the secured party, after being told by the debtor's wife to wait until her husband came home before repossessing, harshly disregarded her objection and pushed the car from the garage.

A threat of force was also established in Kensinger Acceptance Corp. v. Davis, 223 Ark. 942, 269 S.W.2d 792, 793-94 (1954), on the basis of the following testimony of the defendant's manager:

> 'Q. Did you at any time touch Mr. Davis or threaten any bodily harm to him?
> A. No. sir.
> Q. You told him he couldn't drive it off?
> A. I told him he wasn't going to leave in the truck.'

The court concluded:

> This was a time when Davis was sitting in the truck with the key in his hand. It was not shown just how Enochs [the manager] was going to prevent Davis from leaving in the truck except through violence. The evidence justifies a finding that Enochs' statement was a *threat of violence*, was so intended by him and so understood by Davis.

Ibid. (Emphasis added.)

10. Austin v. General Motors Acceptance Corp., 239 Miss. 699, 125 So. 2d 79 (1960).

11. See, *e.g.*, McWaters v. Gardner, 37 Ala. App. 418, 422, 69 So. 2d 724, 727 (1954) (action for trespass):

> The . . . [plaintiff] left his car parked on a public street; the . . . [defendant] had the legal right to repossess the property; without the knowledge or consent of the . . . [plaintiff] the . . . [defendant], without either actual or constructive force, possessed the car and conveyed it to its place of business.

See also Ikovich v. Silver Bow Motor Car Co., 80 Ore. 378, 157 P.2d 785 (1945), in which the retaking of possession occurred behind the debtor's house with the automobile's front wheels in an alley; Gaffney v. O'Leary, 155 Wash. 171, 283 Pac. 1091 (1930); Lepley v. State, 69 Okla. Crim. 379, 103 P.2d 568 (1940) (dictum).

the knowledge of the debtor[12] if the security agreement expressly permits the secured party to enter the debtor's premises to retake possession[13] or requires that the debtor deliver possession to the secured party.[14]

In addition to cases of actual force or violence, a breach-of-the-peace issue is raised when an attempted repossession gives rise to *threats* of violence. The "threat" cases raise closer questions than those in which actual force is involved. Thus, how should a court proceed when there is an oral objection to the retaking but the retaking is executed without force, violence, or articulated threats?[15] Or where permission once given is withdrawn, and bodily contact is necessary to restrain the debtor?[16] There is some authority to the effect that the use of derogatory remarks by the secured party—though no

12. *Cf.* Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938), in which the secured party was held liable for retaking the debtor's automobile from a hotel parking lot by breaking a window of the auto. In discussing security agreements which allow the secured party to take possession on default, the court said:

> To allow the holder of such a contract to be his own judge, and to execute his judgment in any violent or forcible way he might choose, would be contrary to good order would be provocative of retaliatory violence and breaches of the peace; wherefore, as a matter of public policy, no such right can exist.

184 So. at 441-42. See also Dominick v. Rea, 226 Mich. 594, 198 N.W. 184 (1924) (secured party broke into debtor's garage to repossess automobile).

13. Furches Motor Co. v. Anderson, 216 Miss. 40, 61 So. 2d 674 (1952); Morris v. Halford, 352 Pa. 138, 42 A.2d 411 (1945) (entry made into debtor's home through unlocked door and furniture repossessed); North v. Williams, 120 Pa. 109, 13 Atl. 723 (1888); Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1909) (retaking of a horse over the objections of the debtor was allowed since the seller had the contractual right to enter the property and the retaking was not violent, forceful, or disorderly); Singer Mfg. Co. v. Rios, 96 Tex. 174, 71 S.W. 275 (1903) (involved retaking of a sewing machine from the debtor's premises without his consent and against the express wishes of the parties in possession, but no force, violence, or breach of the peace was committed).

14. See, *e.g.*, McLean v. Underdal, 73 N.D. 74, 11 N.W.2d 102 (1943).

15. See, *e.g.*, Commercial Credit Co. v. Cain, 190 Miss. 866, 1 So. 2d 776 (1941) (judgment for debtor was reversed since secured party committed no actionable wrong); Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1909) (secured party held not liable).

In Flaherty v. Ginsberg, 135 Iowa 743, 110 N.W. 1050 (1907), the secured party was permitted to enter the debtor's home, but the debtor objected to the taking of furniture including a bed which she contended was needed because of her pregnancy. The debtor suffered a miscarriage following the retaking, but recovery was denied:

> [T]he woman's helplessness and need must be such that to deprive her of the bed will expose her to increased sickness and suffering, and such fact must have been known or ought to have been known to the person demanding and removing the property.

Id. at 748, 110 N.W. at 1052.

16. See Biggs v. Seufferlein, 164 Iowa 241, 145 N.W. 507 (1914), where it was held that the secured party was not liable because he had already acquired possession of the collateral and could use force to maintain that possession.

force or violence is involved—may render the secured party liable;[17] why words alone are sufficient for liability is unclear from the decisions.[18]

For purposes of the following discussion, unless the contrary is specifically stated, it will be assumed that the parties have not by contract limited the secured party's rights to repossess the collateral on default.[19]

I

HYPOTHETICAL PROBLEMS UNDER SECTION 9-503

A. Generally—Force, Violence, and Damages

Hefty sold a truck-tractor to Rhodes receiving a security interest in return to secure the unpaid balance of the purchase price. After two payments, Rhodes defaulted and Hefty sought to repossess. The collateral was found at a truck terminal. It was hitched to a loaded trailer, locked, and with the brakes set. Hefty called a wrecker to have the truck-tractor moved to Hefty's lot. An air cap on the side of the truck had to be removed to permit entry to the inside. The wrecker man then unhitched the truck-tractor and towed it to Hefty's lot. No physical damage was done to the truck-tractor in the course of the repossession. The trailer which had been unhitched contained fish, and the entire load spoiled before Rhodes could arrange to have it moved. Was there a wrongful taking of the collateral here for which the debtor, Rhodes, can recover?

No force was used in repossessing the truck-tractor. Nothing was broken or damaged. The air intake cap was removed, an act which would be a trespass if done without the right of repossession being present. This seems insufficient to constitute force, and, thus, is not a breach of the peace.[20] The fact that the collateral was taken without

17. Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936) (defendant called the debtor a "deadbeat" and threatened to get the sheriff; debtor could recover for miscarriage resulting from fright); see also Freeman v. General Motors Acceptance Corp., 205 N.C. 257, 171 S.E. 63 (1933) (judgment for defendant reversed because of abusive language used).

18. *But see* Kirby v. Jules Chain Stores Corp., *supra* note 17, in which the plaintiff became sick immediately following the derogatory remarks of the defendant and later suffered a miscarriage.

19. UCC § 9-503: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral."

20. See Martin v. Cook, 237 Miss. 267, 114 So. 2d 669 (1959); Rea v. Universal C.I.T. Credit Corp., 257 N.C. 639, 127 S.E.2d 225 (1962) (secured party used coat hanger to unlock automobile door; debtor denied punitive and compensatory damages).

the knowledge or consent of the debtor is immaterial since there was no actual force.[21]

Actual force, of course, may not be essential to a finding of a breach of the peace. Some courts talk in terms of *constructive* force being sufficient to support such a finding. Thus, if the collateral is repossessed in such a manner as to cause the debtor to yield to the secured party's demands, constructive force may be found although no actual force was used.[22] Constructive force is nothing more than a phrase used to describe threats by the secured party which cause the debtor to fear reasonably that force will be used unless the debtor yields. It is submitted, however, that the New Mexico court should apply the term "constructive force" differently. The phrase might well be applied to permit recovery in the case posed. Thus, when it is obvious to the secured party that the debtor intended to prevent entry into or onto his property by any party, and the debtor is not present when the retaking is attempted, then the secured party should be considered to have used "constructive force" if he in fact does enter. The term may well include entry into the debtor's locked garage by prying the door open, going through an open window of a locked house, or climbing over a fence surrounding the debtor's premises. Since the courts will find actual force if there is physical evidence of a forcible entry,[23] it logically follows that "constructive force" should be established when the crafty or ingenious secured party is able to make an entry without leaving physical evidence of that entry.

Hefty, the secured party, might have been satisfied to collect the amount owed on the note rather than repossess the collateral.[24] Had Rhodes been present at the time of the retaking it may be that he would have paid the amount due, thereby preventing the repossession. This would have saved time and the expenses involved. Under the decided cases, however, Rhodes' absence creates no liability on Hefty's part.[25] And since Rhodes still has the right to redeem the truck, he suffers no loss other than costs[26] and the loss of use of the vehicle.

Since the truck-tractor comes within the Code definition of equip-

21. See McWaters v. Gardner, 37 Ala. App. 418, 69 So. 2d 724 (1954).

22. Crews & Green v. Parker, 192 Ala. 383, 68 So. 287 (1915); American Discount Corp. v. Wyckroff, 29 Ala. App. 82, 191 So. 790 (1939).

23. See, *e.g.*, Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).

24. See UCC § 3-109(1)(c).

25. See cases cited in note 20 *supra*.

26. See UCC § 9-506.

ment,[27] Hefty could have proceeded under the special equipment provision of section 9-503:

> [W]ithout removal a secured party may render equipment unusable and may dispose of collateral on the debtor's premises . . . .

If Hefty had been unable to open the truck-tractor, he could have lifted the hood and rendered the vehicle unusable. The quoted language talks only of disposing "of collateral on the debtor's premises." Here the collateral was located at a truck terminal, which was not Rhodes' premises. In order for Hefty legally to dispose of the collateral at the place of retaking, it would have to be argued that the language of the above-quoted section is not exclusive. In other words, the permissive language of the section is not meant to allow disposition *only* on the debtor's premises, but at any place that retaking occurs. Since the Code's repossession system attempts generally to minimize the expenses incurred in repossessing, it would be quite unreasonable to read the Code as requiring that the secured party incur unreasonable expenses of having heavy equipment moved to the debtor's premises for disposition. It makes more sense to read the section as permitting the disposition from the situs of the collateral at the time of repossession. It is urged that the section be read this way.

The Code offers no aid in trying to determine how a secured party should go about rendering the equipment unusable, except that it must be done in a "commercially reasonable manner."[28] Any method seems acceptable as long as the secured party uses no force in rendering the equipment unusable. Properly, a secured party could remove a vital engine part such as the coil or distributor. Hefty possibly could have removed the tires. Note that these items are usually readily accessible to anyone without requiring force. Hefty may have been able to chain the equipment to a tree or other immovable object, and, thus, render the truck-trailer unusable. It is submitted, however, that when equipment is rendered unusuable and the method used for that purpose would not be visible to the debtor, the law should require that the secured party immediately notify the debtor so that he will not incur expenses in attempting to use his equipment in ignorance of its having been rendered unusable.

Suppose Hefty had been able to gain entry to the truck only by first breaking a window. By the weight of authority this would have

27. UCC § 9-109(2).
28. See UCC § 9-503, Comment.

been a forcible entry[29] and, thus, a breach of the peace, making Hefty liable.[30] Such liability might well include liability for the decay of the fish in the trailer attached to the tractor unit.[31] If the secured party has an absolute right to possession of the collateral upon default, it can be argued that nothing seems to justify holding him liable if he breaks a window while holding him harmless if he is able to gain access without breaking anything. The value of the broken window certainly is negligible when compared to the overall value of the collateral. In the past liability has hinged upon this fact.

Despite the surface validity of the above argument, there is a substantial justification for the distinction, as stated in *Commercial Credit Co. v. Spence*:[32]

> The majority of people are honest and yield peaceable obedience to their contractual obligations. When they do not so yield, it is, in most cases, because there is some reason worthy of impartial examination or consideration why they do not. To allow the holder of such a contract to be his own judge, and to execute his judgment in any violent or forcible way he might choose, would be contrary to good order would be provocative of retaliatory violence and breaches of the peace; wherefore, as a matter of public policy, no such right can exist.
>
> Under the facts . . . the conduct of appellant here in breaking into the automobile and taking it by that means was a trespass; and under all the circumstances the offense is properly to be characterized as an aggravated and oppressive trespass, for which punitive damages are allowable in the discretion of the jury; and the jury was properly instructed on that feature.

An act of the secured party which constitutes a trespass—regardless of the actual damage done to the debtor's property—is sufficient to find a breach of the peace. The secured party always has the right to get judicial process, and there is really no excuse or reason for the secured party to break anything belonging to the debtor or any of the collateral in the debtor's possession.

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29. See, *e.g.*, Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).

30. See Manhattan Credit Co. v. Brewer, 232 Ark. 976, 341 S.W.2d 765 (1961) (conversion); Bradley v. Associates Discount Corp., 230 Miss. 131, 92 So. 2d 468 (1957) (trespass); Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 91 S.W. 1020 (1905) (trespass; reversed on other grounds); Webber v. Farmer Chevrolet Co., 186 S.C. 111, 195 S.E. 139 (1938) (trespass).

31. Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938) (also allowed punitive damages); Binder v. General Motors Acceptance Corp., 222 N.C. 512, 23 S.E.2d 894 (1943); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936).

32. 185 Miss. 293, 184 So. 439, 441-42 (1938).

B. *Judicial Process*

Jim defaulted in making payments on a note he had signed along with a security agreement when he purchased a car from Square Deal, a car dealer who held the paper. Jim refused to permit Square Deal's possessor to repossess in the absence of judicial process permitting him to do so. The possessor, rather than going through the formality of obtaining process from the court, went back to the office and picked up an old replevy order. He brought along Jake, an employee, to pretend to serve the "order." When Jake confronted Jim with the "order" and with the fake badge he wore, Jim released the car to Square Deal's possessor. Was this a wrongful repossession?

Under section 9-503, Square Deal could either repossess without breach of the peace or by obtaining judicial process. In any event, Square Deal had the right to the possession of the collateral. Though the process purported to be used here was void, the retaking of possession was peaceful. And if upon default there is a right to repossession, any method of acquiring such possession as long as it is peaceful should satisfy the requirements of the Code.[33] Neither Square Deal nor Jake, its employee, expressly represented that Jake was an officer of the law.[34] Further, the "order" was void on its face and Jim could have ascertained this had he inspected it.[35]

33. See, *e.g.*, Grossman v. Weiss, 129 Misc. 234, 221 N.Y. Supp. 266 (Sup. Ct. 1927), holding that a sheriff acting under a void writ was acting as the agent of the secured party; so, if the secured party had a right to peacefully retake possession, he could not endanger his position in this regard by attempting to do so under process of law, such process being in fact void on its face. *Grossman* was followed in Hartford Acceptance v. Kirchheimer, 166 Misc. 219, 2 N.Y.S.2d 224 (N.Y. Munic. Ct. 1938).

34. In Day v. National Bond & Inv. Co., 99 S.W.2d 117 (Mo. Ct. App. 1936), the secured party falsely represented an ordinary process server to be a "constable," and the debtor then gave possession to the secured party. The court, though finding this conduct of the secured party to be reprehensible and indefensible, decided that this was a moral question rather than a legal wrong since the debtor was in default and the secured party had a right to possession at the time the false representation was made.

See also North v. Williams, 120 Pa. 109, 13 Atl. 723 (1888), in which the secured party entered the debtor's premises to repossess a piano. The debtor contended that entrance was made through a false representation by the secured party that he was going to tune the piano. The court refused to find a trespass because entrance was made to the property before the false statement was made.

35. See Day v. National Bond & Inv. Co., *supra* note 34.

But see See v. Automobile Discount Corp., 330 Mo. 906, 50 S.W.2d 993 (1932), in which a void writ was used by a sheriff. The court held that since the debtor knew the sheriff personally, the repossession under the void writ was a taking by coercion and intimidation amounting to force within the law. The debtor had sufficient reason to believe that the legal papers were proper.

It may be argued that the Code allows two separate and distinct methods of retaking collateral—either (1) without breach of the peace, or (2) by judicial process. If the debtor refuses to allow the secured party to retake without judicial process it would logically follow that a breach of the peace would occur if the secured party attempted to proceed without such process. Therefore, the only alternative left for the secured party is to obtain judicial process. If he does this then he has fulfilled the requirements of the Code. But, if he attempts to repossess by misrepresenting that he has a judicial process, or if he acquires possession of the collateral by any sham whatsoever after he has been told to obtain judicial process, then the secured party has retaken possession wrongfully and would be liable the same as he would had he breached the peace.

II

REMEDIES UNDER THE CODE—SECTION 9-507

In assessing damages for a retaking which breaches the peace, it is necessary to determine whether section 9-507 applies. On its face, the section seems to provide an exclusive remedy. How effective or complete this remedy really is is questionable. Subsection (1) of 9-507 provides:

> If it is established that the secured party is not proceeding in accordance with the *provisions of this Part* disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the *provisions of this Part.* If the collateral is consumer goods, the debtor has a right to recover in any event not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price. [Emphasis added.]

The language of the subsection, "provisions of this Part" seems to include the breach-of-peace provision which is in Part 5 of Article 9. Query whether in fact it applies?

When the secured party breaches the peace and thereby injures the debtor in retaking collateral, the first sentence of subsection (1) offers little aid to the debtor. The only remedy offered in the first sentence is that the disposition of the repossessed collateral may be "ordered or restrained." Such an order, however, does not restore the property to the debtor's possession or compensate him for his injuries. It amounts to a delaying action.

Looking to the second sentence of the subsection, it is arguable that two interpretations are possible: (1) The debtor has a right to recover, *after* the collateral has been disposed of, for any loss caused by a failure to comply with section 9-503, and (2) the debtor has the right to recover for losses caused by the secured party in not complying with the methods of *disposing* of collateral provided in Part 5.[36] In support of interpretation (1), it may be said that since section 9-507 attempts to provide a remedy for the failure to comply with any and all provisions of Part 5, section 9-503 must therefore be incorporated within section 9-507. Once the collateral has been disposed of, the debtor may recover *any* losses which he incurred when the secured party breached the peace in taking possession of the collateral. But what difference does it make whether the secured party has already made a disposition of the collateral since the debtor's losses, over and above the loss of the collateral, are not contingent upon the amount the secured party receives from the disposition? In many instances a debtor's actual losses resulting from a secured party's breach of the peace will considerably exceed the value of the collateral. The fact that the collateral has been disposed of by the secured party should not be a prerequisite for recovery under section 9-507(1). This leads to interpretation (2).

Since it appears that the Code requires that the collateral be disposed of prior to a recovery for breach of section 9-503, the indication is that section 9-507(1) was not intended to cover a breach of section 9-503. This is not to say that the aggrieved debtor has no recovery at all; it is only that he has no express recovery under the Code. He may still have a tort action for his damages since the Code does not prohibit such a claim. A study of the last sentence of section 9-507(1) will further support this argument. This sentence provides for a minimum recovery if the collateral is consumer goods. But why does the Code place consumer goods in a unique position as

36. See UCC §§ 9-504 to -505.

far as section 9-503 is concerned, since similar damages can result when other than consumer goods are involved?[37]

The Code is somewhat vague in its attempt to provide a satisfactory remedy for a breach of section 9-503. If the collateral is wrongfully retaken under that section, and subsequently a wrongful disposition occurs of that collateral, then an action under section 9-507 (1) will result, and the debtor may also seek his recovery for the wrongful retaking in the same action. If it is intended that the Code provide a remedy for a section 9-503 breach, then section 9-507(1) should be amended to express such an intention and provide a remedy aimed specifically at righting the wrong. It is submitted that the third sentence of subsection (1) of section 9-507 should be amended as follows:

> If the collateral is consumer goods, *or if there is a breach of the peace under Section 9-503 whether or not there has been a disposition of the wrongfully taken collateral*, the debtor has a right to recover . . . .

With the suggested language, the subsection would make it clear that a wronged debtor may have at least a minimum recovery against the secured party regardless of his actual damage when it is shown that a breach of the peace occurred during the retaking by the secured party. Certainly no serious objection can be made to this amendment notwithstanding its absolute liability factor. It will have no effect upon the secured party who retakes his collateral in an orderly, peaceable manner. It should be noted also that a recovery under the amended subsection is not contingent upon whether there has been disposition of the collateral.[38]

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37. It has been suggested that purchasers of consumer goods are least able to protect themselves from a non-complying secured party, so that a minimum recovery by the consumer goods debtor will act as a restraint on non-compliance with the Code. I agree with this proposition when referring to the "disposition of collateral" sections of the Code, but when referring to a breach of the peace under § 9-503, an entirely different approach must be taken.

Any debtor who has had his collateral property retaken from him, whether such collateral be consumer goods or otherwise, is in no better position to protect himself from such acts than is a non-consumer goods debtor. They stand in the same light; either may refuse the secured party to retake without judicial process, and either may be subjected to the same harm or injury by the secured party's breach of the peace.

38. This is important in two respects: (1) if the collateral has been wrongfully retaken under § 9-503, but there has not been a disposition of that collateral, the necessity of ordering disposition under the first sentence of § 9-507(1) is thereby eliminated so that suit may be instituted at once by the debtor for his damages; (2) if there has not been a disposition of the wrongfully taken collateral and the debtor notifies the secured party of his intention to recover for a breach of the peace, the secured party still has an opportunity to mitigate the damages by agreeing to return the collateral.

CONCLUSION

In discussing the provisions of section 9-503, it is, of course, impossible to include all the issues which may develop concerning it. It is hoped, however, that the hypothetical problems presented in Part II will help in understanding the general tenor of the section. A general rule concerning the breach of the peace provision may be framed in the following fashion: A secured party has an absolute right, on default, to possession of the collateral; however, whenever it appears that force or violence, or the apprehension of it, will be involved in the retaking of that collateral, then the secured party should seek judicial process in retaking possession.

Consideration has been given to the possibility of proposing an amendment to section 9-503 in order to spell out in the Code what is intended by "breach of the peace," but no improvement would result. Specificity may only tend to shackle the courts in their interpretation of "breach of the peace." And it might make the section too cumbersome or wordy to apply. Interpretation of the section should be toward the prevention of force and violence when retaking collateral.

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