

Santa's Grab Bag:
The Repo Man Is Coming To Town
Legal Question of The Week
Vol. 2, Number 27
December 18, 2009

Brian Beasley
All You Want For Christmas and
Legal Adviser, HPPD

Well, it's beginning to look a lot like Christmas again. In one week, children all over the world will wake up, tear open their presents, and then get upset because their Dad won't let them have a turn playing with all the cool stuff that they get.¹ But before we put an exclamation mark on 2009,² I've got three more brief things I want to discuss with you. Fear not, faithful legal update readers! For behold, I bring you these legal tidings in a way which shall bring joy to all people. That's right – it's the very special Christmas edition of the Legal Question of the Week.

*'Twas the night before Christmas, when all through the house, not a creature was stirring, not even a mouse. The hooptie was parked in the driveway with care, 'cause we knew not the repo man soon would be there.*³

In our last legal update, we dealt with child custody orders, which are primarily civil in nature but will sometimes arise and have to be dealt with by law enforcement officers. Another predominantly civil issue that pops up on our radar from time to time is the collateral repossession process. People tend to get agitated when things that they consider their property⁴ are taken away from them, and when people get agitated they often call the police. But what are the rights of the reposessor and the repossessed? Consider the following strictly hypothetical situation:

A place of business (let's say a furniture company) has several employees. Because the furniture business doesn't pay like it used to, these employees have trouble

¹ At least that's what happens at my house. Look – I paid for the video game, the controllers, and the Wii. It's only fair that I get to play Mario Kart first!

² Since there seems to be little to argue about these days, a controversy has arisen over whether January 1, 2010 will be the beginning of a new decade or whether we have to wait until January 1, 2011. I understand your argument that there was never a year "0," but place me firmly in the "decade starts in 2010" camp. I just feel like something as important as a decade should start in an even-numbered year.

³ With apologies to Clement Clarke Moore (1779-1863) who wrote "A Visit From St. Nicholas" in 1822, I'm going to take a few liberties with his excellent poem today. Mr. Moore was a reticent man whose poem was published anonymously after a family friend submitted it to the New York Sentinel. I think we would have to attribute most of this shyness to the fact that he had "Clement" as a first name.

⁴ I find it odd that people will consider something their property even if they have stopped making payments on said property. Maybe that's just me.

paying their car payments from time to time.⁵ Since the lender knows where they work, he sends a tow truck to the parking lot of the furniture company to repossess the vehicle.⁶ As you might imagine, having one's car repossessed at work causes the employee's work productivity to suffer, not to mention his or her co-employees who get caught up in the drama of such an event. This downturn in productivity then causes the manager of the furniture company to become upset at the lender and the tow company for disrupting his business. And when people get upset they often call the police. What can you do about this situation?

Our issue here deals with the law of secured transactions. In order to lend you a large amount of money, a bank or other lender requires collateral to "secure" the debt. Collateral is a specific pledge to give up certain property to the lender if the debt is not paid. Most times, the collateral is the property that will be bought with the proceeds of the loan, so that your house and land become the collateral for your home mortgage and your car becomes the collateral for a vehicle loan. These are called "secured transactions" because the debt is secured by collateral.⁷ The lender in a secured transaction is called a "secured party."

Under North Carolina law (G.S. 25-9-609), after default⁸ occurs on a secured loan agreement, the secured party may take possession of the collateral "without judicial process, if it proceeds without a breach of the peace." What this means is that the lender doesn't have to get a court order to repossess the property, so long as he can take it back without breaching the peace. But what constitutes a breach of the peace?

When out on the lawn there arose such a clatter, I sprang from my bed to see what was the matter. Away to the window I flew like a flash, tore open the shutters and threw up the sash.⁹

In the North Carolina Court of Appeals case of Giles v. First Virginia Credit Services,¹⁰ a Lincoln County man named Giles' car was repossessed in the middle of the night. One of his neighbors testified in an affidavit that when he observed what was going on "I got to the phone, called the Giles and told them someone was stealing their car. . . . My lights were on . . . and the Giles' lights were on and that portion of our

⁵ In case you're wondering, it's not a coincidence I'm writing about this topic right here at Christmastime. Remember, Christmas may come and go in a hurry, but the bills will linger for a long time.

⁶ I had some relatives that used to do repossession work for a bank. They had some great stories to tell. I think there's a blockbuster reality show in this somewhere. The goal would be to repossess the most cars without getting shot. And since you asked, I didn't like Survivor's Russell to begin with but I now want him to win it all.

⁷ The money loaned to you by a credit card company, on the other hand, is unsecured in most cases. So is the \$10 your beat partner borrowed from you yesterday.

⁸ What constitutes a default is spelled out in the loan agreement, but usually boils down to the debtor missing too many payments.

⁹ Prior to the publication of this poem, St. Nicholas, the patron saint of children, had never been associated with a sleigh or reindeers.

¹⁰ 149 N.C. App. 89 (2002).

neighborhood had woken up. Richard Giles came out in his yard and we hollared¹¹ a few words back and forth and I jumped in my truck . . . to try to get the police. About 5 minutes later a police car came up and pulled into the Giles' yard. Then another police car came then a Sheriff's Deputy car came. Then another police car came. . . . There was a great commotion going on out in the street and in our yard all to the disturbance of the quietness and tranquility of our neighborhood. . . . It scared me and it scared the Giles.”

The Court looked at five factors to determine whether or not a breach of the peace occurred: (1) where the repossession took place, (2) the debtor's express or constructive consent, (3) the reactions of third parties, (4) the type of premises entered, and (5) the creditor's use of deception. In considering these factors, they held that there was not a breach of the peace here because the vehicle was taken without any type of confrontation. The fact that the owner (and his neighbors) were upset or “skeered”¹² afterwards did not mean that a breach of the peace had occurred.

Applying this analysis to our hypothetical furniture company situation, if the tow truck is able to hook up and take the car without any confrontation or breach of the peace, they are well within their rights to do so. This is true even if there is weeping and gnashing of teeth at the furniture company after they realize the vehicle is gone. On the other hand, if the tow truck driver is caught trying to take the car and there is a confrontation, the lender is required by law to go and get a court order for possession of the vehicle. That order will then be served and executed by the Sheriff's office.

Here's a simple rule of thumb. If you are called and arrive at the scene while the vehicle is still there, you should tell the tow truck driver to leave the vehicle and have the lender go get a court order.¹³ If the vehicle has already been towed away when you arrive on scene, there is nothing that you can or should do about it. If there was a breach of the peace, the vehicle owner can sue the lender in civil court. Under no circumstances should you act as an agent of the reposessor and assist in taking the property unless there is a signed judicial order of possession.

The moon on the breast of the new-fallen snow gave the luster of mid-day to objects below, when what to my web-surfing eyes should appear, but some inappropriate Facebook pictures, whose focus was clear.

With some status update quips that cut to the quick, I knew in a moment I was going to be sick. More rapid than eagles, subpoenas they came, and defense attorneys whistled, and shouted, and caused us great pain!¹⁴

¹¹ Only in Lincoln County would the word “hollared” (spelled incorrectly to boot) appear as part of an official court document. Coincidentally, the media has interviewed Giles' neighbor on two separate occasions following a tornado strike in the neighborhood. Ok – I made that last part up.

¹² This is how we say “scared” out in the county.

¹³ If they refuse to leave, you may make arrests for which you have probable cause based on the circumstances (trespass, disorderly conduct, resist, delay, and obstruct, etc.)

¹⁴ Like many other families, it is a family tradition in my house to read this poem (the real one) just before the kids go to bed on Christmas Eve. We also read the Christmas story from the book of Luke.

I've reminded you previously in this space¹⁵ to be very careful what you post on social networking sites such as Facebook or MySpace.¹⁶ Several of you have sent me another law enforcement Facebook horror story. In this one, an Indiana State Trooper said he was not so much a trooper but a "garbage man, because I pick up trash for a living." Even worse, an off-duty photo shows him holding a gun to another off-duty officer's head and status posts from that day told everybody that both officers had been "drinking lots of beer." Not only can such items be subpoenaed by defense attorneys and used in court, but you can be disciplined for bringing the Department into disrepute even due to off-duty stupidity. Remember this before posting that picture or status update.¹⁷

And then, in a twinkling, I heard in the yard, some jawing and yelling over a fixed game of cards. As one drew back his fist and was turning around, the other one's punch brought him straight to the ground.

When evaluating the appropriate charge for an assault, don't forget to consider Habitual Misdemeanor Assault. This crime was modified in 2004 to make it much easier to charge. If a person commits one of the various types of misdemeanor assaults under G.S. 14-33 and causes physical injury or Assault by Pointing a Gun (G.S. 14-34), and has two or more felony or misdemeanor assault convictions within the last 15 years, he may be charged with the Class H felony of Habitual Misdemeanor Assault. If he also qualifies as a Habitual Felon, you can now send him to prison for 10 years instead of 4 or 5 months. This can be a very helpful tool for our repeat offenders.

One other assault related item: it is a Class H felony for a person subject to a domestic violence protective order (50B) to own, possess, purchase, or receive a firearm, machine gun, ammunition, permit to purchase a firearm, or a carry concealed permit while the 50B is in effect.¹⁸ This is a separate charge from the charge for violating a domestic violence protective order.¹⁹

I spoke not a word, but went straight to my work, filed nuisance abatement papers, then turned with a jerk, shut down my computer, and locking my door, said I won't be at work till 2009 is no more.

I sprang to my car, though not a Mercedes, and away I flew like a bat out of Hades.²⁰ But I stopped to exclaim, 'ere I drove out of sight, "Happy Christmas to all, and to all a good night!"

Brian T. Beasley

Police Attorney

High Point Police Department

¹⁵ See "Discovery Dilemmas," 2 L.Q.O.W. 8 (Mar. 27, 2009).

¹⁶ Or "That Facepage" as my computer illiterate mother calls it.

¹⁷ Friends don't let friends facebook while drunk.

¹⁸ G.S. 14-269.8. The possession of a firearm while subject to a domestic violence protective order is also a federal offense under 18 U.S.C. 922(g).

¹⁹ G.S. 50B-4.1.

²⁰ This is a particularly bad line, but I never claimed to be Emerson. More like Dr. Seuss.