

## LOSS CONTROL TOPIC

### REPOSSESSING AUTOS

Every financial institution that grants automobile loans eventually has to engage in the repossession of some collateral after a loan default. Most of the repossessions are accomplished through the use of outside repossession/towing companies. The financial institution typically has an ongoing contractual agreement with the repossession company who undertakes securing the location and the collateral. Most of the repossession activities occur at night, when the borrower is asleep or at an opportune time when the vehicle is parked in a public place, usually a mall or shopping area.



Because repossession involves an element of sleuth and a clandestine act, there exists a real possibility for direct confrontation between the repossession company and the borrower. This can lead to allegations of bodily injury and/or property damage because of the negligent or intentional acts of the repossession

company. The Uniform Commercial Code requires that the act of repossessing collateral be performed without a “breach of the peace”.

There are numerous court cases where liability for the negligent repossession of collateral has attached to the lending institution on the theory that the repossession company is an agent of the lending institution and not an independent contractor because of their longstanding contractual relationship. For example, in one case, the repossession company poured oil on the borrower’s garage floor in order to be able to pull a front wheel drive car out of the garage. When the borrower entered the garage later, he slipped on the oil and suffered a spinal fracture. Another case involved a borrower who tried to intervene in the repossession process by grabbing on to the tow truck door handle as it pulled away. The driver sped forward, causing the borrower to fall under the wheels of the tow truck suffering fatal injuries. While these case examples are extreme, they point to the potential liability exposure that exists.

The selection of a repossession company and the wording of the vendor contract are critical to minimizing legal liability arising out of the improper, illegal or negligent repossession of collateral.

### **Selection of the Company**

Care should be taken to select a reputable repossession company. You should ask them for customer references that can be contacted. They should have years of experience and be active members of the American Recovery Association or the Towing and Recovery Association of America. They should agree to:

- Match VIN numbers with your records on all repossessed vehicles
- Carefully inventory and secure all vehicle contents
- Provide a detailed vehicle condition report
- Secure all repossessed vehicles in a fenced and locked area on their premises or tow them to a pre-selected storage yard
- Provide a verbal report on the above within 24 hours of repossession and a full written report within 5 days

### **The Contract**

Other than the items listed above and other standard contract wording, you should insist on an indemnity and/or hold harmless agreement in the contract (See our Risk Topic “Facilities Contractors for a more detailed discussion of vendor contracts).

If the contract contains a hold harmless/indemnity agreement requiring the repossession company to “hold harmless and defend” the financial institution from any claims arising out of the negligent acts of the repossession company, and a requirement that the repossession company carry liability insurance naming the financial institution as an additional insured, there is a good possibility that any defense and indemnity costs for the financial institution that arose out of the repossession company’s sole negligence could be assumed by their liability insurance carrier. The contract should also specify the amount of liability insurance limits deemed sufficient by the financial institution and this should be separately provided on a certificate of insurance.

## **Stored Vehicles**

Under no circumstances should repossessed vehicles be driven for any purpose by you or your employees. You should also not allow any prospective purchaser of the vehicles to test drive them. This can cause coverage issues with your general liability and commercial auto carrier as these can be seen as activities requiring garagekeepers liability insurance. It is a good practice to leave the vehicles at a reputable storage yard until they can be auctioned off.

## **Source Materials**

Uniform Commercial Code, Section 9-609 (b) (2) [www.law.cornell.edu.ucc](http://www.law.cornell.edu.ucc)

American Recovery Association [www.repo.org](http://www.repo.org)

The Towing and Recovery Association of America [www.towserver.net](http://www.towserver.net)

*These guidelines are intended to offer general suggestions for follow up and discussion and should not be considered a substitution for professional legal advice.*

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