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ALERT

FEBRUARY 2005

FINANCE INSTITUTION HELD LIABLE FOR REPOSSESSOR'S ACT, BUT REPOSSESSOR LET OFF THE HOOK: *CAN IT BE?*

A recent decision by an appeals court in New York should serve as a reminder to financing institutions to periodically review their practices and procedures for repossessing collateral.

It is common knowledge that the Uniform Commercial Code ("UCC") clearly states that a secured party may take possession of its collateral or render the collateral unusable without judicial process, only if it can do so "without breach of the peace." UCC §9-609(b)(2). What is not clear from the statute, but has been made clear by the Official Comments and case law, is that the duty not to breach the peace is non-delegable and a secured party will be held liable for the actions of an independent contractor, even if applicable tort law would have insulated the secured party from liability.

If a secured party uses its own employees to effectuate repossessions, the secured party would be liable for the employees' actions under the theory of respondeat superior, even in the absence of the statutory liability imposed by the UCC. Under the common law of torts, a secured party would generally not be held liable for an injury caused by an independent contractor it retained or by an employee of the independent contractor. However, under the UCC, the secured party will be held liable regardless of whether the breach of the peace is caused by its own employee or by an independent contractor. Although liability is imposed on a secured party whether a breach of the peace is caused by an employee or an independent contractor, the distinction between the two remains important, as was highlighted by a recent appellate decision in New York.

In General Motors Acceptance Corp. v. Vucich, (decided January 20, 2005) the issue was whether the borrower's claims against GMAC for injuries suffered in an altercation with an employee of a repossession company retained by GMAC, were barred by the statute of limitations. In that case, the borrower's claims were filed more than two years after the repossession and the alleged injury. GMAC and the repossession company both moved to dismiss the borrower's claims on the ground that the claims were barred by New York's one-year statute of limitations applicable to claims arising from battery. The trial court found that the one-year statute of limitations barred the claims against the repossession company, but that the claims against GMAC were subject to the three-year statute of limitation applicable to claims based upon a liability imposed by statute. The appellate court affirmed.

How could the repossession company that allegedly caused the injury have escaped liability, while GMAC was still subject to the claim? Interestingly, the answer lies in the fact that under the common law of torts, GMAC would not have been liable for the acts of its independent contractor.

New York's highest court has held that the three-year statute of limitations applicable to a claim based upon a liability imposed by statute, only applies if the liability would not exist but for a statute. If the statute merely codifies an existing common law liability, the claim is governed by the statute of limitations applicable to the common law source. In the GMAC v. Vucich case, that common law source was the tort of battery, which is governed by a one-year statute of limitations. But since GMAC could not be held liable for a battery committed by its independent contractor, its

liability would not exist but for the statutory liability imposed by the UCC. The irony of the case is that had GMAC's own employees performed the repossession and committed the battery, then it would have been liable under the common law and the one-year statute of limitations would have applied to bar the claim.

While this recent case should not be viewed as a catalyst for financing institutions to bring their repossessions in-house, it should provide an incentive for each institution to review: a) the practices and procedures used by its outside repossession companies; b) the existence of indemnity agreements between the financing institution and its repossession companies; and c) any insurance coverage relied on by the financing institution to protect itself from claims related to repossession activities.

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