A Guide to Vehicle Repossession In Delaware

When you finance or lease a car, truck or other vehicle, you usually give the creditor an interest in the vehicle to secure the loan debt. This interest allows the creditor to take your vehicle when you have missed loan payments and have not resolved the problem by contacting the creditor to work out an alternative payment arrangement. When the creditor takes your vehicle, it is called a "repossession." The creditor can repossess your vehicle without going to court and without prior notice unless your security agreement requires notice.

WHAT SHOULD YOU DO IF YOU ARE UNABLE TO MEET YOUR LOAN PAYMENTS?

You can delay or avoid repossession of your vehicle, in some cases, if you talk to your creditor as soon as you realize that you will be late on a loan payment. When you contact your creditor, you should try to negotiate a modified payment plan or modification of the loan. You should ask the creditor to put any modifications in writing. This writing is generally called a "workout agreement."

SHOULD YOU VOLUNTARILLY SURRENDER THE CAR?

The creditor may ask you to voluntarily surrender the vehicle rather than wait for them to repossess. This surrender is known as a voluntary repossession. In general, you should surrender the car voluntarily only in exchange for the creditor giving up

some right, such as, if the creditor agrees to waive its right to seek the remaining balance owed or agrees not to report the default to the credit reporting agencies. In addition to possibly negotiating more favorable terms of repossession, you might save money by avoiding repossession costs and attorney's fees through voluntary repossession.

DO YOU HAVE THE RIGHT TO CURE THE DEFAULT?

In most cases, you will **not** have a right to cure the default, which means that you will **not** be able to pay missed payments in order to get your vehicle back. You only have the right to cure a default in Delaware if your installment contract provides for a balloon payment and this balloon payment is the one that you missed. A balloon payment means a final loan payment that is much larger than the regular payments. If you have a right to cure the default on the balloon payment, then you have an absolute right to obtain a new payment schedule, and the payments under the new schedule must not be substantially greater than your original installment payments.

DO YOU HAVE A RIGHT TO REDEEM THE VEHICLE?

If you are unable to cure the default, you still have an absolute right to redeem the vehicle any time before the creditor has sold or otherwise disposed of the vehicle. To redeem your vehicle, you must pay the total remaining amount of the loan due, not just the delinquent installments. Plus, you might have to pay reasonable repossession expenses and attorney's fees if any were actually incurred.

COULD BANKRUPTCY HELP YOU PREVENT REPOSSESSION?

You should contact an attorney to find out whether filing a bankruptcy petition would be the best way to deal with your financial problems. As soon as you file for bankruptcy, Bankruptcy law automatically stops any threatened repossession. However, the secured creditor can later ask the court to lift the automatic stay so

that they can proceed with repossession. In some cases, bankruptcy may allow you to recover possession of a vehicle which has already been repossessed. Bankruptcy law also provides you with options to cure defaults and redeem the vehicle which are more favorable than under non-bankruptcy law. For example, in certain circumstances, bankruptcy allows you to redeem the vehicle by paying the fair market value (current value) of the vehicle rather than paying the total amount remaining on the loan.

Seizing the Vehicle

DOES THE CREDITOR HAVE A VALID SECURITY INTEREST IN THE VEHICLE?

A creditor must have a legally enforceable security interest in the vehicle before they can seize it. "Security interest" means a legal share of the vehicle which secures payment of the debt. The security interest is created when you sign a security agreement with the creditor. The security agreement is usually part of the contract you sign when you buy a vehicle on credit.

In order for the security interest to be valid all of the following must be present: (1) You must have signed the security agreement; (2) The security agreement must provide a description of the vehicle used as collateral; and (3) The security agreement must say that you give the creditor a security interest in the vehicle. **Without a valid security interest a creditor has no legal right to repossess the vehicle.**

WERE YOU IN DEFAULT?

In addition to the requirement that a creditor must have a legally enforceable security interest in the vehicle, the debtor must also be in default before they can seize the vehicle. The Delaware Commercial Code does not define the word "default." Typically, the security agreement defines the word "default." For example, an agreement for Ford Motor Credit Company defines default as follows:

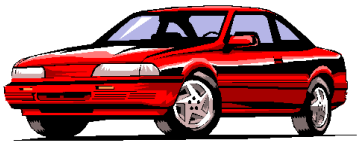
> You will be in default if:
>
> 1. You do not make a payment when it is due; or
> 2. You gave false or misleading information on your credit application relating to this contract; or
> 3. Your vehicle is seized by any local, state, or federal authority and is not promptly and unconditionally returned to you; or
> 4. You file a bankruptcy petition or one is filed against you; or
> 5. You do not keep any other promise in this contract.

If you are not sure what your security agreement says, keep in mind that you will be in default on your car loan if you fail to make loan payments on time, fail to maintain adequate insurance on your vehicle, or violate some other provision of the agreement.

WAS THE SELF-HELP REPOSSESSION PROPERLY CONDUCTED?

The secured creditor has a right to repossession after default. Advanced notice of the repossession is not required in Delaware unless your contract otherwise requires it. The secured creditor may take possession of your vehicle without going to court, but it must seize the vehicle without a breach of peace. Whether a breach of peace has occurred is ultimately determined by the courts. Remedies are available for you if the creditor wrongfully seized your vehicle. You should consult an attorney to determine whether the self-help repossession was properly conducted and to

determine whether any remedies are available.



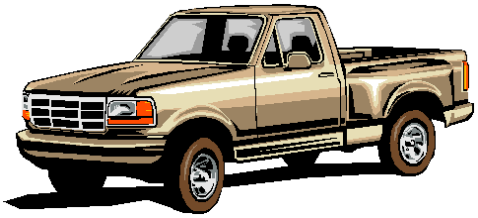
Selling the Car

WAS THE NOTICE OF SALE PROPER?

Although notice is not required prior to the repossession, the creditor must give you proper notice before selling the vehicle or otherwise disposing of the vehicle. Notice for private sale of the vehicle is slightly different than notice for a public sale. The Delaware Commercial Code states that notice is sufficient if it (1) describes the debtor and the secured creditor; (2) describes the vehicle being repossessed; (3) states the method of sale or disposition; (4) states that the debtor is entitled to an accounting of the amount you owe; (5) states the date, time and place of a public sale or states that the vehicle will be sold at a private sale sometime after a certain date; (6) states that the debtor is liable for any deficiency; (7) provides a telephone number to call so that the debtor may redeem the vehicle; and (8) provides a telephone number or mailing address so that the debtor may request more information about the sale. One example of a creditor who failed to meet reasonable notice requirements is where the creditor sent notice to debtors at the wrong street address, a former residence, and sent notice to their current address with the wrong zip code.

WAS THE DISPOSITION OR SALE PROPER?

Every aspect of selling or disposing of the vehicle must be commercially reasonable, including the method, manner, time, place and terms. Commercial reasonableness includes determining whether there was an improper delay in the date of the sale. Sales of repossessed vehicles will be set aside only if the sale price is so low as to shock the conscience of the court. In general, the standard has been met where the sale price represented 50% of the fair market value.



Paying the Deficiency

WAS THE DEFICIENCY COMPUTED CORRECTLY?

A deficiency is the difference between the amount owed under the security agreement and the amount the creditor is able to recover upon selling the vehicle after default. The money from the sale will reduce the amount you owe. If the creditor gets less money than you owe, you will still owe the difference. If the creditor gets more money from the sale than you owe, you will get a refund of the extra money and there is no deficiency. Typically, to calculate the balance due on the deficiency, the creditor takes the unpaid amount you owe under the contract plus late charges, earned and unpaid interest, costs of repossession and sale, minus the proceeds of the sale. You should receive a rebate for unused credit insurance and unearned interest. The creditor should only be allowed reasonable charges for repossession, attorney's fees, storage, towing, repair and reconditioning expenses. A creditor is allowed to sue you for a deficiency judgment to collect the remaining amount owed on the deficiency.

IS THE CREDITOR ENTITLED TO A DEFICIENCY?

In Delaware, failure to strictly comply with the notice provisions of the Delaware Commercial Code regarding the sale of the vehicle may be raised as a defense as to prevent the creditor from recovering a deficiency judgment. For example, where the creditor provides an accounting of the amount due in the notice but fails to account for the rebate of unearned finance charges and insurance premiums, this error in the amount is a defect in the notice. As a result, the creditor is barred from recovery of a deficiency. If a creditor sues you for a deficiency judgment, you should consult an attorney to find out whether you have any defenses which reduce or completely prevent the deficiency judgment.

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