1978 S.C. Op. Atty. Gen. 48 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-30, 1978 WL 22513

Office of the Attorney General

State of South Carolina
Opinion No. 78-30
February 16, 1978

***1** Mr. Neal Forney
Assistant Director
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QUESTION:

Does a creditor have the right to break into and 'hot wire' a car in order to retake possession of the collateral?

AUTHORITIES:

Section 36–5–903, 1976 Code of Laws of South Carolina;

Section 37–5–112, 1976 Code of Laws of South Carolina; Buchanan v. Crites, 150 P. 2d 100, 196 Utah 428 (1974);

Winchester v. Becker, 4 Cal.App. 382, 88 P. 296 (1906); Willis v. Whittle, 82 S.C. 500, 64 S.E. 410 (1908);

Thompson v. Ford Motor Credit Co., 324 F.Supp. 108 (DCSC 1971), Lyda v. Cooper, 169 S.C. 451, 169 S.E. 236 (1933);

Ford Motor Credit Co. v. Ditton, 144 UCC Rep. Serv. 1474 (Ala. Civ. App. 1974).

DISCUSSION:

You have asked whether a creditor claiming the right under Section 36–5–903 of the 1976 Code of Laws of South Carolina may break into and 'hot wire' a car as a method of repossession. It is the opinion of this Office that the situation is not governed by Section 36–5–903, but by Section 37–5–112 of the 1976 Code; accordingly, the method of repossession employed may not lawfully involve the 'use of force or other breach of the peace.' Therefore, a creditor or his agents may not repossess a car by breaking into and 'hot wiring' it.

South Carolina has enacted the Consumer Protection Code, Title 37, which governs this situation. (See Section 37–2–104, 37–1–201(3) of the 1976 Code.) Section 37–1–103 of the 1976 Code states that 'unless displaced by the particular provisions of this title, the Uniform Commercial Code and the principles of law and equity . . . supplement its provisions.'

Accordingly, a creditor's right to repossess collateral due to default in a consumer transaction is governed by Section 37–5–112 of the 1976 Code. The provisions of that section displace Section 36–5–903 of the 1976 Code; therefore, a creditor must comply with Section 37–5–112 when repossessing collateral. (See Section 37–5–110, 37–5–111 of the 1976 Code regarding the creditor's duties before proceeding under Section 37–5–112.)

Section 37–5–112 of the 1976 Code states:
Upon default by a consumer with respect to a consumer credit transaction, unless the consumer voluntarily surrenders possession of the collateral to the creditor, the creditor may take possession of the collateral without judicial process

only if possession can be taken without entry into a dwelling used as a current residence and without the use of force or other breach of the peace. (Emphasis added.)

Therefore, the question turns upon whether breaking into and 'hot wiring' a car constitutes a breach of peace or use of force in violation of Section 37–5–112 of the 1976 Code.

The Consumer Protection Code does not define 'force' or 'breach of peace'. Black's Law Dictionary (4th ed) defines force as 'strength directed to an end'. In Buchanan v. Crites, 150 P.2d 100, 106 Utah 428 (1944), the court said that where a 'defendant who entered dwelling of which he had right to possession and of which plaintiff was tenant at will, by unlocking the door from its hinges, entered by 'force''. Also cited in Buchanan was Winchester v. Becker, 4 Cal.App. 382, 88 P. 296 (1906), which held that 'force is to be regarded as breaking open the door or window of the house'. Applying the ordinary meaning of force and court interpretations of acts constituting force, it appears certain that breaking into a car constitutes an act of force.

***2** Willis v. Whittle, 82 S. C. 500, 64 S.E. 410 (1908) is the classic South Carolina case involving breach of the peace in a repossession situation. The case involved a mortgagee's right to seize mortgaged chattels after the condition of sale was broken. The Court stated that,

[T]here is one restriction, however which the law imposes upon this right. It must be exercised without provoking a breach of the peace; and if the mortgagee finds that he cannot get possession without committing a breach of peace he must stay his hand, and resort to the law, for the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possession of it. Id. at 502.

The District Court of South Carolina recently interpreted what constituted a breach of peace in Thompson v. Ford Motor Credit Co., 324 F.Supp. 108 (DCSC 1971). In that case a creditor had located the car in a public parking lot, with the keys in the ignition, and took possession of it. The debtor claimed that the creditor breached the peace in repossessing the car, thereby violating Section 36–9–503 of the 1976 Code (Section 37–5–112 had not yet been enacted). The district court cited several South Carolina cases establishing the offense of breach of peace. Quoting Lyda v. Cooper, 169 S.C. 451, 169 S.E. 236 (1933), the court said,

In general terms, a breach of the peace is a violation of public order, a disturbance of public tranquility, by any act or conduct inciting to violence. By peace is meant the tranquility which is enjoyed by the citizens of a community, where good order reigns among its members, which is the right of all persons in political society . . .. 324 F.Supp. at 115.

Based on this general definition, the court in Thompson held there was no breach of the peace. It stated,

[T]he stipulated facts do not reveal that anyone was caused, or exhibited any excitement at the parking lot where the car was repossessed. Id.

The court also noted, however, that no element of violence is needed in order for repossession of collateral to constitute a breach of the peace within the contemplation of the UCC.

In light of the foregoing cases, it appears that the method of repossession in question would constitute a breach of peace since it is reasonable to assume that breaking into and 'hot wiring' a car could cause a 'disruption in the public tranquility' or excitement where the act is being performed. Other cases addressing the issue of creditor repossessions support this conclusion. See, Ford Motor Credit Co. v. Ditton, 14 UCC Rep. Serv. 1474 (Ala. Civ. App. 1974), which involved a credit company which repossessed a car by towing it from a public parking lot. The court held there was no breach of the peace. The court quoted Street v. Sinclair, 71 Ala. 110, stating that the right to seize is 'subject to the limitations that recaption must not be perpetrated in a riotous manner or attended with a breach of peace'.

***3** It should be emphasized that the above-mentioned cases interpreted less restrictive statutes governing self-help repossession, breach of peace being the only limitation. However, the controlling statute in the present situation prohibits the use of force, as well as breach of peace. Therefore, it must be concluded that in the usual situation repossessing a car by breaking into and 'hot wiring' it involves the use of force and a breach of the peace, both of which violate Section 37–5–112 of the 1976 Code. This does not mean that the creditor may not repossess the collateral. However, he must proceed in accordance with the limitations established in Section 37–5–112 of the 1976 Code and other relevant provisions.

CONCLUSION:

Therefore, it is the opinion of this Office that a creditor may not 'use force' or a 'breach of peace' in order to retake possession of collateral, therefore, the has no right to break into and 'hot wire' a car in that effort.

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