



Legal Aid  
Society of  
Hawai`i

## Repossession of Personal Property (not real estate)

Use this brochure if you have personal property (including a car, furniture, etc.) that is being repossessed by your creditor.

### IMPORTANT NOTE:

If your home or land is being repossessed, this brochure is not appropriate for your situation. Call Legal Aid for more information on what to do in this situation. Please visit us on the Web <http://www.legalaidhawaii.org>.

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## **Repossessions of personal property (NOT REAL ESTATE)**

### What is Repossession?

If you have fallen behind (**defaulted**) on loan payments AND have used an item of personal property as collateral for that loan, then the party who lent you the money (the **secured party** or the **creditor**) has the right to take that property or collateral. This is called **repossession**.<sup>1</sup>

### What is Collateral?

Collateral can include any form of personal property (including a car, furniture, appliances, jewelry, etc.). If you default on a loan with collateral, the creditor can repossess the collateral. Once the creditor gets the collateral from you, that party uses it to pay off the money that you owe, usually by selling the collateral.

### What is a Default?

In order to determine whether or not you have defaulted on a loan, read the **security agreement** which you signed with the creditor. The security agreement is the contract that governs the relationship between you and your creditor, and describes both parties' rights and liabilities. Default can include the following:

- your late payment or non-payment; OR
- your failure to purchase insurance covering the collateral (for example, car insurance); OR
- moving the collateral to another location without the creditor's permission; OR
- violating any other restrictions set up by the creditor in the security agreement.

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<sup>1</sup>H.R.S. ch. 490:9-503.

**Note:** Keep all contracts and security agreements in a safe place. Do **not** keep them inside property that could be repossessed (for example, a car).

## HOW DOES A CREDITOR REPOSSESS THE COLLATERAL?

Usually the creditor will attempt to reclaim collateral in one or more of the following ways:

- (1) A Work-out Agreement,
- (2) Voluntary Surrender,
- (3) Self-help Repossession, AND/OR
- (4) Judicial process.

### 1. Creating a Work-out Agreement With You

Before a repossession, a creditor may first try to work out an agreement with you in order to try to avoid repossession. The creditor may try this first because it can be an easier and less expensive way to get their money back.

If you decide to work out an agreement:

- (a) **Get it in writing;**
- (b) Do not agree to make payments you cannot afford;
- (c) Do not make big payments without a written guarantee that you can keep the collateral. If you do not get a written guarantee, you may make big payments and lose the collateral anyway.

### 2. Having You Voluntarily Surrender the Collateral

If you and the creditor do not work out a new agreement OR if you the agreement doesn't work, the creditor may try to get you to voluntarily give the collateral to the creditor.

It may be in your best interest to voluntarily surrender the collateral to the creditor rather than wait until the creditor repossesses it on its own because:

- **Voluntary surrender will probably save you additional costs.** If you refuse to return the collateral voluntarily, you will have to pay for the creditor's expenses, such as money spent on repossession. These additional costs will be added to the amount of your debt.
- **Voluntary surrender may protect other items of personal property.** It insures that the creditor does not take anything other than the collateral (for example, tools left in the trunk of your car) when repossessing the collateral.
- **Voluntary surrender may prevent damage to the collateral which may occur during repossession.**
- **Voluntary surrender may be a good bargaining tool when you deal with creditors.** For example, in return for the voluntary surrender, the creditor may agree not to include your default in a credit report, or the creditor may agree not to seek a **deficiency** (more money from you to pay whatever amount you owe that the collateral doesn't cover). If you do win any concessions from the creditor, make sure to get the creditor to agree to the concessions in writing. Read the agreement carefully and do not sign it if you do not understand it.

**IMPORTANT NOTE: Voluntary surrender of collateral does not mean that you do not owe any more money.** Even if you do surrender the collateral voluntarily, you will probably still owe the creditor money. Once the creditor gets the collateral from you, they will sell it and use the money to pay off your debt. If the money they get from the sale is less than your debt, you may still be responsible for the remaining debt. **Almost every car repossession results in a deficiency because repossession sales always bring low prices. Thus, a voluntary repossession is not likely to completely erase a debt.** See section on "Sell the Collateral" on page 8 for more information.

### 3. Creditors May Do A Self-Help Repossession

If a work-out agreement or a voluntary surrender is unsuccessful, creditors have the right, after you default on a loan, to take possession of the collateral: this is called **repossession**. In many cases, the creditor does not need a court order or any assistance from a law enforcement official to repossess the collateral; in other words, the creditor can use **self-help** measures to repossess the collateral. However, the creditor **must** repossess the collateral without a **breach of the peace**. If the creditor is not able to seize the property without a breach of the peace, the creditor must go to court. See text box for what a creditor can and cannot do.

Repossession of collateral will usually ask you to sign papers that say you are *voluntarily* giving up the collateral and certain rights. Many debtors mistakenly believe that signing these papers will cancel any debt owed to the creditor. **Read the document very carefully, and do not sign it if you do not agree with what it says, or if there is anything you do not understand.**

### What the Creditor Can and Cannot Do

Generally, the following are considered a breach of the peace:

- using violence or force;
  - making threats;
  - pretending to be a legal authority (for example, pretending to be a police officer);
  - entering the debtor's residence or closed garage without consent or a court order;
  - destroying private property;
  - failing to get off the debtor's property if the debtor, or some member of the debtor's family, asks the reposessor to leave;
  - taking any property when the debtor objects at the time the repossession is being attempted;
- AND/OR
- using abusive, coercive, and harassing behavior; including language.

Creditors can:

- Tow a car from a public road, an open parking lot, your yard, or an unenclosed carport;
- Enter your house if they get permission from you or someone in the home (including a child) OR if they have a court order;
- Use stealth, trickery, or fraud to repossess collateral as long as the creditor does not pretend that they have legal authority to repossess.

For example, a reposessor can break into your car late at night, "hot wire" the ignition, and drive away.

**b. What You Can and Cannot Do to Resist Repossession Attempts**

If you want to resist the creditor's repossession attempts, there are several methods you can use and some methods you should not use. Remember: if you prevent the creditor from repossessing the collateral, you will increase what you owe to cover the creditor's repossession costs and attorney's fees. Resisting repossession does buy you some time to continue to use the collateral, but you risk facing more expenses. By forcing the creditor to use more elaborate repossession measures or to go to court, you may increase your ability to work out a deal with the creditor. If you want to prevent repossession (at least temporarily), then follow the guidelines in the text box below.

**TO RESIST REPOSSESSION, YOU SHOULD:**

- Notify the creditor **in writing** not to trespass or to threaten you;
- Notify the creditor **in writing** that you object to any repossession;
- Call the police if you think the reposessor is violating the law;
- Arrange for neighbors and relatives to witness reposessor's threats, violence or trespass, and to witness your objections to the reposessor's actions;
- Make sure that anyone claiming to be a government official is telling the truth (request official identification) and has a court order to seize the property;
- Secure collateral within a closed and locked structure or with a chain or lock;

**YOU SHOULD NOT**

- Allow, or anyone else in your house allow, a reposessor to come onto your property or to take the collateral (this is especially important in the case of household goods);
- Resort to violence;
- Resist seizure by a sheriff or other government official;
- Attempt to hide or transfer the collateral to another person. Doing so is a criminal offense.<sup>2</sup>
- Leave valuable personal items or contracts in collateral threatened with repossession.

**c. Personal Items Seized with the Collateral**

Avoid leaving personal items in collateral threatened with repossession. If you can't avoid leaving such items in the collateral, keep a list of all items in the collateral and the approximate value of the items. Also try to have witnesses who know what items you left in the collateral when it was seized.

If personal items are seized with the collateral, contact the debtor or collection agency in person or by telephone and demand return of your personal property. If the debtor or collection agency is not being cooperative, write them a letter to them, listing the property taken with the collateral and the approximate value of the property. Keep one copy of the letter for yourself, and send another dated copy to the creditor or collection agency by certified mail, return receipt requested (to prove that the creditor received the

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<sup>2</sup>H.R.S. ch. 476-27.

letter).

Some creditors or collection agencies may ask you to sign a form before they return your personal property. **Read any such form very carefully before signing.** The creditor may try to get you to waive other rights in exchange for getting your property back. Refuse to sign the form if you are unsure about the legal effect of any part of it or if you disagree with any of the provisions of the form.

#### **4. Judicial Process OR Going to Court**

If the creditor is unable to repossess the collateral without a breach of the peace, then the creditor must initiate an action in state court to recover the collateral. Often, the creditor will not bother to sue to recover the collateral, but instead will sue for repayment of the debt itself. An action to recover possession of collateral is sometimes called **replevin**.<sup>3</sup>

##### **a. Creditor Files a Complaint**

The creditor must file a complaint in court. The complaint describes the property, states that the creditor is entitled to possession, and states that the debtor has possession of the property.\* The creditor must also post a **bond** with the court.

##### **b. Seizure of Collateral by the Sheriff**

After the creditor files the complaint, the court can issue an order to the sheriff or police officer to immediately seize the collateral and give the creditor a temporary custody until the court decides who has a right to the property. The purpose of this seizure is to hold the collateral safely until the court makes its decision.

If the sheriff or police officer has an order, s/he has the right to enter your residence to seize the property and can order you to assist in the seizure. At the same time as the property is seized, you should receive a copy of the complaint, the bond, and the order for immediate seizure.

\*\*If you want to avoid giving the collateral to the creditor, you can post your own bond before the collateral is turned over to the creditor. The amount of the bond is decided by the court.

##### **c. Your Answer to the Complaint**

In response to the creditor's Complaint, you have twenty calendar days to write an Answer to the Court, telling your side of the story and presenting your defenses. Make sure to include the following:

1. The word "Answer" at the top of the page;
2. The names of the parties (plaintiff and defendant) exactly as they appear on the top left

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<sup>3</sup>H.R.S. ch. 654 governs actions for Special Proceedings for Immediate Possession of Personal Property.

hand corner of the Complaint;

3. The case number (this number will be on the upper right hand corner of the Complaint and you should put the number in the same place on your Answer);

In your Answer, write a response to each numbered paragraph in the creditor's Complaint, stating whether you agree or disagree with the creditor's position, and why.

For any of the creditor's statements, you can also state that you don't have enough information to agree or disagree with the creditor.

When you finish, make six copies of your Answer and take the copies and the original to the court named at the top of the creditor's Complaint. **File** your Answer with the court clerk, which means that the clerk will date-stamp the forms and keep two copies for the court files and return the rest to you. You then need to **serve** your creditor. This means that you need to mail two copies to the creditor's attorney and keep the rest for yourself. When you mail your answer to the creditor's attorney, be sure to use certified mail with a return receipt requested.

#### **d. Your Right to a Hearing**

You have a right to a hearing soon after the collateral is seized. At this hearing, you may present any defenses you have to the validity of the loan or sales contract, the credit terms, or the existence of the default.

IMPORTANT: You should know that if the creditor gets the collateral through a properly issued court order and you have no valid defenses, fighting the creditor in court just increases both sides' attorney's fees and delays the sale of the collateral. You will be responsible for the creditor's storage costs, attorney's fees and costs of repossession.

If you really want to fight the repossession action in court, go to a law library to determine if you have any valid defenses to the action and to find out what form your answer should be in. One useful source is Jonathan Sheldon, Repossessions and Foreclosures (3rd Ed.). National Consumer Law Center, 1995.

Legal Aid will not represent you in court.

## After the Repossession

Two things can happen after the creditor lawfully repossesses the collateral.

### **1. The Creditor Can Keep the Collateral**

**The creditor can propose to keep the collateral if:**

- you have paid less than sixty percent of the cash price of the property being repossessed, or
- you have paid less than sixty percent of the loan secured by the collateral.

The creditor must to give you written notice of its proposal to keep the property. If you do not agree to this proposal, you need to write a letter within 21 days. The creditor will have to sell the collateral and follow the steps listed in part B, below. **The creditor does not have to follow these steps if you signed any statement giving up these rights.**

\*\*If you think that the collateral could be sold for a price higher than the amount you owe (**including** the creditor's expenses (including attorney's fees) for getting possession of, storing, fixing, and selling the collateral), **be sure to object to the creditor's keeping the collateral.** If the creditor sells the collateral and gets more money than you owe, you may be able to get some money back.

**Beware: you may be better off without a resale. For example, repossessed cars are sold at wholesale auctions for a fraction of their value, leaving the debtor still owing money.**

## **2. The Creditor Can Sell the Collateral<sup>4</sup>**

If the creditor does not keep the collateral, they may sell, lease or otherwise dispose of the it.

The creditor can sell the collateral at either a public sale or private sale. If the sale is public, the creditor must give you written notice of the time and place of the sale. If the sale is private, the creditor must give you written notice of a date after which the car will be sold.

Any money the creditor gets from the sale for the collateral will be used:

- first, for the creditor's reasonable expenses in retaking, holding, and preparing the collateral for sale and reasonable attorney's fees and legal expenses; and
- second, for the satisfaction of your debts.

If there is anything left after paying off your debt, the creditor must give that money to you. This is called a "surplus."

Example of **surplus**: if the creditor sells the collateral for \$10,000 and the creditor's expenses are \$5,000, and you owe the creditor \$3,000, there is a \$2,000 surplus which the creditor must give you. (10,000 minus 8,000 equals 2,000 excess)

**If the money received from the sale of the**

### **What Happens If There Is A Deficiency Balance?**

If there is a deficiency balance, you will owe the creditor some money. This isn't as bad as it sounds though because normal rules of debt collection apply.

If you are judgment proof, you will not need to pay off the deficiency until you are no longer judgment proof.

If you are not judgment proof, bankruptcy may be an option.

*[Intake Advocate: go over debt collection and judgment proof scripts. Route to Consumer unit for Bankruptcy if meets case acceptance criteria.]*

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<sup>4</sup>H.R.S. ch. 490:9-504.

**collateral is not enough to pay what you owe, you will still owe the creditor money, UNLESS** the security agreement or some later agreement between you and the debtor states that you will not be responsible for any deficiency. The left over expense you owe the creditor is called a “deficiency.”

Example of **deficiency**: if the creditor sells the collateral for \$5,000 and the creditor’s expenses are \$8,000 and you owe the creditor \$6,000, there is a \$13,000 deficiency. You owe the creditor \$13,000 unless you and the creditor agreed otherwise.

**In Hawaii, nearly every car repossession results in a deficiency balance.**

When you calculate what you owe the creditor after the repossession, keep the following in mind:

You are not responsible for interest payments for the period of time when you do not have the collateral.

*For example*, when you make a 5 year car loan from a bank, the bank calculates interest for the 5 years that you will have your loan. If you default and the car is repossessed after 1 year, you are only responsible for one year’s worth of interest. You do not have to pay the interest for the entire 5 years.

### **YOUR RIGHT TO REDEEM THE COLLATERAL<sup>5</sup>**

At any time before the creditor has sold or otherwise disposed of the collateral, you can get the collateral back by paying off your entire debt (not just the payments you missed). This includes paying all the reasonable expenses the creditor has incurred for taking, holding, and preparing the collateral for sale (including attorney’s fees). The total amount you owe should take into account the set-offs for unearned interest and unearned insurance premiums.

### **YOUR REMEDIES IF THE CREDITOR BREAKS THE LAW**

Your creditor, or anyone the creditor hires to repossess your property, cannot break the law while repossessing the collateral or disposing of the collateral after repossession (including failing to give you adequate notice or failing to sell the collateral in a commercially reasonable manner).

If they do break the law, you can sue the creditor for the actual damages you suffered because of the creditor’s violation or **statutory damages** equal to the amount of the credit service charge plus ten per cent of the principal amount of the debt.<sup>6</sup> Practically speaking, it will be difficult to win this kind of claim against a creditor without the help of an attorney. However, if the creditor attempts to sue you for a deficiency, you should bring possible violations of the law to the attention of the court in your answer to the complaint.

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<sup>5</sup>H.R.S. ch. 490:9-506.

<sup>6</sup>H.R.S. 490:9-507.

## **THE BANKRUPTCY OPTION**

Filing for a Chapter 7 bankruptcy can offer you some protections and advantages if you are trying to prevent repossession of your property.

## **Bankruptcy can...**

- once you file, an **automatic stay** will take effect while your finances are being sorted out; while the stay is in place, the creditor must get permission from the court before it repossesses your property or before it sells property it has already repossessed;
- if your property has already been repossessed, surrendered, or seized by court order before you file for bankruptcy, you can request that it be temporarily turned over to the bankruptcy trustee (who, in turn, may allow you to use it) as long as it has not yet been sold;
- filing for bankruptcy allows you to recover the property by paying its value, which is usually far less than the amount you would have to pay to redeem the property (the entire debt owed plus repossession expenses) outside of the bankruptcy proceeding;
- filing for bankruptcy may eliminate any debt you would owe to the creditor as a deficiency; and
- because many of your other debts will be discharged in bankruptcy, you will have more money available to continue making payments on the loan if you can work out an agreement with your creditor.

If you plan on filing for bankruptcy to prevent repossession, you should let your creditor, and any debt collection agency the creditor has hired, know as soon as you file your petition. You should call, and send a copy of your petition by certified mail. You might also consider putting a sign in the windshield of a car that might be repossessed, informing any reposessor that they are not allowed to seize the property without the permission of the bankruptcy court.

## **Bankruptcy cannot...**

- eliminate a debt that is secured by collateral. In order to keep property that secures a debt, you will need to pay the creditor at least the value of the property.  
**Bankruptcy also has some other disadvantages, and in general, it is not a good idea to file for bankruptcy if your only goal is to temporarily prevent repossession of property.**

There are other disadvantages of filing for bankruptcy: (1) cancel all credit cards; (2) takes a while to go through and costs \$175.00; (3) will be on your credit report.