



Principles for Laws Permitting Electronic Repossession of Vehicles

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Introduction

Recently some states have begun to consider legislation enabling the use of electronic repossession—from devices to track or immobilize financed and leased cars to payment “warning” sounds to harass owners. These principles, applicable to state or federal policymakers addressing aspects of electronic repossession, provide the robust protections necessary for consumers and also address public safety and privacy concerns.

Electronic repossession and collection efforts are increasingly used in auto finance. It is even possible that software and electronics that are now built into new cars at the time of manufacture could be used to perform these same collection activities. At the same time consumers’ access to their vehicles has never been more critical and electronic repossession may result in financial disruption and loss of access to employment, day care, schooling, medical care, and other essential services.

Other forms of repossessions are regulated by state law, even if that regulation is not fully adequate.ⁱ Even the extraordinary remedy that vehicle creditors already enjoy – self-help repossession – has some restrictions, and violations can lead to substantial statutory damages.

It is not surprising that the main law governing repossessions, the Uniform Commercial Code’s Article 9, in effect in all 50 states, does not directly address electronic repossessions. Article 9 was approved in 1952, and revised in 1998, with minor changes in 1999, 2000, and 2001. Electronic repossessions at the time were uncommon.

While Article 9 does not explicitly address electronic repossessions, it does allow a secured creditor to disable “equipment,”ⁱⁱ but the definition of equipment explicitly excludes consumer goods.ⁱⁱⁱ Since consumer goods are specifically excluded from the type of property that may be disabled, it is possible to interpret Article 9 as prohibiting the use of electronic repossession for consumer goods such as cars. However, courts have not resolved this issue, and many creditors, particularly “Buy Here Pay Here” dealers and subprime finance companies, now use electronic repossession extensively.

Unlike traditional repossession, which typically entails a repossession agent taking the car, electronic repossession is generally employed directly by creditors themselves. Using the features of electronic repossession, such as keeping a car from starting, tracking the car, or making a “warning” sound when a consumer is behind or will soon be behind on a payment, is as easy as pushing a button or using a smartphone app. Given that electronic repossession is so easy and cheap to deploy when compared to hiring a repo agent, creditors may use it much more quickly and frequently. Even if a creditor does not go as far as disabling the car, it may use the potential of disablement or active tracking or warning sounds as a threat or a cudgel.

Additionally, most new cars can now be controlled to some degree through the use of software and hardware already installed in the vehicle. Soon a car may be remotely told to drive itself back to a secured creditor’s lot. At present it could simply be remotely disabled or tracked. This type of scenario may be most likely in a lease situation but also could be used in sales transactions. The use or modification of software and hardware already installed in the car by the manufacturer or software added by the finance company or dealer, either while in the dealer’s possession or over the air, would not give

the consumer the same warning that something new is being installed. It could also void a warranty or breach a license for use of the software.

Need to Address Consumer Protections in Proposed State Electronic Repossession Laws

Dealers, subprime finance companies, and manufacturers of electronic repossession devices are seeking state legislation that specifically authorizes the use of electronic repossession. While a case can be made against any authorization to use electronic repossession, to the extent laws are enacted allowing creditors to use electronic repossession, such legislation must include strong consumer protections.

The following principles provide a framework for those protections. They give consumers an avenue to avoid loss of their property by allowing them a limited period of time to catch up on back due payments. They address privacy concerns and the public safety concerns involved with the use of electronic repossession, which can endanger not only families whose cars are financed, but everyone on the roads. They also provide greater transparency for consumers. These principles offer much-needed protection for consumers when electronic repossession will be used while not prejudicing creditors that are gaining the ability to use these cheaper and easier collection methods.

Principles for Laws Permitting Use of Electronic Repossessions

- **Scope**

Electronic repossession laws should encompass:

1. Devices or software installed in vehicles by dealers, creditors, or others for the purposes of compelling payment or aiding collection or repossession efforts; and
2. Electronics and software built into a car by the manufacturer if it is subsequently used for the purpose of compelling payment or aiding collection or repossession efforts.

These principles should apply to both sale and lease of motor vehicles to individuals.

- **Principles**

- I. Privacy and Data Protections**

- a. The sale or sharing of personal data collected by any device or software used for electronic repossession should be prohibited.
- b. Any personal data collected by any device or software used for electronic repossession must be stored so as to protect the privacy and security of the consumer.
- c. Any personal data collected must be relevant to the purpose of collection or repossession and should be accurate, complete and up-to-date.
- d. Any data collected must be purged after 60 days.
- e. Consumers should have access to their personal data obtained in connection with electronic repossession.
- f. The tracking functions of electronic repossession devices or software should not be allowed to be used for geofencing (restricting the area where a debtor may operate the vehicle) or any other commercial purpose such as marketing. Instead they should only be used to track a vehicle for purposes of repossession after a consumer has defaulted and been given a 30-day right to cure the default.

II. Notification and Consent

- a. Consumers must be provided conspicuous written disclosure of i) any device or software in the vehicle that will be used for the purpose of compelling payment or aiding collection or repossession efforts; and ii) the permissible uses of the device or software.
- b. The sale of add-on products ancillary to electronic repossession should be prohibited to ensure that consumers are freely consenting to the use of electronic repossession and to avoid creating incentives for dealers to misinform consumers. For example, a dealer might tout an electronic tracking and repossession device not only as tool for repossessing the car but as part of an allegedly beneficial anti-theft package for which it will charge consumers.
- c. Dealerships that use electronic repossession should be required to post a prominent sign that vehicles sold there may be subject to the use of electronic repossession.

III. Installation Requirements and Device and Software Requirements

- a. Training and certification should be required for installers of any device or software related to electronic repossession.
- b. Any device or software to be used for electronic repossession should be certified for safety and reliability and should not violate any warranty terms.
- c. Starter interrupter devices or software should be allowed only to restrict the ability to start the vehicle and not to shut off the vehicle while it is in operation.
- d. Any software or device must be outfitted with an override option for the driver to have additional opportunities to start and operate the vehicle for a period of 24 hours.

IV. No Charge to Consumers

- a. Consumers must not be charged for any electronic repossession device or software, the installation of any device or software, or the use of electronic repossession. Part of the appeal to creditors of electronic repossession is its low cost in comparison to traditional repossession. While creditors may charge fees paid to repossession agents to consumers in traditional repossession, they should not be allowed to charge any repossession fee to consumers for the use of electronic repossession given its low cost and ease of activation. Creditors could still be allowed to charge consumers reasonable fees related to physically picking up and storing the vehicle after it has been disabled.
- b. Secured creditors must provide prompt free removal of any device and uninstallation of any software upon the satisfaction of the debt, with no accompanying damage to the vehicle.

V. Data Collection and Reporting by Entities Using Electronic Repossession

- a. Creditors and dealers should be required to report data to the state regarding demographics of consumers in transactions involving electronic repossession devices and the terms of the contracts.
- b. Creditors should be required to report data to the state regarding the use of an electronic repossession device. The data should include all occasions where a device was used to disable or track a vehicle, including where and when the device was activated, the status of the indebtedness at the time of activation, and verification that the consumer was notified of the default and the right to cure prior to activation. The data should also include information about the outcome of the repossession, including whether there was a reinstatement or a sale of the vehicle. These records should be maintained by the creditor for three years.
- c. The state should make redacted reported data available to the public.

VI. Restrictions on the Use of Electronic Repossession

- a. Before any creditor or lessor makes use of electronic repossession, including activation of the tracking capability of any device or software, it should be required to give a consumer debtor or lessee a 30-day right to cure any default.
- b. Electronic repossession activities should not be allowed until a payment is 30 days past due and the consumer has been notified of default and the right to cure. Electronic repossession activities include the use of GPS tracking of a vehicle and activation of a starter interrupter software or device to disable a vehicle.
- c. After electronic repossession or conventional repossession the debtor or lessee should have the right to reinstate the contract and regain possession and use of the vehicle by paying the past-due amounts within 30 days.
- d. The law should provide that use of an electronic repossession device or software to disable a vehicle constitutes repossession under Article 9 of the Uniform Commercial Code. This would trigger the secured creditor's post-repossession duties, such as to safeguard and maintain the vehicle and allow the debtor to "redeem" the vehicle by paying the full balance owed.

VII. Enforcement and Remedies

- a. Enforcement
 - i. A state agency should be given rulemaking and enforcement authority under the statute.
 - ii. If necessary to cover the cost of data collection and enforcement, the state should consider requiring entities that use electronic repossession software or devices to pay a fee to the state.
- b. Remedies
 - i. Any violation of the consumer protections should be defined as a deceptive trade practice, actionable under the state deceptive practices statute.
 - ii. Statutory damages and punitive damages should be made available for prevailing consumers in addition to any other remedy.
 - iii. The creditor should be liable for all remedies for violations engaged in by the creditor's employees, agents and contractors, including statutory and punitive damages.
 - iv. The creditor's agents or contractors and others involved in the use of electronic repossession should also be liable for their violations, including statutory and punitive damages.
 - v. State dealer bonding requirements should be increased and clarified to ensure that consumers can recover these remedies.

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Endnotes

i See Jonathan Sheldon, Carolyn Carter, and John Van Alst, Making Repossessions Safer and Fairer: Model Consumer Amendments to Uniform Commercial Code Article 9, June 2016, National Consumer Law Center, available at: <https://www.nclc.org/legislation-regulation/legislation-a-regulation/model-state-laws.html>.

ii U.C.C. §9-609(a)(2).

iii U.C.C. §9-102(a)(33).



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