Ford Motor Credit Company v. Byrd: Is Repossession Accomplished by the Use of Stealth, Trickery, or Fraud a Breach of the Peace Under Uniform Commercial Code Section 9-503?

Secured parties who decide to repossess collateral generally have been given much latitude in the methods used to carry out a repossession. A renowned authority on the subject of repossession has flatly stated that trickery, stealth, or fraud can be used by a secured party in effecting a repossession.[1] Most jurisdictions have not questioned the use of such methods in the course of a repossession.[2] The Supreme Court of Alabama in *Ford Motor Credit Company v. Byrd*[3] questioned this traditional position when it held that repossession of an automobile accomplished through trickery, stealth, or fraud without the consent of the debtor would support a cause of action for conversion of the collateral.[4] *Byrd* is the first case in which those grounds have been used to invalidate a repossession.

The secured party in *Byrd* requested that the debtor come to his place of business to discuss whether the debtor was in default. The debtor's automobile was repossessed while it was parked in front of the seller's place of business. The court, relying on a number of elements recognized in defining a breach of the peace, together with the particular circumstances of the case, decided that Uniform Commercial Code (Code) section 9-503 could not authorize a repossession carried out in this manner.[5]

The *Byrd* decision marks the outer limits of the degree of trickery, stealth, or fraud used by secured parties that will be tolerated by the courts. Since a purpose of the Code is to insure uniformity among the several jurisdictions,[6] *Byrd* may influence other states when faced with similar situations. This Case Comment will focus on the breach of the peace doctrine, particularly with respect to its application to repossessions effected through the use of trickery, stealth, or fraud. The Case Comment will then analyze the *Byrd* decision to determine whether the Alabama Supreme Court expanded that doctrine to include trickery, stealth, or fraud.

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1. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1, at 1212 (1965).

2. *See generally* Hogan, *The Secured Party and Default Proceedings under the U.C.C.*, 47 MINN. L. REV. 205, 211-12 (1962); Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973); Comment, *Non-Judicial Repossession—Reprisal in Need for Reform*, 11 B.C. IND. AND COMM. L. REV. 435 (1970); Comment, *Breach of Peace and Section 9-503 of the Uniform Commercial Code—A Modern Definition for an Ancient Restriction*, 82 DICK. L. REV. 351 (1977).

3. 351 So. 2d 557 (Ala. 1977).

4. *Id.* at 650.

5. *Id.* at 559.

6. U.C.C. § 1-102(2)(c). *See also* General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute, *reprinted in* 1 U.L.A.-U.C.C. xv (1976).

I. BREACH OF THE PEACE AND SELF-HELP REPOSSESSION

The right of self-help has long been recognized in the history of the law. The ancient Greeks,[7] as well as the Romans,[8] subscribed to the doctrine. The self-help impulse springs from human nature, and the law has attempted to keep it within allowable limits.[9] Pollock and Maitland wrote:

> Had we to write legal history out of our own heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory.[10]

The common law accepted the right of a conditional seller to retake collateral without the aid of the courts upon default by the buyer.[11] The 1952 Official Draft of the Uniform Commercial Code reasserted this ancient remedy in section 9-503, which provides that the secured party, upon default by the debtor, has the right to take possession of the collateral.[12] This right can be exercised without judicial process, provided the means employed do not constitute a breach of the peace.[13]

A. *Elements of the Breach of the Peace Doctrine*

The starting point for definition of a breach of the peace lies in the criminal law, which characterizes a breach of the peace as "a violation of public order, a disturbance of the public tranquility, by an act or conduct inciting to violence or tending to provoke or excite others to breach the peace. . . . It includes any violation of any law enacted to preserve peace and good order."[14] The criminal law stresses violence or the threat of violence as the most important considerations in determining that a breach of the peace has occurred. The courts drew upon the criminal law definition of breach of the peace in formulating the civil doctrines of force and constructive force.

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7. L.WHIBLEY, A COMPANION TO GREEK STUDIES 489-90 (3d ed. 1916).

8. W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 352 (1939).

9. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 574 (2d ed. 1923).

10. *Id.*

11. Annot., 55 A.L.R. 184 (1928).

12. U.C.C. § 9-503 provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

13. U.C.C. § 1-103 provides that state common law is to supplement the Code. Thus, a state's common law interpretation of what constitutes a breach of the peace can be used to construe the Code.

14. 2 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 802 (1957).

All jurisdictions forbid the use of actual force in effecting a repossession. Thus, an actual striking of a person[15] or breaking of property[16] is forbidden. An entry into a debtor's home may be found to be the use of actual force. Some courts have found a creditor's simple entry into the debtor's home for the purpose of repossession to be a breach of the peace,[17] and most jurisdictions hold a breaking and entering to be a breach.[18] These decisions seek to protect the property interests of the debtor and protect the sanctity of the debtor's home[19] by discouraging acts likely to lead to retaliatory violence.[20] A breach of the peace is less likely to be found in the repossession from a nonresidential building because there is no entry into the debtor's home and therefore less likelihood of retaliatory violence. A simple entry into a nonresidential building is not a breach of the peace, but the use of force or physical breaking is.[21] If the structure is open, such as a garage,[22] a carport,[23] or an airplane hangar,[24] courts have held that entry does not constitute a breach. Furthermore, a creditor generally can enter the debtor's property to repossess an automobile from the driveway[25] or a public street.[26]

The doctrine of constructive force covers situations in which a secured party has used intimidation or a threat of force in the course of a repossession. This doctrine prohibits acts that are *likely* to produce violence or a breach of the peace.[27] This is a departure from the common law's original requirement of actual violence or force before a breach of the peace could be found.

Professor James J. White perceives two general elements "which are crucial in defining the acts which constitute a breach of the peace: (1) whether there is entry by the creditor upon the debtor's premises; and (2) whether there is contemporaneous consent or opposition by the debtor or

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15. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 26-6 at 971 (1972).

16. Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938); General Motors Acceptance Corp. v. Vincent, 183 Okla. 547, 83 P.2d 539 (1938).

17. Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934); Kirkwood v. Hickman, 223 Miss. 372, 78 So. 2d 355 (1955).

18. Evers-Jordan Furniture Co. v. Hartzog, 237 Ala. 407, 187 So. 491 (1939); Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934).

19. Evers-Jordan Furniture Co. v. Hartzog, 237 Ala. 407, 409, 187 So. 491, 493 (1939).

20. Steward v. F. A. North Co., 65 Pa. Super. Ct. 195, 200-01 (1916).

21. C. H. Gilliland & Son v. Martin, 149 Ala. 672, 42 So. 7 (1906). *But see* Cherno v. Bank of Babylon, 54 Misc. 2d 277, 282 N.Y.S. 2d 114 (Sup. Ct. 1967).

22. *E.g.*, A. B. Lewis Co. v. Robinson, 339 S.W.2d 731 (Tex. Ct. App. 1960).

23. *E.g.*, Raffa v. Dania Bank, 321 So. 2d 83 (Fla. Dist. Ct. App. 1975).

24. *E.g.*, Kroeger v. Ogsden, 429 P.2d 78 (Okla. 1967).

25. Raffa v. Dania Bank, 321 So. 2d 83 (Fla. Dist. Ct. App. 1975).

26. McWaters v. Gardner, 37 Ala. App. 418, 69 So. 2d 724 (1954); General Motors Acceptance Corp. v. Vincent, 183 Okla. 547, 83 P.2d 539 (1938).

27. Webb v. Dickinson, 276 Ala. 553, 165 So. 2d 103 (1964); American Discount Co. v. Wyckroff, 29 Ala. App. 82, 191 So. 790 (1939); Crews & Green v. Parker, 192 Ala. 383, 68 So. 287 (1916).

one acting on his behalf to the repossession."[28] The free and voluntary contemporaneous consent of a debtor to a repossession usually forecloses the allegation of a breach of the peace, since there is no possibility of resulting violence.[29] Conversely, in most jurisdictions, if a debtor objects to repossession at the time of the attempted repossession, the secured party must end all efforts and either take advantage of the legal process or try again at a later time.[30] The reason that objection forces the secured party to end all efforts is that a debtor should not be compelled to resort to force to retain possession of the collateral.[31] Thus, courts have held that the debtor's objection serves in lieu of actual resistance to the repossession for pusposes of establishing a breach of the peace. However, whether the debtor's words alone are sufficient to amount to an objection may be an issue.[32] An unequivocal protest by the debtor will generally suffice to prevent repossession, as will third party objections.[33]

B. *Policies Underpinning Breach of the Peace*

In addition to the elements mentioned above, most jurisdictions also take into account policies supporting the breach of the peace concept. Each case presents a balancing of the interests of the debtor, the creditor, and society; allowing the secured party the freedom to regain the collateral, while protecting the debtor and society. This balancing of interests is the function of the breach of the peace doctrine.[34]

Another policy implicit in the breach of the peace restriction is that a democratic government favors resolution of disputes through institutions and not by individual, extrajudicial activity.[35] The law will allow self-help as long as it does not compromise society's interests or the personal interests of the debtor. The courts disfavor self-help because, if abused, it invades the legitimate conflict resolution function of the courts.

The policy of prohibiting actions that are violent or are likely to lead to violence also supports the breach of the peace doctrine. It in effect forbids the use of threats or intimidation in the course of a repossession.[36] In particular, this policy gives direct support to the role of constructive

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28. White, *Representing the Low Income Consumer in Repossessions, Resales, and Deficiency Judgement Cases,* 64 NW. U.L. REV. 808, 809 (1970).

29. Besner v. Smith, 178 A.2d 924 (D.C. Ct. App. 1962); Annot., 99 A.L.R.2d 358 (1965).

30. Crews & Green v. Parker, 192 Ala. 383, 68 So. 287 (1916); Manhattan Credit Co. v. Brewer, 232 Ark. 976, 341 S.W.2d 765 (1961).

31. Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 91 S.W. 1026 (1905).

32. McWaters v. Gardner, 37 Ala. App. 418, 420, 69 So. 2d 724, 726 (1954); Benschoter v. First Nat'l Bank, 218 Kan. 144, 153, 542 P.2d 1042, 1050 (1975).

33. McWaters v. Gardner, 37 Ala. App. 418, 69 So. 2d 724 (1954); Morris v. First Nat'l Bank, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970).

34. *See* note 28 *supra.*

35. 351 So. 2d at 560.

36. Thompson v. Ford Motor Credit Co., 550 F.2d 256 (5th Cir. 1977); Morris v. First Nat'l Bank, 21 Ohio St. 2d 25, 254 N.E. 2d 683 (1970).

force in breach of the peace doctrine. For example, the language used by the repossessor need not constitute a direct threat; if he uses rude, abusive, or insulting language, a breach of the peace will often be found because this increases the likelihood of retaliatory violence.[37] Actions that give rise to the possibility of violence usually occur in the debtor's presence.[38] Repossession in the debtor's absence presents no possibility of immediate violence and thus no breach of the peace in most situations. If a debtor comes on the scene after the fact, the creditor having already gained possession, this policy will not support a finding of a breach of the peace even though the debtor objects to the act.[39]

Any repossession could possibly lead to violence, because a debtor may desire revenge upon a secured party for repossessing collateral. Courts, however, have decided not to proscribe repossessions in which violence is only a remote possibility. For example, repossessions of automobiles from driveways in the middle of the night are not proscribed since there is little possibility of immediate retaliation.[40]

The judicial policy that favors the protection of the debtor's home has been discussed previously in connection with the definition of actual force.[41] A repossession that would otherwise be lawful often will be found to be unlawful if the debtor's home was significantly involved.

Words or acts of the secured party that manipulate the debtor are also considered by some courts in determining whether a breach of the peace has taken place. When the debtor is tricked by the secured party into taking actions that the debtor would not otherwise have undertaken, some courts have found a breach of the peace.[42] This policy comes into play when a debtor is manipulated into putting the collateral in a position, that allows subsequent repossession. Also, as previously noted, the debtor has the right to object to a repossession without having to defend the collateral physically. In many cases, the secured party has somehow persuaded the debtor to forfeit his right to object to repossession.[43] This type of debtor manipulation is also prohibited by some courts.[44] Debtor manipulation also can be analyzed as a violation of the good faith doctrine,[45] since the

37. Crews & Green v. Parker, 192 Ala. 383, 68 So. 287 (1916); Deavers v. Standridge, 144 Ga. App. 673, 242 S.E. 2d 331 (1978).

38. Ford Motor Credit Co. v. Ditton, 52 Ala. App. 555, 295 So. 2d 408 (1974).

39. La Porte Motor Co. v. Firemen's Ins. Co., 209 Wis. 397, 245 N.W. 105 (1932).

40. Marine Midland Bank-Cent. v. Cote, 351 So.2d 750 (Fla. Ct. App. 1977); Raffa v. Dania Bank, 321 So. 2d 83 (Fla. Ct. App. 1975); Pierce v. Leasing Int'l Inc., 142 Ga. App. 371, 235 S.E.2d 752 (1977); Ford Motor Credit Co. v. Cole, 503 S.W.2d 853 (Tex. Ct. App. 1973).

41. *See* note 15 and accompanying text *supra*.

42. *E.g.*, Walker v. Ayers, 47 Ga. App. 113, 169 S.E. 784 (1933).

43. Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

44. Walker v. Ayers, 47 Ga. App. 113, 169 S.E. 784 (1933); N.J. Scott Excavating and Wrecking, Inc. v. Rosencrantz, 107 N.H. 422, 223 A.2d 522 (1966); F.A. North v. Williams, 120 Pa. 109, 13 A. 723 (1888).

45. U.C.C. § 1-203 imposes an obligation of good faith on every contract or duty within the Code. *See* Summers, "*Good Faith*," 54 VA. L. REV. 195 (1968).

secured party is not proceeding in good faith when trying to circumvent the debtor's rights by manipulation. Manipulation of the debtor by the secured party will also affect the equities of the situation and a court will be more likely to find a breach of the peace when manipulation is present.[46]

A simple way to stop abuse of self-help repossession would be to abolish it altogether. Commentators have generally agreed, however, that self-help repossession is necessary to reduce the cost of obtaining credit.[47] Litigation only adds to the lender's expenses, which will then be passed on to others seeking credit. Defaults by poor-risk borrowers would also increase credit costs for others unless self-help repossession can be used. Further, self-help repossession protects the secured party's collateral from being sold or stolen before relief from the courts can be procured. Self-help should therefore be retained as a remedy, although the methods used by the secured party to repossess should be determined by a balancing of the interests of the secured party, the debtor, and society.

II. TRICKERY, STEALTH OR FRAUD AS A BREACH OF THE PEACE

The elements of trickery, stealth, or fraud can be found in some repossession methods. The courts, when faced with a repossession effected by those means, have reacted diversely. While none of the cases prior to *Byrd* have relied on the elements of trickery, stealth, or fraud as the sole basis for a breach of the peace in a repossession case, their presence has clearly influenced many decisions.

A. *Repair Cases*

A common method of repossession is for the secured party to take a collateral from the debtor on the pretense that the item will be repaired and presumably returned to the debtor. Having thus regained possession of the collateral in this manner, the secured party repossesses it.[48]

Whether the manner of repossession employed in "repair cases" constitutes a breach of the peace depends on two interrelated considerations. One is how the court views the manipulation that induced the debtor to return the collateral. The second, which necessarily subsumes the first, is the aggregate of equities of the particular fact situation.

The use of trickery, stealth, or fraud to manipulate a debtor is not viewed favorably by some courts.[49] Although no court has based a decision squarely on this consideration one court at least buttressed its decision by underlining the repugnance of such techniques.[50] The importance of

46. *See* notes 49-51 & 68-69 and accompanying text *infra*.

47. *See, e.g.*, Johnson, *supra* note 2.

48. *See, e.g.*, Walker v. Ayers, 47 Ga. App. 113, 169 S.E. 784 (1933); N.J. Scott Excavating and Wrecking, Inc. V. Rosencrantz, 107 N.H. 422, 223 A.2d 522 (1966).

49. Walker v. Ayers, 47 Ga. App. 113, 169 S.E. 784 (1933); N.J. Scott Excavating and Wrecking, Inc. v. Rosencrantz, 107 N.H. 422, 223 A.2d 522 (1966).

50. Walker v. Ayers, 47 Ga. App. 113, 169 S.E. 784 (1933).

debtor manipulation to the *Byrd* court's decision is evidenced by the fact that one court has held that if the secured party induces the debtor to return the collateral, the repossession is illegal.[51] On the other hand, if the debtor voluntarily returns the collateral to a third party to be repaired and the secured party then repossesses, such actions are a breach of the peace.[52] Thus, there appears to be a point at which the repossession becomes illegal. The line is drawn where the secured party manipulates the debtor; in other words, where the debtor is induced to aid in the repossession by returning the collateral. When this element is present, courts are more likely to find a breach of peace.

The second consideration that plays a strong role, not only in repair cases but in all repossession cases, is the overall balance of equities of the particular fact situation. The fact that the collateral is defective,[53] thus leading to a default by the debtor, casts the case for the debtor in a stronger light. On the other hand, if the debtor's abuse led to the need for repair,[54] a court will be more likely to sympathize with the secured party's position. If the debtor has made a large number of the payments due,[55] the court may view the debtor as trying in good faith to settle the problem. Conversely, if the debtor has made few payments,[56] the court will be less reluctant to allow a repossession. If the debtor knowingly purchased a demonstrator unit,[57] the court may be less sympathetic with the debtor's refusal to make payments until repairs are done. These circumstances play an important role in the area of breach of the peace, especially in particularly egregious situations. The court will be more inclined to grasp a new theory, as the *Byrd* court did, if the older theories do not lead to an equitable result.

Some courts view the repair situations as a simple question of force or constructive force.[58] If the repossession was effected without transgressing either doctrine, the court will find no breach of the peace.[59] One wonders whether these courts, faced with particularly egregious cases, would allow such repossessions to stand.

B. *Color of Legal Process*

A method of repossession that clearly uses trickery, stealth, or fraud is a repossession effected under the color of legal process. This area of abuse

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51. N.J. Scott Excavating and Wrecking, Inc. v. Rosencrantz, 107 N.H. 422, 223 A.2d 522 (1966).

52. *Id.*

53. Walker v. Ayers, 47 Ga. App. 113, 169 S.E. 784 (1933).

54. Montenegro Riehm Music Co. v. Beuris, 160 Ky. 557, 169 S.W. 986 (1914); N.J. Scott Excavating and Wrecking, Inc. v. Rosencrantz, 107 N.H. 422, 223 A.2d 522 (1966).

55. Ford Motor Credit Co. v. Byrd, 351 So. 2d 557 (Ala. 1977); Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).

56. N.J. Scott Excavating and Wrecking, Inc. v. Rosencrantz, 107 N.H. 422, 223 A.2d 522 (1966).

57. *Id.*

58. Cox v. Galigher Motor Sales Co., 213 S.E.2d 475 (W. Va. 1975).

59. *Id.*

is consistently prohibited by most jurisdictions[60] and may take a number of forms.

First, an agent of the secured party can dress as a police officer and attempt to repossess the collateral by representing himself as an officer of the law.[61] Second, an obliging member of a police department can accompany the repossessors and give the impression that he has a legal obligation to aid in the repossession.[62] Finally, a repossessor can represent that the creditor has a legal right to take the property from the debtor by showing papers purportedly issued by the courts or police.[63]

While this form of repossession is clearly fraudulent or deceptive, courts have usually brought it within the prohibition against the use of constructive force.[64] The theory is that use of bogus legal process intimidates or coerces the debtor to give up possession of the property.[65] While "color of legal process" repossessions fit within the strict theory of constructive force, the basic policy underpinning that theory—preventing the possibility of violence—is not as prevalent a consideration as in other situations. The possibility of violence is not very great in a repossession using this technique, possibly even less likely than in other forms of allowable techniques. Nevertheless, the courts stress that this technique is a form of coercion or intimidation that effectively forces the debtor to turn over the collateral without a protest, thus circumventing the debtor's right to protest against the repossession.[66]

The use of color of legal process in effecting a repossession is prohibited on a number of policy grounds. Such methods engender a loss of respect for the police and lead to a loss of effectiveness in law enforcement.[67] For example, the general public would begin to question whether a police officer, in a particular instance, was acting in an official capacity. One can also perceive in these cases, as in the repair cases, judicial disfavor of the manipulation of the debtor by trickery, fraud, or deceit. This disfavor is evident from cases that find a breach of the peace based on constructive force without mentioning any of the policy aspects dealing with respect for the police.[68] In such cases, the potential for violence is

60. *See, e.g.*, Thornton v. Cochran, 51 Ala. 415 (1874); Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

61. *See, e.g.*, Stallworth v. Doss, 280 Ala. 409, 194 So. 2d 566 (1967); Rhodes-Carroll Furniture Co. v. Webb, 230 Ala. 251, 160 So. 247 (1935).

62. *E.g.*, Thorn v. Kemp, 98 Ala. 417, 13 So. 749 (1893); Thorton v. Cochran, 51 Ala. 415 (1874); Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

63. *E.g.*, Thornton v. Cochran, 51 Ala. 415 (1874).

64. *E.g.*, Rhodes-Carroll Furniture Co. v. Webb, 230 Ala. 251, 160 So. 247 (1935); Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

65. *E.g.*, Firebaugh v. Gunther, 106 Okla. 131, 233 P. 460 (1925); Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

66. Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

67. Thorn v. Kemp, 98 Ala. 417, 13 So. 749 (1893); Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

68. *E.g.*, Firebaugh v. Gunther, 106 Okla. 131, 233 P. 460 (1925).

miniscule, yet the courts nevertheless find a breach of the peace.[69] Some courts assert that the secured party has circumvented the debtor's right to protest, but once again, this right is based on the policy against violence. The right to protest stems from the idea that the debtor should not have to force a violent confrontation in order to protect the collateral, not from a right to notice of an attempt to repossess. When the decisions are considered, it is apparent that, beyond the basic policy considerations, courts fundamentally disfavor such trickery or fraud in a repossession.

C. *Accord and Satisfaction*

A finding of accord and satisfaction in a repossession is another method the courts have used to prevent repossession by trickery, stealth, or fraud.[70] When the secured party sues for the deficiency owed, the suit can be denied on the grounds that the collateral was taken in satisfaction of the debt remaining. This theory has been used in situations in which the secured party has tricked the debtor into returning the collateral to the secured party.[71] The secured party need not represent acceptance of the collateral in satisfaction of the debt in order to fall prey to this doctrine.[72] One court found an acceptance in accord and satisfaction in a situation in which such an idea was never expressed by either party.[73]

As in the repair cases, the equities of a particular situation will give the court a reason to decide to free the debtor from a deficiency judgment.[74] Although the court is implicitly finding a lawful repossession, it is not allowing the secured party to recover the full amount owed under the contract. When faced with a situation in which the equities favor the debtor, the court can find an acceptance in accord and satisfaction and protect the debtor.

Throughout the cases dealing with methods of repossession using trickery, stealth, or fraud, it is apparent that the equities of a case play a large role in the ultimate decision of the court. The fact that a debtor is making a good effort to pay, or that the merchandise is defective, or the secured party is underhanded in dealing with the debtor will give the court a reason to find against the secured party. Thus, when faced with fact patterns that do not fit within the standard definitions of breach of the peace, the court will employ another doctrine, such as accord and satisfaction, or expand the scope of a doctrine, or stress different policies, as in the color of law cases, to reach the desired result. The repair cases are

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69. *Id.*

70. *See, e.g.*, McCarty-Greene Motor Co. v. House, 216 Ala. 666, 114 So. 60 (1927).

71. McCarty-Greene Motor Co. v. House, 216 Ala. 666, 114 So. 60 (1927); Moody v. Nides Fin. Co., 115 Ga. App. 859, 156 S.E.2d 310 (1967).

72. Moody v. Nides Fin. Co., 115 Ga. App. 859, 156 S.E.2d 310 (1967).

73. *Id.*

74. *Id.*

significant, for possibly the courts were flirting with the idea that trickery, stealth, or fraud alone may lead to a finding of a breach of the peace. The importance of *Byrd* is that the court explicitly does what other courts only hint at doing.

III. Facts and Holding

In 1969, appellee Verbin Byrd purchased a 1970 automobile from Bassett Ford, Inc. in Citronelle, Alabama. Byrd purchased the automobile under a retail installment contract that was assigned by Bassett Ford to appellant Ford Motor Credit Company (FMCC). In the contract Byrd granted a security interest in the automobile to FMCC. The payment schedule specified that Byrd would pay thirty-six monthly installments beginning on December 6, 1969.

On September 13, 1972, an agent of the secured party contacted Byrd at his home to discuss the status of the retail installment contract. The parties disagreed whether Byrd's payments were in arrears. In order to settle the question, the agent requested that Byrd accompany him to Bassett Ford to compare his receipts to Bassett Ford's account records. Byrd then drove to Bassett Ford, parked his car outside, and went in to review the records. While Byrd was inside the dealership disputing the alleged default, his car was taken by the secured party's agents to a locked storage area on Bassett Ford's premises.

Byrd filed a complaint in state court alleging conversion and wrongful taking of his automobile by FMCC. A claim for punitive damages was also submitted. The trial court awarded a verdict of $10,435 in favor of Byrd, which was then remitted to $5,435. On appeal, the Supreme Court of Alabama affirmed, holding that "[p]ossession of a chattel obtained through fraud, artifice, stealth, or trickery without consent of the owner, implied or expressed, is wrongful and will support an action for the conversion of the chattel."[75]

IV. Analysis of the Byrd Decision

Byrd was the first case to hold that the use of trickery, stealth, or fraud invalidates a repossession under Code section 9-503. Prior Alabama law and the case itself must be examined to determine the operative elements of the court's analysis.

A. *The Scope of Breach of the Peace in* Byrd

The Supreme Court of Alabama in *Byrd* relied on Code section 9-503, which provides that "[u]nless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process, if this can be done

75. Ford Motor Credit Co. v. Byrd, 351 So. 2d 557, 560 (Ala. 1977).

without breach of the peace, or may proceed by action . . . ."[76] The court found that Byrd was indeed in default, which gave FMCC the right to use self-help under the Code. The court, however, went on to hold that "[w]e cannot interpret § 9-503 to permit obtaining possession through trick, without knowledge upon the part of the debtor. To interpret § 9-503 to allow repossession in these circumstances would encourage practices abhorrent to society: fraud, trickery, chicanery, and subterfuge . . . ."[77] The court stressed that Alabama's public policy favors the resolution of disputes by resort to judicial process as opposed to private action, noting that FMCC could easily have used prejudgment seizure.[78]

The court in *Byrd* announced the general Alabama rule that if a secured party cannot regain possession of the collateral peaceably, then resort to the courts is necessary.[79] This is, of course, a formulation of the actual force doctrine, which requires actual violence before a breach of the peace is found. The court also found that secured parties cannot use techniques that would be "provocative of retaliatory violence and breaches of the peace . . . ."[80] This statement indicated that the court also adopted the constructive force doctrine to analyze whether the actions of FMCC constituted a breach of the peace under Code section 9-503.

At one point in the *Byrd* opinion, the court seemed to depart from the breach of the peace requirement in Code section 9-503 when it said: "[I]s self-help repossession permitted under all circumstances unless there is a concurrent breach of the peace. It is not. We cannot interpret § 9-503 to permit obtaining possession through trick, without knowledge on the part of the debtor."[81] On first reading the court appeared to hold that despite the fact that no actual breach of the peace was found, a violation of Code section 9-503 would be found because the secured party tricked the debtor. This would, of course, be outside the traditional force and constructive force doctrine and would therefore constitute a separate theory of breach of the peace. Alternatively, the *Byrd* opinion could be interpreted to mean that while such activities are not within the traditional force and constructive force doctrines, such doctrines will be expanded to encompass the type of trickery, stealth, or fraud used by the secured party in *Byrd*.

The element of debtor manipulation was also used by the court to find that the secured party's actions were unlawful. The Alabama court announced its position using the words of a pre-code Kentucky court, stating that "[t]herefore, when appellant, as appears, by artifice or trickery

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76. *See* note 12 *supra*.

77. 351 So. 2d at 559.

78. *Id.*

79. Singer Sewing Mach. Co. v. Hayes, 22 Ala. App. 250, 114 So. 420 (1927); Commercial Credit Co. v. Spence, 185 Miss. 293, 298, 184 So. 439, 441 (1938).

80. Commercial Credit Co. v. Spence, 185 Miss 293, 298, 184 So. 439, 441 (1938).

81. 351 So. 2d at 559.

obtained possession of the mortgaged property for one purpose, and asserted the right to retain such possession for another purpose, there was a conversion by it of appellee's property. . . ."[82] The Alabama Supreme Court found it important that the debtor was manipulated, or tricked, into doing something he would not otherwise have done. The repair cases [83] support this theory and are analgous.

Finally, the court placed great emphasis on the fact that, at the very moment of repossession, there was a bona fide dispute between the debtor and the secured party regarding default. The court used this fact to distinguish cases that would support the position of the secured party.[84] *Byrd* is a classic example of the effect equities can have in a given case. The equities of a situation will, as in *Byrd*, persuade a court to stretch existing doctrine or to create a new cause of action to decide for the favored party.

B. Byrd's *Relation to Alabama Precedent*

The general rule in Alabama prior to the adoption of the Code was that a party holding a security interest in property who became entitled to repossess, could take possession of the property wherever it could be found, provided there was no force or threat of force or breach of the peace. Recent cases in Alabama dealing with automobile repossession sanctioned the secured party's use of some trickery, stealth, or fraud in the course of a repossession.[85] These cases all dealt with the use of trickery, stealth, or fraud within a traditional force or constructive force analysis. Either actual violence or the possibility of retaliatory violence was required to show a breach of the peace. The courts strictly interpreted these tests and found that the secured parties had not breached the peace. One case even held that "merely to connive to repossess"[86] does not make the secured party liable to the debtor.

The *Byrd* case can be distinguished from these recent cases on two grounds. One distinguishing factor is the element of debtor manipulation present in *Byrd*. None of the previous Alabama cases dealt with a situation in which the debtor was manipulated by the secured party for the purpose of repossessing the collateral. All previous Alabama cases dealt with a secured party repossessing the collateral where the secured party found it. In *Byrd*, the debtor was tricked by the secured party into delivering the collateral to a place where it could then be repossessed by the secured

82. 351 So. 2d at 560, quoting Cable Co. v. Greenfield, 196 Ky. 314, 244 S.W. 692 (1922).

83. *See* notes 48-59 and accompanying text *supra*.

84. In its opinion, the court in *Byrd* did not mention the cases that it had distinguished. The court only mentioned in passing that "[n]umerous cases of this court are cited in support of FMCC's contention; also decisions of the Court of Appeals, the Fifth Circuit, and one of a United States District Court." 351 So. 2d at 559.

85. Thompson v. Ford Motor Credit Co., 550 f.2d 256 (5th Cir. 1977); Speigle v. Chrysler Credit Corp., 56 Ala. App. 469, 323 So. 2d 360 (1975); Ford Motor Credit Co. v. Ditton, 52 Ala. App. 555, 295 So. 2d 408 (1974).

86. Thompson v. Ford Motor Credit Co., 550 F.2d 256, 258 (5th Cir. 1977).

party. The court in *Byrd*, unable to condone this conduct, found it to violate Code section 9-503.

The second aspect that distinguishes *Byrd* from earlier cases is that in *Byrd* there was a bona fide dispute concerning the debtor's default. The debtor honestly believed that his payments were current, while the secured party contended otherwise. Notwithstanding the debtor's contentions, the secured party repossessed the collateral. The *Byrd* court used this fact to distinguish prior Alabama cases.[87] Because the equities are clearly in favor of the debtor in this situation, the court found it necessary to decide in the debtor's favor. It is not clear whether the *Byrd* court has expanded the constructive force doctrine to include trickery, stealth, or fraud, or whether it has created an entirely new theory in finding that the secured party had breached the peace.

The *Byrd* case marks the conjunction of many of the elements that courts have used to assess whether there has been a breach of the peace. First, *Byrd* presented a factual situation in which the secured party engaged in manipulation of the debtor, conduct that the courts have viewed with disfavor.[88] The *Byrd* court perceived the acts of the secured party with such distaste that it asserted that even if the actions did not come within the breach of peace restriction, the court still would not permit the law to allow such acts.[89] Second, the equities were heavily in favor of Byrd. Byrd believed in good faith that he had made all the payments due under the contract. When a dispute arose, the debtor was more than willing to try to solve the problem and his good intentions came to naught when the secured party took advantage of his cooperation by repossessing the car. The debtor was manipulated in a manner that is as reprehensible as the creditor's conduct in the repair cases.

Since the facts of *Byrd* did not fit within the definition of breach of the peace that had been used by the Alabama courts,[90] the *Byrd* court faced a dilemma. The court, pressed to decide for the plaintiff, seized upon the language of a 1922 Kentucky case[91] that had never been cited for the proposition that the use of trickery, stealth, or fraud was a breach of the peace.

The classification of trickery, stealth, or fraud as an independent form of breach of the peace and not merely as a supporting element—as in the repair or color of law cases—is an important aspect of the *Byrd* decision. How strong a precedent will the decision be for cases in which a secured party used trickery, stealth, or fraud in a repossession? What types of

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87. *See* note 84 and accompanying text *supra*.

88. *See, e.g.*, Moody v. Nides Fin. Co., 115 Ga. App. 859, 156 S.E.2d 310 (1967); Walker v. Ayers, 47 Ga. App. 113, 169 S.E. 784 (1933).

89. Ford Motor Credit Co. v. Byrd, 351 So. 2d 557, 559 (Ala. 1977).

90. *See* note 85 *supra*.

91. Cable Co. v. Greenfield, 196 Ky. 314, 244 S.W. 692 (1922).

trickery, stealth, or fraud will be encompassed within the breach of the peace restriction?

C. *Future Implications*

Because not every secretive method of repossession manipulates the debtor, it seems clear that some forms of repossession by "stealth" will still be allowed. A secured party will still be able to repossess in the middle of the night[92] from the debtor's driveway,[93] or at least from the street.

The future use of *Byrd* is questionable. As previously stated, the facts of the case are very favorable to the debtor. The court placed heavy emphasis on the fact that there was a bona fide dispute. One wonders whether the court would have found a breach of the peace if Byrd had clearly been in default. A future decision could easily distinguish *Byrd* as presenting the special situation of a bona fide dispute.

Whether to classify a repossession effected by trickery, stealth, or fraud within the constructive force concept or to place it within a separate category is a dead issue. The constructive force classification could be used, analyzing the manipulation as a form of force, because the debtor is made to do something he would not otherwise do.[94] The policy basis of constructive force, the prevention of violence,[95] is not strongly implicated in this particular form of repossession. Nevertheless, other actions that also pose a similarly miniscule threat of violence have been found by the courts to be a breach of the peace.[96]

Trickery, stealth, or fraud as a breach of the peace could be better viewed as a separate classification from force or constructive force. One policy supporting the concept is the protection of the debtor's personal interest in being free from the creditor's manipulative acts. The good faith doctrine embodied in Code section 1-203[97] also supports the view that a secured party should not be allowed to use trickery, stealth, or fraud in the course of a repossession. The good faith doctrine requires that the parties on both sides of the transaction deal fairly with each other.[98] In the *Byrd* case, the debtor satisfied this standard since he had an honest belief that he had paid all payments then due. On the other hand, the secured party had invited the debtor to his place of business purportedly to discuss the payment situation, while intending to repossess the automobile once the debtor arrived. These manipulative acts do not satisfy the "honesty in fact" standard imposed by the Code.

What can be done in the future to guide the actions of secured parties

92. *See, e.g.*, Ford Motor Credit Co. v. Cole, 503 S.W.2d 853 (Tex. Ct. App. 1973).
93. *See* note 25 *supra.*
94. *See* note 42-46 and accompanying text *supra.*
95. *See* note 27 *supra.*
96. *See* note 68 *supra.*
97. *See* note 45 *supra.*
98. *Id.*

and debtors? Since self-help is economically necessary to secured transactions,[99] the right cannot be totally eliminated. Also, in view of the diversity of repossession methods used by secured parties, it is impractical for the Code to list all allowable and forbidden methods of repossession. The drafters were wise to use the term "breach of the peace" in section 9-503, allowing courts to deal appropriately with abuses of self-help on a case-by-case basis. The reaction of the Alabama court, when faced with an abusive situation that failed to fit within the definition of "breach of the peace" previously used in Alabama, was to expand the doctrine to encompass such a repossession. The flexibility allowed in dealing with situations as they arise is the strength of the position now taken by the Code. The weakness of Code section 9-503 is that the provision has led to differing standards among the jurisdictions. Thus the creditor is faced with the problem of determining what manner of repossession is allowable. If the secured party proceeds within reason, that is, within the well-defined limits of what constitutes a peaceful repossession, a court will find no breach of the peace. If the secured party does not proceed within those limits, the likelihood of a court finding a breach of the peace increases.

V. CONCLUSION

The *Byrd* decision is unique because it bases a finding of a breach of the peace solely on the fact that a repossession was effected by trickery, stealth, or fraud. Thus, the Alabama Supreme Court has expanded the breach of the peace doctrine beyond the scope of the definition now accepted by the majority of jurisdictions. The particularly severe facts of the *Byrd* case will probably limit its future use; every use of trickery, stealth, or fraud need not constitute a per se violation of Code section 9-503. The *Byrd* decision may nevertheless influence other jurisdictions to invalidate repossessions as reprehensible as that rejected in *Byrd.*

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99. *See* note 47 *supra.*