

## The *Cobb* Notice: Beware “Reasonable Reliance” Issues in Secured Financing Agreements

Patrick D. Newman

Tal A. Bakke

Bassford Remele, P.A.

100 South Fifth Street, Suite 1500

Minneapolis, MN 55402

612.333.3000

[www.bassford.com](http://www.bassford.com)

April 2021

### What is the *Cobb* Notice?

Under Minnesota law, a lender may repossess collateral upon default by self-help (i.e., without judicial process) so long as the repossession does not breach the peace.

However, in circumstances where a lender repeatedly accepts late payments during the loan term without exercising its self-help remedy, the lender must “notify the debtor that strict compliance with the contract terms will be required before the creditor can lawfully repossess the collateral.” *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W. 2d 232, 237 (Minn. 1980).

States outside Minnesota have adopted *Cobb*-type notice requirements as well. *See, e.g., Ford Motor Co. v. Waters*, 273 So. 2d 96 (Fla. App. 1973); *Pierce v. Leasing Int’l, Inc.*, 235 S.E. 2d 752 (Ga. App. 1977); *Nevada Nat’l Bank v. Huff*, 582 P.2d 364 (Nev. 1978); *Lee v. Woods Prods Credit Union*, 551 P. 2d 442 (Or. 1976); *Ford Motor Credit Co. v. Washington*, 573 S.W. 2d 616 (Tex. Civ. App. 1978); *Minor v. Chase Auto Fin. Corp.*, 2010 Ark. 246, 9, 372 S.W.3d 762, 767 (2010).

Here is a “classic” *Cobb* notice scenario:

- The debtor makes timely payment on a retail installment contract for the first year of the loan.
- In year two of the loan, the debtor begins skipping payments every couple of months. The lender, hoping this pattern will not continue, elects not to exercise its self-help remedy.
- Unfortunately, the pattern *does* continue into year three. Finally, after the sixth missed payment, the lender becomes fed up and orders the repossession.

The problem in this scenario—according to *Cobb*—is that by allowing the borrower to make late payments without ever exercising the self-help remedy, the borrower formed a justified belief that making late payments was “OK” with the lender. Or, formulated differently, the lender “waived” the default by repeatedly accepting late payments.

If the lender wished to repossess after the sixth missed payment in the example above without running afoul of *Cobb*, the lender needed to send the debtor a notice **after the fifth missed payment** stating that strict compliance with the contract terms would be required going forward.

### **When is the *Cobb* Notice required?**

The *Cobb* notice is a pre-requisite to repossession every time the creditor “repeatedly” accepts late payments. Accepting two late payments is likely sufficient to trigger the *Cobb* requirement.

The key is that the creditor must make clear to the debtor that there is no justified reliance or waiver created by the prior acceptance of late payments, and that the lender expects timely payment going forward, otherwise self-help is on the table.

If the lender sends a *Cobb* Notice but then goes on to accept additional late payments, the lender must send *another* notice prior to effectuating repossession. In the above example, if the lender sent a *Cobb* Notice after the fourth missed payment but thereafter accepted the fifth late payment, the lender would be required to send an additional notice before exercising its self-help remedy.

### **Who is required to send a *Cobb* Notice?**

Any lender who “repeatedly” accepts late payments must send a *Cobb* Notice.

### **Why should the repossession industry be concerned with *Cobb*?**

Repossession must pay attention to whether their creditor clients are sending *Cobb* notices in the necessary circumstances. If the creditor fails to send the notice before the repossession is effectuated, the agent may be subject to liability for:

- A wrongful repossession under the Uniform Commercial Code (§ 9-609). In Minnesota, punitive damages may be awarded for wrongful repossession if the debtor can prove a “willful indifference to the rights or safety of others.”
- A Fair Debt Collection Practices Act claim for “[t]aking ... any nonjudicial action to effect dispossession of property ... [with] no present right to possession of the property claimed as collateral through an enforceable security interest ...” 15 U.S.C. § 1692f(6). The FDCPA provides for actual damages, statutory damages, and attorneys’ fees.
- Other statutory or common-law claims, such as conversion.

### **How can repossession protect against liability?**

Implement policies and procedures and communicate with your lender clients. Specifically,

- 1) Ask the lender to verify that any necessary *Cobb* notices were sent before placement.

- 2) Include a warranty in your service agreement that the lender will properly notice all files prior to placement.
- 3) Create written policies and procedures to memorialize that:
  - a) Your organization reviews documents from lender clients *pre-repossession*, including copies of the security agreement and payment history. Document that such information has been received and verified.
  - b) Your organization will not undertake any repossession until it is verified that a *Cobb* notice is not required or, if a *Cobb* notice is required, that no repossession be undertaken until it has verified the notice has been sent and the debtor has not strictly complied with the security agreement.

***This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Effort has been made to assure this information is up-to-date. However, the law may change frequently and it is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of legal counsel. Nothing stated herein creates an attorney-client relationship between any entity or individual, including American Recovery Association members, and Bassford Remele, P.A. No such relationship will be created absent an executed retention agreement with Bassford Remele, P.A.***

©2021 Bassford Remele, A Professional Association