**18.05 CONvERSION/INTENTIONAL INTERFERENCE WITH CHATTELS — Excuse — Repossessions**

The defendant claims (he)(she)(it) had a legal right to repossess (insert item of property).

The defendant had a legal right to repossess the (insert item of property) if:

(Insert elements necessary to establish the defendant's legal right to repossess the property, e.g.,

(1) existence of a contract of sale or security agreement,

(2) breach of the contract of sale or security agreement) [and]

[(3) the defendant acted reasonably in taking back the (insert item of property) and did so without causing a breach of the peace.]

If you decide these things are more likely true than not true, then you must find in favor of the defendant on this claim.

# **Use Note**

This instruction should be used whenever it is asserted that the conversion or trespass to chattel was privileged because it was a repossession by a creditor or other person entitled to repossess property.

If possible, the court should insert the specific act of the defendant in this instruction or, if that is too complex, general language describing the act of interference.

For use of the bracketed item 3, see the Comment below.

# **Comment**

A valid repossession by the defendant constitutes a defense to a conversion action. *Hollembaek v. Alaska Rural Rehabilitation Corp*., 447 P.2d 67, 71 (Alaska 1968); Restatement (Second) of Torts § 183, 272 (1965). Repossession is authorized in Alaska by statute:

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.

AS 45.09.503.

AS 45.29.625(b) also states that a secured party is liable for “damages in the amount of any loss caused by a failure to comply with this chapter,” which includes the requirement that a repossessing party not breach the peace during any repossession. AS 45.29.625(b). The Alaska Supreme Court has not ruled whether a breach of the peace destroys the privilege under Alaska law, including AS 45.29.625(b), or only exposes the repossessing party to a claim for damages arising out of any torts committed by the repossessing party during the course of the repossession.

Some cases from other jurisdictions hold that a breach of the peace destroys the privilege and exposes the repossessing party to a claim for wrongful repossession as well as a claim for damages arising out of any tort (e.g. assault and battery, trespass, etc.) committed during the breach of the peace. *See, e.g. Morris v. First National Bank and Trust Co. of Ravenna*, 254 N.E.2d 683 (Ohio 1970). In contrast, others hold that while a breach of peace exposes the repossessing party to a claim for damages arising out of any tort committed during the breach of the peace, the repossessing party cannot be liable for the repossession itself. *See, e.g. Callaway v. Whittenton,* 892 So.2d 852 (Ala. 2004).

The Commentary to the Uniform Commercial Code, upon which AS 45.09.503 and AS 45.29.625(b) are based, states:

Damages for violation of the requirements of this Article, including Section 9-609 [requiring that the repossessing party act reasonably and not commit a breach of the peace], are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred. See Section 1-106. ***Subsection (b) supports the recovery of actual damages for committing a breach of the peace in violation of Section 9-609, and principles of tort law supplement this subsection***. See Section 1-103. However, to the extent that damages in tort compensate the debtor for the same loss dealt with by this Article, the debtor should be entitled to only one recovery.

Uniform Commercial Code § 9-625, Comment 4 (emphasis added).

The court must decide, under the facts and circumstances of each case, the consequences of a repossessing party’s breach of the peace during a repossession.

Bracketed item 3 should only be given if the court decides that a breach of the peace destroys the privilege. Any tort claims that a party might have against the repossessing party that arise out of a repossession should be addressed by separate instructions.