



Rollin' On



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QUICK COURT DATE: AN OXYMORON?

We've all heard the horror stories, about it taking forever and a day to actually get into court if you've had to file a lawsuit against someone. Then that bad apple files an appeal and it takes another eternity for that to get decided, and then there's a reversal on appeal, and then the whole thing starts over again, and pretty soon your children are visiting you in a nursing home (remember what Phyllis Diller said, be nice to your children since they pick out the nursing home for you). There is some truth to the foregoing, especially if you've chosen mass murder as a profession. The courts bend over backwards for you, which is a scary thought even when they aren't bending over at all. But that's another deal.

Anyway, in the real world it's sometimes very important to get into court right away, such as where depreciating assets are involved. A common example is where equipment is sold on contract and the seller takes back a security interest (Article 9, as in the Uniform Commercial Code if you're taking a test). The financing agreement usually provides that when a default occurs, the seller has the right to take back the equipment without going to court. The seller can repossess the equipment without a court order, as long as there is no breach of the peace. But if the buyer says no way Jose, or hides the equipment, or digs in for World War III, the seller will need to go to a lawyer to get the job done.

Most or all states have laws that provide a quick remedy for these sorts of problems. In Oregon we call it provisional process. (No, it's not a

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Catholic ceremony although it may sound like one.) A knowledgeable lawyer (getting close to those darn oxies again) will prepare an affidavit for the client to sign, declaring how horrible the debtor is, how the asset is wasting away (even though not in Margaritaville), how the client will be irreparably harmed (doesn't this conjure up thoughts of losing body parts?) if the court doesn't immediately direct the sheriff to take possession of the equipment. That in and of itself can be difficult, getting the sheriff to pick up a 20 ton machine, after the more difficult job of getting the deputies out of the donut shop.

The lawyer, armed with the affidavit and motion, then marches off to court to get the judge to sign an order to show cause why the debtor shouldn't be required to turn over the equipment to the seller. A hearing date is immediately established, usually to be held within a week. The debtor is served with the paperwork, which includes the security agreement which the debtor should recognize since it had to be signed to obtain possession of the equipment in the first place. In the meantime, the seller arranges to obtain a bond which will be required after the court reviews the paperwork, listens to the witnesses and generally tries to stay awake. Actually, the hearing should not take more than an hour or so, since payment, or rather lack thereof, is usually not an issue.

Then, assuming the seller (or creditor) has done its job, the court will direct the debtor to turnover the equipment to the seller. Although the

sheriff's assistance is at times necessary, which frequently consists of the sheriff hiring someone else to do the work (at the seller's expense), the turnover should get accomplished without the efforts of the public servants.

This sounds all plain and simple, as it should be. You've found a lawyer who has found the courthouse with a judge and there's a courtroom there with a bailiff and the All Rise command is given and is this a great country or what. But things can go astray.

For example, the debtor can wait to file affidavits at the time of the hearing – none of this advance notice stuff – which can bring up various defenses, such as breach of contract by the seller. One thing lawyers hate almost as much as not getting paid (emphasis on the word almost) is to not know what someone might file on the date of the hearing. The client by now is expecting, outwardly at least, a slam dunk, and thus the thinking goes that only an incompetent lawyer (this might fall more in the redundancy area than the oxie area) could possibly screw up this case. But the fact remains that debtors can raise issues out of left field. Since this is a request for "extraordinary relief" (evidenced in part by the quick hearing date), the court will be cautious about taking action before there is a full blown trial on the whole ball of wax. So pick your debtor and your lawyer and your case and your quick hearing date with caution.

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That's all for now. Until next time, keep the cargo *rollin'*!

Short Bio

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 25 years and emphasizing transportation law, business law and related litigation.

The Obligatory Disclaimer

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