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How to Seize Stuff

By Patrick W. Begos

"A *repo man spends his life getting into tense situations."— Bud (Harry Dean Stanton),* Repo Man, 1984 .

Litigation is usually a chivalrous exercise for a lawyer. You are reasonable. You are polite. You compliment your adversary before you begin fencing. The battlefield is typically well-defined, and you try not to take the battle off the field.

Seizing stuff, on the other hand, is not chivalrous. It is guerrilla warfare. You walk into your adversary's home, or his place of business, or his bank, and you walk away with something that is his. You cannot get more in-your-face than that. There are few things in a litigator's day that are as momentous as seizing stuff (though a great cross-examination comes close).

Seizing stuff is like going all-in in a poker game. There's a big reward, but a big risk. Do it right, and you've taken control of the thing that you and your adversary are fighting over. Do it wrong, and you could be liable to your adversary.

There's also the risk that the person whose stuff you're taking will do something hot-headed in the heat of the moment. Sometimes things can get really exciting. I recently helped one of my clients seize a grocery store in a not-so-nice part of Manhattan, under an order authorizing the marshals to enter without notice, and by force if necessary. The marshals came in strength, with at least eight or nine officers, all armed; they were able to peacefully usher the customers, the workers, and (most importantly) the owner out of the store and turn it over to us. After they left, there was nearly a riot outside—kindly instigated by the now-dispossessed owner—and my clients and I had to call the police to restore order and escort us to our cars.

As Harry Dean said, it can get tense.

Before you seize something, you need to know the rules and the boundaries. You need to know what resources you have on your side. Basically, you need to minimize the risks and the costs and maximize the likelihood of success.

Let's get down to it, repo man.

Self-Help
This is the domain of the real-life repo man. The Uniform Commercial Code (UCC) allows a secured creditor, in the event of default, to recover possession of the collateral by *self-help* as long as it can be done without a *breach of the peace*.

Plainly, the near riot I experienced in Manhattan would have been a breach of the peace if my client had been exercising self-help. You cannot hire a mercenary force to storm the premises and remove resistance (as cool as that would be). Or, to quote another line from *Repo Man,* you should not say something like: "You gonna give me my car, or do I gotta go to your house and shove your dog's head down the toilet?" I suppose state law may vary, but I am guessing that many judges would consider that kind of exchange to be a breach of the peace.

You should not be tempted to consider the peace unbreached as long as no fists have been thrown and no threats have been made. Generally speaking, any time you enter the debtor's property without consent, you have breached the peace. Walking into an empty house? Breach of the peace. Impersonating a police officer to gain entry? Ditto. One commentator labels a recent Texas case as possibly the outer limit of peaceable self-help. A woman left her car running on the street (not her driveway, mind you) while she ran into the house for a moment. While she was inside, a repo man hooked it to his tow truck and drove away. He got a couple of blocks before he noticed two children in the back seat. He returned the kids. He kept the car. No breach of the peace. *Chapa v. Traciers and Associates*, 267 S.W.3d 386 (Tex. App. 2008). I do not encourage anyone to push this particular envelope, at least outside of the great state of Texas.

Incidentally, a secured party cannot absolve himself of UCC problems for breaching the peace by hiring, say, a repo man to do the work. If the independent contractor breaches the peace, the trend is to hold the secured party responsible for the consequences (which might include actual and punitive damages, among other things).

If you do not think you can effectively engage in self-help without breaching the peace, you may want to consider announcing the intent to exercise self-help. Think of it as a shot across your adversary's bow. I once did collection work for a client who sold very expensive computer equipment. The client had a standard letter for defaulting customers that said something like: "You are in default. We are entitled to take possession of the equipment we sold you. We will have a truck at your office next Tuesday at 10:00 am. Please have the equipment packed and ready for us to pick up." Of course, no one ever actually complied with those demands. But they were nice reminders to the debtors that they could end up losing equipment that might be mission-critical for them.

Self-help is wonderful when it happens. You may have won without the need for a lawsuit. But it is a rare thing. This takes us to the more common way of seizing stuff: the replevin action.

Replevin

A replevin action seeks to determine which party has the superior right to immediate possession of moveable collateral *(*i.e. *,* stuff that can be seized). The end result of a successful replevin action is a judgment giving your client possession of the property. Generally, the first step in a replevin action is to seek a prejudgment remedy to take the asset out of the defendant's hands until the action is concluded. Nothing says "I'm serious about this" more than having the court order the property in question seized and held pending judgment.

How does the seizure of stuff in a replevin action differ from the seizure of stuff by self-help? The most important difference is that judges can do things that you cannot do, and that includes giving orders to people who carry badges and guns.

This is not to say that an order directing a marshal to seize something is all you need—marshals generally are not going to take it upon themselves to breach the peace. Rather, if the defendant refuses to allow the marshal onto the premises, the marshal will probably report to you that he was unable to effect the seizure.

Now it becomes important to work closely with the marshal. This is because there is most likely magic language that, when subscribed by the presiding judge, will allow your marshal to enter the premises forcibly, perhaps without notice, and seize the property in question. The marshal knows that magic language and probably knows what judges want to hear before they will utter the incantation. Of course, the judge may refuse to do what you ask. Or, while you are getting the power of entry issued and delivered into the marshal's hands, the defendant may move the asset. (They never seem to fight fair, do they?)

Talking to the marshal early in the process can be extremely helpful for other reasons, too. For example, I once had to seize a racehorse in New York. I had no idea what the logistics were. I couldn't imagine the marshal's office would know, but I called anyway. Well, it turns out that there were several racetracks in that vicinity, and the marshals seized horses all the time. They had a standard set of requirements. Rent a trailer to transport the horse. Hire a veterinarian to examine the horse at the time of seizure. Pay to feed, stable, and insure the horse. That phone call eliminated a whole host of uncertainties.

This brings up an important point: Before you go too far down the replevin road, make sure you and your client are prepared for the expenses. The marshal may earn a fee (called poundage in New York), which may be a percentage of what the property is worth. You need to find out the fee in your jurisdiction. The marshal who seizes the property is going to be holding it until final judgment; depending on the asset, there might be storage and insurance costs. The marshal may need to hire a specialist to assist in moving the property. For example, when seizing an excavator, the marshal will probably need to rent a truck and a trailer and to hire someone who can load the excavator onto the trailer and drive it away. The last thing you want to do is spend a lot of time, money, and energy fighting over a prejudgment seizure only to learn, after you win, that the client does not want to pay the costs associated with victory.

A final word to the wise before you seek a prejudgment replevin. Question your client closely and make very sure that her claim is solid and her facts are accurate. In the distant past, I successfully got an ex-parte replevin order on behalf of a very sophisticated client to seize a rare and valuable automobile that was supposedly on its way out of the country. After the car was seized, the client informed us of a "technicality." It turns out that the company that owned the car was ever-so-slightly different from the company that owed the money; she didn't tell us that earlier because she didn't want to "confuse" us. You can imagine how the rest of that conversation went.

Conclusion

Sometimes the life of a lawyer, even a litigator, can get monotonous. Reviewing documents and drafting papers day after day can get to all of us. To spice it up, see if you can go out and seize some stuff. Be a repo man. I guarantee you it won't be boring.

- **Patrick W. Begos is a partner in the firm of Begos Horgan & Brown LLP, with offices in New York and Connecticut. He specializes in commercial litigation, and he loves seizing stuff. He may be reached at *pwb@begoshorgan.com*.**

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