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## Recovering Your Collateral: Replevin vs. Civil Suit

### Recovering Your Collateral: Replevin vs. Civil Suit

Jack should have gone with a civil suit.

Replevin actions are expensive. The legal papers required are more complex than those for commencing civil action against the lessee and guarantor, and most attorneys charge an hourly rate or substantial flat fee.

A replevin action is also more expensive because it requires an attorney to make one or two court appearances to obtain a seizure order. A civil suit requires no court appearances unless the matter is contested. Under a flat fee arrangement, most law firms consider the fee to cover only the process of obtaining the judicial order to seize the equipment and not the additional costs involved in actually seizing the property (i.e., hiring a trucker to transport the equipment, locating storage space, and hiring an auctioneer to perform the auction).

Most attorneys anticipate that the client will take care of that part of the process, and that their job is merely to obtain the judicial order enabling the seizure. In contrast, a civil suit against the lessee and guarantor is comparatively inexpensive. Most attorneys will handle the matter on a contingency or small fixed fee before judgment and a contingency fee for post-judgment collection.

If the leased equipment is essential to the debtor's business, it is probably the last obligation the debtor fails to pay. By the time the sheriff attempts to enforce the seizure order, the debtor will probably be either out of business or in bankruptcy.

### Two Suits

Since equipment depreciates over time, a deficiency action will probably be required as well if the property is recovered and sold. And since the lessee's unsecured creditors will probably have already proceeded to suit--and have recorded judgments--you will have to start two suits and may be the last judgment creditor to be paid. For all of these reasons, a straight suit will save time and money.

If the leased item is mobile (i.e., computer equipment, a mobile home, an automobile), locating the item after receiving the order of seizure may be a problem. In most states a replevin action, like a civil suit, requires the moving party to notify the defendant-lessee of the proposed remedy. An order of seizure only permits the creditor to seize the specifically described property at a specific location(s). If the equipment has been transported across state or even county lines, the sheriff will no longer have jurisdictional grounds on which to seize the property.

If state law requires notice to the party in possession, a clever lessee will simply relocate the property. Unfortunately, if the property disappears from its presumed location, during the pendency of the action, the creditor's money has been wasted. The creditor then has to start a civil suit against the lessee and guarantor if they can be located. Another related problem is that even if the property is at the specified location, the sheriff may refuse to seize the property if the description of the property is faulty.

### Key definitions

**Replevin Action** - A legal action, typically used by creditors, to reclaim property that his unlawfully held by a debtor.

The expenses of a replevin action are twofold: (1) legal fees and (2) recovery fees. There are costs for hauling the equipment to a storage area as well as storage fees. Also, the sheriff or marshall will not break and enter the premises. The recovery manager must either obtain the landlord's consent or hire a locksmith. The sheriff or marshall will require a signed release holding them harmless from any liability. Out-of-state creditors sometimes fail to recognize that these parties must be hired locally to seize the property. Under a replevin seizure order, the property may be required to be stored at a location within the sheriff's jurisdiction for approximately 10 days before the creditor may sell the property at auction.

While it is uneconomical to pay an attorney to obtain suitable parties to perform these tasks, a creditor with no local contacts has little choice but to rely on the attorney to perform these routine tasks. If a creditor is unable to locate and hire agents to seize the goods, store the goods, and sell the goods, a civil suit would be advisable because once a judgment is obtained, an auction can be sent to the sheriff who will perform all these tasks for a significantly lower fee.

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#### **No Fear**

Finally, it is a misconception that a repossession action will scare a defendant more than a civil suit. First, a replevin action only affects the lessee-business, not the guarantor, because the lessor is merely attempting to recover the property.

Second, lessees of commercial equipment are sophisticated business people and are not easily scared. If the equipment has become a commercial fixture, the lessee will assume that the creditor would spend substantial funds necessary to remove it only as a last resort. A civil suit should be instituted against both the business and the guarantor, since both parties are equally liable.

A lessee would also be more fearful of a judgment because a judgment creditor possesses many legal remedies not available to a creditor with a replevin seizure order. Once a default judgment is taken against the business and the guarantor, the judgment can be given to a sheriff/marshall who can then sell the entire business including your equipment at public auction.

Simultaneously, the assets of the guarantor may be levied upon. The business may be failing, but the guarantor may be wealthy. While the business may not want the property returned, the individual guarantors will pressure the business to surrender the property to protect their own personal assets from levy, as well as protecting their credit history.

Prior to the lessee's business's failure, the principal's whereabouts is still known for service of process. Once the business fails, the principals may disappear. Since the balances in the actions are large, most guarantors will surrender the property to diminish their personal exposure. Bankruptcy may be the only defense for the guarantor for a suit for the deficiency on the property. The creditor is a secured party and thus entitled to the value of the property if the business files bankruptcy.

#### **When Replevin Is Advisable**

However, situations do exist in which a replevin action is advisable. A replevin action is recommended where the business is operated out of the lessee's personal residence and the property is located at the same location. Many sheriffs are not empowered to enter a personal residence to sell a business under state law, and a replevin action is the lessor's only available remedy. A replevin is recommended in this situation if it is certain that the property is extremely difficult to relocate.

Another situation in which a replevin is recommended is when the property is in the hands of a third party--being held under some common law lien such as a mechanic's lien, or bailee's lien. If the value of the equipment is substantial and cannot be readily removed, a replevin may be the answer. State law must be reviewed. Each case must be studied to determine the cost, the ease of removal, whether prior notice is

required, the likelihood that the property will disappear, the effect on the debtor, and the surrounding circumstances before determining the best method of recovery.

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