



Judicial Remedies if the Bank Cannot Repossess the Collateral

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Judicial Remedies if the Bank Cannot Repossess the Collateral

A creditor may use judicial means to repossess the collateral. A replevin is a legal action to ask for the return of the property that is lien or owned by another. The party requesting such relief must file a replevin complaint. The plaintiff must allege ownership or have a security interest in the property. The complaint may be sworn under oath or generally plead. As a practice point, a sworn complaint may speed the hearing so that no witness is needed at the hearing. A replevin action cannot be used for real estate. Usually, a replevin action is used if there is an ownership dispute, or the property cannot be repossessed lawfully.

Some states allow the complaint to contain a request for monetary damages. If an attorney decides to plead for monetary relief, make certain the Fair Debt Collection Practices Act is followed if the debt is a consumer debt. In that situation, an attorney would need to send a 30-day validation letter to the consumer.

After the complaint is filed, a summons needs to be served on the defendant. I usually instruct my constable to try to get the defendant to turnover of the vehicle at this time. While the summons is being served, I prepare the necessary replevin bond. Most states will require the bond to be two times the value of the vehicle. I also prepare an affidavit for the client to sign if the complaint is not verified. Make certain that the affidavit and the complaint include all the necessary information to obtain the vehicle.

Once served, a hearing must be held. Rhode Island requires a 10-day notice to be given to all defendants by mail after service. I usually request a hearing date 20 days after service, so that the defendant may be defaulted limiting the hearing. If the case is answered, you may want to commence discovery. If so, make certain that the plaintiff requests a restraining order prohibiting any transfer or destruction of the property.

At the hearing, the plaintiff must prove ownership of the property and a breach of the contract or any other reason that defendant is wrongfully detaining the property. The plaintiff must show a probability of a judgment being rendered in favor of the plaintiff and that there is substantial need for transfer of possession of the good and to the plaintiff pending adjudication of the claim. Furthermore, the value of the property must also be alleged so a bond can be issued. The bond gives the defendant security in case the defendant should prevail after full trial. Usually, the bond is for two times the value of the property.

Some disputed replevin cases can involve common law liens or good faith purchasers. In the good faith purchase situation, the plaintiff's lien will be reviewed. If the lien is not properly recorded, the good faith purchaser may be successful if the good faith purchaser had no knowledge of the plaintiff's lien. For example, if a lender does not title the vehicle timely, the defendant could sell the vehicle to a third party and the buyer would have no knowledge of the contract between the parties. As a result, the lender would not be successful on the writ of replevin.

Once a replevin is granted, the clerk issues a writ of replevin. A constable can pick up the property with the writ. Most states allow the

constable to enter the property for purposes of demanding the property and take possession of the vehicle. State law will determine if the Constable has the authority to enter the building or enclosure by breaking a lock where the property is located. If your State does not allow the breaking of a lock, the Plaintiff will need to file a Motion to Hold the Defendant in contempt for failure to follow the Judge's order.

What Happens if the Debtor Files Bankruptcy

Once a creditor receives notice of a bankruptcy, an automatic stay arises. Creditors are prohibited from taking any collection actions including repossession and replevin. A creditor can petition the Court to remove the automatic lien and allow repossession. If the bankruptcy is a Chapter 7, some creditors may wish to wait until the case is closed and resume collection activities.

If the car was repossessed before the filing of the bankruptcy, the car may need to be returned. In a Chapter 13, the arrears owed to the creditor can be placed into the Plan and the defendant will need to keep regular payments going forward on time. Not all Courts agree that the car needs to be returned. See *Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009) and *Bell-Tel Fed. Credit Union v. Kalter*, (11th Cir. 2002)

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