

**REPORT AND RECOMMENDATIONS
RELATING TO REPLEVIN**

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INTRODUCTION

New Jersey replevin statutes consist of 19 sections derived from the 1877 Revision. While some of the sections were amended between 1890 and 1963, the replevin procedure, "originally designed to test the true title to property," has not changed significantly for more than a century. To a seller-creditor, the availability of this procedure for repossessing property has made certain sales possible and has become "part of the fabric of our modern financing...." Almor Furniture & Appliances v. MacMillan, 116 N.J. Super. 65, 67 (Essex Cty. Dist. Ct. 1971).

N.J.S. 2A:59-1 states:

If the goods or chattels of any person be wrongfully taken and detained, or wrongfully detained, the sheriff, or other officer authorized by law, of the county where the goods or chattels may be, shall cause such goods and chattels to be replevied and delivered.

Following the United States Supreme Court decision, Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969), courts began declaring constitutionally infirm those replevin laws which allowed taking of property or property rights without a prior hearing. Sniadach involved a Wisconsin statute allowing garnishment of one-half salary without notice.

The first case challenging the constitutionality of New Jersey's replevin statutes, Almor Furniture & Appliances v. MacMillan, 116 N.J. Super. 65 (Essex Cty. Dist. Ct. 1971), raised three issues: 1) denial of due process by taking property without requiring prior notice or hearing; 2) violation of the fourth amendment prohibition against unreasonable searches and seizures; and 3) denial of the fourteenth amendment guarantee of equal protection. The court declined to decide the constitutional issues raised lest "the security permitted and approved by the relatively recently enacted Uniform Commercial Code should be jeopardized by a sudden declaration of unconstitutionality of one of the remedies relied upon by sellers in security transactions." Almor, supra at 69.

The next year, the United States Supreme Court found Florida and Pennsylvania replevin statutes (which were similar to New Jersey replevin statutes) violative of fourteenth amendment due process because they did not require prior notice and hearing. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556, reh'g denied, 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed. 2d 165 (1972). The following year, 1973, in response to Fuentes v. Shevin, New Jersey Court Rules 4:61-1 and 4:61-2 were amended to comply with that decision's requirements of prior notice and hearing.

In The Singer Co. v. Gardner, 65 N.J. 403 (1974), the court agreed with defendant's argument that plaintiff's seizure under a writ of replevin was unconstitutional because there had been neither notice nor hearing beforehand. The court pointed to Fuentes v. Shevin as the impetus for the 1973 Rule changes.

New Jersey replevin statutes have never been amended to cure the constitutional defects. It is inappropriate to rely on court rules to make the statutes constitutional as applied. The proposed provisions provide constitutionally required pre-judgment hearing and notice. They also simplify and modernize the law. The court rules on replevin, R. 4:61-1 through -5, can then serve their appropriate function, providing greatly detailed procedural guidance.

2B:X-1. Action for replevin

A person seeking recovery of goods wrongly held by another may bring an action for replevin in the Superior Court. If the person establishes the cause of action, the court shall enter an order granting possession.

Source: 2A:59-3.

COMMENT

This section eliminates references to the former county court and the county district court and substitutes "an action for replevin" for the archaic "writ of replevin."

2B:X-2. Temporary relief; On Notice

If the court, after notice and hearing, and based upon filed papers and testimony, if any, finds a probability of final judgment for the plaintiff, it may, prior to final judgment:

- a. grant possession of the goods to the plaintiff; or
- b. order other just relief.

Source: New.

COMMENT

This section is based upon paragraph (a) of R. 4:61-1. The Rule was amended in 1973 to require pre-judgment notice and hearing.

2B:X-3. Temporary Relief; Without Notice

In an extraordinary case if, before notice and hearing, the court finds from specific facts in an affidavit or verified complaint that the plaintiff is entitled to possession and that an immediate order is necessary to prevent removal of, or irreparable damage to, the goods, the court without notice, may:

- a. direct a person authorized by the court to remove the goods from the party in possession and hold them pending a hearing; or
- b. order necessary temporary restraints to preserve the goods pending a hearing.

Source: New.

COMMENT

This section, which is based on paragraph (b) of R. 4:61-1, allows pre-judgment replevin without notice only when action is necessary to prevent irreparable damage. The Comment to R. 4:61-1 states that the standard is defined as including the imminent destruction, secretion or disposition of the chattels by the defendant.

2B:X-4. Security

As part of an order that determines who shall hold the goods pending judgment, the court may further order the holder to give security.

Source: 2A:59-5, 2A:59-6

COMMENT

This section is a general security provision that replaces the source bonding statutes, gives the court authority regarding security requirements and is compatible with the relevant rule, R. 4:61-1(c).

2B:X-5. Unrelinquished property

If the court orders a person to relinquish goods and the person does not relinquish them, the court shall enter an order in aid of execution, or if the plaintiff so requests, assess damages.

Source: 2A:59-4, R. 4:59-1(e)

COMMENT

This provision eliminates the source statute's blanket right for the sheriff to break into a building or to trespass on private property in order to seize property and substitutes the discretion of the court in determining how concealed and other unrelinquished property shall be retaken. The phrase, "enter an order in aid of execution," derives from similar language in R. 4:59-1(e), supplementary proceedings to enforce judgments.

TABLE OF DISPOSITIONS

Section	Disposition	Comment
2A:59-1	Unconstitutional	Deleted
2A:59-2		Deleted Unnecessary
2A:59-3		2B:X-1
2A:59-4		2B:X-5
2A:59-5		2B:X-4
2A:59-6		2B:X-4
2A:59-7		Deleted Unnecessary
2A:59-8		Deleted Unnecessary
2A:59-9		Deleted Unnecessary
2A:59-10		Deleted Unnecessary
2A:59-11		Deleted Unnecessary
2A:59-12		Deleted Unnecessary
2A:59-13		Deleted Unnecessary
2A:59-14		Deleted Unnecessary
2A:59-15		Deleted Unnecessary
2A:59-16		Deleted Unnecessary
2A:59-17		Deleted Unnecessary
2A:59-18		Deleted Unnecessary
2A:59-19	Deleted	Unnecessary