REPLEVIN
(REMOVAL AND SEIZURE OF UTILITY METERS)

Project Utility Law Project Manual
8th Edition 2018

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The PULP Law Manual was originally funded in part by a grant from the New York State Bar Foundation. The 7th Edition was funded in part by a grant in 2017 from the Berk Foundation of New York. The 8th Edition was funded in part by the 2017 Berk Foundation grant and by other funds provided by PULP.

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REPLEVIN OR REMOVAL OF UTILITY METERS

1. Introduction

Replevin is a civil action that grants a court authority to decide which party has a superior right to possession of personal property that is alleged to be wrongfully or unlawfully held.[1] Utilities initiate replevin actions against customers in order to remove an electric or gas meter from the property of a customer whom the utility alleges is in serious debt to the utility. Once the meter is removed, the termination of the electric or gas service previously provided to the customer through the meter is accomplished. From the utility's perspective, replevin allows the utility to end the burdensome cost of managing and maintaining service to a customer who is unwilling or unable to pay for the service rendered. And it allows the utility to repossess property that it is legally entitled to possess. From the consumer advocate's position, replevin or the threat of replevin creates greater bargaining power for the utility against the customer.

Because electricity and gas are considered life necessities,[2] New York State law requires the utility providers to follow certain steps before replevin can occur. These steps are designed to balance a customer's access to critical life necessities such as heat and electricity, with the utility's right to get paid for the service it provides to its customers through meters it owns.

[1] New York Civil Practice Law and Rules (CPLR) Article 71, entitled "Recovery of Chattel." A chattel is generally defined as any personal property which has any monetary value. See also, https://www.law.cornell.edu/wex/replevin.

[2] "[Utilities are] necessary to sustain life in today's world ... and the discontinuance of gas and electric work tremendous hardships on the users of these essentials...." *Consolidated Edison of New York, Inc. v. Powell*, 77 Misc.2d 475, 354 N.Y.S.2d 311, 315 (Sup. Ct. N.Y. Co. 1974).

2. Overview of Replevin Procedure

Generally speaking, a utility has the right to terminate a customer's service when a customer becomes seriously delinquent.[3] But if the meter on a property is not accessible remotely, or the utility cannot physically access it, then the utility will need to obtain permission from the Court to have the meter removed by initiating a replevin action.

Prior to beginning the replevin process, the utility must first follow the HEFPA-required procedural steps. First, the utility mails a notice of termination to the customer which gives him 15 days to pay the overdue bill. When the statutory period ends, the utility can disconnect service. But if the utility cannot obtain access to the meter for purposes of termination, then it will initiate a replevin action by filing a Notice of Application with the court to grant an Order of Seizure.[4] When the utility makes the application for an Order of Seizure, and submits the accompanying affidavit as required, then the Court may grant an Order of Seizure "upon the court's finding that it is probable the plaintiff will succeed on the merits...." If the utility is granted an Order of Seizure, then the utility will coordinate with law enforcement to remove the meter from the property in question. Pursuant to the Order of Seizure, law enforcement (typically a sheriff or Marshall) has the authority to "break open, enter, and search" customers' residences to take the meter.[5]

3 Subject to such parts of Art 2 of the Public Service Law ("HEFPA") as may be applicable.
[4] The CPLR refers to replevin orders as "Orders of Seizure."
[5] CPLR §7102(d)(1).

3. Application For An Order of Seizure

The first step in initiating a replevin process is for the utility to apply for an order of seizure from the court by serving a Notice of Application.[6] The utility's application for the order of seizure must be supported by an affidavit from an individual with personal knowledge of the facts that "shall clearly identify the chattel to be seized"[7] and shall further state:

- That the plaintiff is entitled to possession of the meter by virtue of the facts set forth;
- That the named defendant no longer has a legal right to continue in possession of the meter;
- That an action has or has not been commenced to recover the meter and, if an action has been commenced, state full details as to the status of the action;
- The value of the meter or meters sought to be recovered;
- The location of the meter and facts sufficient to establish its presence at that location, in the event a breaking and entering may be necessary to recover the meter;
- That there is no defense to the seizure known to plaintiff; and
- If the order of seizure is sought without notice, facts sufficient to show that unless the order is granted without notice, it is probable that the meter will become lost to the jurisdiction because of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value.[8]

If the utility company's application for order of seizure fails to allege any facts pertaining to any

[6] CPLR §7102(c).
[7] CPLR §7102(c). As of January 2019, PULP has direct knowledge that Notice of Applications are used in NYC, Westchester and Long Island by Con Edison and National Grid. National Grid also uses NOAs for replevins initiated in upstate New York. It is our understanding that the utility companies Central Hudson and Orange and Rockland County do not send Notice of Applications to customers, and do not conduct replevins. It is currently unknown whether the utilities National Fuel Gas, NYSEG and RG&E send NOAs.
[8] Given the realities of utility service, it is unlikely that facts could be alleged to meet the burden of proof mandated by this requirement. Nevertheless, it should not be taken for granted that such an order will never be issued. CPLR § 7102(c).

of the relevant provisions of HEFPA, as required by CPLR Article 71, then the application must be denied by the Court.[9] Note that in a case brought in Westchester County, a Court held that seizure orders may not be issued for a meter for which the county Department of Social Services has guaranteed payment. While the law has changed substantially, given that the utility guarantee statutes have been considerably strengthened, it does not appear this holding was overruled.[10]

Customer Accounts within New York City

As of August 2016, applications for replevin orders must abide by New York City Administrative Code, Article 4, § 400 (Chief Clerk's Memorandum).[11] The Chief Clerk's Memorandum explains that utilities serving customers in New York City must file a Summons and Complaint in order to commence a replevin action in NYC Civil Court.[12] Additionally, the utility typically serves a Notice of Application for an order of seizure when it cannot obtain access to the customers' meters.

When a Notice of Application has been served, the defendant customer may come to court to schedule a voluntary meeting with the plaintiff utility company. This voluntary meeting is described as a "Voluntary Informal Conference" (VIC). The meeting is not mandatory. Upon receiving a Notice of Application, the defendant customer can also tell the court that he or she declines the offer to meet the utility at a VIC, and instead, requests a hearing by the Court.

Note about Voluntary Informal Conferences (VIC)

[9] *Consolidated Edison Co. v Jones*, 111 Misc. 2d 1 (N.Y. Civ. Ct. 1981).
[10] See, Consol. Edison Co. v. McClain, 87 Misc. 2d 766, 386 N.Y.S.2d 770 (City Ct. 1976).
[11] Chief Clerk's Memorandum, Class CCM-117-A, Category GP-60, dated August 15, 2016.
[12] Note that this is an added procedural protection in New York City, and arose after a PSC proceeding investigating Con Edison's replevin activity in

VICs are optional.[13] If a customer requests a VIC, then the clerk of the Court will schedule a date and time for the customer to discuss his or her account with a representative from Con Edison at the courthouse. At the VIC, it may be possible for Con Ed to establish a new deferred payment agreement even if the customer defaulted on a payment agreement previously. In preparation for a VIC, the customer should bring documentation to support his or her request that termination be stayed. For example, if the customer, or a member of his or her household, has a medical condition necessitating utility service, then, the customer should bring a doctor's note confirming as such. The customer can also bring documentation showing that he or she, or a member of the household, is elderly, blind, or has a disability. The customer can also bring documentation showing proof of unemployment, or financial hardship to support a request for reduced deferred payment agreement.

4. Notice

A. Notice to Customer Prior to Utility's Application for Court Order

HEFPA requires that utilities take specific actions before terminating a customer's service. For example, a utility must issue a final notice of termination as well as offer the customer the option to pay back debt through a deferred payment agreement.[14] HEFPA also provides additional consumer protections for customers with special needs, such as medical emergencies, customers who are elderly, blind or disabled, or recipients of public assistance.[15] Utilities must

[13] It has been held that the provision of notice and an opportunity to be heard – basically an NOA -- is sufficient to satisfy due process requirements under CPLR 7102. No requirement for a VIC was discussed by the Court. See, Rochester Gas & Elec. Corp. v. Chatterton, 81 Misc. 2d 522, 526-7, 366 N.Y.S.2d 323 (Cnty. Ct. 1975).

[14] *See*, e.g., PSL §§ 32, 37 ; *see also*, 16 NYCRR Part 11 passim.
[15] *See*, PSL § 32.

also follow certain procedures during November through April, the designated cold weather period, prior to service termination. Notice requirements are discussed in depth in Chapter 1 of this manual.

However, there is nothing in CPLR Article 71 that requires that a summons and complaint be served simultaneously with the removal of the chattel or before the enforcement of a seizure order.[16] And as noted above, only customer defendants residing in New York City are required to receive a summons and complaint prior to the utility initiating a replevin action because of rules established by the New York Civil Court in 2016.

Con Edison Customers

As of January 2017, in addition to the notice requirements under HEFPA, Con Edison is required to send a specific letter notifying customers of a potential replevin action against them and provide information as to the customers' rights and responsibilities. This Pre-Replevin Letter was developed by PULP and Con Edison during a 2016 rate case proceeding. By Order adopting the Joint Proposal approving increased rates and other modifications, Con Edison is required to send this Pre-Replevin letter to all customers before initiating a replevin action. See, Case 16-E-0060, et al., Con Edison Electric and Gas Rates, Order Approving Electric and Gas Rate Plans (issued January 25, 2017). The Pre-Replevin letter notifies customers of the potential replevin action and provides information as to customers' rights and responsibilities in plain English. It is sent to customers 7 to 10 days prior to the initiation of any replevin action.

It is important to note that with the exception of the Civil Court's memorandum

[16] See, Consolidated Edison Co. v. Lee, 126 Misc. 2d 524 (N.Y. Civ. Ct. 1984).

extending additional process to all utility customers in New York City, the remainder of these additional procedural protections are only applicable to Con Edison customers. While Con Edison appears to conduct the largest number of replevins in New York, National Grid's New York City and Long Island subsidiaries conducted 41,000 replevins in 2008,[17] and continue to conduct large numbers of replevins in New York City and Long Island, and substantial numbers of replevins in its Upstate Niagara Mohawk entity.

B. Notice to Customer After Utility's Application for Court Order

After the utility has applied for a court Order, a defendant customer is notified of the utility's intention to seize the meter. A copy of the application and the affidavit usually is mailed to the customer whose meter is to be seized.[18] Failure to appear in the underlying action could result in a default judgment regardless of the outcome of the utility's application for an Order of Seizure.

4. Order of Seizure

After the utility has presented an application, with affidavit and undertaking[19] to the Court, the court may grant an order directing the sheriff of any county where the meter is located to remove the meter described in the affidavit and to break open, enter and search for the meter if necessary.[20]

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[17] *See*, *Nat'l Grid Corp. Servs., LLC v. LeSchack & Grodensky*, P.C., 2011 NY Slip Op 32916(U) (Sup. Ct.).
[18] CPLR 7102(d)(3) was added to the statute in 1978 to include "a requirement that ... a defendant must be placed on notice of a pending application for an order of seizure." *Consolidated Edison Company of New York Inc., v. Wyns*, 152 Misc.2d 360, 361, 576 N.Y.S.2d 765 (Civ. Ct. Kings Cty. 1991).
[19] An undertaking is a surety not less than twice the value of the meter stated in the utility's affidavit. CPLR §7102(e).
[20] CPLR §7102(d).

5. Strategies for Opposing a Replevin

The Court is not required to issue an order of seizure merely because a utility has met the minimum requirements of the statute. In fact, the Court's latitude is extensive when making this determination.[21] This flexibility, in conjunction with the serious nature of the proceeding, creates opportunities for opposition based on equity as well as on the law and the facts. Whether opposing the replevin through an affidavit, or in person at a court appearance, the customer, or his advocate, should clearly set forth the reasons why he or she believes the utility has failed to comply with the law, and also, argue against the removal of the meter for public policy reasons.

A. Procedural Arguments

The Home Energy Fair Practices Act (HEFPA) requires utilities to provide notice before any termination of service should occur.[22] The content and timing of notices is prescribed by law and must be strictly adhered. In the utility's affidavit supporting an order for seizure, the utility must set forth facts to demonstrate that the utility has complied with the termination requirements of HEFPA.[23] First, the utility's affidavit should contain an allegation as to whether the meter to be seized services a residential or non-residential premise. If the premises are residential, the affidavit must allege, inter alia, that (i) a fifteen day notice of termination has been served, (ii) a deferred payment agreement was offered, (iii) more than twenty days had elapsed from the date payment was due before the fifteen day termination notice was issued. It is

[21] "The legislature saw fit to afford the court ... substantial discretion in determining whether to grant orders of seizures ...." *Consolidated Edison Company of New York v. Haymer*, 527 N.Y.S.2d 941, 942, 139 Misc.2d 95 (App. Term, 1st Dept. 1988). The Appellate Term was acknowledging the language change adopted by the Legislature in 1978. Until that time the statute required that the Court, upon presentation of the proper papers, "grant an order directing the sheriff ... to seize the chattel ...." The statute now reads that the Court "may grant an order ...."
[22] *See*, "Rights of Residential Gas and Electricity Customers" under HEFPA, Chapter 1 of PULP's Law Manual.
[23] *Consolidated Edison Company of New York, Inc. v. Branley*, N.Y.L.J. Jan. 25, 1989, p. 25 (Civ. Ct. N.Y. Co.).

not enough for the utility to re-state the requirements of the law. The affidavit must be made by someone with personal knowledge of the underlying facts and must contain more than conclusory allegations.[24] Therefore, it is unacceptable for the utility to merely state that it has sufficient data upon which to conclude what the facts are.

If the utility has failed to provide an affidavit that is fully supportive of its application for an order of seizure, then, the customer could argue that the affidavit is defective because it fails to meet the minimal due process information required by law, and therefore the Court must deny the application.[25] It is also inadequate for a utility to send a letter to a customer telling him to appear in court to obtain a future hearing date to refute the overdue utility bill, and simply stating that an order of seizure would be presented to the court for signature if the customer fails to appear in court. The utility's notice to the customer must provide the actual time and place of presentation of order for signature.[26]

B. Factual Arguments

The customer could also attack the affidavit on the basis that it is factually inaccurate. There could be many reasons why the utility is seeking removal of the meter at the customer's premises. The utility could be seeking termination on the basis of non-payment, late payment or partial payment of bills for service, or because the customer failed to abide by the terms of a

[24] *Consolidated Edison Company v. Branley*, N.Y.L.J. Jan 25, 1989, p. 25 (Civ. Ct. N.Y. Co.).
[25] "[T]he Civil Court, when presented with these ex parte applications ..., must carefully scrutinize the papers to insure that all of the requirements of the Statute have been met." *Consolidated Edison Company of New York, Inc. v. Pearson*, 474 N.Y.S.2d 230, 233, 123 Misc.2d 598, (Civ. Ct. N.Y. Co. 1984) and *Brooklyn Union Gas Co. v. Richy*, 123 Misc.2d 802, (Civ. Ct. Kings Co. 1984). Utility companies that leave information blank in an affidavit will be found to have fallen short of legal and constitutional prerequisites to replevin. Consolidated Edison Co. v. Haymer, 139 Misc. 2d 95 (N.Y. App. Term 1988).
[26] *See*, *Brooklyn Union Gas Co. v Gottlieb*, 121 Misc. 2d 778 (N.Y. Civ. Ct. 1983).

deferred payment agreement. The customer should argue in his opposing affidavit, or in person at the court appearance, against these facts if he or she believes that the utility has made an error of fact. If the customer has already challenged the alleged debt and has filed a complaint with the Public Service Commission and that complaint has been undecided as of the time of the hearing on replevin, then the customer should make sure that the Court is aware that there is a pending dispute is before the PSC.[27]

The purpose of the affidavit in support of the application for an Order of Seizure is to convince the court that the utility will probably succeed on the merits. Even if the affidavit is facially sufficient, however, the court is not required to grant the application but, rather, may grant the order. Therefore, the advocate can challenge the affidavit procedurally, factually and equitably to convince the court not to exercise its discretion. Therefore, the customer could demonstrate the superficiality of the utility's application or its failure to allege specific facts to support its application for an order of seizure.

C. Policy Arguments

The customer could argue against the removal of the meter by appealing to the court's discretion to allow equitable remedies that do not involve termination of the customer's electric or gas meter which provides that family with a necessity of life.[28] Since removing a meter terminates utility service, the public interest of this state requires that a court carefully and

[27] For a detailed explanation on how a customer can file a complaint against a utility with the Public Service Commission for failing to abide by termination procedures, please see PULP's Law Manual chapter entitled, "Complaint Handling Procedures."

[28] "Replevin is a drastic remedy. When it involves breaking and entering into someone's home, especially to remove what is most likely the home's sole source of heat and cooking fuel, it is even more so." *Brooklyn Union Gas Company v. Richy, et al.*, 475 N.Y.S.2d 981, 982, 123 Misc.2d 802 (Civ. Ct. Kings Cty. 1984).

thoughtfully exercise its authority, and permit such an action only as a last resort.[29] It is settled state policy "that the continued provision of gas, electric and steam service without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest."[30] Therefore, the customer could argue that it is against state policy to terminate utility service if a customer is willing to cooperate with a utility.

For example, the customer could demonstrate to the court that its willing to seek state assistance to help pay its debt to the utility. The Legislature enacted Social Services Law §131-s and Public Service Law §65-b which provide customers monetary assistance when a threat of termination exists. A customer may request emergency utility payment from its local social services department (SSL §131-s) if he or she is unable to afford the utility bill. Perhaps, if the customer has not yet applied for such assistance, he or she could argue that the Court should delay termination until he or she can complete the appropriate application.

D. Affirmative Defenses

Affirmative defenses are available to a person whose meter the utility seeks to seize. For example, the customer could argue that removal should not be granted because the customer has made partial payment, or because the customer was overcharged, or because the customer is being held responsible for another person's debt, or because the customer is privy to an illegal shared meter situation. Any of these circumstances should be brought to the attention of the court in opposing the application for an Order of Seizure.

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[29] "[T]he courts have been careful to attempt to insure that any requested seizures comport fully with constitutional due process requirements." *Id*. at 982

[30] Public Service Law §30 (the Home Energy Fair Practices Act §§30-52).

6. Removal of Meter

If the Court grants the plaintiff utility's application for an Order of Seizure, then, the utility will work with the local authorities to coordinate the removal of the meter on the customers property. The removal of the meter is seized in accordance with the provisions of the Order and without delay.[31] Pursuant to the Order of Seizure, law enforcement (typically a sheriff or Marshall) has the authority to "break open, enter, and search" customers' residences to take the meter.[32] On the day of removal, the sheriff is required to serve the person from whose possession the chattel is removed a copy of the order of seizure, the papers on which the order was granted, and the undertaking delivered to him by the plaintiff. Unless the order of seizure provides otherwise, service of papers must be made in person by the sheriff on each defendant not in default.[33] Therefore, a customer of record who has been shown to be so delinquent on his account to the utility is not entitled to service. Only the person from whose possession the chattel is seized – in other words, the property owner or landlord of a delinquent tenant and customer of record. However, if the customer had appeared in court as defendant, then he is also entitled to service in the manner provided for service of papers generally.[34]

[31] CPLR §7102(a).
[32] CPLR §7102(d)(1).
[33] CPLR §7102(b).
[34] Id.

7. Conclusion

The ultimate result of the seizure of a utility meter is termination of utility service, the consequences of which are dire. The courts have recognized that gas and electricity are absolute necessities of life, the absence of which evokes severe hardship and endangers health and safety.[35]

The first step in challenging a replevin action is to delay the removal of the meter. After the Notice of Application is received by the customer, he or she can attempt to work out a payment plan that would stall removal of the meter, or he or she can lodge a complaint against the utility to challenge the underlying accuracy of the debt itself. If the matter is brought to Court, advocates or customers seeking to defend against termination of their service should make all possible arguments, including legal and equitable arguments against the proposed replevin, but that also challenge the procedural, substantive, legislative and constitutional propriety of the proceeding itself. Customers and advocates should seek advice from the Public Service Commission and public interest law groups like PULP and the New York Legal Action Group ("NYLAG") before appearing before Court if possible.

[35] *Montalvo v. Consol. Edison Co.*, 110 Misc. 2d 24, 34 (Sup. Ct. 1981) *citing Velardi v. Consolidated Edison Co. of N. Y., 63 Misc 2d 623* (Sup. Ct. 1970).