VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

RULE 64. REPLEVIN

(a) Availability of Replevin. A plaintiff claiming the possession of goods wrongfully taken or detained may replevy the goods on writ of replevin as provided by this rule or by law, provided that the value of the goods sought to be replevied is within the subject-matter jurisdiction of the court.

(b) Writ of Replevin: Form. The writ of replevin shall bear the signature or facsimile signature of the clerk, be under seal of the court, contain the name of the court, the names and residences of the parties and the date of the complaint, be directed to the sheriff or the sheriff's deputies of the county within which the goods are located, and command them to replevy the goods, which shall be described with reasonable particularity and their respective values stated. The writ of replevin shall also state the name of the justice or judge who entered the order approving the writ of replevin and the amount of the replevin bond and the date of the order.

(c) Same: Service. No writ of replevin shall be executed unless both it and the amount of the replevin bond are approved by order of the court. Except as provided in subdivision (h) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that it is more likely than not that the plaintiff will prevail in the replevin action and that the amount of the replevin bond is twice the reasonable value of the goods and chattels to be replevied.

A replevin action may be commenced only by filing the complaint with the court, together with a motion for approval of the writ of replevin and the amount of the replevin bond. The motion shall be supported by affidavit or affidavits setting forth specific facts sufficient to warrant the required finding and shall be upon the affiant's own knowledge, information and belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true. Except as provided in subdivision (h) of this rule, the motion and affidavit or affidavits with notice of hearing thereon shall be served upon the defendant in the manner provided in Rule 4 at the same time the summons and complaint are served upon that defendant.

A defendant opposing a motion for approval of a writ of replevin shall file material in opposition as required by Rule 7(c). If the defendant is deemed to have waived all objection to the motion as provided in Rule 7(c) for failure to file the opposition material within the time therein provided or as extended, the court shall, without hearing, upon a finding that the plaintiff is entitled to a writ of replevin under the terms of this subdivision (c), enter an order of approval of the writ.

The writ of replevin may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiffs' attorney shall deliver to the officer replevying the goods the original writ of replevin upon which to make the officer's return and shall attach thereto the bond required by law and a copy of the writ of replevin and bond for service on the defendant. The officer shall forthwith cause the goods to be replevied and delivered to the plaintiff. Thereupon the defendant shall be served, in the manner provided in either Rule 4 or Rule 5, with a copy of the writ of replevin and bond, with the officer's endorsement thereon of the date of execution of the writ.

(d) Allegations of Demand and Refusal; Title. If the action is for a wrongful detention only, a demand and refusal of possession before beginning the action shall be alleged by the plaintiff in replevin. Where the title to the goods of the plaintiff in replevin rests upon the title of a third person or upon a special property, the facts shall be alleged.

(e) Defenses; Counterclaim. All defenses shall be made by answer. If the defendant in replevin claims title to the goods or relies upon the title of a third person or upon a special property, the answer shall so state. All claims by the defendant in replevin for a return of the goods, or for damages, or a lien in an amount within the subject-matter jurisdiction of the court, shall be made by counterclaim or answer.

(f) Replevin on Counterclaim, Cross-Claim or Third-Party Complaint. Goods may be replevied on writ of replevin by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim, provided that the goods are located within the county where the action is pending and the value of the goods is within the subject-matter jurisdiction of the court.

(g) Equitable Replevin. These rules shall not be construed to extend or limit the availability of equitable replevin.

(h) Ex Parte Orders Approving Replevin. An order approving a writ of replevin and the amount of the replevin bond may be entered ex parte upon findings by the court that it is more likely than not that the plaintiff will prevail in the replevin action and that the amount of the replevin bond is twice the reasonable value of the goods and chattels to be replevied, and that either (i) the person of the defendant is not subject to the jurisdiction of the court in the action; or (ii) there is a clear danger that the defendant if notified in advance of replevin of the property will remove it from the state or conceal it; or (iii) there is immediate danger that the defendant will damage or destroy the property to be replevied. The motion for such ex parte order, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meetings the requirements set forth for affidavits in subdivision (c) of this rule. The hearing on the motion shall be held forthwith after the filing of the complaint.

(i) Return of Property Replevied on Ex Parte Order. On 2 days' notice to the plaintiff or on such shorter notice as the court may prescribe, a defendant from whom property has been replevied pursuant to an ex parte order entered under subdivision (h) of this rule may appear, without thereby submitting to the personal jurisdiction of the court, and move the return of the property replevied, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order which the defendant has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means, otherwise available by law, for obtaining return of the replevied property or damages or a lien, or for obtaining an adjudication of the rights of the parties in the replevied property.

Advisory Notes – January 2013

The third sentence of the second paragraph in subsection (c) is amended to correct a typographical error. The rule is revised to read, "affidavit or affidavits" instead of, "affidavits or affidavits."

Advisory Committee's Notes
1993

Rules 64(c) and (h) are amended for conformity with Rules 4A and 4B as amended effective February 15, 1992, and simultaneously with the present amendment. The standard of "more likely than not" is adopted for approval of a writ of replevin as a matter of policy rather than constitutional mandate in order to

strike a more even balance between plaintiff and defendant. Under the former standard of "reasonable likelihood," the plaintiff had only to show that there was some substance to the claim. Under the amended standard, the plaintiff must show a greater than fifty percent chance of prevailing.

Language is also added to Rule 64(c) for the purpose of expediting proceedings by requiring the court to issue the writ of replevin without hearing if the defendant fails to respond to the motion for approval within 21 days as provided in Rule 7(c). Rule 64(h) is further amended to provide for expedited hearing of an ex parte motion for approval.

For further discussion of the reasons for these amendments, s*ee* M.R. Civ. P. 4A advisory committee's note to 1992 amend., Me. Rptr., 604 A.2d adv. sht. no. 2 at CXLII-CXLIV, and Advisory Committee's Note to simultaneous amendments of Rule 4A.

Rule 64(c) is also amended to eliminate a gender reference that was inadvertently omitted from the general amendments of July 1, 1987, eliminating such references.

Advisory Committee's Note
April 15, 1975

This amendment corrects an obvious typographical error made in the Promulgation Order for the amendment effective January 1, 1973.

Advisory Committee's Note
January 1, 1973

The amendment of this Rule, as well as the simultaneous amendment of Form 14 and the addition of Forms 14A through 14D, are made for the purpose of complying with the constitutional requirement of notice and hearing before property may be taken on writ of replevin as recently laid down by the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) [rehearing denied 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed.2d 165]. In *Fuentes* the replevin procedures of Florida and Pennsylvania, similar in pertinent respects to the replevin procedures in Maine, were held constitutionally deficient because "at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the

issuance of the writ." (92 S.Ct. at 1991) The Supreme Court specifically held that the requirements that the plaintiff "must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong" are "hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights." (*Id.* at 1995) As the Supreme Court said, "when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." (Id. at 1994)

Three-judge federal district courts in the First Circuit have applied the *Fuentes* principle to hold unconstitutional both Rhode Island attachment of tangible personal property and Massachusetts trustee process (both similar to the parallel mesne process in Maine) because of the absence of prior notice and hearing. *McClellan v. Commercial Credit Corp*., 350 F.Supp. 1013 (D.R.I.1972) [affirmed *sub nom*. *Georges v. McClellan*, 409 U.S. 1120, 93 S.Ct. 935, 35 L.Ed.2d 253 (1973)] ; *Schneider v. Margossian*, 349 F.Supp. 741. (D.Mass. 1972). Simultaneously with the amendment of the replevin rule and forms, Rules 4A and 4B and the associated official forms are being amended to meet the constitutional requirements as declared in *Fuentes* and applied in *McClellan* and *Schneider*. Reference is made to the Advisory Committee's Notes to Rules 4A and 4B.

The United States Supreme Court in the *Fuentes* case leaves open the exact "nature and form of such prior hearings" (*Id*. at 2002), except to say that "the essential reason for the requirement of prior hearing is to prevent unfair and mistaken deprivations of property" and that accordingly "it is axiomatic that the hearing must provide a real test." By quoting from Justice Harlan's concurring opinion in the *Sniadach* case (*Id*. at 2002-03) the Supreme Court makes clear that the defendant must be given "an opportunity to contest at least the probable validity of the underlying claim." (Quoted language is from *Schneider v. Margossian, supra*) This opportunity the rule assures to the defendant by requiring that a writ of replevin can be approved only if the court finds, upon the basis of affidavits or any other sworn evidence received from the parties, that there is a reasonable likelihood that the plaintiff will prevail in the replevin action. Compare the similar test for approval of attachment of tangible personal property and attachment on trustee process under the simultaneous amendments to Rules 4A and 4B. The amendment to the replevin rule goes further and requires as a prerequisite to court approval of the writ of replevin that the court determine the reasonable

value of the goods and chattels to be replevied, thus assuring the defendant the full protection of the statute requiring a replevin bond in an amount twice that value.

The plaintiff will not prevail on his motion for approval of the writ of replevin simply by making out a prima facie case on the basis of his affidavits. The defendant by affidavit or other evidence can contest the plaintiff's attempted showing of "reasonable likelihood" both by contradictory evidence and by affirmative defenses including, for example, claims of title to the goods or title in a third person. If the motion is being heard prior to the filing of an answer the special requirements for stating defenses as set forth in Rule 64(e) should not be applied to prevent the defendant from raising any such defenses as a basis for convincing the court that there is not a reasonable likelihood that the plaintiff will prevail in the replevin action.

The procedure in the early stages of the replevin action will, under the amended Rule 64 and associated forms, be as follows: The replevin action may be commenced only by the second method specified in Rule 3, that is, by filing the complaint with the court. Along with the complaint there will be filed a motion for approval of the writ of replevin and of the amount of the replevin bond. The motion must be supported by one or more affidavits setting forth evidentiary facts showing that there is a reasonable likelihood the plaintiff will prevail in the replevin action and also showing the reasonable value of the goods and chattels to be replevied. The next step will be service on the defendant of the summons and complaint, together with a copy of the motion and its supporting affidavits. The notice of hearing also served upon the defendant at that time will state the exact time and date of the hearing, which in accordance with Rule 6(d) must be not sooner than 7 days after service on the defendant. The defendant has the right to file opposing affidavits not later than 1 day before the hearing. See Rule 6(d). For the form of the motion and notice of hearing, see new Form 14A. Upon making the required findings of "reasonable likelihood" and of the reasonable value of the goods and chattels to be replevied, the judge will enter the order approving the writ of replevin and the replevin bond. See new Form 14B.

After court approval of the writ and the bond, the plaintiff's attorney will, as now, fill out the writ of replevin which he has procured in blank from the clerk. Under the amendment of Form 14, the writ of replevin must contain a specific recitation of the name of the Superior Court Justice granting the order of approval, the amount of the replevin bond approved by the court and the date of the order. The writ of replevin with the attached bond is then put in the hands of the officer for execution. Following the replevy of the described goods and chattels, a copy of

the writ of replevin and bond bearing the officer's endorsement as to the date the writ was executed must be served upon the defendant. Normally, the officer should serve that copy on the defendant at the same time he replevies the goods and in such case he would use the methods of service prescribed in Rule 4 for the original service of summons and complaint. However, if (as will be the case except where under subdivision (h) the writ of replevin and bond have been approved ex parte) the defendant has already been served with the summons and complaint, the copy of the writ of replevin with the officer's endorsement may be served upon the defendant by mail as prescribed in Rule 5.

Although the *Fuentes* case lays down the normal requirement for prior notice and hearing, it does recognize that "there are 'extraordinary situations' that justify postponing notice and opportunity for a hearing." (92 S.Ct. at 1999) Rule 64(h) added by this amendment specifies, as does the newly added Rule 4A(f), extraordinary situations justifying the issuance ex parte of an order approving the writ of replevin and replevin bond. The first situation where no prior notice and hearing are required is that held valid in *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921), approved in *Fuentes*, n. 23. The second and third situations were also recognized by *Fuentes* (92 S.Ct. at 2000–01) as "demanding prompt action," namely, situations of "immediate danger that a debtor will destroy or conceal disputed goods."

The ex parte order for replevin will normally be granted on affidavits only. Those affidavits are required, in the same manner as affidavits in support of motions for temporary restraining orders under Rule 65(a), to set forth specific facts (and not merely conclusory allegations) sufficient to warrant the required court findings both as to "reasonable likelihood" and as to a special situation in which notice to the defendant may be dispensed with.

Rule 64(h), providing as it does for a court order for replevin without notice to the defendant, has many similarities to Rule 65(a) permitting ex parte temporary restraining orders. Rule 64(i) permits the defendant from whom property is replevied ex parte to move expeditiously for return of the property. A defendant who is not subject to personal service in the state may appear to contest the ex parte replevin without thereby submitting himself to the personal jurisdiction of the court. On the hearing under Rule 64(i) the plaintiff has the burden of proof. Rule 64(i) expressly declares that the provision there made for an expeditious hearing on return of the replevied property is in addition to other available means for obtaining return of the property or other relief.

Explanation of Amendments
(Dec. 1, 1959; Aug. 1, 1962)

Rule 64(b) was amended November 2, 1959, effective December 1, 1959, to require the writ of replevin to set forth the respective values of the goods to be replevied. Although the same conclusion had been previously achieved by interpreting any claim stated in an answer as being a counterclaim,* the 1962 amendment of Rule 64(e) puts beyond any doubt that a claim for return of the replevied goods, for damages, or for a lien, need not be denominated as a counterclaim. If not denominated as a counterclaim, the plaintiff is not required to file a reply. See Rule 7(a).

Reporter's Notes
December 1, 1959

The purpose of this rule is to preserve existing practice with respect to replevin to the extent compatible with these rules. It has no counterpart in the Federal Rules.

Rule 64(a) makes available the remedy of replevin as provided by this rule or by law, thus incorporating by reference R.S.1954, Chap. 125, as amended in 1959 [now 14 M.R.S.A. § 7301.]

Rule 64(b) prescribes the form of the writ of replevin. See Form 14 in the Appendix of Forms. The requirement that the goods be described with reasonable particularity is in accord with case law. *Musgrave v. Farren*, 92 Me. 198, 42 A. 355 (1898).

Rule 64(c) provides that service shall be made as in other actions and prescribes the requirement of a replevin bond. R.S.1954, Chap. 125, Sec. 10 [now 14 M.R.S.A. § 7303]. The procedure is similar to that in ordinary attachments. A separate summons and complaint are required, and the defendant is also to be served with a copy of the writ of replevin and of the officer's return thereon. Presumably the writ of replevin and the summons and complaint would ordinarily be served together.

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* According to Field, McKusick & Wroth: "Note in original: Memo of Supreme Judicial Court Conference of July 13, 1960." 2 Field, McKusick & Wroth, *Maine Civil Practice* at 97 (2d ed. 1970)].

Rule 64(d) apparently changes the law in requiring allegations of demand and refusal where the claim is for wrongful detention only. Although in such a case proof of demand and refusal is necessary (unless the defendant claims title in himself), the Maine cases hold that it need not be pleaded. *Cate v. Merrill*, 116 Me. 432, 102 A. 235 (1917). The last sentence may also require a more specific statement than present practice.

Rule 64(e), consistently with the rules generally, requires the factual basis of the defendant's position to be spelled out in the answer; and provides that a claim for a return, for damages, or for a lien shall be by counterclaim.[*]

Rule 64(f) allows replevin on counterclaims and the like, but only when the goods are located within the county where the action is pending. This limitation is because replevin is a local action which can be brought only in such county. R.S. 1954, Chap. 125, Sec. 9 [now 14 M.R.S.A. § 7302].[**] A counterclaim in replevin is not compulsory within the meaning of Rule 13(a) when the goods are detained in another county even though the replevin claim arises out of the same transaction or occurrence as the plaintiff's claim.

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[*] [Field, McKusick & Wroth noted: "Or by answer. See Explanation of Amendments." 2 Field, McKusick & Wroth, *Maine Civil Practice* at 97 (2d ed. 1970)].

[**] [Field, McKusick & Wroth noted: "By 1963 Laws, c. 402, § 203, the venue of replevin actions in the District Court was further restricted to the division where the goods are detained. See § 0.8 n. 21 above." 2 Field, McKusick & Wroth, *Maine Civil Practice* at 97 (2d ed. 1970)].