

Agenda

Advisory Committee on Rules of Civil Procedure

February 25, 2004
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes	Fran Wikstrom
Report on meeting with Supreme Court	Fran Wikstrom
HJR 16. Amendments to URCP 62	Tim Shea
Rule 47. Communication with jurors	Tim Shea
Rule 51. Instructions to jury; objections	Tim Shea
Remedies rules	Tim Shea

Meeting Schedule

March 24
April 28
May 26
September 22
October 27
November 17 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

**Wednesday, January 28, 2004
Administrative Office of the Courts**

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Glenn C. Hanni, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Thomas R. Karrenberg, R. Scott Waterfall, David W. Scofield, Francis J. Carney, Terrie T. McIntosh, Debora Threedy, Paula Carr, W. Cullen Battle, Janet H. Smith, Todd M. Shaughnessy, Leslie W. Slauch, Virginia S. Smith, James T. Blanch, Honorable Lyle R. Anderson (via telephone)

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Thomas R. Lee, Honorable David Nuffer

GUESTS: None

I. APPROVAL OF MINUTES.

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the December 18, 2003 meeting were reviewed, and R. Scott Waterfall moved that they be approved as written. The motion was seconded and approved unanimously.

II. RULE 65B. REQUEST BY CLIFTON PANOS.

Clifton Panos has submitted letters to Tim Shea and Mr. Wikstrom commenting on Rule 65B, and these letters were circulated to all Committee members before today's meeting. After discussion, a motion was made that after considering Mr. Panos' comments and suggestions regarding Rule 65B, the Committee has decided to take no action. The motion was seconded and approved unanimously.

III. COMMENTS TO AMENDMENTS.

Prior to today's meeting, Mr. Shea compiled the comments to recent amendments along with his own recommendations where applicable, and provided these to Committee members. Mr. Shea and Mr. Wikstrom led the Committee in a discussion of these comments.

A. SMALL CLAIMS RULES.

1. RULE 3.

In response to a comment by Judge Elayne Storrs, it was agreed that the requirement of an affidavit should be included in this Rule.

2. RULE 4.

The issue of res judicata was raised and discussed. A recent case from the Court of Appeals dealing with small claims actions was also mentioned, and there was a discussion about whether that case would effect the amendment. After consideration of the res judicata issue and the Court of Appeals case, it was moved and seconded that the Rule be left as amended. The motion carried, with two members voting no.

3. RULE 6.

After the issue of discovery in small claims cases was discussed, it was agreed that Rule 6 would remain as amended. Mr. Shea commented that there may be a proposal before the legislature to require parties in small claims actions to exchange evidence before trial, but this has not been decided.

4. APPROVAL OF SMALL CLAIMS RULES.

After all comments were considered and discussed, Thomas Karrenberg moved that all Small Claims Rules be submitted as proposed by the Committee. The motion was seconded and approved unanimously.

B. OTHER RULES.

1. URCP 6.

It was agreed to leave this Rule as amended.

2. URCP 7.

In response to comments received, Mr. Shea has changed Rule 7 (p. 56, line 25), to state that this Rule will also apply to proceedings before commissioners. It was agreed that this should be done.

The Committee discussed other aspects of Rule 7, including whether memoranda should be required in cases before commissioners, proposed orders, and the increase in the page limit for summary judgment memoranda.

Judge Anthony Quinn commented that the commissioners feel very strongly that

memoranda should not be required in cases before them and believe that it will tie up cases. Judge Anthony Schofield noted that orders to show cause are sometimes filed in cases before commissioners, when they actually are motions, but that commissioners do not want to require memoranda in all situations. Leslie Slauch commented that orders to show cause are typically filed in order to get a quick ruling without going through the typical process. Mr. Shea pointed out that the wording of the Rule would require a motion any time a party is requesting relief. Several Committee members expressed concern that the domestic bar will not understand from this Rule that they must file a motion. Francis Carney noted that his concern is that commissioners were exempt from old URJP 4-501 but required to comply with old Rule 7, and the amendment would alter that.

After extensive discussion, a motion was made that the Rule be adopted as written regarding memoranda, with the proviso that this Committee develop rules applicable to practice before the commissioners. The motion was seconded, and carried with two Committee members voting no.

Proposed orders under Rule 7 were discussed. With regard to commissioners' orders, it was agreed to change "minute entry" to "date of service of subsequent written recommendation." After discussion, Scott Waterfall moved that the changes to Rule 7 that are proposed on pp. 58 and 59 of today's materials be approved, so that a proposed order would not be served until an objection was served or the time to object had expired. The motion was seconded and approved unanimously.

Judge Quinn then raised the issue of whether to retain the previously adopted 25-page limit for summary judgment memoranda. Referring to Third District Judge Robert Hilder's comment requesting that the 10-page limit be reinstated, Judge Quinn stated that most judges in the Third District are opposed to changing the page limit to 25 pages, with a major concern being the Third District's very heavy caseloads with very little law clerk assistance. There is a concern that the additional pages allowed will further bog down the process, and will also encourage unnecessarily lengthy memoranda.

Mr. Shea stated that since Rule 7 is already in effect, it will take an amendment to change the page limit. Most Committee members expressed opinions either for or against the increase to 25 pages, with many stating that they prefer to defer to the judges' opinions on page limits. After extension discussion, Judge Quinn moved to amend the rule to allow only 10 pages for summary judgment memoranda. The motion was seconded, and rejected. The vote was 8 in favor of returning to the 10-page limit, with 9 opposed. The Committee agreed to revisit this issue in one year, and solicit comments at that time from judges as to how the 25-page limit is working out in practice.

In light of the judges' concerns, the Committee also asked that a comment be included in the Minutes stating that it is troubling to the Committee that there are insufficient resources to allow for assistance with judges' case loads. This is particularly true with regard to financial resources that would enable judges to hire law clerks.

3. RULE 24.

The Attorney General had previously supported language in Rule 24 which would require that the party challenging the constitutionality of a statute notify the Attorney General, which then might choose to intervene. The Attorney General's office has now submitted a comment objecting to this language, and stating that the State's interest regarding constitutionality of statutes is adequately protected by statute. The Committee discussed this issue, with several members stating that even though the notification requirement is already contained in a statute, it should also be included in the Rule. It was pointed out that the Rule does not require the Attorney General to intervene, and only allows it. After further discussion, Debora Threedy moved that the last sentences of Rule 24(d)(1) and -(2) be deleted. The motion was seconded, and carried.

4. RULE 56.

Todd Shaughnessy expressed concern that Rule 56 as presently written would no longer require that an affidavit be submitted in support of a Rule 56(f) motion. Mr. Shea stated that the intent of the amendment was to simplify language and not to remove the requirement of an affidavit. Mr. Shaughnessy then moved that the language of Rule 56(f) track the language of Fed.R.Civ.P. 56(f). The motion was seconded, and carried unanimously.

5. RULE 64D.

In response to comments, Mr. Shea has proposed changes which would include both "Office of Recovery Services" and "Department of Workforce Services" in the language of Rule 64D. Mr. Shea's proposed changes were adopted by consensus.

6. RULE 68.

Several comments were received concerning Rule 68, with most comments being that the Rule should apply equally to both plaintiffs and defendants. Mr. Shea stated that he has proposed language that would make the Rule reciprocal. After discussion, a motion was made that Mr. Shea's proposed language be rejected and that the Rule remain as previously written. The motion was seconded, and carried.

7. RULE 74.

Judge Michael Lyon has recommended the following amendments to proposed Rule 74: (1) attorneys filing motions to withdraw must affirmatively state whether there is a pending motion or trial or certificate of readiness for trial filed, the pending dates for such matters, and the reason(s) for the motion; (2) withdrawing attorneys must provide opposing counsel with his or her client's most current address. Thomas Karrenberg moved that the Committee approve the changes proposed by Judge Lyon. The motion was seconded and carried.

8. RULE 101.

Based on the comment of Commissioner Michael Evans, Mr. Shea moved that Rule 101 be deleted in its entirety. The motion was seconded, and carried.

9. RULE 106.

Commissioner Lyon has submitted a comment suggesting that the phrase “or motion” be added to the following language in Rule 106: “No request to modify a decree shall be raised by an order to show cause.” Mr. Shea suggested that, rather than listing ways in which one may *not* raise a modification of a divorce decree, the language regarding prohibition be deleted so that the Rule retain only the affirmative requirement that modification be made by petition. Judge Schofield moved to adopt Mr. Shea’s proposed change. The motion was seconded, and carried.

10. APPROVAL OF OTHER RULES.

After discussion of these Rules, Cullen Battle moved that the Committee approve all amendments as approved in today’s meeting. Glenn Hanni seconded the motion, which was approved unanimously.

IV. RULE 47. COMMUNICATION WITH JURORS.

The Committee discussed Rule 47, regarding communications with jurors. The term “not form an opinion” was discussed, with Mr. Battle asking how that requirement can be enforced. He noted that jurors can be admonished not to express an opinion and/or to keep an open mind, but making it obligatory not to “form” an opinion is difficult. The Committee also discussed whether it could be a claim of error if the jury is not instructed at every break not to discuss the case. In light of the late hour, it was agreed that this issue will be placed on the agenda for the next meeting.

V. ADJOURNMENT.

The meeting adjourned at 6:05 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, February 24, 2004, at the Administrative Office of the Courts.

**RESOLUTION AMENDING RULES OF CIVIL
PROCEDURE - JUDGMENT**

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Greg J. Curtis

LONG TITLE

General Description:

This joint resolution amends the Utah Rules of Civil Procedure by providing for a maximum supersedeas bond amount that may be required of an appellant.

Highlighted Provisions:

This resolution:

- ▶ limits the appellate bond amount to ~~10% of the defendant's net worth or~~ \$25,000,000; and

- ▶ allows a judge to require an appellant to execute a bond in excess of the limit if the defendant, by a preponderance of the evidence, proves that the appellant, outside the normal course of business, is dissipating assets to avoid the payment of a judgment.

Special Clauses:

This resolution provides an immediate effective date.

Utah Rules of Civil Procedure Affected:

AMENDS:

Rule 62, Utah Rules of Civil Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of



all members of both houses of the Legislature:

Section 1. **Rule 62**, Utah Rules of Civil Procedure is amended to read:

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Stay upon entry of judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction pending appeal. When an appeal is taken, from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) Stay upon appeal. When an appeal is taken, the appellant by giving a supersedeas bond or other form of security may obtain a stay throughout the course of all appeals or discretionary reviews, unless such a stay is otherwise prohibited by law or these rules. The bond or other form of security may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond or other form of security is approved by the court. In cases brought under any legal theory in which the amount or value of the judgment exceeds \$5,000,000, including cases involving individual, aggregated, class-action, or otherwise joined claims, the amount of the bond required collectively of all appellants may not exceed \$25,000,000, and the bond or other form of security required of any single appellant may not exceed the lesser of (1) \$5,000,000 plus 10% of the judgment award, or (2) \$25,000,000, regardless of the amount of the judgment. The court may require an appellant to execute a bond in an amount up to the total amount of the judgment if an appellant whose bond or other form of security has been limited is dissipating assets outside the ordinary course of business to avoid payment of a judgment.

(e) Stay in favor of the state, or agency thereof. When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i) Form of supersedeas bond; deposit in lieu of bond; waiver of bond; jurisdiction over sureties to be set forth in undertaking.

(i) (1) A supersedeas bond given under Subdivision (d) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file an affidavit setting forth in reasonable detail the assets and liabilities of the surety.

(i) (2) Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d).

(i) (3) The parties may by written stipulation waive the requirement of giving a supersedeas bond under Subdivision (d) or agree to an alternate form of security.

(i) (4) A supersedeas bond given pursuant to Subdivision (d) shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be

served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(j) Objecting to sufficiency or amount of security. Any party whose judgment is stayed or sought to be stayed pursuant to Subdivision (d) may object to the sufficiency of the sureties on the supersedeas bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. The party so objecting shall be entitled to a hearing thereon upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay. The fact that a supersedeas bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

Section 2. **Effective date.**

This resolution takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.

Legislative Review Note

as of 1-28-04 9:30 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number HJR016

Resolution Amending Rules of Civil Procedure-Judgment*06-Feb-04**10:36 AM*

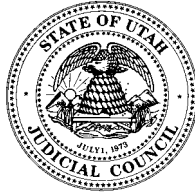
State Impact

It is estimated that provisions of this bill can be implemented with existing resources.

Individual and Business Impact

The fiscal impact is not determinable.

Office of the Legislative Fiscal Analyst



Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

To: Civil Procedures Committee
From: Tim Shea *TS*
Date: February 17, 2004
Re: Communication with jurors

The Committee on Improving Jury Service recommends the following amendment to URCP 47, regulating communication with jurors. The Committee believes the proposal is more in keeping with the case law and provides clearer limits than the existing rule. If endorsed by the Civil Procedures Committee, a similar amendment will be proposed to the Advisory Committee on Rules of Criminal Procedure.

Draft Utah Rule of Civil Procedure 47. Jurors.

....

~~(1) Separation of jury. If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.~~

(1) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors may communicate with court personnel and among themselves, but, unless authorized by the court, jurors shall not communicate with any person regarding a subject of the trial. It is the duty of jurors not to form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so instruct the jury.

The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.

1 Rule 51. Instructions to jury; objections.

2 (a) Preliminary instructions. After the jury is sworn and before opening statements, the court
3 may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the
4 elements and burden of proof for the cause of action, and the definition of terms. The court may
5 instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and
6 any matter the court in its discretion believes will assist the jurors in comprehending the case.
7 Preliminary instructions shall be in writing and a copy provided to each juror. At the final
8 pretrial conference or at such other time as the court directs, a party may file a written request
9 that the court instruct the jury on the law as set forth in the request. The court shall inform the
10 parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish
11 the parties with a copy of its proposed instructions, unless the parties waive this requirement.

12 (b) Interim written instructions. During the course of the trial, the court may instruct the jury
13 on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the
14 written instruction, the court shall advise the parties of its intent to do so and of the content of the
15 instruction. A party may request an interim written instruction.

16 (c) Final instructions. Parties shall file requested jury instructions at the time and in the
17 format directed by the court. If a party relies on statute, rule or case law to support or object to a
18 requested instruction, the party shall provide a citation to or a copy of the precedent. The court
19 shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it
20 shall furnish counsel with a copy of its proposed instructions, unless the parties waive this
21 requirement. The court shall instruct the jury at the conclusion of the evidence on any matter not
22 included in earlier instructions. The court may repeat an earlier instruction to assist the jury in
23 comprehending the case. Final instructions shall be in writing and at least one copy provided to
24 the jury. The court shall provide a copy to any juror who requests one and may, in its discretion,
25 provide a copy to all jurors.

26 (d) Objections to instructions. Objections to written instructions shall be made before the
27 instructions are given to the jury. Objections to oral instructions may be made after they are
28 given to the jury, but before the jury retires to consider its verdict. The court shall provide an
29 opportunity to make objections outside the hearing of the jury. Unless a party objects to an
30 instruction or the failure to give an instruction, the instruction may not be assigned as error

except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

(e) Arguments. Arguments for the respective parties shall be made after the court has given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

Rule 64. Writs in general.

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) “Claim” means claims, counterclaim, cross claim, third party claim or any other claim.

(a)(2)¹ “Defendant” means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) “Deliver” means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4)² “Disposable earnings” means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5)³ “Earnings” means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6)⁴ “Notice of exemptions” means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and how to claim exemptions.

(a)(7) “Officer” means the person to whom the writ is issued, including the sheriff, constable or deputy thereof, any person appointed by the officer to hold the property, and any person designated by the court.⁵

(a)(8)⁶ “Plaintiff” means the party filing a claim or in whose favor judgment has been entered.

(a)(9)⁷ “Property” means the defendant’s property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

¹ 64D(a)(iv), 64E

² 64D(d)(viii)

³ 64D(d)(vi), (vii)

⁴ 69(g)

⁵ 69(f)

⁶ 64D(a)(iv), 64E

⁷ 64C(a), 64D(a)(iii), 69(b)

1 (a)(10) “Serve” with respect to parties means any method of service authorized by Rule 5 and
2 with respect to non-parties means any manner of service authorized by Rule 4.

3 (b)⁸ Security.

4 (b)(1) Amount. When security is required of a party, the party shall provide security in the
5 sum and form the court deems adequate. For security by the plaintiff the amount should be
6 sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a
7 writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the
8 amount of the claim or judgment or the value of the defendant’s interest in the property. In fixing
9 the amount, the court may consider any relevant factor. The court may relieve a party from the
10 necessity of providing security if it appears that none of the parties will incur damages, costs or
11 attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial
12 reason for dispensing with the security.⁹ The amount of security does not establish or limit the
13 amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

14 (b)(2) Jurisdiction over surety. A surety upon a bond or undertaking submits to the
15 jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom
16 papers affecting the surety’s liability may be served. The surety’s liability may be enforced on
17 motion without the necessity of an independent action. The motion shall be mailed to the surety
18 at the address on the bond or undertaking. If the opposing party recovers judgment or if the writ
19 is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to
20 exceed the sum specified in the contract. The surety is responsible for return of property ordered
21 returned.

22 (b)(3) Objection. The court may issue additional writs upon the original security as often as
23 required subject to the objection of the opposing party. The opposing party may object to the
24 sufficiency of the security or the sufficiency of the sureties within five days after service of the
25 writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on
26 the proponent of the security.

27 (c) Inquiry and orders in aid of writs.

28 (c)(1) Referee. The court may appoint a referee to monitor hearings under this subsection.

⁸ 64B(c), (d). 64C(b), (c), (f), (g)

⁹ 64F; 65A(c)

1 (c)(2)¹⁰ Hearing; witnesses. The court may conduct hearings as necessary to identify property
2 and to apply the property toward the satisfaction of the judgment. Witnesses may be subpoenaed
3 to appear, testify and produce records.

4 (c)(3)¹¹ Restraint. The court may forbid any person from transferring, disposing or interfering
5 with the property.

6 (d) Issuance of writ, service

7 (d)(1)¹² Clerk to issue writs. The clerk of the court shall issue writs. A court in which a
8 transcript or abstract of a judgment or order has been filed has the same authority to issue a writ
9 as the court that entered the judgment or order. If the writ directs the seizure of real property, the
10 clerk of the court shall issue the writ to the sheriff of the county in which the real property is
11 located. If the writ directs the seizure of personal property, the clerk of the court may issue the
12 writ to an officer of any county.

13 (d)(2)¹³ Content of writ. As appropriate to the circumstances of the action, the writ shall
14 direct the officer to seize the property, to keep the property safe until further order of the court or
15 as directed in the writ, to deliver the property to the plaintiff, or to sell the property. If the writ is
16 to enforce a judgment or order for the payment of money, the writ shall specify the amount
17 ordered to be paid and the amount due. If the writ is issued ex parte before judgment, the clerk
18 shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing,
19 order authorizing the writ, notice of exemptions and reply form. If the writ is issued after
20 judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the
21 property, the judgment, notice of exemptions and reply form.

22 (d)(3) Service of writ.

23 (d)(3)(A)¹⁴ Upon whom. The officer shall serve the writ and accompanying papers on the
24 defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an
25 interest in the property. The officer may simultaneously serve notice of the date, time and place
26 of sale. A writ of garnishment of earnings applies to the earnings accruing during the pay period
27 in which the writ is served.

¹⁰ 69(o), (p), (r); 64C(i).

¹¹ 69(q), (s), (t)

¹² 69(c)

¹³ 64A(8), 64B(c), (h)(2), 64C(d), 64D(d), 69(d)

¹⁴ 64A(7), 64B(c), 64C(e), 64D(e), 69(f)

(d)(3)(B)¹⁵ Return, inventory. Within 10 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give to the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(C)¹⁶ **Service of a writ by publication.** The court may order service of a writ by publication in circumstances in which service of a complaint and summons would be appropriate under Rule 4.

(d)(3)(C)(i) If service of a writ is by publication, at least the following notice shall be published under the caption of the case:

To _____, Defendant:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78, Chapter 23.

(d)(3)(C)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 10 days prior to the due date for the reply or at least 10 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e)¹⁷ Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed defendant. Any claimant not named by the plaintiff and not served with the writ and

¹⁵ 64A(7), 64B(c), (h)(3), 64C(e)(7), (h), 64D(e), 69(e)

¹⁶ 69(g)

¹⁷ 64B(i), 64C(m), 64D(l), 69(n)

1 accompanying papers may exercise those rights and obligations at any time before the property is
2 sold or delivered to plaintiff.

3 (e)(2) Join claimant as defendant. The court may order any named claimant joined as a
4 defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is
5 thereafter a defendant to the action and shall answer within 10 days, setting forth any claim or
6 defense. The court may render judgment for or against the claimant to the limit of claimant's
7 interest in the property.

8 (e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed
9 by a person other than the defendant, the officer may request that the court require the plaintiff to
10 file security.

11 (f) Discharge of writ, release of property.

12 (f)(1)¹⁸ By defendant. At any time before the property is delivered to the plaintiff notice of
13 sale, the defendant may file security and a motion to discharge the writ and release the property.
14 The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within
15 five days after service of the motion. At any time before the property is delivered to the plaintiff
16 or notice of sale, the defendant may file a motion to discharge the writ and release the property
17 on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable
18 opportunity to correct any defect. The defendant shall serve the order to discharge the writ and
19 release the property upon the officer, defendant, garnishee and any third person claiming an
20 interest in the property.

21 (f)(2) By plaintiff. The plaintiff may discharge the writ and release the property by filing a
22 release and serving it upon the officer, defendant, garnishee and any third person claiming an
23 interest in the property.

24 (f)(3)¹⁹ Disposition of property if defendant prevails. If the defendant prevails on a claim, the
25 court shall order the writ discharged and proceeds of sales and remaining property delivered to
26 the defendant.

27 (f)(4)²⁰ Copy filed with county recorder. When an order discharges a writ upon property
28 seized by filing with the county recorder, the officer or a party shall file a certified copy of the
29 order with the county recorder.

¹⁸ 64A(6), 64B(e), 64C(f)(1), (4)

¹⁹ 64C(l)

(f)(5)²¹ Service on officer, disposition of property. If the order discharging the writ and releasing the property is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

If the property is in the custody of the plaintiff or a third person, the court shall order that person to deliver the property to the defendant.

Rule 64A. Prejudgment writs in general.

(a) Availability. A writ of replevin, attachment or garnishment is available after the claim has been filed and before judgment only upon written order of the court.

(b)²² Motion, affidavit. To obtain a writ of replevin, attachment or garnishment before judgment, plaintiff shall file a motion, security as ordered by the court and an affidavit stating facts showing the grounds for relief and other information required by these rules. The affidavit supporting the motion shall state facts in simple, concise and direct terms that are not conclusory.

An affidavit may be based upon information and belief by describing the investigation conducted to support the information and belief.

(c) Grounds for prejudgment writ. Grounds for a prejudgment writ include, in addition to the grounds for the specific writ, at least one of the following:

(c)(1) that the defendant is avoiding service of process; or

(c)(2) that the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, the property with intent to defraud creditors; or

(c)(3) that the defendant has left or is about to leave the state with intent to defraud creditors;

or

(c)(4) that the defendant has fraudulently incurred the obligation that is the subject of the action; or

(c)(5) that the property will decline in value; or

²⁰ 64C(m)

²¹ 64C(3)

²² 65C(a)

(c)(6) probable cause of losing the remedy unless the court issues the writ;
and all of the following:

(c)(7) that the property is not earnings and not exempt from execution; and

(c)(8) that the writ is not sought to hinder, delay or defraud a creditor of the defendant; and

(c)(9) that the threatened injury to the plaintiff outweighs the damage the writ may cause the defendant; and

(c)(10) a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim.

(d) Statement. The affidavit supporting the motion shall state facts sufficient to show the following information:

(d)(1) the nature, location and estimated value of the property and the name, address and phone number of the person holding the property;

(d)(2) that the property has not been taken for a tax, assessment or fine;

(d)(3) that the property has not been seized under a writ against the property of the plaintiff or that it is exempt from seizure;

(d)(4) the name and address of any person known to the plaintiff to claim an interest in the property; and, if the motion is for a writ of garnishment,

(d)(5) the name and address of the garnishee; and

(d)(6) that the plaintiff will pay to the garnishee the fee established by Utah Code Section 78-7-44.

(e) Notice, hearing. The court may order a writ of replevin, attachment or garnishment be issued before judgment after notice to the defendant and opportunity to be heard.

(f) Method of service. The affidavit for the prejudgment writ shall be served on the defendant and any person named by the plaintiff as claiming an interest in the property in a manner directed by the court that is reasonably calculated to expeditiously give actual notice of the hearing.

(g)²³ Reply. The defendant may file a reply to the affidavit for a prejudgment writ at least 24 hours before the hearing. The reply may:

(g)(1) challenge the issuance of the writ;

(g)(2) object to the sufficiency of sureties;

²³ 64D(h), 69(g)

(g)(3) request return of the property;

(g)(4) claim the property is exempt; or

(g)(5) claim a set off.

(h) Burden of proof. At the hearing the burden is on the plaintiff to prove the facts necessary to support the writ.

(i) Ex parte writ before judgment. If plaintiff seeks a prejudgment writ prior to a hearing, the plaintiff shall file an affidavit stating facts showing irreparable injury to the plaintiff before the defendant can be heard or the reasons notice should not be given. If a writ is issued without notice to the defendant and opportunity to be heard, the court shall set a hearing for the earliest reasonable time, and the writ and the order authorizing the writ shall:

(i)(1) designate the date and time of issuance and the date and time of expiration;

(i)(2) designate the date, time and place of the hearing;

(i)(3) forthwith be filed in the clerk's office and entered of record;

(i)(4) expire 10 days after issuance unless the court establishes an earlier expiration date, the defendant consents that the order and writ be extended or the court extends the order and writ after hearing;

(i)(4) be served on the defendant and any person named by the plaintiff as claiming an interest in the property in a manner directed by the court that is reasonably calculated to expeditiously give actual notice of the hearing.

Rule 64B. Writ of replevin.

(a)²⁴ Availability. A writ of replevin is available to compel delivery to plaintiff of specific personal property held by defendant.

(b)²⁵ Grounds. In addition to the grounds required in Rule 64A, grounds for a writ of replevin require all of the following:

(b)(1)²⁶ that plaintiff is entitled to possession; and

(b)(2)²⁷ that defendant wrongfully detains the property.

Rule 64C. Writ of attachment.

²⁴ 64B(a)

²⁵ 64B(b)

²⁶ 64B(b)(2)

²⁷ 64B(b)(3), (4)

1 (a)²⁸ Availability. A writ of attachment is available to seize property in the possession or
2 under the control of the defendant.

3 (b)²⁹ Grounds. In addition to the grounds required in Rule 64A, grounds for a writ of
4 attachment require all of the following:

5 (b)(1) that the defendant is indebted to the plaintiff;

6 (b)(2) that the action is upon a contract; is against a defendant who is not a resident of this
7 state or is against a foreign corporation not qualified to do business in this state; and

8 (b)(3) that payment of the claim has not been secured by a lien upon property in this state.

9 **Rule 64D. Writ of garnishment.**

10 (a)³⁰ Availability. A writ of garnishment is available to seize personal property of the
11 defendant in the possession or under the control of a person other than the defendant. A writ of
12 garnishment is available after final judgment or after the claim has been filed and prior to
13 judgment. The maximum portion of disposable earnings of an individual subject to seizure is the
14 lesser of:

15 (a)(1) 50% of defendant's disposable earnings for a writ to enforce payment of a judgment
16 for failure to support dependent children or 25% of defendant's disposable earnings for any other
17 writ; or

18 (a)(2) the amount by which the defendant's disposable earnings for a pay period exceeds the
19 number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage
20 prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

21 (b) Grounds for writ before judgment.³¹ In addition to the grounds required in Rule 64A,
22 grounds for a writ of garnishment before judgment require all of the following:

23 (b)(1) that the defendant is indebted to the plaintiff;

24 (b)(2) that the action is upon a contract; is against a defendant who is not a resident of this
25 state or is against a foreign corporation not qualified to do business in this state;

26 (b)(3) that payment of the claim has not been secured by a lien upon property in this state and

27 (b)(4) that the garnishee possesses or controls property of the defendant.

28 (c) Statement. The application for a post-judgment writ of garnishment shall state:

²⁸ 65C(a), (o)

²⁹ 65C(a)

³⁰ 64D(a)(i), (ii)

³¹ 64D(b)(i), (ii)

(c)(1) the name and address of the garnishee;

(c)(2) a detailed description of the property, including its value;

(c)(3) whether any of the property consists of earnings;

(c)(4) the amount of the judgment and the amount due on the judgment;

(c)(5) the name, address and phone number of any person known to the plaintiff to claim an interest in the property; and

(c)(6) that the plaintiff will pay to the garnishee the fee established by Utah Code Section 78-7-44.

(d)³² Interrogatories. The plaintiff shall submit with the affidavit or application **the information required by Utah Code Section 78-22-1.5 of a judgment information statement describing defendant** and interrogatories to the garnishee inquiring:

(d)(1) whether the garnishee is indebted to the defendant and the nature of the indebtedness;

(d)(2) whether the garnishee possesses or controls any property of the defendant and, if so, the nature, location and estimated value of the property;

(d)(3) whether the garnishee knows of any property of the defendant in the possession or under the control of another, and, if so, the nature, location and estimated value of the property and the name, address and phone number of the person with possession or control;

(d)(4) whether the garnishee is deducting an amount in satisfaction of a claim against the plaintiff or the defendant, a designation as to whom the claim relates, and the amount deducted;

(d)(5)³³ the date and manner of garnishee's service upon the defendant and any third persons;

(d)(6)³⁴ the dates on which previously served writs of continuing garnishment were served; and

(d)(7) any other relevant information plaintiff may desire, including defendant's position, defendant's rate and method of compensation, defendant's pay period and the computation of the amount of defendant's disposable earnings.

(e)³⁵ Content of writ, priority. The writ shall instruct the garnishee to complete the steps in subsection (f) and instruct the garnishee how to deliver the property. Several writs may be issued

³² 64D(d)(ii)

³³ 64D(d)(iii), 64D(g)

³⁴ 64D(v)(iii)

³⁵ 64D(c), 64D(d)(i), (v), 64D(v)(iii)

1 at the same time so long as there is only one garnishee named in a writ. Priority among writs of
2 garnishment is in order of their service.

3 (f)³⁶ Garnishee's responsibilities. The writ shall direct the garnishee to complete the
4 following within seven business days of service of the writ upon the garnishee:

5 (f)(1) answer the interrogatories under oath or affirmation;

6 (f)(2)³⁷ serve the answers to the interrogatories on the plaintiff;

7 (f)(3)³⁸ serve the writ, answers to interrogatories, notice of exemptions and two copies of the
8 reply form upon the defendant and any other person shown by the records of the garnishee to
9 have an interest in the property; and

10 (f)(4) file the answers to the interrogatories with the clerk of the court.

11 **The garnishee may amend answers to interrogatories to correct errors or to reflect a**
12 **change in circumstances by serving and filing the amended answers in the same manner as**
13 **the original answers.**

14 (g)³⁹ Reply to answer of garnishee; request for hearing.

15 (g)(1) The plaintiff or defendant may file and serve upon the garnishee a reply to the answers
16 and request a hearing. The reply shall be filed and served within 10 days after service of the
17 answers to the interrogatories, but the court may deem the reply timely if filed before the
18 property is delivered to the plaintiff or notice of sale. The reply may:

19 (g)(1)(A) challenge the issuance of the writ;

20 (g)(1)(B) challenge the accuracy of the answers to interrogatories;

21 (g)(1)(C) claim the property or a portion of the property is exempt; or

22 (g)(1)(D) claim a set off.

23 (g)(2) The reply is deemed denied, and the court shall conduct an evidentiary hearing. **The**
24 **court may permit discovery.**

25 (g)(3) If a person served by the garnishee fails to reply, as to that person:

26 (g)(3)(A) the garnishee's answers to interrogatories are deemed correct; and

27 (g)(3)(B) the property is not exempt, except as reflected in the answers to interrogatories.

³⁶ 64D(d)(iii)

³⁷ 5(b)

³⁸ 5(b)

³⁹ 64D(h), (i)

1 (h)⁴⁰ Delivery of property. A garnishee shall not deliver property until the property is due the
2 defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 20
3 days after service by the garnishee under subsection (f). If the garnishee receives a reply within
4 that time, the garnishee shall retain the property and comply with the order of the court entered
5 after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in
6 the writ.

7 (i) Liability of garnishee.

8 (i)(1)⁴¹ A garnishee who acts in accordance with this rule, the writ or an order of the court is
9 released from liability, unless answers to interrogatories are successfully controverted.

10 (i)(2)⁴² If the garnishee fails to comply with this rule, the writ or an order of the court, the
11 court may order the garnishee to appear and show cause why the garnishee should not be ordered
12 to pay such amounts as are just, including the value of the property or the balance of the
13 judgment, whichever is less, and payment of reasonable cost and attorney fees incurred by
14 parties as a result of garnishee's failure. **If the garnishee takes reasonable steps within a**
15 **reasonable period of time to secure property to which defendant has immediate access, the**
16 **garnishee is not in violation of this rule.**

17 (i)(3)⁴³ No person is liable as garnishee by reason of having drawn, accepted, made or
18 endorsed any negotiable instrument that is not in the possession or control of the garnishee at the
19 time of service of the writ.

20 (i)(4)⁴⁴ Any person indebted to the defendant may pay to the officer the amount of the debt or
21 so much as is necessary to satisfy the writ, and the officer's receipt discharges the debtor for the
22 amount paid.

23 (i)(5)⁴⁵ A garnishee may deduct from the property any claim against the plaintiff or
24 defendant.

25 (j) Property as security.

⁴⁰ 64D(h)(i), (iii), (iv), 64D(r)

⁴¹ 64D(k)

⁴² 64D(j)

⁴³ 64D(n)

⁴⁴ 69(m)

⁴⁵ 64D(m)

(j)(1)⁴⁶ If property secures payment of a debt to the garnishee, the property need not be applied at that time but shall remain subject to being applied pending payment in full of the debt. If property secures payment of a debt to the garnishee, the plaintiff may obtain an order authorizing the plaintiff to buy the debt and requiring the garnishee to deliver the property.

(j)(2)⁴⁷ If property secures an obligation that does not require the personal performance of the defendant and can be performed by a third person, the plaintiff may obtain an order authorizing the plaintiff or a third person to perform the obligation and requiring the garnishee to deliver the property upon completion of the performance or tender of performance that is refused.

(k)⁴⁸ Writ of continuing garnishment.

(k)(1) After the court has entered final judgment plaintiff may obtain a writ of continuing garnishment **against any non exempt periodic payment**. All provisions of this rule apply to this subsection, but this subsection governs over a contrary provision.

(k)(2) A writ of continuing garnishment applies to payments to the defendant from the date of service of the writ until the earlier of the following:

(k)(2)(A) 120 days from the date of service of the writ or, in the case of multiple writs, 120 days from the date a writ becomes effective;

(k)(2)(B) the last periodic payment;

(k)(2)(C) the judgment is stayed, vacated or satisfied in full; or

(k)(2)(D) the writ is discharged.

(k)(3) Only one writ of continuing garnishment (*in favor of this plaintiff against this defendant naming this garnishee*) may be in effect at one time. **Only one additional writ of continuing garnishment for a subsequent payment period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.**

(k)(3) Within seven days after the end of each payment period, the garnishee shall with respect to that period :

(k)(3)(A) answer the interrogatories under oath or affirmation;

(k)(3)(B) serve the answers to the interrogatories on the plaintiff, defendant and any other person shown by the records of the garnishee to have an interest in the property;

⁴⁶ 64D(o)

⁴⁷ 64D(p)

⁴⁸ 64D(v)

(k)(3)(C) file the answers to the interrogatories with the clerk of the court; and

(k)(3)(D) deliver the property as provided in the writ.

(k)(4) Any person served by the garnishee may reply as in subsection (g), but whether to grant a hearing is within the judge's discretion.

(k)(5) A writ of continuing garnishment issued **in favor of the State of Utah**:

(k)(5)(A) is not limited to 120-days;

(k)(5)(B) has priority over other writs of continuing garnishment; and

(k)(5)(C) if served during the term of another writ of continuing garnishment, tolls that term and preserves all priorities until the expiration of the State's writ.

Rule 64E. Writ of execution.

(a)⁴⁹ Availability. A writ of execution is available following entry of a final judgment or order requiring the delivery of property or the payment of money to seize property in the possession or under the control of the defendant.

(b)⁵⁰ Application. To obtain a writ of execution, plaintiff shall file an application stating:

(b)(1) the amount of the judgment and the amount due on the judgment;

(b)(2) a detailed description of the property; and

(b)(3) the name and address of any person known to the plaintiff to claim an interest in the property.

(c)⁵¹ Death of plaintiff. If the plaintiff dies, a writ of execution may be issued upon the affidavit of an authorized executor or administrator or successor in interest.

(d)⁵² Reply to writ; request for hearing.

(d)(1) The defendant may reply to the writ and request a hearing. The reply shall be filed and served within 10 days after service upon the defendant of the writ and accompanying papers under Rule 64(d).

(d)(2) The court shall set the matter for hearing within 10 days after the reply is filed. If the court determines that the writ was issued improperly, or that property is exempt from seizure, the court shall issue an order directing the officer to release the property. If the court determines that the writ was properly issued and the property is not exempt, the court shall issue an order

⁴⁹ 69(a), (c)

⁵⁰ 69(d)

⁵¹ 69(c)

⁵² 69(h)

1 directing the officer to sell or deliver the property. If the date of sale has passed, notice of the
2 rescheduled sale shall be given. No sale may be held until the court has decided upon the issues
3 presented at the hearing.

4 (d)(3) If a reply is not filed, the officer shall proceed to sell or deliver the property.

5 (e)⁵³ Mortgage foreclosure governed by statute. Utah Code, Title 78, Chapter 37, governs
6 mortgage foreclosure proceedings over contrary provisions of this rule.

7 **Rule 69A.⁵⁴ Seizure of property.**

8 Unless otherwise directed by the writ, the officer shall seize property as follows:

9 (a)⁵⁵ Debtor's preference. When there is more property than necessary to satisfy the amount
10 due, the officer shall seize such part of the property as the defendant may indicate. If the
11 defendant does not indicate a preference, the officer shall first seize personal property, and if
12 sufficient personal property cannot be found, then the officer shall seize real property.

13 (b) Real property. Real property shall be seized by filing the writ and a description of the
14 property with the county recorder and leaving the writ and description with an occupant of the
15 property. If there is no occupant of the property, the officer shall post the writ and description in
16 a conspicuous place on the property. If another person claims an interest in the real property, the
17 officer shall serve the writ and description on the other person.

18 (c) Growing crops. Crops growing upon real property shall be seized by filing the writ and a
19 description of the crops and the property upon which the crops are growing with the county
20 recorder and leaving the writ and description with an occupant of the property. If there is no
21 occupant of the property, the officer shall post the writ and description in a conspicuous place on
22 the property. If another person claims an interest in the real property or the crops, the officer
23 shall serve the writ and description on the other person.

24 (d)(1) Personal property. When severed, crops are personal property. Except as provided in
25 subsections (d)(2) and (d)(3), personal property shall be seized by serving the writ and a
26 description of the property on the person holding the property and taking the property into
27 custody.

⁵³ 69(g)

⁵⁴ 64C(e)

⁵⁵ 69(f)

(d)(2) Range stock, such as cattle, horses, sheep and other livestock, may be seized by filing the writ and a description of the property, specifying the number and marks or brands, with the county recorder. Range stock may be seized by taking it into custody, but any additional cost of taking it into custody will not be allowed if the court finds that taking the property into custody was unnecessary.

(d)(3) In the discretion of the officer, property of extraordinary size or bulk, property that would be costly take into custody or to store and property not capable of delivery may be seized by serving the writ and a description of the property on the person holding the property. The officer shall request of the person holding the property an affidavit describing the nature, location and estimated value of the property.

(e) Securities. Securities shall be seized as provided in Utah Code Section 70A-8-111.

Rule 69B. Sale of property; delivery of property.

(a)⁵⁶ Sale before judgment. The officer may sell the property before judgment if it is perishable or threatens to decline speedily in value. The court may order the officer to sell the property before judgment if the court finds that the interest of the parties will be served by sale. The officer shall keep proceeds of the sale safe subject to further order of the court.

(b) Notice of sale. The officer shall set the date, time and place for sale and serve notice thereof on the defendant and on any third party named by the plaintiff or garnishee. Service on the defendant and third party shall be not later than the initial publication of notice. The officer shall publish notice of the date time and place of sale as follows:

(b)(1) If the property is perishable or threatens to decline speedily in value, the officer shall post written notice of the date, time and place of sale and a general description of the property to be sold in the courthouse from which the writ was issued and in at least three public places of the county or city where the sale is to take place. The officer shall post the notice for such time as the officer determines is reasonable, considering the character and condition of the property.

(b)(2) If the property is other personal property, the officer shall post written notice of the date, time and place of sale and a general description of the property to be sold in the courthouse from which the writ was issued and in at least three public places of the county or city where the sale is to take place. The officer shall post the notice for at least seven days and publish the same

⁵⁶ 64C(j)

1 at least one time not less than one day preceding the sale in a newspaper of general circulation, if
2 there is one, in the county where the sale is to take place.

3 (b)(3) If the property is real property, the officer shall post written notice of the date, time
4 and place of sale and a particular description of the property to be sold on the property, at the
5 place of sale, at the district courthouse of the county in which the real property is situated, and in
6 at least three other public places of the county or city in which the sale is to take place. The
7 officer shall post the notice for at least 21 days and publish the same at least three times once a
8 week for three successive weeks immediately preceding the sale in a newspaper of general
9 circulation, if there is one, in the county.

10 (c) Postponement. If the officer finds sufficient cause, the officer may postpone the sale. The
11 officer shall declare the postponement at the time and place set for the sale. If the postponement
12 is longer than 72 hours, notice of the rescheduled sale shall be given in the same manner as the
13 original notice of sale.

14 (d) Conduct of sale. All sales shall be at auction to the highest bidder, Monday through
15 Saturday, legal holidays excluded, between the hours of 9 o'clock a.m. and 8 o'clock p.m. at a
16 place reasonably convenient to the public. The officer shall sell only so much property as is
17 necessary to satisfy the amount due. The officer shall not purchase property or be interested in
18 any purchase. Property capable of delivery shall be within view of those who attend the sale. The
19 property shall be sold in such parcels as are likely to bring the highest price. Severable lots of
20 real property shall be sold separately. Real property claimed by a third party shall be sold
21 separately if requested by the third party. Real property shall be sold at the courthouse of the
22 county in which the property is situated. The defendant may direct the order in which the
23 property is sold.

24 (e) Accounting. Upon request of the defendant, the plaintiff shall deliver an accounting of the
25 sale. The officer is entitled to recover the reasonable and necessary costs of seizing, storing and
26 selling the property. The officer shall apply the property in the following order up to the amount
27 due or the value of the property, whichever is less:

28 (e)(1) pay the cost of seizure, storage and sale;

29 (e)(2) deliver to the plaintiff the remaining proceeds of the sale;

30 (e)(3) deliver to the defendant the remaining property and proceeds of the sale.

(f) Purchaser refusing to pay. Every bid is an irrevocable offer. If a person refuses to pay the amount bid, the person is liable for the difference between the amount bid and the ultimate sale price. If a person refuses to pay the amount bid, the officer may:

(f)(1) offer the property to the next highest bidder;

(f)(2) renew bidding on the property; and

(f)(3) reject any other bid of such person.

(g) Property capable of delivery. Upon payment of the amount bid, the officer shall deliver to the purchaser of property capable of delivery the property and a certificate of sale stating that all right, title and interest which the defendant had in the property is transferred to the purchaser.

(h) Property not capable of delivery.⁵⁷ Upon payment of the amount bid, the officer shall deliver to the purchaser of property not capable of delivery a certificate of sale describing the property and stating that all right, title and interest which the defendant had in the property is transferred to the purchaser. The officer shall serve a duplicate of the certificate on the person controlling the property.

(i) Real property. Upon payment of the amount bid, the officer shall deliver to the purchaser of real property a certificate of sale for each parcel containing:

(i)(1) a description of the real property;

(i)(2) the price paid;

(i)(3) a statement that all right, title, interest of the defendant in the property is conveyed to the purchaser; and

(i)(4) a statement whether the sale is subject to redemption.

The officer shall file a duplicate of the certificate in the office of the county recorder.

(j) The officer shall deliver the property as directed by the writ.

Rule 69C. Redemption of real property after sale.

(a)⁵⁸ Right of redemption. Real property may be redeemed unless the estate is less than a leasehold of a two-years' unexpired term, in which event the sale is absolute.

(b) Who may redeem. Real property subject to redemption may be redeemed by the defendant or by a creditor having a lien on the property subsequent to that on which the property was sold or by their successors in interest. If the defendant redeems, the effect of the sale is

⁵⁷ New.

⁵⁸ 69(j)

1 terminated and the defendant is restored to the defendant's estate. If the property is redeemed by
2 a creditor, any other creditor having a right of redemption may redeem.

3 (c) How made. **The redemptioner shall serve on the purchaser notice of intent to redeem**
4 **at least 10 days before redemption.** The redemptioner shall pay the amount required to the
5 officer or to the purchaser and shall serve on the officer or purchaser:

6 (c)(1) a certified copy of the judgment or lien under which the redemptioner claims the right
7 to redeem;

8 (c)(2) an assignment, properly acknowledged or proved if necessary to establish the claim;
9 and

10 (c)(3) an affidavit showing the amount due on the judgment or lien.

11 (d) Time for redemption. The property may be redeemed within 180 days after the sale.

12 (e) Notice of expenses. The purchaser or redemptioner may file with the county recorder
13 notice of the amounts paid for taxes, assessments, insurance, maintenance, repair and any lien
14 other than the lien on which the redemption was based. **The purchaser or redemptioner shall**
15 **file such notice after service of the notice to redeem.** Failure to do so relieves a redemptioner
16 of the obligation to pay such amounts.⁵⁹

17 (f) Redemption price. The price to redeem property is the sale price plus six percent. The
18 price for a subsequent redemption is the redemption price plus three percent. If notice of the
19 amounts are filed with the county recorder, the price to redeem includes the amounts paid for
20 taxes, assessments, insurance, maintenance, repair and any lien other than the lien on which the
21 redemption was based plus six percent interest for an initial redemption or three percent interest
22 for a subsequent redemption.

23 (g) Dispute regarding price. If there is a dispute about the redemption price, the redemptioner
24 shall **within 20 days of the redemption** pay into court the amount necessary for redemption less
25 the amount in dispute and file and serve upon the purchaser a petition setting forth the items to
26 which the redemptioner objects and the grounds for objection. The petition is deemed denied.
27 The court may permit discovery. The court shall conduct an evidentiary hearing and enter an
28 order determining the redemption price. The redemptioner shall pay to the clerk any additional
29 amount within seven days after the court's order.

⁵⁹ 69(j)(5)

(h) Certificate of redemption. The purchaser shall promptly execute and deliver to the redemptioner, or the redemptioner to a subsequent redemptioner, a certificate of redemption containing:

(h)(1) a particular description of the real property;

(h)(2) the price paid;

(g)(3) a statement that all right, title, interest of the purchaser in the property is conveyed to the redemptioner; and

(h)(4) if known, whether the sale is subject to redemption.

The redemptioner or subsequent redemptioner shall file a duplicate of the certificate with the county recorder.

(i)⁶⁰ Conveyance. The purchaser or last redemptioner is entitled to conveyance upon the expiration of the time permitted for redemption.

(j)⁶¹ Rents and profits, request for accounting, extension of time for redemption.

(j)(1) The purchaser is entitled to the rents of the property⁶² or the value of the use and occupation of the property from the time of sale until redemption. A redemptioner is entitled to the rents of the property or the value of the use and occupation of the property from the time of redemption until a subsequent redemption. Rents and profits are a credit upon the redemption price.

(j)(2) Upon written request served on the purchaser before the expiration of time for redemption, the purchaser shall prepare and serve on the requester a written and verified account of rents and profits. The period for redemption is extended to five days after the accounting is served. If the purchaser fails to serve the accounting within 30 days after the request, the redemptioner may, within 60 days after the request, bring an action to compel an accounting. The period for redemption is extended to 15 days after the order of the court.

(k)⁶³ Remedies.

(k)(1) For waste. A purchaser or redemptioner may file a motion requesting the court to restrain the commission of waste on the property. After the estate has become absolute, the

⁶⁰ 69(j)(6)

⁶¹ 69(j)(7)

⁶² This raises issues of the effect of a lien senior to the foreclosing lien. Is this dealt with outside the rules of civil procedure.

⁶³ 69(k)

1 purchaser or redemptioner may file an action to recover damages for injury to the property by the
2 tenant.

3 (k)(2) If purchaser fails to obtain property. A purchaser or redemptioner who fails to obtain
4 the property or is evicted from the property because the judgment against defendant is reversed
5 or discharged may file a motion for judgment against the plaintiff for the purchase price plus
6 amounts paid for taxes, assessments, insurance, maintenance and repair plus interest. A
7 purchaser or redemptioner who fails to obtain the property or is evicted from the property
8 because of an irregularity in the sale or because the property was exempt, may file a motion for
9 judgment against the plaintiff or to revive the judgment against the defendant for the purchase
10 price plus amounts paid for taxes, assessments, insurance, maintenance and repair plus interest.

11 (l)⁶⁴ Contribution and reimbursement. A defendant may claim contribution or reimbursement
12 from other defendants by filing a motion.

13 **Rule 66. Receivers.**

14 (a) Grounds for appointment.

15 (a)(1) The court may appoint a receiver in any action in which property is in danger of being
16 lost, removed, materially injured or is probably insufficient to discharge the debt.

17 (a)(2) The court may appoint a receiver after judgment to carry the judgment into effect, to
18 dispose of the property according to the judgment, to preserve property during the pendency of
19 an appeal, in proceedings in aid of execution when an execution has been returned unsatisfied, or
20 when the judgment debtor refuses to apply property in satisfaction of the judgment.

21 (a)(3) The court may appoint a receiver in cases in which a corporation has been dissolved or
22 is insolvent or in imminent danger of insolvency or has forfeited its corporate rights.

23 (a)(4) The court may appoint a receiver in all other cases where receivers have been
24 appointed by courts of equity.

25 (b) Appointment of receiver. No party or attorney to the action, nor any person who is not
26 entirely impartial and disinterested as to all the parties and the subject matter of the action can be
27 appointed receiver without the written consent of all interested parties.

28 (c) The court may require security from the receiver in accordance with Rule 64.

29 (d) Oath. A receiver shall swear or affirm to perform duties faithfully.

⁶⁴ 69(l)

1 (e) Powers of receivers. A receiver has, under the direction of the court, power to bring and
2 defend actions as receiver, to take and keep possession of the property, to receive rents, to collect
3 debts, to pay debts, to compound for and compromise the same, to make transfers and to do such
4 acts respecting the property as the court may authorize.

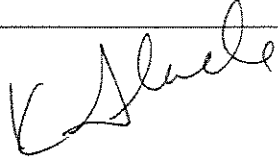
5 (f) Payment of taxes before sale or pledge of personal property. Before any personal property
6 coming into the hands of a receiver may be sold, transferred or pledged, the receiver shall pay all
7 taxes, and shall file receipts showing payment of taxes. If there are insufficient assets to pay the
8 taxes, the court may authorize the sale, transfer or pledge with the proceeds thereof to be used to
9 pay taxes. Within 10 days after payment the receiver shall file receipts showing payment of
10 taxes.

11 (g) Investments by receivers. Funds in the hands of a receiver may be invested by order of
12 the court.

13 (h) Real property. Before a receiver is vested with real property, the receiver shall record a
14 certified copy of the appointment in the office of the recorder of the county in which the real
15 property is located.
16

MEMORANDUM

Date: January 27, 2004

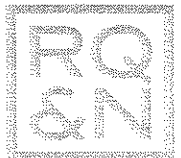
To: Jan Smith
From: Kevin Glade 
cc: Steve Tingey
Re: Proposed changes to "remedy rules" in URCP

This memorandum summarizes an important comment to the proposed changes to the "remedy rules" in the Utah Rules of Civil Procedures. I reviewed the draft dated November 20, 2003.

The proposed changes to Rule 64A – changes that I would call "dead beat protection changes" -- impose new, costly and unnecessary burdens on a secured lender seeking a writ of replevin to obtain possession of the lender's collateral when a loan is in default.

If a lender cannot take possession of its collateral without a "breach of the peace" as set forth in U.C.A. § 70A-9a-609, the lender's only recourse is to obtain a writ of replevin. In that instance, the right of the lender to obtain possession of the collateral is a "legal" right created by a contract between the lender and the borrower and by Article 9 of the Utah Uniform Commercial Code. The right of the lender to obtain possession of the collateral is not an "equitable" remedy. Nonetheless, the proposed changes to Rule 64A assume that a motion for a writ of replevin is an equitable remedy akin to a motion for a temporary restraining order or a preliminary injunction. Under the proposed changes, in addition to pleading the lender's contractual, legal right to possession of the collateral, the lender is now required to show:

1. That the defendant is engaging in conduct that puts the collateral at risk or that time will impair the lender's rights;
2. That the threatened injury to the plaintiff outweighs the damage the write may cause the defendant;
3. That there is a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim; and



4. If the writ is sought ex parte, that there is an irreparable injury to the lender.

These changes are an improper effort to interject principles governing equitable remedies into the legal, contractual right of a party to obtain possession of collateral voluntarily given by a borrower to repay a defaulted loan. For example, in the instance of a car repossession, there will always be harm to the borrower if the car is repossessed, but, nonetheless, the borrower has agreed that the car lender can repossess the collateral if the payments are not made. The proposed “balancing” suggested by the rule change impairs improperly the lender’s legal rights.

Current Rule 64 recognizes the legal right and protects the borrower/defendant by requiring a bond—in twice the value of the replevined property—to be posted. Thus, the current rule adequately protects the defendant.

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