Agenda

Advisory Committee on Rules of Civil Procedure

July 28, 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
Rule 62; HJR 16. Stay of proceedings to enforce a judgment	Fran Wikstrom
Comments to rules. Final recommendations.	Tim Shea

Meeting Schedule

September 22
October 27
November 17 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 26, 2004
Administrative Office of the Courts

Tim Shea, Presiding

PRESENT: Francis J. Carney, Cullen Battle, Terrie T. McIntosh, David W. Scofield, Leslie W. Slaugh, Paula Carr, Virginia S. Smith, Thomas R. Karrenberg, James T. Blanch, Janet H. Smith, R. Scott Waterfall, Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Honorable David Nuffer

STAFF: Tim Shea

EXCUSED: Francis M. Wikstrom, Todd M. Shaughnessy, Glenn C. Hanni, Debora Threedy, Honorable Lyle R. Anderson, Judith D. Wolferts

GUESTS: Commissioner Michael S. Evans, Robert J. Shelby (for Judith D. Wolferts)

I. APPROVAL OF MINUTES.

In the absence of Committee Chairman Francis M. Wikstrom, Tim Shea called the meeting to order at 4:00 p.m. The minutes of the March 24, 2004 meeting were reviewed, and Francis J. Carney moved that they be approved as written. The Motion was seconded by R. Scott Waterfall, and approved unanimously.

II. RULE 101: MOTION PRACTICE BEFORE COURT COMMISSIONERS.

Tim Shea presented a draft of proposed Rule 101, governing motion practice before court commissioners. The draft was prompted by the fact that no rule now exists governing this practice area. The commissioners had previously reviewed and approved the proposed draft. Commissioner Michael S. Evans was introduced, and Mr. Shea offered a general explanation of the intended purpose of several sections of the proposed Rule.

Leslie D. Slaugh raised several concerns about the draft in its current form, particularly whether the service provisions under subsection (c) were adequate in light of the fact that attorneys in divorce proceedings often file a notice of withdrawal immediately following entry of a final decree, creating a potential problem for parties who fail to receive actual or timely notice of post-decree motions. Additionally, Mr. Slaugh was concerned with the selection of 90 days for service under subsection (b) and the selection of only specific motions in subsection (j) for separate treatment under Rule 7. Mr. Slaugh questioned whether a better approach might be to

require post-decree service on parties, instead of their attorneys.

Mr. Shea noted the commissioners were recommending personal service after the 90 day period, thinking that enough time would then have passed to treat any subsequent motion like a new action under Rule 4. Commissioner Evans indicated the commissioners were looking for a bright line rule for when notice must be given to a party, instead of lawyers, following entry of a final decree.

Mr. Slaugh proposed that subsection (b) be eliminated and subsection (j) amended to provide that service of post-judgment motions filed 90 days or more after entry of a judgment must be effected under existing Rule 4. With respect to subsection (j), Judge Anthony B. Quinn indicated a preference for uniformity, suggesting that all motions before commissioners should be treated similarly. Mr. Carney inquired whether there was currently a different local practice in each of the district courts. It was widely believed to be the case. There was general consensus that local discretion seemed to offer a good solution.

Thomas R. Karrenberg asked whether a group of family law practitioners had been afforded an opportunity to review the draft and offer feedback. Commissioner Evans and Mr. Shea explained that the practitioners had reviewed the draft and offered suggestions, but not directly on the points raised by the Committee.

Mr. Slaugh identified other potential problems with the proposed expedited timeline for submitting motions, responses and replies. After some discussion about potential modifications to the proposed language to meet those concerns, Judge Anthony W. Schofield suggested a better approach might be to refer the proposed rule to the Board of District Judges for review and feedback before spending a great deal of time working out the kinks and polishing the specific language. The Committee agreed such a course was a prudent way to proceed. The proposed Rule will be so referred for review and feedback prior to further Committee action.

III. RULE 106: MODIFICATION OF DIVORCE DECREES.

For the reasons discussed above, the Committee concluded the draft of proposed Rule 106 would also be referred to the Board of District Judges for review and feedback prior to further Committee action.

IV. RULE 47: PEREMPTORY CHALLENGES.

Mr. Carney and Mr. Shea led a discussion concerning the fact that Rule 47 currently refers to "parties" having three peremptory challenges each, when the case law has since clarified that each "side" has three peremptory challenges. There was discussion concerning the *Randle v. Allen* decision by the Utah Supreme Court clarifying the intended limitation absent "substantial controversy" between the parties. Discussion ensued concerning whether the Rule should be changed to incorporate the case law clarification, or whether an annotation should be offered.

Cullen Battle pointed out the problems with third-party practice and other issues that occasionally arise in complex litigation. Mr. Battle suggested it would be difficult to craft a rule that would account for all the various potential complexities. James T. Blanch inquired whether the federal rule might offer some guidance. There was general consensus after reading the federal rule that it offered superior flexibility to the existing Rule 47. Mr. Carney offered to work on a draft of an amended Rule 47 that would more closely resemble the federal approach. The silence in opposition to Mr. Carney's offer was predictably deafening.

V. ELECTRONIC DISCOVERY.

Judge David Nuffer described ongoing efforts to amend the federal rules to account for dramatic changes in the manner of generating and storing electronic data over the years. He detailed the prevalence of paperless transactions, e-mails and e-Business solutions, all of which are forcing courts to deal with new electronic discovery issues without the benefit of modern rules.

Several non-controversial proposed amendments to the federal rules were discussed, as were several contentious proposals. There was unanimous agreement that it was wise to wait until fall to see what fruits the current federal efforts yield and the specific proposals for rule changes that follow. It was agreed to table the issue until fall, at which time the issue will be revisited.

VI. ADJOURNMENT.

The meeting adjourned at 5:30 p.m. The Committee will next meet at 4:00 p.m. on Wednesday, July 28, 2004, at the Administrative Office of the Courts.

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedure Committee
From: Tim Shea
Date: July 21, 2004
Re: Rule 62; HJR 16. Stay of proceedings to enforce a judgment.

You may recall that during the 2004 General Session, the Legislature enacted HJR 16 by two-thirds majority of both houses, amending URCP 62. Although the Supreme Court has constitutional authority to adopt rules of procedure and evidence, the Legislature has the authority to amend them. Utah Constitution Article VIII, Section 4. On May 12, the Supreme Court entered an order that changed URCP 62 back to its form before HJR 16. The Court has directed this committee to consider the merits of the HJR 16 amendments and make recommendations.

The Court's May 12 order was entered under the emergency provisions of CJA 11-101(4)(E). Therefore, URCP 62 without the HJR 16 amendments is currently in effect. Following the procedures in CJA 11-101, I published URCP 62 for comment. Only one was received. The comment period closed July 21.

The attached documents show the version of URCP 62 currently in effect and the text of the HJR 16 amendments. At the committee meeting, I anticipate further materials (none were received as of the time for distribution) and a presentation by the proponents of HJR 16.

Encl. Letter from Matty Branch
Supreme Court Order May 12, 2004
HJR 16
Letter from Chief Justice Durham
Text of Rule 62 published for comment
Comments
Cases with judgment greater than $5 million

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Supreme Court of Utah

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Christine M. Durham
Chief Justice

Matthew B. Durrant
Associate Chief Justice

Michael J. Wilkins
Justice

Jill N. Parrish
Justice

Ronald E. Nehring
Justice

Marilyn M. Branch
Appellate Court Administrator

Pat H. Bartholomew
Clerk

May 12, 2004

Francis M. Wikstrom, Esq.
Parsons Behle & Latimer
P. O. Box 45898
Salt Lake City, UT 84145-0898

Re: Review of Legislature's Amendment of Rule 62(d) of the Utah Rules of Civil Procedure

Dear Fran:

As you may be aware, the Legislature approved H.J.R. 16 by a two-thirds vote during the last session which had the effect of amending Rule 62(d) of the Utah Rules of Civil Procedure as set forth in the attached resolution. This amendment was effective March 2, 2004. The Supreme Court has entered an order, pursuant to its emergency rulemaking authority, that returns Rule 62(d) to its pre-H.J.R. 16 version, effective as of May 15, 2004.

The Court requests that its Advisory Committee on the Rules of Civil Procedure review the amendment to Rule 62(d) approved by the Legislature under H.J.R. 16 and advise it whether it recommends adoption of the Legislature's changes. Thank you for your assistance in this matter.

Sincerely,

Marilyn M. Branch
Appellate Court Administrator

Enclosures
cc w/enclosures: Tim Shea

IN THE SUPREME COURT OF THE STATE OF UTAH

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In re: Amendment to Rule 62 of the Utah Rules of Civil Procedure

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ORDER

Pursuant to H.J.R. 16, the Legislature of the state of Utah voted to amend Rule 62(d) of the Utah Rules of Civil Procedure, effective as of March 2, 2004, as stated in the attached copy of the bill.

IT IS HEREBY ORDERED that Rule 62(d) of the Utah Rules of Civil Procedure is amended so as to return the rule to its pre-H.J.R. 16 text. Rule 62(d) shall be amended to read as follows:

> (d) Stay upon appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

This amendment is made pursuant to the emergency rulemaking provisions of Rule 11-101(4)(E) of the Supreme Court Rules of Professional Practice, with an effective date of May 15, 2004.

FOR THE COURT:

May 12, 2004
Date

Christine M. Durham
Christine M. Durham,
Chief Justice

Enrolled Copy **H.J.R. 16**

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 $25,000,000; and
- allows a judge to require an appellant to execute a bond in excess of the limit if the plaintiff, 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.

Supreme Court of Utah

450 South State Street
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Appellate Court Administrator

Pat H. Bartholomew
Clerk

May 12, 2004

L. Alma "Al" Mansell
President
Utah State Senate

Martin R. Stephens
Speaker
Utah House of Representatives

Greg J. Curtis
Majority Leader
Utah House of Representatives

Gentlemen:

In the last session, the Legislature passed H.J.R. 16 which amended Rule 62(d) of the Utah Rules of Civil Procedure. This action was taken properly pursuant to Article VIII, Section 4, of the Utah Constitution, but without any discussion with the Supreme Court's Advisory Committee on the Rules of Civil Procedure as to the purpose or need for the rule change.

This Court has established a thoughtful, orderly process for the adoption, modification and repeal of rules of procedure and evidence, as set forth in Rule 11-101 of the Supreme Court Rules of Professional Practice. The Court believes the legal system is best served if changes to rules of procedure or evidence go through a detailed rulemaking process which includes review by an advisory committee consisting of lawyers and judges, and the publication of proposed amendments for public comment.

Because of our view of the benefits of this process, and because there did not appear to be any urgency in connection with the changes made by the bill, the Court has unanimously, by order entered May 12, 2004, under its emergency rulemaking authority, amended Rule 62(d) to restore it to its pre-H.J.R. 16 version, effective as of May 15, 2004. At the same time, the Court has referred the version of the rule set forth in H.J.R. 16 to its Advisory Committee on the Rules of Civil Procedure, and requested that the committee review the amendments approved by the

Legislature and advise the Court whether it recommends adoption of such changes. I am sure the committee would welcome any information from and discussion with members of the Legislature about the need for the amendments.

Sincerely,

Christine M. Durham
Chief Justice

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 final 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 order 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.

Comments to URCP 62

Re URCP62(d): I believe the previous amendments to this rule are troublesome. Among other difficult aspects, it places an additional and onerous burden on the appellee to somehow discover (after judgment has been taken and discovery is closed) - and sufficiently establish for the court - whether an appellant is "dissipating assets outside the course of normal business to avoid payment for a judgment." The statutorily reduced amount of the security bond is also troublesome given the fact that judgment has already been rendered. In my opinion, the amendments unfairly diminish the chances of successful collection if the appeal is unsuccessful (which is more likely than not to be the case.

Posted by Katherine A. Fox May 25, 2004 05:31 PM

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: July 21, 2004
Re: Judgments over $5 million

Researching district court records back through 1995, we found 29 cases in which the judgment was more than $5 million.

Case Number	Court	Case Type	Judgment Date	Disposition Type	Judgment Amount
940013406	SLC	Civil	12-May-95	Default	$7,012,308
950014299	SLC	Civil	19-Apr-96	Default	$5,204,388
970906865	SLC	Civil	20-Jan-98	Default/Settled	$6,576,573
960908725	SLC	Contracts	07-Oct-98	Settled	$12,464,688
980906771	SLC	Miscellaneous	28-Apr-99	Settled	$8,904,000
990700449	Farmington	Contracts	06-Jan-00	Settled	$7,365,535
010900333	SLC	Debt Collection	19-Mar-01	Default	$17,754,551
010901817	SLC	Contracts	15-May-01	Default	$7,089,044
000404160	Provo	Contracts	25-Jun-01	Default	$6,984,450
940904312	SLC	Civil	02-Jul-01	Jury	$7,124,745
980100145	Brigham City	Property Damage	09-Aug-01	Jury	$8,014,342
980403769	Provo	Civil	22-Oct-01	Settled	$6,000,000
010908079	SLC	Contracts	23-Nov-01	Default	$6,049,523
010910263	SLC	Arbitration Award	08-Feb-02	Bench Trial	$19,506,502
010908750	SLC	Contracts	22-Feb-02	Settled	$18,101,039
020900843	SLC	Contracts	02-Apr-02	Default	$8,003,890
000905126	SLC	Contracts	01-May-02	Jury	$14,121,129
010905355	SLC	Miscellaneous	18-Jul-02	Summary Judgment	$83,604,296
990402401	Provo	Debt Collection	12-Nov-02	Settled	$5,500,111
010900563	SLC	Contracts	13-Nov-02	Default	$7,568,000
000906793	SLC	Contracts	03-Dec-02	Default	$40,000,000
000402011	Provo	Contracts	10-Feb-03	Summary Judgment	$17,675,459
020100193	Brigham City	Personal Injury	30-Apr-03	Bench Trial	$11,022,773

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Case Number	Court	Case Type	Judgment Date	Disposition Type	Judgment Amount
010910643	SLC	Debt Collection	28-May-03	Settled	$5,197,391
970400153	Nephi	Civil	18-Jun-03	Bench Trial	$5,436,812
990402607	Provo	Tax Protest	30-Jun-03	Settled	$5,030,000
940902068	SLC	Civil	03-Jul-03	Summary Judgment	$6,684,520
030915106	SLC	Miscellaneous	10-Jul-03	Settled	$6,000,000
020905904	SLC	Foreclosure	23-Sep-03	Default/Bcy Stay	$6,739,769

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: July 6, 2004
Re: Comments to rules; Final Recommendations

The following rules were published for comment. The rules, the comments and my analysis follow this memo. I have not included the rules that are repealed. I have suggested just a few further changes to the Rule 64/69 series in response to the comments. These are noted in my analysis. The committee may make further changes in response to the comments or on its own. The rules are ready for your final recommendations to the Supreme Court.

URCP 45. Subpoena. Amend. Correct reference to Rule 4 regarding methods of serving subpoena

URCP 47. Jurors. Amend. Conforms rule regulating conversing with jurors to caselaw.

URCP 56. Summary judgment. Amend. Corrects reference to URCP 7. Technical amendments.

URCP 63. Disability or disqualification of a judge. Amend. Advises the judge regarding voluntary recusal upon remand after reversal.

URCP 64. Writs in general. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64A. Prejudgment writs in general. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64B. Writ of replevin. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64C. Writ of attachment. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64D. Writ of garnishment. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64E. Writ of execution. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64F. Waiver of bond or undertaking. Repeal. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 66. Receivers. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 69. Execution and proceedings supplemental thereto. Repeal. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69A. Seizure of property. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69B. Sale of property; delivery of property. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69C. Redemption of real property after sale. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

History of Proposed Utah R. Civ. P. 63(c)

The proposed amendment to Rule 63 comes after extensive deliberation and debate by the Advisory Committee over the course of the past couple of years. During that time frame, various members of the Utah bar have appeared before the Committee to express the concern that a trial judge who is reversed on appeal may be perceived to be prejudiced against the successful appellant in any further proceedings on remand. Because the current version of Rule 63 does not appear to provide a mechanism for protecting that concern, members of the bar proposed an amendment to Rule 63 that would give successful appellants the right to disqualify the trial judge after remand.

Such a proposal was first presented to the Committee in 2001. At that time, the Committee heard testimony and considered proposals to amend Rule 63, but ultimately decided against any change after extensive discussion. Later that year, Fran Wikstrom, Advisory Committee Chair, testified on this issue to an interim committee of the Utah legislature. Mr. Wikstrom indicated that the Advisory Committee's decision was based on its views that judges do not generally take reversal personally, and that a right of disqualification might lead to gamesmanship. He also warned that such a right could impose significant burdens on the judicial system, especially in the rural districts in Utah that have only a few judges, and particularly where the rule might be read to extend to criminal cases. Finally, Mr. Wikstrom explained that there was no objective evidence to support the need for a change in the rule, and that the vast majority of the states do not recognize a right to disqualify a judge on remand.

The proposed amendment to Rule 63 was again considered by this Committee in a series of meetings in 2003. In February, the Committee received a letter from attorney Douglas Mortensen, expressing his view that a party prevailing on appeal should have the discretion to exercise a right to disqualify a trial judge on remand, and suggesting that this view is supported by a survey of members of the Utah Trial Lawyers Association. Although the Committee had considered and rejected the same proposal in 2001, it invited Mr. Mortensen and other proponents of the amendment to attend the Committee's April meeting. At that meeting, the Committee heard at length from Mr. Mortensen, and from attorneys Richard Burbidge, Robert Wallace, and Michael Zundel, all of whom suggested that parties who prevail on appeal often have serious concerns as to whether the trial judge whose decision has been reversed may be prejudiced against the appellant and in favor of the appellee. In response to extensive questions from members of the Committee, the proponents of the amendment to Rule 63 also asserted that an appellant's right to disqualify the trial judge on remand would not substantially compromise the goal of judicial economy, nor impugn the integrity of trial judges.

During the April 2003 meeting, members of the Committee generally agreed that the perception of prejudice on the part of prevailing appellants is a real concern, but there was extensive debate as to whether this concern could be effectively addressed by the proposed amendment. Most importantly, members of the Committee noted that not all cases that are remanded involve a new trial, and that in some cases the judge's familiarity with the law or the facts of the case may be important to the timely resolution of the case. Moreover, members of the Committee suggested that it would be difficult to identify a rule for distinguishing the cases in which disqualification would be appropriate from the cases in which it would not be. Finally,

Committee members expressed concerns that a rule allowing automatic disqualification would introduce the potential for gamesmanship and abuse on the part of prevailing appellants. At that point, the matter was tabled for further consideration at a subsequent meeting.

Members of the Committee continued to debate this issue via email and again in further meetings in May, August, and September, 2003. Many of the same concerns were raised and discussed during those meetings, and in the August meeting the Committee heard from another proponent of the proposed amendment, attorney Rich Humphreys. In the September meeting, the Committee ultimately agreed to the concept of a compromise amendment to Rule 63, which would provide a mechanism for the parties to ask the trial judge to exercise discretion to recuse himself on remand, without risking the costs associated with an overbroad rule of automatic disqualification. The specific language of the proposed compromise amendment was presented and unanimously approved at the Committee's meeting in October 2003. By authorizing a motion to disqualify on the basis of an appearance of bias or prejudice against a party prevailing on appeal, the proposed amendment recognizes the important concerns raised by those members of the bar who appeared to the Committee. By making the decision to disqualify a discretionary call on the part of the trial judge, however, the proposed amendment also avoids the inefficiencies and other difficulties associated with a rule allowing automatic disqualification.

The Committee also discussed the possibility of referring the issue to the Appellate Rules Advisory Committee for consideration whether the Appellate Rules should be modified to allow parties on appeal to ask the appellate court to reassign the matter upon remand. This would allow the appellate court to balance the concerns of the parties and the needs of the judicial system on a case-by-case basis. No action was taken on this suggestion.

Third Judicial District Court

William W. Barrett
District Judge

June 1, 2004

Francis M. Wikstrom, Chair
Supreme Court Advisory Committee
on Civil Procedure
201 S. Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145

Dear Fran:

At the District Court Judges Conference the proposed amendment, specifically the addition of subpart (c), to Rule 63 of the Utah Rules of Civil Procedure was discussed by the district judges. After discussion on two different occasions, the district court judges at their official business meeting voted unanimously to oppose the addition of subpart (c) to Rule 63. There are few issues among district judges where one finds such unanimity. There are several good reasons for the opposition. In 2003, 1,306 district and juvenile cases were appealed to the appellate courts. It is safe to say that any judge with even minimal experience has had at least one case partially or fully overturned and remanded. That is the nature of the job of being a trial judge. This rule amendment proposal flies in the face of reason and lacks any empirical data that once the case is remanded, that the original trial judge cannot objectively and impartially finish the case pursuant to instructions given by the appellate courts.

Amending this rule perpetuates the unjustified perception that a judge cannot impartially consider a case after it has been remanded by the appellate court. The Utah Appellate Courts have stated that judges are presumed qualified in all the cases they are assigned. This presumption is an important foundation of the justice system. Judges often see the same parties and attorneys in multiple proceedings. Even though a judge rules against one party in one proceeding, the judge is still presumed able to handle a subsequent proceeding involving the same party or attorney. The rule proposal undermines this presumption. It is part of our jurisprudence that when a case is remanded that it should return to the judge who originally heard the case since he or she understands it having originally tried it. To recuse him or herself after a remand casts a shadow on the judge's fairness and impartiality. If

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this amendment is adopted, some judges may want to avoid criticism by *sua sponte* recusing themselves or routinely granting the parties' motion that the judge recuse.

The adoption of this amendment would contribute to "judge shopping" and undue delay. It appears that this may be just another procedure or strategy allowing an attorney to shop for a different judge. Furthermore, it may take days for any new judge to get up to speed on any case that has been appealed, remanded and transferred to the new judge.

Moreover, Rule 63 as presently adopted provides appropriate safeguards for any party or attorney aggrieved by the actual or appearance of bias to seek removal. Implementation of the proposed amendment would entail an evidentiary hearing to enable factual findings to be made supporting the decision to recuse or not in order to meet the mandates of subparts (c)(1) and (c)(2).

There is no compelling reason or evidence presented that the current process utilized by the appellate courts of remanding the case to the original judge needs change. On the other hand allowing a judge *sua sponte* to recuse himself or herself, or allowing parties by motion to request a recusal only creates an atmosphere which encourages "judge shopping" will add delay to the proceedings and undermine confidence in the impartiality of the trial bench.

For the reasons specified, the district judges unanimously request that the Committee and the Supreme Court decline to amend Rule 63 by the adoption of the proposed subpart (c).

Respectfully,

Judge William W. Barrett
Chair, Board of District Court Judges

cc: Honorable Christine M. Durham
Honorable Thomas Willmore
Honorable Pamela G. Heffernan
Honorable Michael G. Allphin
Honorable Paul G. Maughan
Honorable J. Dennis Frederick
Honorable Anthony B. Quinn
Honorable Howard Maetani
Honorable Fred D. Howard
Honorable Lynn A. Payne
Honorable David L. Mower
Timothy Shea, Esq.

COMMENT TO PROPOSED AMENDMENTS

RULES OF SMALL CLAIMS PROCEDURE

Posted by Judge Eves March 16, 2004 09:48 AM
In the context of this rule, what does the term "entry" mean? Is that term defined anywhere in the Small Claims Rules or elsewhere?

Analysis: The term “enter” is not defined, but URCP 58A(c) identifies the minimum steps necessary for entering a judgment.

RULES OF CIVIL PROCEDURE

In general

From: "P. Bruce Badger" <bbadger@fabianlaw.com>
To: <tims@email.utcourts.gov>
Date: 5/12/04 6:30PM
Subject: proposed rules
CC: <dhimonas@joneswaldo.com>, <wklein@utah.gov>

Tim, I write on behalf of the Executive Committee of the Litigation Section to let you know that we have had an opportunity to review the proposed amendments to the Utah Rules of Civil Procedure. It is our view that any comments we might make as an Executive Committee would prefer the position of some of the members of the Litigation Section over others, depending on the nature of their practices. Therefore, we decline to comment as a section to any of the proposed changes and anticipate that the individual members of the Litigation Section will forward their comments diectly to you. Thank you for your efforts and for the opportunity to review the proposed rules changes. Regards, Bruce

URCP 63

See also the letter on behalf of the district court judges recommending the amendment not be adopted.

Posted by Tim Shea May 13, 2004 02:22 PM
Will the PJ have to review the Rule 63(c) motions to recuse?

Analysis. The committee presumably did not intend that requests for a judge to recuse under subsection (c) would follow the process of subsection (b), but appearing, as it does, in the same rule, it may lead to that result.

Posted by Michael N. Zundel May 31, 2004 11:08 AM

The proposed amendment to Rule 63 fails to provide a remedy to a party who believes a judge is not capable of being fair when that party's opinion has been reinforced by an appellate court reversal and remand. By leaving total discretion in the trial court, the proposed rule change seems to assume that the problem of judicial bias is one of perception only and does not really exist. Real or not, the rule should give more credence to the perception of a party who has had a judge reversed and place discretion in the hands of that party, not the judge who's thinking might be compromised. The proposed rule should assume that judicially incapacitating bias, though rare, does exist and provide a real remedy.

The rule should acknowledge that only parties, not judges, have a vested interest in the outcome of a case. The rule should subordinate all concerns for judicial pride to the paramount concerns of justice, which must not only be done, but be perceived to be done as well, if the maximum social good is to be achieved and the judiciary is to fulfill its role in our democracy.

The rule also seems to be unduly concerned about the time and effort needed to reeducate a new judge in a case after remand. Cases are often reassigned to new judges in this state for much more mundane reasons than protecting the integrity of the judicial process, without serious adverse consequences. Some districts have rotating calendars for example. Few cases are so complex that a new judge cannot be brought up to speed in due course. The appellate courts must be "brought up to speed" in every case. A new trial judge would have the luxury of hearing evidence anew if he or she wished. It can take a long time for a case to return to a trial judge after remand. Remembered half-truths and half remembered truths in the mind of the original trial judge may do more harm than good.

The rule as it exists should be amended to give discretion to the prevailing party on appeal after remand to have a new judge assigned to the case upon exparte motion and without explanation. Remands are relatively uncommon. Such a simple rule will do much good for the public and judiciary, cause few significant inconveniences and no injustice.

Posted by Doug Mortensen June 1, 2004 01:07 PM

The proposed change to Rule 63 (inviting a judge who has been reversed on appeal to consider recusing himself/herself) is a step in the right direction but not a big enough step.

The results of a recent survey of 3 separate groups of Utah trial attorneys show STRONG support for a rule change which would place the discretion in the hands of a successful appellant to have a remanded case heard by a judge other than the judge whose decision was found to have been erroneous.

In early January of 2003, attorneys who had appealed and won reversals in Utah cases within the preceding 3 years were sent a survey soliciting their views on this subject. They were asked whether they would favor, oppose or feel neutral about the adoption of a rule or statute which would give a successful appellant the right, exercisable at his or her option, to have the remanded

case assigned to a new judge rather than the judge whose judgment or order was reversed, for the handling of the new trial or evidentiary hearing. 39 attorneys responded. 35 of them FAVORED such a measure (22 of them STRONGLY); Only 4 responded they would oppose it (only 2 "strongly").

A similar survey was sent to members of the Utah Trial Lawyers Association. The results were overwhelmingly in favor of the measure (27 to 1).

The same survey was made available to attendees of the Annual Family Law Section Seminar on May 9, 2003. Of the 39 attorneys who responded, 34 FAVORED the rule change (17 of them "STRONGLY"); only 5 opposed it (only 1 of them "strongly").

I have reviewed the actual survey results. They are available to anyone you wants to see them.

Those who desire a further change to the rule are not idle "whiners." They are serious, competent practitioners who genuinely believe justice would more likely occur more frequently if such a rule were in place.

Newspapers reports indicate that certain U.S District Court judges in Utah often, if not invariably, recuse themselves after being reversed on appeal. (Judges Winder, Campbell and Kimball, to name 3). These judges are widely regarded as among the finest our state has ever had. If they thinks it's a good idea, why isn't it? If they suspect they either harbor bias or may be perceived as harboring bias sufficient to justify having another judge take over after reversal, shouldn't they be presumed correct?

The opposition of state court trial judges to such a rule change should not be viewed as dispositive. Doctors as a whole oppose malpractice suits. That is no basis for abolishing medical negligence actions or for concluding that such suits do not lead to or encourage safer health care practices.

That the proposed rule change might slow things down or prove costly in less populated judicial districts should not be of paramount consideration. The goal isn't efficiency; it's justice.

The argument that the proposed rule might be abused makes little sense. Generally, a successful appellant wants justice. Perhaps there are some litigants who appeal solely for delay purposes. Those appellants are not likely to win their appeals. Those who win on appeal, it should be presumed, deserve to win on appeal ...because a mistake was made against them at the trial level. They are usually those who genuinely want justice. If they are willing to endure whatever extra time it may take for a new judge to get "up to speed" on the case, why shouldn't they be trusted to exercise their discretion responsibly?

Fairness and the perception of fairness should be paramount above all other considerations. Both would be served by the adoption of the suggested additional change to Rule 63.

Rule 64/69 Series

Posted by Chase Kimball May 7, 2004 12:08 PM

I am concerned about the rewrite of URCP 64B dealing with replevin. The new law is terse, giving very basic information about when a writ of replevin may be ordered. The current version of 64B gives a great deal of guidance on procedure and enforcement, much of which appears to be covered in new rule 64. However, I cannot find any instructions dealing with retrieval of the replevined property similar to what is currently noted in 64B(h)(1), which gives the officer the

authority to enter a building by force if necessary, and seize the wrongfully held property. This is a very important power for the officer to have in the many cases where deadbeats refuse compliance with court orders. This issue needs to be addressed in the new rule.

Analysis. The paragraph referred to was purposefully omitted. The officer's authority to use force in executing civil process is adequately governed by §77-4-1: "A public officer authorized to execute process issued by any court may use such force as is reasonable and necessary to execute service of process. If necessary, he may seize, arrest, and confine persons resisting or aiding and abetting resistance to his service of process."

Posted by Sammi Anderson for Manning Curtis Bradshaw & Bednar May 28, 2004 02:12 PM

The changes proposed for Rules 64 through 69 are a decided improvement. The proposed changes bring organization, cogency and a plain English approach that will be appreciated by judges and attorneys that do not specialize in collections law. Thank you to those involved for your efforts.

A few comments with respect to proposed Rule 64D - Writ of garnishment: First, proposed subsection (h)(1) nullifies the requirement that a reply to a garnishee's answer to interrogatories be filed within ten days. The current rule states that a request for a hearing to challenge a garnishee's answers must be filed within ten days or the right to a hearing is waived and the garnishee's answers are deemed correct and binding. Utah R. Civ. P. 64D(h)(i) and 64D(h)(ii). The proposed rule contains the same proscription but then adds the qualification "but the court may deem the reply timely if filed before notice of sale of the property or before the property is delivered to the plaintiff." This qualification gives the Defendant an opportunity to delay at the expense of the Plaintiff and at the expense of judicial economy. For example, under this proposal the court could hold a full evidentiary hearing to resolve a dispute between the Plaintiff and garnishee and order the property delivered to Plaintiff. So long as the Defendant were to file a reply before that property is delivered, Defendant is entitled to a new evidentiary hearing. Such a process is inefficient for all involved. The time limit requiring a response from a Defendant as contained in the current rule should remain in effect.

Analysis. The intent was that defendant would get only one hearing and only if requested. The current rule allows the judge to recognize a late reply as timely in the case of a continuing garnishment URCP 64D(v)(iv). We extended that concept to all garnishments and established a final deadline. Except for pretrial garnishments, the process does not contemplate a hearing on the writ other than in response to a defendant's request for one after garnishee files answers. So I'm not sure under what circumstances the defendant might obtain two hearings. If the reply is filed after the 10-day deadline, but the judge decides to treat it as timely, the judge could award to the plaintiff any costs suffered as a result of the delay. I think that authority does not need to be stated, but we could make it express.

Posted by Sammi Anderson (continuing)

In addition, proposed subsection (h)(2) contains no time frame for when an evidentiary hearing should occur in the event a reply to the garnishee's answers is filed. The current rule

requires a hearing to be held within ten days of a request for a hearing. Utah R. Civ. P. 64D(h)(iii). This time limit should remain in effect. Matters of collection are frequently the conclusion of protracted, expensive disputes and individuals that have succeeded in obtaining a judgment should be assisted by the judicial system in enforcing that judgment with all dispatch.

Analysis. The proposed rule eliminates the reference to the timing of the hearing. The hearing should be held as soon as possible, as should all hearings. But there's never been an enforcement mechanism and collection issues compete for time with a lot of other matters. I always recommend leaving scheduling discretion to the judge, but if the committee believes that a 10-day deadline stresses the importance of resolving the claims, we should include something.

Posted by Sammi Anderson (continuing)

Finally, regarding proposed subsection (j)(5), the provision should be changed to read: "A garnishee may deduct from the property any claim [that is fixed and liquidated at the time garnishment is served] against the plaintiff or defendant." In circumstances where a garnishee, such as an institutional trustee, charges significant administration fees and the dispute over the garnished property is protracted, the new rule as proposed would allow the garnishee to collect those fees over the course of the dispute at the expense of Plaintiff. The suggested language would allow the garnishee to collect all fees to which it is entitled at the time of garnishment but no more. Such a provision will also help to ensure that the garnishee's role in the garnishment proceeding is neutral and disinterested.

Analysis. I recommend the addition and have modified the proposed rule accordingly. Proposed Rule 64D(j)(5). The current rule, URCP 64D(m), which permits the garnishee to withhold claims against the plaintiff or defendant, is limited to liquidated amounts. I overlooked that provision in the rewrite.

Posted by Robert Kariya-Barnes Bank" <rkariya@barnesbank.com>

Thank you for your proposed amendments. I believe line 23 makes proposed Rule 64A (c) confusing and unclear. Subsection (c) requires "at least one of the following" items (c) (1) through (7), but then line 23 adds "and all of the following" items (c) (8) through (11). Are all of items (8) through (11) required in addition to one of items (1) through (7)? Or do items (8) through (11) merely represent three more options besides items (1) through (7)? If items (8) through (11) will be required in addition to one of the items (1) through (7), perhaps the three required items could be placed first in order, then the items described as items (1) through (7).

Analysis. The intent is to require at least one of the items in (1) – (7) and all of the items in (8) – (11). We've struggled with how best to convey this. Logically, it makes no difference which comes first. Intellectually, listing the 4 mandatory items before the alternative items may be an improvement. It's an ergonomic issue more than anything.

Posted by Steve Tingey June 1, 2004 10:23 AM

The proposed changes to Rule 64A affecting prejudgment writs of replevin and writs of attachment essentially eliminate the separate remedies of replevin and attachment and severely limit the rights of secured parties. In particular, under the proposed Rule 64A, the moving party must prove one of the traditional grounds for a replevin or attachment, and then all of the requirements contained in paragraphs (c)(8) through (c)(11) of Rule 64A. The requirements contained in paragraphs (c)(10) and (c)(11) are essentially the requirements for a temporary restraining order found in current Rule 65A(e), including the requirement that the threatened injury to the moving party outweighs the damage the writ may cause the other party. Thus, writs of replevin and attachment, which are available only in the narrow instances described in current Rule 64, would now be subject to the balancing of equities test applicable to TRO's or preliminary injunctions under the proposed rule.

This inappropriately limits the contractual and statutory rights of a secured lender. By statute, a secured lender is entitled to possession its collateral on default under the Uniform Commercial Code. See U.C.A. §70A-9a-609. By contract, the secured party is almost universally granted this right also – current Rule 64B recognizes and promotes these rights by making replevin available on a showing that the plaintiff "is the owner of the property or has a special ownership or interest therein" and that the "property is wrongfully detained by the adverse party." See Rule 64B(b)(2) and (3). Current Rule 64B protects the borrower/defendant by requiring a bond. See Rule 64B(c).

The proposed rule restricts the ability to enforce these contractual and statutory rights, by injecting in every replevin hearing an equitable balancing of the harm issue. A person who is having collateral repossessed will always have harm, but by statute and contract the secured party is entitled to possession, on showing that the defendant/borrower has breached the contract.

I am not aware of serious problems arising out of the current rule. If there were significant problems with the current rule, those problems would be manifested by numerous actions to collect on replevin bonds and I do not believe this is happening with any frequency, if at all. The proposed rule will make enforcement of lenders' remedies more costly and time consuming, and those costs eventually will be reflected in the cost of credit.

Analysis. The proposed new rule adds to the requirements of a prejudgment writ. As the commentator points out, (c)(1) through (c)(7) are the traditional grounds for replevin and attachment. Modified a little, but not a lot. Subsections (c)(8) and (c)(9) are new to replevin but not attachment; they are, in any event, straightforward and in keeping with other provisions protecting the defendant and third party creditors. Subsection (c)(11), which is new, requires plaintiff to show a substantial likelihood of prevailing on the claim. Replevin and attachment are pretrial writs and the committee thought that this requirement was sound since the remedy in essence precedes the result. Subsection (c)(10), which is new, requires plaintiff to show that the threatened injury to plaintiff (absent the writ) outweighs the damage to defendant (from issuing the writ). Including subsection (c)(10) will, as the commentator observes, introduce balancing equities into the decision on pretrial writs. The issue is whether this is appropriate. It may be that the other elements for the writ plus a bond are sufficient to protect the defendant.

Posted by Rand Beacham June 1, 2004 02:13 PM

I suggest that the revision of Rule 64A should replace the term, "irreparable injury," with something more meaningful. In the context of Rule 65A injunctions, it appears to me that "irreparable injury" has been interpreted to include completely speculative injuries as well as injuries which are probably entirely compensable in damages. "Irreparable" now means little more than "could be pretty bad." I suggest using a term more accurately descriptive of the current legal standard, such as "significant injury" or "potentially great injury."

Analysis. The term "irreparable injury" is used in the current rule and the proposed new rule and is limited to pretrial writs issued without prior notice and hearing. It may be that the meaning has broadened over the years and is no longer a valid shorthand description of the legal standard. Whether a different term, such as one of those suggested, would more accurately reflect the real standard or further erode the required showing, only time would tell.

Posted by Laron Lind June 1, 2004 02:24 PM

I am an Assistant Attorney General with the Tax & Revenue Division of the Utah Attorney General's Office. The currently proposed changes to the collection rules are an improvement. However, we believe a few additional changes would be helpful. We suggest the following changes and additions to the proposed changes to Rules 64, 64A, 64B, 64C, 64D, 64E, 66, 69A, 69B, and 69C of the Utah Rules of Civil Procedure.

1. Security

Proposed Rule 64(b) (Writs in General) (Security):

We propose that the State of Utah and its subdivisions be exempt from the security requirement for writs. The State of Utah, its subdivisions and the United States are already exempt from the security requirements for injunctions as set forth in the last sentence of current Rule 65A(c)(1). That sentence states as follows: "No such security shall be required of the United States, the State of Utah, or of an officer, agency, or subdivision of either; nor shall it be required when it is prohibited by law."

Similar language could be added to proposed Rule 64 by adding subdivision (b)(4) after current subdivision (b)(3).

This change would also affect Rule 66 (Receivers) though the statement in subdivision 66(c) that security may be required in accordance with Rule 64.

Analysis. I recommend the proposed change and have modified the rule accordingly. Proposed Rule 64(b)(4).

Posted by Laron Lind (continuing)

2. Writ of Assistance

Proposed Rule 64(c) (Writs in General) (Inquiry and Orders in Aid of Writs):

We suggest that language similar to that found in current Rule 64B (Replevin), authorizing the sheriff and constable to enter a building or inclosure to retrieve property, be included in a new subsection 64(c)(4). The language would apply writs other than replevin, such as writs of execution. Our suggested language reads as follows:

If the officer has probable cause to believe that the property or any part thereof is concealed or withheld in a building or inclosure or access is otherwise blocked, the officer must publicly demand its delivery. If it is not delivered, he or she must cause the building or inclosure to be broken open or the objects blocking access removed, and take the property into his or her possession, and, if necessary he may call to his aid the power of the county. The plaintiff may also obtain a writ of assistance from the court upon application supported by an affidavit describing the property and the impediments blocking access to it. The writ of assistance shall authorize the officer to take such actions as described above in this paragraph, or such other reasonable actions as the court may describe, to allow the officer to take the property into his or her possession.

Analysis. As mentioned before, the authority to use force is regulated by §77-4-1. I recommend against a writ of assistance, which does little more than direct the sheriff to exercise the authority. If, In the exercise of discretion, the sheriff declines to use force even though authorized to do so, the judge can order the defendant to show cause based on the failure to turn over the property.

Posted by Laron Lind (continuing)

3. Garnishments

A. Proposed Rule 64D(h) (Garnishments) (Reply to answers; request for hearing:

We suggest that the reply to the garnishee's answers and request for hearing be served upon the other party in addition to filing the original with the court and serving a copy upon the garnishee. We often receive notices of garnishment hearings without receiving the request for the hearing. We then have to independently obtain a copy of the request for hearing. Not all courts are willing to fax us a copy. This makes it difficult, if not impossible, to obtain a copy of the request prior to the hearing. This in turn hinders our ability to resolve garnishment objections and/or prepare for garnishment hearings.

This change can be made by adding the phrase "and the other party to the action" after the word "garnishee" in the first sentence of proposed Rule 64D(h)(1). The sentence would then read as follows: "The plaintiff or defendant may file and serve upon the garnishee and the other party to the action a reply to the answer and request a hearing."

Analysis. URCP 5(a)(1) requires all papers filed with the court to be served on the other parties not in default. Adding a service provision here would be duplicative.

Posted by Laron Lind (continuing)

B. Proposed Rule 64(d)(3)(B) (Writs in General) (Limits on writs of garnishment).

We propose that the limit on one garnishment in effect at one time not apply to situations where the pre-existing garnishment is taking less than 25% of the defendant's disposable earnings. This typically occurs where the first garnishment is an administrative one.

For example, under the current and proposed rules, an administrative student loan repayment garnishment could be taking 10% of the disposable income over a long period of time (administrative garnishments are not limited to 120 days) and other judgment creditors could be prevented from taking the remaining 15% of the defendant's disposable income.

Analysis. Conceptually, this suggestion offers as policy the alternative to the committee's "one writ" discussions from earlier meetings. To put this policy into place, we would need only to eliminate the "one writ" provisions from proposed Rule 64A(d)(3)(B)(ii). At that point, writs of garnishment would be limited by the federal maximum, reflected in proposed Rule 64D(a). It is feasible, but it changes the existing law, which imposes a one-writ-at-a-time limit.

Posted by Laron Lind (continuing)

4. Combining Writs - Rule 64(d) Issuance of writ; service.

We propose that multiple judgments by the same plaintiff(s) against the same defendants(s) may be combined in a single post-judgment writ listing all of the judgment case numbers from the lowest to the highest number, with the lowest case number governing for judicial administration purposes. Unless the writ requires otherwise, the officer should be required to apply the proceeds first to the lowest case number (oldest judgment.) Such a provision could be added somewhere in proposed Rule 64(d)(1) or (2).

We often face the situation where we are executing on real or personal property and are forced to issue multiple writs of execution on numerous low dollar amount tax judgments. It would be more efficient to issue a single writ referencing the numerous judgments than it is to issue multiple writs.

Analysis. It's not an impossible task, but the clerks would have difficulty processing a single writ for multiple judgments. The better approach may be to create a process by which judgments can be consolidated and issue a single writ on the consolidated judgment.

From: "David McGrath" <dmcgrath@zionsbank.com>
To: <tims@email.utcourts.gov>, "Robert Goodman" <rgoodman@zionsbank.com>
Date: 6/1/04 8:29AM
Subject: Re: Rule 64D

It looks to me like the wording of the proposed rule is clear enough and strong enough that nothing additional is required to enable the garnishee to request and obtain a hearing as of right. This wording, together with the Court's decision in Pangea, which is grounded in considerations of constitutional due process, will continue to apply under the proposed rule and should be more than enough.

Analysis. During the comment period, the Supreme Court entered its opinion on one of the issues discussed by the committee. The Court's decision is in keeping with the committee's conclusions. *Pangea Technologies, Inc. v. Internet Promotions, Inc.*, 2004 UT 40, http://www.utcourts.gov/opinions/supopin/pangea051804.htm

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title of the action, the name of the court from which it is issued, the name and address of the party or attorney serving the subpoena, and its civil action number;

(a)(1)(C) command each person to whom it is directed to appear to give testimony at trial, or at hearing, or at deposition, or to produce or to permit inspection and copying of documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(a)(1)(D) set forth the text of Notice to Persons Served with a Subpoena, in substantially similar form to the subpoena form appended to these rules.

(a)(2) A command to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing, or at deposition, or may be issued separately.

(a)(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(b) Service; scope.

(b)(1) Generally.

(b)(1)(A) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made as provided in Rule 4~~(e)~~(d) for the service of process and, if the person's appearance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered. Prior notice of any commanded production or inspection of documents or tangible things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(b)(1)(B) Proof of service when necessary shall be made by filing with the clerk of the court from which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(b)(1)(C) Service of a subpoena outside of this state, for the taking of a deposition or production or inspection of documents or tangible things or inspection of premises outside this state, shall be made in accordance with the requirements of the jurisdiction in which such service is made.

(b)(2) Subpoena for appearance at trial or hearing. A subpoena commanding a witness to appear at a trial or at a hearing pending in this state may be served at any place within the state.

(b)(3) Subpoena for taking deposition.

(b)(3)(A) A person who resides in this state may be required to appear at deposition only in the county where the person resides, or is employed, or transacts business in person, or at such other place as the court may order. A person who does not reside in this state may be required to appear at deposition only in the county in this state where the person is served with a subpoena, or at such other place as the court may order.

(b)(3)(B) A subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of documents or tangible things relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30(b) and paragraph (c) of this rule.

(b)(4) Subpoena for production or inspection of documents or tangible things or inspection of premises. A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises may be served at any time after commencement of the action. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule. The party serving the subpoena shall pay the reasonable cost of producing or copying the documents or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

(c) Protection of persons subject to subpoenas.

(c)(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court from which the subpoena was issued shall enforce this duty and impose

upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(c)(2)(A) A subpoena served upon a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises, whether or not joined with a command to appear at trial, or at hearing, or at deposition, must allow the person at least 14 days after service to comply, unless a shorter time has been ordered by the court for good cause shown.

(c)(2)(B) A person commanded to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing, or at deposition.

(c)(2)(C) A person commanded to produce or to permit inspection and copying of documents or tangible things or inspection of premises may, before the time specified for compliance with the subpoena, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the documents or tangible things or inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(c)(3)(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it:

(c)(3)(A)(i) fails to allow reasonable time for compliance;

(c)(3)(A)(ii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or requires a non-resident of this state to appear at deposition in a county other than the county in which the person was served;

(c)(3)(A)(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies;

(c)(3)(A)(iv) subjects a person to undue burden.

(c)(3)(B) If a subpoena:

(c)(3)(B)(i) requires disclosure of a trade secret or other confidential research, development, or commercial information;

(c)(3)(B)(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party;

(c)(3)(B)(iii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or

(c)(3)(B)(iv) requires a non-resident of this state who is not a party to appear at deposition in a county other than the county in which the person was served;

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in responding to subpoena.

(d)(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(d)(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to appear or produce at a place not within the limits provided by subparagraph (c)(3)(A)(ii).

(f) Procedure where witness conceals himself or fails to attend. If a witness evades service of a subpoena, or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(g) Procedure when witness is confined in jail. If the witness is a prisoner confined in a jail or prison within the state, an order for examination in the prison upon deposition or, in the discretion of the court, for temporary removal and production before the court or officer for the purpose of being orally examined, may be made upon motion, with or without notice, by a justice of the Supreme Court, or by the district court of the county in which the action is pending.

(h) Subpoena unnecessary; when. A person present in court, or before a judicial officer, may be required to testify in the same manner as if the person were in attendance upon a subpoena.

Rule 47. Jurors.

(a) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(b) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

(c) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

(d) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule.

(f) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(f)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(f)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(f)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(f)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(f)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(f)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(g) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(g)(1) Strike and replace method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory

challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is ~~completed~~ selected an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue

between the parties, and render a true verdict ~~rendered~~ according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after impaneling the jury and before verdict, a juror becomes unable or disqualified to perform the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(k) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

~~(l) 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.~~

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors shall not communicate with any person regarding a subject of the trial. Jurors may communicate with court personnel and among themselves about topics other than 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 admonish the jury at the beginning of trial and remind them as appropriate.

(m) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having charge of them must not make or allow to be made any communication to them with respect to the action, except to ask them if they have agreed upon their verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of deliberations or the verdict agreed upon.

(n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(o) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(p) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(q) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(r) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(s) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move ~~with or without supporting affidavits~~ for ~~a~~ summary judgment ~~in his favor~~ upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move ~~with or without supporting affidavits~~ for ~~a~~ summary judgment ~~in his favor~~ as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be ~~filed and served~~ in accordance with ~~CJA 4-501~~ Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of ~~his~~ the pleadings, but ~~his~~ the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ~~If he does not so respond, summary~~ Summary judgment, if appropriate, shall be entered against ~~him~~ a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that ~~he~~ the party cannot for reasons stated present by affidavit facts essential to justify ~~his~~ the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. ~~Should it appear to the satisfaction of the court at any time that~~ If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party ~~employing~~ presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused ~~him to incur~~, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 63. Disability or disqualification of a judge.

(a) Substitute judge; Prior testimony. If the judge to whom an action has been assigned is unable to perform the duties required of the court under these rules, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is assigned may in the exercise of discretion rehear the evidence or some part of it.

(b) Disqualification.

(b)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest.

(b)(1)(B) The motion shall be filed after commencement of the action, but not later than 20 days after the last of the following:

(b)(1)(B)(i) assignment of the action or hearing to the judge;

(b)(1)(B)(ii) appearance of the party or the party's attorney; or

(b)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 20 days prior to a hearing, the motion shall be filed as soon as practicable.

(b)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action.

(b)(2) The judge against whom the motion and affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(b)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

(b)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

(b)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.

(c) Discretionary recusal after remand. If an action is remanded after appeal, the judge to whom the matter is assigned may, either sua sponte or on motion of one of the parties, exercise the discretion to recuse himself or herself from further consideration of the action and allow it to be reassigned to another judge. In exercising such discretion, the judge should evaluate, in light of the nature of the decision on appeal and the extent of the issues remaining for decision on remand:

(c)(1) whether and to what extent recusal might impede the timely resolution of the issues remaining on remand, as in a case where the judge's familiarity with the law or the facts of the case may be important to the timely resolution of the action; and

(c)(2) whether and to what extent recusal might avoid the appearance or perception of bias or prejudice against the parties prevailing on appeal.

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 a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "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) "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) "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) "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 request for hearing.

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

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

(a)(9) "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.

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

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a

writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

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

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

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

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

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

(d) Issuance of writ; service

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

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) 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 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)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

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

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. 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)(D)(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) 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 the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

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

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

(f) Discharge of writ; release of property.

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

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

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

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

(f)(5) Service on officer; disposition of property. If the order discharging the writ 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.

154

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) 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. If the plaintiff cannot by due diligence determine the facts necessary to support the affidavit, the plaintiff shall explain in the affidavit the steps taken to determine the facts and why the facts could not be determined. The affidavit supporting the motion shall state facts in simple, concise and direct terms that are not conclusory.

(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 materially decline in value; or

(c)(6) that the plaintiff has an ownership or special interest in the property; or

(c)(7) probable cause of losing the remedy unless the court issues the writ;

and all of the following:

(c)(8) that the property is not earnings and not exempt from execution; and

(c)(9) that the writ is not sought to hinder, delay or defraud a creditor of the defendant; and

(c)(10) that the threatened injury to the plaintiff outweighs the damage the writ may cause the defendant; and

(c)(11) 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) if known, the nature, location, account number 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 that 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. The affidavit shall be served in a manner directed by the court that is reasonably calculated to expeditiously give actual notice of the hearing.

(g) 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 the security or the sufficiency of the sureties;

(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. The burden is on the plaintiff to prove the facts necessary to support the writ.

(i) Ex parte writ before judgment. If the 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 other reason 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) state the grounds for issuance without notice;

(i)(2) designate the date and time of issuance and the date and time of expiration;

(i)(3) designate the date, time and place of the hearing;

(i)(4) forthwith be filed in the clerk's office and entered of record;

(i)(5) 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)(6) 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) Availability. A writ of replevin is available to compel delivery to the plaintiff of specific personal property held by the defendant.

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

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

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

Rule 64C. Writ of attachment.

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

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

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

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

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

Rule 64D. Writ of garnishment.

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

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

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

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

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

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

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

(b)(4) that the garnishee possesses or controls property of the defendant; and

(b)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78-7-44.

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

(c)(1) if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(c)(2) whether any of the property consists of earnings;

(c)(3) the amount of the judgment and the amount due on the judgment;

(c)(4) the name, address and phone number of any person known to the plaintiff to claim an interest in the property; and

(c)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78-7-44.

(d) Defendant identification. The plaintiff shall submit with the affidavit or application a copy of the judgment information statement described in Utah Code Section 78-22-1.5 or the

defendant's name and address and, if known, the defendant's social security number and driver license number and state of issuance.

(e) Interrogatories. The plaintiff shall submit with the affidavit or application interrogatories to the garnishee inquiring:

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

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

(e)(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;

(e)(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;

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

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

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

(f) Content of writ; priority. The writ shall instruct the garnishee to complete the steps in subsection (g) and instruct the garnishee how to deliver the property. Several writs may be issued at the same time so long as only one garnishee is named in a writ. Priority among writs of garnishment is in order of service. A writ of garnishment of earnings applies to the earnings accruing during the pay period in which the writ is served.

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

(g)(1) answer the interrogatories under oath or affirmation;

(g)(2) serve the answers on the plaintiff;

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

(g)(4) file the answers with the clerk of the court.

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

(h) Reply to answers; request for hearing.

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

(h)(1)(A) challenge the issuance of the writ;

(h)(1)(B) challenge the accuracy of the answers;

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

(h)(1)(D) claim a set off.

(h)(2) The reply is deemed denied, and the court shall conduct an evidentiary hearing.

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

(h)(3)(A) the garnishee's answers are deemed correct; and

(h)(3)(B) the property is not exempt, except as reflected in the answers.

(i) Delivery of property. A garnishee shall not deliver property until the property is due the defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 20 days after service by the garnishee under subsection (g). If the garnishee is served with a reply within that time, the garnishee shall retain the property and comply with the order of the court entered after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in the writ.

(j) Liability of garnishee.

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

(j)(2) If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee's failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee's liability in whole or in part.

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

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

(j)(5) A garnishee may deduct from the property any liquidated claim against the plaintiff or defendant.

(k) Property as security.

(k)(1) If property secures payment of a debt to the garnishee, the property need not be applied at that time but the writ remains in effect, and the property remains subject to being applied upon payment 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.

(k)(2) If property secures an obligation that does not require the personal performance of the defendant and that 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 performance or upon tender of performance that is refused.

(l) Writ of continuing garnishment.

(l)(1) After final judgment, the 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.

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

(l)(2)(A) 120 days;

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

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

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

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

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

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

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

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

(l)(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.

(l)(5) A writ of continuing garnishment issued in favor of the Office of Recovery Services or the Department of Workforce Services of the state of Utah to recover overpayments:

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

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

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

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

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

(b)(2) the nature, location and estimated value 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) 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) 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 of the writ and accompanying papers upon the defendant.

(d)(2) The court shall set the matter for an evidentiary hearing. If the court determines that the writ was wrongfully obtained, or that property is exempt from seizure, the court shall enter 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 enter an order directing the officer to sell or deliver the property. If the date of sale has passed, notice of the rescheduled sale shall be given. No sale may be held until the court has decided upon the issues presented at the hearing.

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

(e) Mortgage foreclosure governed by statute. Utah Code Title 78, Chapter 37, Mortgage Foreclosure, governs mortgage foreclosure proceedings notwithstanding contrary provisions of these rules.

Rule 66. Receivers.

(a) Grounds for appointment. The court may appoint a receiver:

(a)(1) in any action in which property is in danger of being lost, removed, damaged or is insufficient to satisfy a judgment, order or claim;

(a)(2) to carry the judgment into effect, to dispose of property according to the judgment and to preserve property during the pendency of an appeal;

(a)(3) when a writ of execution has been returned unsatisfied or when the judgment debtor refuses to apply property in satisfaction of the judgment;

(a)(4) when a corporation has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights; or

(a)(5) in all other cases in which receivers have been appointed by courts of equity.

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

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

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

(e) Powers of receivers. A receiver has, under the direction of the court, power to bring and defend actions, to seize property, to collect, pay and compromise debts, to invest funds, to make transfers and to take other action as the court may authorize.

(f) Payment of taxes before sale or pledge of personal property. Before the receiver may sell, transfer or pledge personal property, the receiver shall pay applicable taxes and shall file receipts showing payment of taxes. If there are insufficient assets to pay the taxes, the court may authorize the sale, transfer or pledge with the proceeds to be used to pay taxes. Within 10 days after payment, the receiver shall file receipts showing payment of taxes.

(g) Real property. Before a receiver is vested with real property, the receiver shall file a certified copy of the appointment order in the office of the county recorder of the county in which the real property is located.

Rule 69A. Seizure of property.

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

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

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

(c) Personal property.

(c)(1) Farm products, as that term is defined in Utah Code Section 70A-9a-102, may be seized by filing the writ and description of the property with the central filing system established by Utah Code Section 70A-9a-320.

(c)(2) Securities shall be seized as provided in Utah Code Section 70A-8-111.

(c)(3) In the discretion of the officer, property of extraordinary size or bulk, property that would be costly to 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.

(c)(4) Otherwise, personal property shall be seized by serving the writ and a description of the property on the person holding the property and taking the property into custody.

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

(a) Sale before judgment. The officer may sell the property before judgment if it is perishable or likely 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 safe the proceeds of the sale 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 shall be not later than the initial publication of notice of the sale. The officer shall publish notice of the date time and place of sale as follows:

(b)(1) If the property is perishable or likely 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 (A) in the courthouse from which the writ was issued and (B) in at least other three public places in the county or city in which 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 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 (A) in the courthouse from which the writ was issued and (B) in at least three other public places in the county or city in which the sale is to take place. The officer shall post the notice for at least seven days and publish the same at least one time not less than one day preceding the sale in a newspaper of general circulation, if there is one, in the county in which the sale is to take place.

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

(c) Postponement. If the officer finds sufficient cause, the officer may postpone the sale. The officer shall declare the postponement at the time and place set for the sale. If the postponement

is longer than 72 hours, notice of the rescheduled sale shall be given in the same manner as the original notice of sale.

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

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

(e)(1) pay the reasonable and necessary costs of seizing, transporting, storing and selling the property;

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

(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. 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) Right of redemption. Real property may be redeemed unless the estate is less than a leasehold of a two-years' unexpired term, in which case 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 junior to that on which the property was sold or by their successors in interest. If the defendant redeems, the effect of the sale is terminated and the defendant is restored to the defendant's estate. If the property is redeemed by a creditor, any other creditor having a right of redemption may redeem.

(c) How made. To redeem, the redemptioner shall pay the amount required to the purchaser and shall serve on the purchaser:

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

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

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

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

(e) Redemption price. The price to redeem is the sale price plus six percent. The price for a subsequent redemption is the redemption price plus three percent. If the purchaser or redemptioner files with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to file notice of the amounts with the county recorder waives the right to claim such amounts.

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

(g) 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:

(g)(1) a detailed description of the real property;

(g)(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

(g)(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.

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

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

(i)(1) Subject to a superior claim, the purchaser is entitled to the rents of the property or the value of the use and occupation of the property from the time of sale until redemption. Subject to a superior claim, 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.

(i)(2) Upon written request served on the purchaser before the time for redemption expires, 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.

(j) Remedies.

(j)(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 purchaser or redemptioner may file an action to recover damages for waste.

(j)(2) Failure to obtain property.

(j)(2)(A) A purchaser or redemptioner who fails to obtain the property or is evicted from the property because the judgment against the defendant is reversed or discharged may file a motion

for judgment against the plaintiff for the purchase price plus amounts paid for taxes, assessments, insurance, maintenance and repair plus interest.

(j)(2)(B) A purchaser or redemptioner who fails to obtain the property or is evicted from the property because of an irregularity in the sale or because the property is exempt, may file a motion for judgment against the plaintiff or the defendant for the purchase price plus amounts paid for taxes, assessments, insurance, maintenance and repair plus interest. If the court enters judgment against the plaintiff, the court shall revive the plaintiff's judgment against defendant for the amount of the judgment against plaintiff.

(j)(2)(C) Interest on a judgment in favor of a purchaser or redemptioner is governed by Utah Code Section 15-1-4. Interest on a revived judgment in favor of the plaintiff against the defendant is at the rate of the original judgment. The effective date of a revived judgment in favor of plaintiff against defendant is the date of the original judgment except as to intervening purchaser in good faith.

(k) Contribution and reimbursement. A defendant may claim contribution or reimbursement from other defendants by filing a motion.