UTAH BUSINESS COALITION

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July 12, 2004

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ADMINISTRATIVE OFFICE
OF THE COURTS

Chief Justice Christine M. Durham
Utah Supreme Court
PO Box 140210
Salt Lake City, UT 84114-0210

Re: Order No. 2004-07-21

Dear Chief Justice Durham and Justices of the Utah Supreme Court:

On behalf of Utah's business community, we submit this letter regarding the Court's order issued on May 12, 2004, that amended Utah Rule of Civil Procedure 62 ("Rule 62"). The Court requested comments on the proper content of Rule 62. We strongly believe that the Court's order to return the rule to its pre-H.J.R. 16 text endangers the health of Utah's businesses and as such, we respectfully urge the Court to adopt the changes made by H.J.R. 16 to Rule 62.

In order to remain competitive and solvent in the state's currently struggling economy, [1] Utah's businesses must endure numerous challenges, not the least of which is the burden of litigation. While few huge verdicts have been handed down thus far against businesses in Utah, the picture from other states is not comforting. Judgments in the hundreds of millions and even billions of dollars are becoming increasingly common: in 2003 alone, nationally there were 21 jury verdicts over $100 million, including one for $11.8 billion, while in 1992 only 8 verdicts exceeded $100 million.[2]

Utah, like virtually every other state, requires a defendant who seeks to appeal an adverse judgment to post a supersedeas bond. In the diminishing number of states that do not have limits on appeal bonds, the supersedeas bond amount usually equals the amount of the judgment. In Utah, the court has discretion under Rule 62 to set the amount of bond -- meaning the court could set the bond in an amount that exceeds the amount of the judgment. When the judgment equals hundreds of millions or even billions of dollars, however, a defendant may simply be unable to post a full bond to obtain a stay, even if it has good arguments that the trial verdict was improper. Litigation in other states has demonstrated the serious consequences that

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1 The Utah economy, like that of the nation, slowed dramatically in 2002. Non-agricultural employment fell by -1.0% (-1,300 jobs) in 2002, the first negative net job growth since 1964. The 2002 unemployment rate, at 6.0%, was the worst in a decade. The national recession has been especially severe for Utah's information technology, telecommunications, and financial services businesses. Further, while the 2002 Olympic Winter Games provided a boost to the economy in 2001 and early 2002, the loss of these temporary jobs after the end of the Games may have worsened the situation. Utah's economy improved only slightly in 2003 due to the lingering effects of the national slowdown, the bursting of the dot-com bubble, and the completion of the 2002 Olympic Winter Games. *See* Utah DEA, *2004 Econ. Rep. to the Gov.*, at 15 (Jan. 2004), *available at* http://www.governor.state.ut.us/dea/ERG/ERG2004/ERG04.pdf.

2 *See* VerdictSearch, *Top 100 of 2003*, at http://www.verdictsearch.com/jv3_news/top100/; "1992's Largest Verdicts," *National Law Journal*, at S1 (Jan. 25, 1993).

high appeal bonds can have on businesses and their employees. Several corporations have been forced to make a Hobson's choice because they could not afford to post an appeal bond in the full amount of the judgment: either to file for bankruptcy -- which automatically stays the defendant's obligations to its creditors -- or to settle with the plaintiffs. The risk of bankruptcy is not merely hypothetical. For example, in 1987 Texaco was forced into bankruptcy after a Texas jury returned an $11 billion verdict against the corporation, because Texaco could not afford to post the bond required to stay the execution of the judgment.[3] Similarly, Alton Telegraph Printing Co., an Illinois newspaper that had been in business for over 100 years, was ordered to post a bond that greatly exceeded the company's net worth in order to stay a $9.2 million libel and defamation judgment. In order to avoid the forced sale and liquidation of its businesses to satisfy the judgment during the appeal, Alton had to file for bankruptcy protection. The court recognized that declaring bankruptcy was necessary just so the company could "preserve its status as an ongoing concern and protect its employees and its creditors while the claims against it are being litigated."[4]

The potential problems that can be caused by exorbitant appeal bonds have been most vividly demonstrated by the *Engle* case in Florida, in which a class of smokers was awarded $145 billion in punitive damages. When the *Engle* trial started, Florida law required a defendant to post a bond equal to 125 percent of the verdict. This would have resulted in a bond in the *Engle* case of $181 billion. Since no company or industry could post such a bond, the only way for the defendants to obtain a stay would have been for them to declare bankruptcy. Had these defendants been forced to prematurely declare bankruptcy, all payments due under the national tobacco settlements to Florida and every other State, including Utah, would have ceased entirely. Moreover, this would have had severe financial consequences for the defendants and their respective employees -- as well as for the employees of other companies whose pension funds invest in the defendants' stock. However, just before the verdict, the Florida legislature enacted an appeal bond cap of $100 million. This allowed the defendants to post a bond and pursue their appeal. In May 2003 the intermediate appellate court reversed and rejected the verdict in its entirety,[5] and the case is now on appeal to the Florida Supreme Court.

The Utah Legislature understands that if the state's appeal bond rules are not amended to impose an appeal bond cap, Utah's businesses may be forced to face a similar scenario. The Legislature further recognizes that for Utah to remain competitive with other states in attracting more businesses and in preventing those that are already here from leaving, it must join the growing number of states (30 so far) that have adopted limits on appeal bonds. Consequently, the Legislature exercised its authority under Article VII, section 4 of the Utah Constitution to promulgate amendments to procedural rules and unanimously passed H.J.R. 16. This resolution amended Rule 62 to establish a $25 million cap on the bond required of all defendants collectively in cases where the judgment exceeds $5 million. For individual defendants, the limit is set at the lesser of $5 million plus 10% of the judgment or $25 million. H.J.R. 16 thus ensures that no company is driven out of business just so it can appeal a huge judgment against it. If Utah's businesses can remain healthy throughout the appeals process, the jobs of their employees are also protected.

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3 *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 4-5 (1987).

4 *In Re Alton Telegraph Printing Co.*, 14 B.R. 238 (Bankr. S.D. Ill. 1981). Another example of this disturbing trend is a Mississippi case involving the Loewen Group. Because the company could not afford to post the $625 million bond required to stay the execution of a judgment, the company settled with the plaintiffs for $175 million. "Funeral Chain Settles, Avoiding a Big Bill," *N.Y. Times*, at D5 (Jan. 30, 1996).

5 *Liggett Group v. Engle*, 2003 Fla. App. LEXIS 7500 (Fla. Dist. Ct. App. 2003).

Importantly, H.J.R. 16 does not in any way limit damages for people who are injured. In fact, in no way does H.J.R. 16 affect the rights of any plaintiffs to be fully compensated for their injuries, no matter how large their damages are. If a jury delivers a large verdict in favor of a plaintiff, and that verdict is upheld on appeal, the defendant is still required to pay the plaintiff the full amount of the judgment. Furthermore, by ensuring that defendants are not bankrupted by huge appeal bond requirements, H.J.R. 16 helps to guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect.

If the Court does not adopt an order restoring the changes made by H.J.R. 16, the continued vitality of the state's existing businesses could be threatened, and new businesses could be discouraged from locating here. In order for the citizens in our state to have more jobs and better jobs, we must be sensitive to the factors that companies consider when deciding where to expand or locate a business -- such as whether the state's laws are fair to businesses and their employees. As mentioned above, 30 other states have already recognized the potential consequences that high appeal bonds can have on businesses and their workers and have enacted sensible appeal bond limitations. Ignoring the changes adopted by H.J.R. 16 put Utah at a disadvantage with respect to these other states and does a disservice to the citizens of Utah.

Our issue is with the substance of Rule 62 and we do not want its importance to be overshadowed by a separation of powers disagreement In summary, the amendments to Rule 62 contained in H.J.R. 16 represent meaningful reform to Utah's court rules. We therefore urge the Supreme Court to issue an order incorporating the changes to Rule 62 made by H.J.R. 16.

Sincerely,

Utah Manufacturers Association

Utah ~~Food Industry~~ Association

Utah Taxpayers Association

Salt Lake Chamber of Commerce

Utah Petroleum Marketers & Retailers Assoc.

Utah State Legislature

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July 20, 2004

Chief Justice Christine M. Durham
Utah Supreme Court
PO Box 140210
Salt Lake City, UT 84114-0210

Re: Order No. 2004-07-21

Dear Chief Justice Durham and Justices of the Utah Supreme Court:

We are submitting this letter to comment on the Court's order of May 12, 2004, amending Utah Rule of Civil Procedure 62 ("Rule 62") to return the rule to its pre-H.J.R. 16 text. As the legislative sponsors and supporters of H.J.R. 16, we would like to express our concerns about the serious constitutional implications arising from the Court's nullification of a unanimous act of the Legislature. Furthermore, we would like to explain to the Court our reasons for adopting H.J.R. 16 and to urge the Court to restore the changes made by H.J.R. 16 to Rule 62.

The historical division of rule-making responsibility in Utah and the legislative history of Article VIII, section 4 of the Utah Constitution ("Section 4") indicate that the Legislature has final authority over rules of court procedure. Prior to 1985, the Supreme Court's power to make procedural rules was delegated to it by the Legislature; the Court had no independent constitutional rule-making authority.[1] In 1984, however, the Utah Constitutional Revision Commission proposed a constitutional amendment that would give the Court the constitutional authority to make procedural rules. The Legislature adopted the Commission's proposal, but modified it to add the provision that the Legislature may amend court rules by a two-thirds majority vote in each chamber. The legislative floor debates concerning this amendment indicate that the Legislature wanted to retain to itself this power because it wanted to retain "oversight" of procedural rules, and it "sought assurances that the supreme court would not

[1] *See* Note, *Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution*, 1992 Utah L. Rev. 153, 154-58 (1992) (citing Act of Mar. 6, 1943, ch. 33, 1943 Utah Laws 33; Act of Mar. 8, 1951, ch. 58, 1951 Utah Laws 150, 152). While the Court held prior to 1985 that procedural rule-making was the "exclusive prerogative" of the Court, this decision was based on the Court's "inherent powers," not on the Constitution. *Brickyard Homeowners' Association v. Gibbons Realty Co.*, 668 P.2d 535 (Utah 1983).

possess absolute authority to make procedural and evidentiary rules."[2]

This amendment was ratified by Utah voters in 1985 and was codified in Article VII, section 4 of the Constitution, which now reads:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

The Utah Supreme Court has repeatedly recognized that this constitutional provision gives the Legislature the power to amend procedural court rules by a two-thirds vote.[3] By passing H.J.R. 16 unanimously, the Legislature clearly met the two-thirds constitutional requirement, and validly amended Rule 62 to establish a bond cap of $25 million collectively, or the lesser of (1) $5 million plus 10% of the judgment award or (2) $25 million for any single appellant, in cases where the judgment exceeds $5 million.

The Court's order restoring Rule 62 to its pre-H.J.R. 16 form clearly undermines the intention behind Section 4 to make the Legislature the final authority over the promulgation of procedural rules. This is an improper intrusion on the constitutional principle that "no person charged with the exercise of powers properly belonging to one [branch of government] shall exercise any functions appertaining to either of the others."[4] Moreover, the Court's order superseding the Legislature's enactment essentially renders the last sentence of Section 4 meaningless, thus violating the "cardinal principle of constitutional construction" that "the whole instrument -- every section, every clause, every word -- must be given effect."[5] In order to resolve these serious constitutional issues, the Court should either: (1) rescind its May 12 order; (2) issue another order implementing the changes made by H.J.R. 16; or (3) promulgate a new rule to reflect the policy issues raised by H.J.R. 16.

Even if the Court were not constitutionally required to accept the provisions of H.J.R. 16, we would urge the Court to do so anyway, because the amendments in H.J.R. 16 are sensible and important changes to Utah's supersedeas bond rules. Rule 62(c) provides that an appellant may obtain a stay of a judgment pending appeal by posting a supersedeas bond. The purpose of the bond is to "maintain the status quo during the appeal" by protecting the plaintiff's interest in the judgment,[6] while at the same time preventing the plaintiff from seizing the defendant's assets during the appeal. While Utah courts have traditionally required defendants to

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[2] *Court Rulemaking in Utah*, *supra* n.1 at 163. (citing Floor Debate, comments by Sen. C.E. Peterson, 45th Utah Leg., 2d Spec. Sess. (Mar. 27, 1984) (Sen. Recording No. 6, Side 2); Floor Debate, comments by Rep. Lyle W. Hillyard, 45th Utah Leg., 2d Spec. Sess. (Mar. 27, 1984) (House Recording No. 11, Side 1).

[3] *See State v. Robertson*, 932 P.2d 1219 (Utah 1997); *State v. Banner*, 717 P.2d 1325 (Utah 1986); *State v. Lamper,* 779 P.2d 1125, 1131 (Utah 1989); *Ryan v. Gold Cross Servs.*, 903 P.2d 423, 425 (Utah 1995).

[4] Utah Const. art. V, sec. 1.

[5] *State ex rel. Breeden v. Lewis*, 72 P. 388, 390 (Utah 1903).

[6] *See Diversified Holdings, L.C. v. Turner*, 63 P.3d 686 (Utah 2002) (*citing* 5 Am. Jur. 2d Appellate Review, § 441 (1995)).

post supersedeas bonds in an amount equal to the amount of the judgment,[7] the current version of Rule 62(c) sets no limits on the size of the bond required to stay the execution of a judgment -- meaning that courts have the authority to set the bond at any amount they deem appropriate, even if that amount exceeds the total judgment.

The bond requirement originated in the early years of our country, at a time when most litigation involved individuals, not well-established companies. It also began before the development of the class action device and the onset of large punitive damage awards, at a time when multi-million or -billion dollar verdicts were unthinkable. Now, however, defendants who are subject to large damage awards (which are becoming increasingly common across the country) may simply be unable to post a bond to protect their assets while they appeal. In order to stop a plaintiff from seizing their assets during an appeal, these defendants may have no alternative other than to seek bankruptcy protection, which carries with it an automatic stay of the debtor's obligations to pay its creditors.

These concerns have motivated many of our sister states to address this issue as they have become increasingly aware of the potential consequences of high appeal bonds. To date, 30 states have passed legislation or amended court rules to limit the size of the required bond in cases involving large judgments. In addition, five other states do not require any defendant to post a bond at all during an appeal. The attached chart provides an overview of the rules and statutes governing appeal bonds for these 35 states. As the attached chart shows, the bond caps that have been adopted range from $1 million to $150 million.

The majority of these states (18 out of 30) have passed legislation or adopted court rules that apply broadly to all litigants. That was the approach that we took in adopting H.J.R. 16, because we thought that it was important to ensure that all defendants are treated fairly and are given the right to pursue a just and orderly appeal. The actions taken by the other 12 states demonstrate that this issue is not just one of fairness for all litigants, but also a matter of protecting state revenue. These states have passed bond caps that apply only to signatories or successors and affiliates of signatories of the Master Settlement Agreement ("MSA") and other settlements between the tobacco companies and every state. These companies have been subjected to several very large verdicts, including a $145 billion verdict in Florida and a $10.1 billion verdict in Illinois. Without bond caps, these companies may be forced to declare bankruptcy in order to stay a judgment during appeal, because they could not possibly afford to post a bond in the full amount of the judgment. However, a bankruptcy stay would have the potential to disrupt the billions of dollars in payments that the companies owe to Utah and every other state.[8] The MSA-specific bond caps thus reflect the importance of keeping these companies solvent while they appeal a large adverse judgment. Of course, if a tobacco company were to lose an appeal, a bond cap would provide them no protection at all.

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[7] Before the Rules of Appellate Procedure were created in 1985, Utah R. Civ. P. 73(d) provided that a supersedeas bond must be "conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay." *See U-M Inv. v. Ray*, 701 P.2d 1061, 1063 (Utah 1985) (bond equaled amount of judgment); *see also Jorgenson v. Aetna Casualty & Sur. Co.*, 769 P.2d 809, 810 (Utah 1988) (defendant filed a supersedeas bond for $191,463, the amount of damages awarded by the court).

[8] For example, it is estimated that Utah will receive $27 million in tobacco settlement revenue in 2004. NCSL Health Policy Tracking Service, *State Management and Allocation of Tobacco Settlement Revenue* 60-61 (Sept. 2003).

The Utah legislature recognizes that uncapped appeal bonds could effectively deny a defendant's right to appeal. Accordingly, we adopted H.J.R. 16 to impose a $25 million cap on the bond required of all defendants collectively in cases where the judgment exceeds $5 million, with a limit of the lesser of $5 million plus 10% of the judgment or $25 million for individual defendants. The amendments preserve a trial court's discretion to determine how large of a bond is necessary to protect the plaintiff should the defendant's appeal be unsuccessful, within this generous limit.

H.J.R. 16 also provides that, if the plaintiff proves by a preponderance of the evidence that the defendant is dissipating its assets outside the ordinary course of its business for the purpose of evading the payment of a judgment, the court may order a bond up to the full amount of the judgment. A similar provision is found in the laws of most of the other states that have adopted bond caps. This standard is not burdensome for plaintiffs to meet, because the majority of defendants who are subject to huge judgments are large corporations that must make frequent financial disclosures to their shareholders and to the regulatory authorities. These disclosures would reveal if the defendant was dissipating its assets. In addition, placing the burden to prove dissipation on defendants would raise the difficult issue of how to prove a negative, and create protracted post-trial proceedings that waste judicial resources and increase the cost of litigation for both parties.

Significantly, H.J.R. 16 does not change any substantive law. Nothing in the amendments to Rule 62 changed the right of plaintiffs to recover fully the damages to which they are entitled. An appeal bond that is set lower than the total damages award does not have any effect on the judgment itself. If the verdict is upheld on appeal, the defendants are required to pay the full amount of the judgment, not merely the amount of the appeal bond. The amendments also protect plaintiffs by the large but limited bond that would be required, and by the provision requiring a higher bond if the defendant is dissipating its assets.

In summary, the amendments to Rule 62 contained in H.J.R. 16 represent sensible changes to Utah's court rules. We therefore urge the Supreme Court to rescind its May 12 order that effectively nullified the legislature's constitutional prerogatives, or at a minimum issue an order reinstating the changes made by H.J.R. 16. This is the only way to remedy the Court's intrusion on the Legislature's authority to amend court rules, and also to ensure that all defendants can fully exercise their right to an appeal without going into bankruptcy or being forced to settle with the plaintiffs.

Sincerely,

John L. Valentine

Sen. John L. Valentine

Rep. Greg J. Curtis

ENACTED APPEAL BOND LEGISLATION

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Arkansas	HB 1038	3/27/2003	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
California	A 1752	8/9/2003	Master Settlement Agreement signatories, successors, and affiliates	The lesser of 100% of the judgment or $150,000,000	Applies to all judgments in civil litigation regardless of legal theory
Colorado	HB 1366	5/20/2003	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Florida	HB 1721 SB 2826	5/9/2000 6/10/2003	All litigants in class actions Master Settlement Agreement signatories, successors, and affiliates	$100,000,000 $100,000,000	As passed in 2000, applied to judgments for non-compensatory damages. Broadened in 2003 to apply to all money judgments under any legal theory
Georgia	HB 1346 SB 411	3/30/2000 5/17/2004	All litigants All litigants	$25,000,000 $25,000,000	Applies to punitive damages only Expands current law to apply to all forms of judgments in civil litigation
Hawaii	SB 2840	6/30/04	Master Settlement Agreement signatories, successors, and affiliates	$150 million	Applies to all forms of judgments in civil litigation under any legal theory
Idaho	HB 92	3/26/2003	All litigants	$1,000,000	Applies to punitive damages only
Indiana	HB 1204	3/14/2002	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Kansas	SB 64	4/21/2003	Master Settlement Agreement signatories and their successors	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Kentucky	SB 316	3/29/2000	All litigants	$100,000,000	Applies to punitive damages portion of a judgment
Louisiana	HB 1807 HB 1819	6/25/2001 7/2/2003	As passed in 2001, covered Master Settlement Agreement signatories only; broadened in 2003 to include "affiliates"	$50,000,000	Applies to all money judgments
Michigan	HB 5151	5/8/2002	All litigants	$25,000,000 plus COLA every 5th year	Applies to all judgments in civil litigation
Minnesota	HF 1425	5/13/2004	All litigants	$150 million	Applies to all forms of judgments in civil litigation under any legal theory
Mississippi	Rule 8	4/26/2001	All litigants	The lesser of the following: 1. 125% of the judgment 2. 10% of the net worth of the defendant 3. $100,000,000	Applies to the punitive damages portion of a judgment
Missouri	SB 242	7/10/2003	Master Settlement Agreement signatories, successors, and affiliates	$50,000,000	Applies to all forms of judgments in civil litigation
Nebraska	LB 1207	4/15/2004	All litigants	The lesser of the following: 1. Amount of the money judgment 2. 50% of appellant's net worth 3. $50 million	Applies to all forms of judgments in civil litigation

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Nevada	AB 576	5/29/2001	Master Settlement Agreement signatories	$50,000,000	Applies to all forms of judgments in civil litigation
New Jersey	SB 2738	11/21/2003	Master Settlement Agreement signatories, successors, and affiliates	$50,000,000	Applies to all forms of judgments in civil litigation
North Carolina	SB 2 SB 784	4/5/2000 4/23/2003	All litigants All litigants	$25,000,000	As passed in 2002, applied to judgments for non-compensatory damages. Broadened in 2003 to apply to all money judgments under any legal theory
Ohio	SB 161	3/28/2002	All litigants	$50,000,000	Applies to all forms of judgments in civil litigation
Oklahoma	SB 372 SB 1275 HB 2661	4/10/2001 5/28/2004 5/28/2004	As passed in 2001, covered Master Settlement Agreement signatories only; broadened in 2004 to include successors and affiliates as well Separate legislation was passed in 2004 that applies to all litigants	$25,000,000 Separate legislation was passed in 2004 that gives the court discretion to lower the bond if judgment debtor can show that it is likely to suffer substantial economic harm if required to post bond in the amount required by statute (which is double the amount of the judgment)	As passed in 2001, applied to all forms of judgments in civil litigation involving MSA signatories Separate legislation was passed in 2004 that applies to all forms of judgments in civil litigation

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Oregon	HB 2368	9/24/2003	Master Settlement Agreement signatories, successors, and affiliates	$150,000,000	Applies to all judgments in civil litigation regardless of legal theory
Pennsylvania	HB 1718	12/30/2003	Master Settlement Agreement signatories, successors, and affiliates	$100,000,000	Applies to all judgments in civil litigation regardless of legal theory
South Carolina	HB 4823	4/26/2004	Master Settlement Agreement signatories, successors, and affiliates	Appeal automatically stays execution of judgment - no bond required	Applies to all forms of judgments in civil litigation
South Dakota	Sup. Ct. R. 03-13	9/29/2003	All litigants	$25,000,000	Applies to money judgments
Tennessee	SB 1687	6/5/2003	All litigants	$75,000,000	Applies to all forms of judgments in civil litigation
Texas	HB 4	6/11/2003	All litigants	The lesser of 50% of the judgment debtor's net worth or $25,000,000	Applies to money judgments
Virginia	HB 1547 HB 430/ SB 172	3/10/2000 4/8/2004	All litigants All litigants	$25,000,000 $25,000,000	As passed in 2000, applied only to punitive damages portion of a judgment; as passed in 2004, expanded to apply to all forms of judgments in civil litigation

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
West Virginia	SB 661 S 671	5/2/2001 4/6/2004	As passed in 2001, applied only to Master Settlement Agreement signatories; amended in 2004 to clarify that the appeal bond limitations extend to appellants who control or are under common control with signatories to the master settlement agreement	\$100,000,000 for all portions of a judgment other punitive damages; \$100,000,000 for the punitive damages portion of a judgment	Applies to all civil litigation and provides that consolidated or aggregated cases shall be treated as a single judgment for purposes of the appeal bond limits
Wisconsin	AB 548	12/12/2003	All litigants	\$100,000,000	Applies to all judgments in civil litigation regardless of legal theory

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

Protecting Utah • Protecting You

KIRK TORGENSEN
Chief Deputy

July 22, 2004

Chief Justice Christine M. Durham
Utah Supreme Court
P. O. Box 140210
Salt Lake City, UT 84114-0210

RE: Order No. 2004-07-21 (Amendment to Rule 62 of the Utah Rules of Civil Procedure)

Dear Chief Justice Durham and Justices of the Utah Supreme Court:

Although I have not yet received a request for a formal legal opinion regarding Article VIII, Section 4 of the Utah Constitution, I anticipate that a request is forthcoming. Thus, I have carefully reviewed Article VIII, Section 4 of the Utah Constitution, which establishes a clear sequence for the promulgation of court rules. This section specifically provides:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. . . .

In my opinion, the above language clearly provides that the Supreme Court has the initial power to enact procedural rules and the Legislature has the prerogative to change the court rules, as long as it does so by a two-thirds vote. This requirement was fulfilled when both houses of the Utah Legislature unanimously passed H.J.R. 16 during the 2004 general session.

While nothing in the Utah Constitution explicitly prohibits the Utah Supreme Court from amending the rules back to their original form once the Legislature has amended the act, certainly this prohibition is implied in the framework set up by Article VIII, Section 4. Chaos

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would result if each body can simply veto and amend the rules to their liking *ad infinitum*. It would also serve no purpose for the Constitution to grant the Legislature the authority to amend court rules if the Court could immediately veto the Legislature's changes by passing the earlier version of the Order.

This matter has obviously created a significant separation of powers issue, which needs to be resolved. I urge the Court to work with the Legislature to resolve this issue, and I offer the services of my office to assist in any way to avoid discord between branches of the state government. Perhaps a protocol needs to be developed between the Legislative and Judicial branches to avoid future confrontations on this issue.

With all due respect, I urge the Court to consider rescinding its May 12, 2004 emergency Order, which reversed the amendments to Rule 62 made by H.J.R. 16.

Sincerely,

Mark L. Shurtleff
Attorney General