MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, July 28, 2004
Administrative Office of the Courts

Tim Shea, Presiding

PRESENT: Francis J. Carney, Cullen Battle, Terrie T. McIntosh, Leslie W. Slaugh, Paula Carr, Virginia S. Smith, Honorable Anthony W. Schofield, Honorable Lyle R. Anderson, Honorable David Nuffer, James T. Blanch

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Francis M. Wikstrom, David W. Scofield, Thomas R. Karrenberg, Janet H. Smith, R. Scott Waterfall, Honorable Anthony B. Quinn, Todd M. Shaughnessy, Glenn C. Hanni, Debora Threedy, Lance Long

GUESTS: Matty Branch
Rep. Greg Curtis
Gary Thorup
Ray Hintze
Jim Olson
Esther Chelsea-McCarty

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 May 26, 2004 meeting were reviewed, and an error in Leslie W. Slaugh's middle initial was pointed out. Mr. Slaugh moved that the Minutes be approved as amended. The Motion was seconded by Paula Carr, and approved unanimously.

II. RULE 62; HJR 16. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

During the 2004 General Session, the Utah Legislature enacted HJR 16, which amended URCP 62. HJR 16 passed by two-thirds majority of both houses. On May 12, 2004, the Supreme Court entered an order pursuant to its emergency rules that changed URCP 62 back to its form prior to HJR 16. The court then asked this Committee to consider the merits of the HJR 16 amendments and make recommendations. Prior to this meeting, Rule 62 as amended by HJR 16 was published for comment. One comment was received prior to the close of the comment period on July 21, 2004.

Mr. Shea introduced the following guests who attended the meeting to either address the Committee regarding HJR 16 or to observe: (1) Rep. Greg Curtis, House Majority Leader and sponsor of HJR 16; (2) Gary Thorup, attorney with Holme Roberts & Owens; (3) Ray Hintze, Chief Deputy to Utah Attorney General Mark Shurtliff; (4) Jim Olson, executive director and president of Utah Food Association; (5) Esther Chelsea-McCarty, Office of Legislative Research and General Council, drafter of HJR 16. Prior to the meeting, Committee members received a printout with a summary of each state's supersedeas bond requirements.

Rep. Curtis presented a brief history of HJR 16. He stated that he was approached by the Utah food industry with a request that monetary limits be set for supersedeas bonds. Their concern was that if a party has a judgment against them so large that it hinders their ability to even file a bond, does the amount of the bond required amount to a denial of access to the courts? The amendment would limit bond amounts where judgments are $5 million or greater.

Mr. Slaugh expressed concern that limiting the bond amount seems to assume the trial judge or jury was wrong in cases where a judgment is over $5 million. He pointed out that there is no requirement that a bond be posted in order to appeal; a bond is required only to stop execution on the judgment. Mr. Slaugh asked Rep. Curtis why $5 million is the point where limits would begin. Judge Lyle Anderson also questioned why $5 million was made the limit, and commented that it makes more sense to devise a rule where there is a relationship between the judgment amount, defendant's assets, and amount of bond. Responding to these comments, Rep. Curtis explained that the amendment was an attempt to draft a rule that would set some standards for limitation, and that there is concern that defendants, particularly businesses, may be forced into bankruptcy if they are required to post an extremely large supersedeas bond.

Judge Anthony Schofield observed that if the issue is due process there is no reason to distinguish between a judgment of $150,000 and a judgment of $5 million, since a $150,000 judgment may force a mom and pop business into bankruptcy as readily as a $5 million judgment may force a larger company into bankruptcy. Mr. Slaugh agreed and commented that although the rule likely needs adjustment, he is concerned that HJR 16 appears designed to protect only large companies.

Rep. Curtis was asked whether any defendant had actually been forced into bankruptcy by the requirement of posting a bond, and he admitted that he did not know of any such instances. He commented that the amendment is an attempt to preclude such an occurance and that it is not good policy to essentially tell big companies that they will have to file bankruptcy if they wish to appeal. Judge Schofield again commented that it is not treating everyone equally when a large company with a $5 million judgment against it receives a break whereas a mom and pop business with a $150,000 judgment against it does not. The Committee further questioned Rep. Curtis as to the impetus for HJR 16, and asked whether the Legislature believed that there was a problem with large tort judgments. Rep. Curtis commented that the Legislature is concerned with both large tort judgments and class actions.

Judge Schofield stated that carving punitive damages and class action judgments out of the supersedeas bond requirements might be a satisfactory solution. He observed that there is a difference in punitive damages and compensatory damages, and if compensatory damages truly compensate the plaintiff as they should, the plaintiff would take no risk if the bond requirement for punitive damages were to be eliminated.

Mr. Shea then introduced Jim Olson who spoke on behalf of the Utah Food Association, which is the organization that had approached Rep. Curtis with the request for a change in Rule 62. Mr. Olson gave the following reasons for the request: (1) thirty states have adopted similar legislation and five states have no supersedeas bond requirement; (2) extremely large judgments and large punitive damages awards are a recent phenomenon; and (3) defendants should not have to file bankruptcy in order to appeal.

Judge David Nuffer stated that his concern with HJR 16 is that there should be a point when the plaintiff can feel secure in a judgment, even though there may be an appeal. Cullen Battle asked Mr. Olson whether he had considered the effect this limitation might have on Association members' ability to collect large debts, since a reduced bond might allow dissipation of assets during the appeal period. Judge Anderson noted that although dissipation is not a concern when a plaintiff's judgment is against a defendant who has acted in good faith, there may be defendants who would deliberately dissipate assets. Gary Thorup pointed out that there is a provision in HJR 16 that deals with dissipation of assets.

Francis Carney and Judge Nuffer asked the meaning of "other things" that can used to post a bond. Mr. Thorup commented that this simply means that there can be other ways of giving security, such as a property bond.

Mr. Shea introduced Ray Hintze, Chief Deputy for Utah Attorney General Mark Shurtliff. Mr. Hintze stated that it has been a long-term goal of the Attorney General's office to oppose supersedeas bonds, which it sees as an issue of equal access to the courts. The Attorney General's office therefore supports HJR 16. Mr. Hintze pointed out that no one from the plaintiff's bar opposed HJR 16 during the comment period. He also commented that the Attorney General believes that juries are more likely to impose large monetary judgments on large businesses than they are to impose large monetary judgments on other types of defendants.

The Committee discussed at length various solutions to the concerns expressed. Mr. Shea summarized the possible changes suggested: (1) set bond at a percentage of the defendant's net worth; (2) do away with the bond requirement entirely; (3) establish factors to guide the trial court in setting bond; (4) eliminate the bond requirement for punitive damages and/or class actions; (5) increase the limit in HJR 16 from $5 million to $100 million; (6) impose HJR 16 limits only to judgments for punitive damages and/or in class actions.

After additional discussion, including looking at comparable rules from other states, it was agreed that it appears to be wise to amend Rule 62 to grant some kind of relief from bonding

for punitive damages. Judge Nuffer suggested that the Committee consider the Mississippi rule as a place to start, and that the phrase "other form of security" be deleted from any proposed rule. With this in mind, Mr. Shea will work on a proposed rule and forward it to Committee members for comment. He will also send the draft to all guests who attended today's meeting.

III. COMMENTS TO RULES; FINAL RECOMMENDATIONS.

Prior to today's meeting, Committee members received copies of: (1) Thomas Lee's history of proposed Rule 63(c), which includes discussion of the extensive deliberation and debate undertaken by the Committee on Rule 63 over the course of approximately two years; (2) Judge William Barrett's letter written as Chair of the Board of District Court Judges and on behalf of district judges, expressing their unanimous opposition to subpart (c) of Rule 63; (3) all comments received on proposed amendments to or new rules 45, 47, 56, 63, 64, 64A, 64B, 64C, 64D, 64E, 64F, 66, 69, 69A, 69B, 69C. Mr. Shea stated that most issues raised in the comments had already been raised and discussed in previous Committee meetings.

The Committee reviewed all comments submitted on proposed rules and the proposed rules themselves. With regard to proposed Rule 63, Mr. Shea pointed out that district court judges had voted unanimously to opposed subpart (c) of Rule 63. He also suggested that the following provision be added to subpart (c): that a judge's denial of a motion to recuse under subpart (c) is not reviewable under subpart (b). After discussion, Mr. Battle moved that proposed Rule 63 be published for comment as it presently stands and with the amendment suggested by Mr. Shea. Judge Nuffer seconded the motion, which was approved unanimously.

With regard to Rule 64, the Committee found merit in Robert Kariya's (Barnes Bank) comment suggesting a rearrangement of items in subpart (c) in order to make the rule more clear. It was agreed that this will be done. After discussion, the Committee also agreed with Steve Tingey's comment that the proposed rules mandate a "balancing of equities" in actions for replevin and that this is inconsistent with that writ's purpose. The consensus of the Committee is that subpart (c)(10) of Rule 64A, which requires balancing of equities, will be deleted for replevin and that any such requirement for balancing of equities in replevin will be deleted in any other sections where it occurs.

Other minor technical changes were suggested and approved. After extensive discussion, a motion was made that the proposed rules be submitted to the Supreme Court with the additional changes discussed. The motion was seconded and approved unanimously

IV. ADJOURNMENT.

The meeting adjourned at 6:10 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, August 25, 2004, at the Administrative Office of the Courts.