AN ACT

relating to the reform of certain remedies and procedures in civil actions and family law matters.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. EARLY DISMISSAL OF ACTIONS

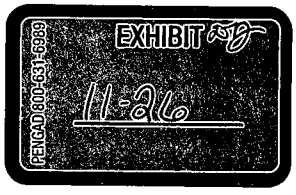
SECTION 1.01. Section 22.004, Government Code, is amended by adding Subsection (g) to read as follows:

(g) The supreme court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. The rules shall not apply to actions under the Family Code.

SECTION 1.02. Chapter 30, Civil Practice and Remedies Code, is amended by adding Section 30.021 to read as follows:

Sec. 30.021. AWARD OF ATTORNEY'S FEES IN RELATION TO CERTAIN MOTIONS TO DISMISS. In a civil proceeding, on a trial court's granting or denial, in whole or in part, of a motion to dismiss filed under the rules adopted by the supreme court under Section 22.004(g), Government Code, the court shall award costs and reasonable and necessary attorney's fees to the prevailing party. This section does not apply to actions by or against the state, other governmental entities, or public officials acting in their official capacity or under color of law.





The LS Snap
STATE BAR LITIGATION SECTION
September 1, 2011

Dear Litigation Section Members,

We are writing to provide additional information about Texas House Bill 274.

**HB 274,** loosely called "Loser Pays", takes effect on September 1, 2011. This statute requires the Texas Supreme Court to promulgate two procedural rules – one that would permit trial courts to enter early dismissals of meritless law suits, and the other that would expedite trials for claims of less than $100,000.

**"Working Group" Proposals.** Representatives of ABOTA, TADC, and TTLA have formed a working group which has provided suggested language to the Texas Supreme Court Rules Advisory Committee on both issues, as well as a letter to Justice Nathan Hecht (as the Court's liason to the advisory committee) regarding the expedited trial rule:

Proposed Language - Motion to Dismiss

Proposed Language - Expedited Trial

Letter to Justice Hecht re Expedited Trial

Any thoughtful comments or suggestions you may have to these proposals may be sent to the Texas Supreme Court Rules Attorney, Marisa Secco.

**The New Statute.** In addition to these new rules, the statute enacts several new features. First, it requires Texas courts to order attorney's fees and costs be paid by the "losing" party to the "prevailing" party under certain circumstances. Expressly, in reference to the early dismissal rule, the trial court, if granting such a dismissal, is required to award costs and reasonable, necessary attorneys' fees (except against any governmental entity).

The statute also changed the agreed appeal of a controlling legal question, to an appeal on a party's or court's own motion. An agreement between the parties is no longer necessary. But the appellate court has discretion to accept the appeal. If it does, then the appellate rules governing accelerated appeals apply. The start date for determining when the notice of appeal should be filed is the date the court of appeals accepts the appeal. Notably, unless the trial court or appellate court stay's the underlying proceeding, it is not stayed.

Further, this new statute changes Texas's "offer of settlement" rule. It expands the definition of recoverable litigation costs to include reasonable deposition costs. And it changes the limits on a prevailing party's costs and attorney fees recovery. For example, recoverable costs and attorneys' fees could equal, but cannot exceed, the amount of actual recovery, not including the cost and fee claim.

One other change enacted by HB 274 requires a defendant to have timely notified the plaintiff of the identity of any responsible 3rd party or, to the extent an applicable statute of limitation applies, the responsible 3rd party may not be designated.

On balance, and depending on the final version of the two rules to be enacted by the Texas Supreme Court, this legislation appears to provide reasonable tweaks to Texas litigation practice. But they are changes that are important to know.

Craig Enoch, Chair
2011 Legislative Committee
Litigation Section, State Bar of Texas

August 25, 2011

VIA FACSIMILE & EMAIL
Justice Nathan L. Hecht
SUPREME COURT OF TEXAS
PO Box 12248
Austin, Texas 78711
nathan.hecht@courts.state.tx.us

RE: HB 274 Proposed Rule –Dismissal Of Causes Of Action That Have No Basis In Law Or In Fact

Dear Justice Hecht:

HB 274, by amendment to Section 22.004 of the Texas Government Code, directs the Supreme Court of Texas to adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without consideration of evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. Further, HB 274 amends Chapter 30 of the Civil Practice and Remedies Code by adding Section 30.021, which awards costs and reasonable and necessary attorney's fees to the prevailing party on such a motion to dismiss.

As a result of this directive, representatives of TEX-ABOTA[1], the Texas Association of Defense Counsel (TADC)[2] and the Texas Trial Lawyers Association (TTLA)[3] formed a voluntary working group to formulate proposed rules that promote both the letter and the spirit of the statutory mandate, from the perspective of trial practitioners on both sides of the Bar, in an

[1] TEX-ABOTA is the regional organization for the 14 ABOTA chapters in Texas. TEX-ABOTA, in association with the American Board of Trial Advocates (ABOTA) seeks to: (1) establish relations and cooperate with other legal organizations for the purposes of promoting the efficient administration of justice and constant improvement of the law; (2) elevate the standards of integrity, honor, and courtesy in the legal profession; (3) aid in further education and training of trial lawyers; (4) work for the preservation of our jury system; (5) serve as an informational center; (6) discuss and study matters of interest to attorneys; (7) provide a forum for the expression of interests common to trial lawyers; and (8) act as an agency through which trial lawyers in general, and Texas members of ABOTA in particular, have a voice with which to speak concerning matters of common and general interest.

[2] TADC is an association of approximately 2,000 members statewide, whose practices are primarily devoted to the defense of civil litigation including, but not limited to, intellectual property, labor and employment, commercial litigation, construction litigation, product liability and personal injury. TADC is not a trade organization. Their primary mission is: (1) the preservation of the Texas Civil Justice System; (2) preservation of the right to trial by jury as guaranteed by the Seventh Amendment of the U.S. Constitution and Article 1 Section 15 of the Texas Constitution; (3) ensuring a civil justice system that is balanced, accessible and effective; and (4) ensuring an independent judiciary that is adequately financed and staffed.

[3] TTLA is a member organization comprised of plaintiff's attorneys throughout the State of Texas, united and committed to maintaining a civil justice system that protects all Texans and making Texas a safer and healthier place to live.

effort to assist the Supreme Court and Supreme Court Advisory Committee[4]. Additionally, at our request, the working group sessions were attended by Mr. Cory Pomeroy, General Counsel to Senator Robert Duncan, on Senator Duncan's behalf. Furthermore, the State Bar of Texas Section of Litigation graciously agreed to serve the working group's efforts as a resource.[5]

The working group convened on July 19, 2011 to reach a consensus on a rule governing motions to dismiss (as well as a rule for expedited jury trials). This was followed by a subsequent meeting on August 4, 2011. In addition to these meetings, there were numerous e-mail exchanges facilitating a collegial exchange of ideas. A significant number of hours have been devoted to this project. The enclosed proposed rule is the end result. This rule represents the unanimous consensus of each member of the working group. In addition to the proposed rule, we offer the following comments.

The intent of the legislature in creating this dismissal procedure was not to adopt a Texas version of the Federal Rule 12(b)(6) motion, which in many federal district courts are routinely converted to motions for summary judgment if evidence is submitted with the motion. The inclusion of the words "without evidence" in HB 274 makes it clear that the courts should only review the pleadings to determine whether the causes of action being pled have no basis in law or in fact. As such, the working group's proposed rule expressly states that the court cannot convert the motion to dismiss to a motion for summary judgment. However, the working group is aware that under current practice, affidavits or accounts attached to a pleading, such as a suit on a sworn account, can be considered "evidence." Accordingly, the working group agreed to make it clear that a court can receive evidence "attached to or incorporated by reference in the pleading" in ruling on a motion to dismiss.

A few other points are worth mentioning. Section (f) of the proposed rule incorporates the language of the new section 30.021 of the Civil Practice and Remedies Code regarding award of costs and attorney's fees, for ease of reference by practitioners. Also, the language of section (e) is identical to the "Rule of Construction" language included in H.R. 966, 112th Cong. (1st Sess. 2011).

We hope that the proposed rule of our working group is beneficial to the Supreme Court and the Supreme Court Advisory Committee. We are willing to help the Court and the Court's Advisory Committee in any capacity to effect rule(s) that satisfy the objectives of the statute and are fair.

---

[4] Representatives of TEX-ABOTA include: Mr. David E. Chamberlain, Treasurer; Professor Gerald Powell, Abner V. McCall Professor of Evidence, Baylor Law School, Member; Mr. Dicky Grigg, Past President of TEX-ABOTA and Past President of the International Academy of Trial Lawyers, Member; Mr. David Cherry, Past President of TEX-ABOTA, Member; and Mr. Mike Wash, Member. Representatives of TADC include: Mr. Keith B. O'Connell, President; and Mr. Dan Worthington, Executive Vice President. Representatives of TTLA include: Mr. Mike Gallagher, Member; Mr. Craig Lewis, Past President of TEX-ABOTA and ABOTA, Member; Mr. Brad Parker, VP of Legislative Affairs; and Mr. Jay Harvey, Member and Past President.

[5] Representatives of the State Bar of Texas Section of Litigation include former Justice Craig Enoch, Representative Tryon Lewis, (R-Odessa), and Ms. Pat Long Weaver, Treasurer.

David Chamberlain w/permission
David E. Chamberlain
Treasurer, TEX-ABOTA

Keith O'Connell w/permission
Keith B. O'Connell
President, TADC

Mike Gallagher w/permission
Mike Gallagher
Member, TTLA

Gerald Powell w/permission
Professor Gerald Powell
Abner V. McCall Professor of Evidence
Baylor Law School; Member, TEX-ABOTA

Brad Parker w/permission
Brad Parker
VP of Legislative Affairs, TTLA

Dan Worthington w/permission
Dan Worthington
Executive Vice President, TADC

Jay Harvey w/permission
Jay Harvey
Member and Past President, TTLA

Dicky Grigg w/permission
Dicky Grigg
Past President of TEX-ABOTA and Past President of the International Academy of Trial Lawyers, Member, TEX-ABOTA

David Cherry w/permission
David Cherry
Past President of TEX-ABOTA, Member, TEX-ABOTA

Mike Wash w/permission
Mike Wash
Member, TEX-ABOTA

Craig Lewis w/permission
Craig Lewis
Past President of TEX-ABOTA and ABOTA, Member, TTLA

cc: VIA FACSIMILE & EMAIL
Charles L. "Chip" Babcock
JACKSON WALKER, LLP
1401 McKinney Street, Ste. 1900
Houston, Texas 77010
cbabcock@jw.com

VIA EMAIL
Thomas R. Phillips
BAKER BOTTS LLP
98 San Jacinto Blvd., Ste. 1500
Austin, Texas 78701-4078
tom.phillips@bakerbotts.com

VIA EMAIL
Tommy Townsend, CAE
Executive Director
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
ttownsend@ttla.com

VIA EMAIL
Zoe Taylor
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
ztaylor@ttla.com

VIA EMAIL
James Fields
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
jfields@ttla.com

VIA EMAIL
Pat Long Weaver
STUBBEMAN MCRAE SEALY
LAUGHLIN & BROWDER, INC.
550 West Texas Ave., Ste. 800
Fasken Center, Tower Two
Midland, Texas 79701
plongweaver@stubbemanlawfirm.com

VIA EMAIL
Willie Chapman, CAE
Communications Director
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
wchapman@ttla.com

VIA EMAIL
Craig T. Enoch
ENOCH KEVER PLLC
600 Congress Ave., Ste. 2800
Austin, Texas 78701
cenoch@enochkever.com

VIA EMAIL
Erin Westendorf
CHAMBERLAIN◆MCHANEY
301 Congress, 21st Floor
Austin, Texas 78701
ewestendorf@chmc-law.com

VIA EMAIL
L. Hayes Fuller, III
NAMAN, HOWELL, SMITH & LEE
P. O. Box 1470
900 Washington Avenue
Waco, Texas 76703
fuller@namanhowell.com

VIA EMAIL
Thomas C. Riney
RINEY & MAYFIELD LLP
600 Maxor Building
320 South Polk Street
Amarillo, Texas 79101
triney@rineymayfield.com

VIA EMAIL
Jim M. Perdue, Jr.
PERDUE KIDD VICKERY
1330 Post Oak Blvd., Ste. 1800
Houston, Texas 77056
jperduejr@justiceseekers.com

VIA EMAIL
Cory Pomeroy
General Counsel | Senator Robert Duncan
cory.pomeroy@senate.state.tx.us

**Rule __. Dismissal Of Causes Of Action That Have No Basis In Law Or In Fact**

(a) A motion to dismiss one or more causes of action in a pleading, on the basis that the affirmative relief sought in the pleading has no basis in law or in fact, must be filed within 60 days of the date the moving party was first served with the pleading. The Court must set the motion to dismiss for oral hearing as promptly as practicable and must either grant or deny the motion within 45 days of the date the motion is filed.

(b) In ruling on the motion to dismiss, the Court:

(1) must accept as true all of the factual allegations in the pleading;

(2) must construe the pleading, and draw all reasonable inferences from the pleading, in the light most favorable to the party seeking affirmative relief;

(3) must not receive evidence from any party in connection with its ruling and must not consider any extraneous evidence not attached to or incorporated by reference in the pleading, whether referred to in the motion to dismiss or attached as an exhibit to the motion to dismiss; and

(4) must not, on its own initiative or on the motion of any party, change or convert the motion to dismiss under this rule to a motion for summary judgment.

(c) Nothing in this rule prohibits the party seeking affirmative relief from amending the pleading prior to the hearing on the motion to dismiss.

(d) The provisions of this rule shall not apply to, nor constitute a waiver of, a special appearance or motion to transfer venue.

(e) Nothing in this rule shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under federal, state, or local laws, including civil rights laws.

(f) The Court shall award costs and reasonable and necessary attorney's fees to the prevailing party.

(g) An official record must be kept of the oral hearing on the motion to dismiss.

JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

Russ Meyer
(214) 953-6134 (Direct Dial)
214-661-6613 (Direct Fax)
rmeyer@jw.com

November 15, 2011

**VIA E-MAIL AND PRIORITY MAIL**

Ms. Marisa Secco
Rules Attorney
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: State Bar of Texas, Committee on Court Rules, Request for New Rule 13a

Dear Marisa:

Enclosed is a copy of proposed Texas Rule of Civil Procedure 13a that I am submitting on behalf of the Court Rules Committee.

The enclosed proposal was approved by our Committee at our November 11, 2011 meeting. On Tuesday, November 29, the State Bar of Texas authorized me to forward it to you. However, this proposal is being presented only on behalf of the State Bar of Texas Court Rules Committee. It should not be construed as representing the position of the Board of Directors, the Executive Committee, or the general membership of the State Bar.

If you, the Supreme Court, or the Advisory Committee have any questions about this proposed new rule, or need any additional information, please let either Jody Hughes or me know. Thanks very much for your help and guidance.

Sincerely,

/s/ Russ Meyer

Russ Meyer
Chair, Court Rules Committee

Enclosure

cc: Mr. Jody Hughes
Vice-Chair

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR NEW RULE
TEXAS RULES OF CIVIL PROCEDURE

**I. Exact Wording of existing rule:**

There is no existing rule at this time.

**II. Proposed Rule:**

**Rule 13a. Dismissal of Causes of Action with No Basis in Law or Fact.**

(a) This rule governs a motion to dismiss a cause of action that has no basis in law or no basis in fact. A party may move to dismiss a cause of action under this rule no later than 60 days after the date the moving party was first served with a pleading stating the cause of action.

(b) A cause of action has no basis in law when the cause of action is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(c) A cause of action has no basis in fact when no reasonable person, from the face of the pleading, could believe that more than a de minimis probability exists that the factual allegations in support of the cause of action could be proven at trial.

(d) At least 21 days before filing a motion under this rule, the moving party must serve a notice of intent to file the motion; however, if a cause of action is added or amended less than 45 days before the date set for trial, then the moving party may serve a notice of intent to file a motion under this rule for dismissal of the added or amended cause of action. The notice may be in letter form and must: identify each cause of action that will be the subject of the motion; state whether the cause of action has no basis in law, no basis in fact, or both; and provide at least a brief description of the grounds for dismissal. The responding party may nonsuit a cause of action before a motion is filed under this rule.

(e) If a cause of action is nonsuited before a motion is filed under this rule, then the cause of action may not be the subject of a motion under this rule. If a cause of action is amended before a motion is filed under this rule, then a moving party may serve an amended notice of intent to file a motion under this rule, and only the amended cause of action may be the subject of a motion under this rule.

(f) A motion under this rule must: identify each cause of action that is the subject of the motion; state whether the cause of action has no basis in law, no basis in fact, or both; and state the specific grounds for dismissal.

(g) A response to a motion under this rule may contain a certificate of conference or affidavit describing what efforts were made by the responding party, before the filing of the motion, to inform the moving party of the grounds for and authorities supporting the cause of action.

(h) In determining whether a cause of action has no basis in law or no basis in fact, the court must not admit or consider evidence.

(i) The court must rule on a motion under this rule no later than 45 days after the date on which the motion is filed.

(j) If the court grants or denies, in whole or in part, a motion under this rule, then the court must award to a prevailing party the costs and attorney's fees that were reasonable and necessary in prosecuting or defending the motion.

(1) In determining whether a party is a prevailing party, the court may consider the extent to which the motion was granted or denied, the relative importance of the parts of the motion that were granted and denied, whether any part of the motion was denied because a pleading defect was cured by or is curable by amendment, and any other factor that may, from the face of the record and without the admission or consideration of evidence, be considered in an equitable and just determination. The court may determine that a party has prevailed on all or only a part of the motion, that no party has prevailed on any part of the motion, or that different parties have prevailed on different parts of the motion.

(2) In determining whether costs and attorney's fees were reasonable and necessary, the court may consider any relevant evidence, including the content of the notice of intent served under subdivision (d), of any certificate of conference or affidavit provided under subdivision (g), and of any other communications between the moving and responding parties regarding the grounds for and authorities supporting either the cause of action or the motion.

(3) The court may assess an award of costs and attorney's fees against the party, the party's counsel, or both, but if an award is made because a cause of action has no basis in law, the court may not assess the award against a represented party.

(4) This subdivision (j) does not apply to an action by or against the State, other governmental entities, or public officials acting in their official capacity or under color of law.

(k) This rule does not preempt or supersede, but exists in addition to, all other procedures and remedies that exist for the dismissal of causes of action, sanctions for pleading misconduct, and any other related subject, whether such procedures and remedies exist by rule, by statute, at common law, or by other legal authority.

(l) This rule does not apply to actions under the Family Code.

## III. Comments of the State Bar Court Rules Committee Regarding this Proposal:

1. Section 22.004(g) of the Texas Government Code requires the Supreme Court of Texas to adopt a dismissal rule for causes of action that have "no basis in law or fact." The Committee noted that the Legislature chose the phrase "no basis in law or fact" instead of the Federal Rule of Civil Procedure 12(b)(6) language of "failure to state a claim upon which relief can be granted." The phrase "no basis in law or fact" appears in an existing sanctions rule (Texas Rule of Civil Procedure 13), and the similar phrase "no arguable basis in law or in fact" appears in two statutes pertaining to frivolous actions (Texas Civil Practice and Remedies Code §§ 13.001(b)(2) and 14.003(b)(2)). From this, the Committee concluded that the Legislature intended Texas Government Code § 22.004(g) to require a sanction rule rather than a general dismissal rule. The Committee therefore recommends that the new rule be numbered 13a so that it follows the existing general sanctions rule.

2. Unlike Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code § 10.001, Texas Government Code § 22.004(g) does not contain any "good faith," "bad faith," "best knowledge, information, and belief," or other language that would support allowing an inquiry into the subjective culpability of the party or counsel who filed the pleading. Additional support for an objective standard is found in the requirement that a motion under the new rule be decided without evidence, as the introduction of evidence may be necessary to determine subjective culpability. The Committee therefore sought to define "no basis in law or fact" with objective standards.

3. The definition of "no basis in law" is based on Federal Rule of Civil Procedure 11(b)(2) and Texas Civil Practice and Remedies Code § 10.001(2). The text of those provisions reflects the common understanding of when a cause of action is legally baseless. By reproducing that text in this rule, courts applying this rule will have the benefit of the existing state and federal precedents interpreting that text.

4. The definition of "no basis in fact" reflects the Committee's opinion that the new rule must be consistent with the Texas Constitution's right of trial by jury. This would not permit dismissal merely because a cause of action is unlikely to succeed. On the other hand, a pleading may allege facts that are, on their face, so "irrational or wholly incredible" that no reasonable person would consider the probability of their proof to be anything more than de minimis. *See Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (discussing when a federal court complaint is factually frivolous on its face). A cause of action dependent on such factual allegations should be dismissed under this rule.

5. The Committee is concerned that the fee-award requirement of Texas Civil Practice and Remedies Code § 30.021 could cause the new rule to become the subject of abuse, particularly by counsel who is more experienced in a particular subject area or who may wait until the last possible moment to disclose controlling or highly persuasive authority of which an opponent is unaware. The Committee does not believe that the court system

would be well-served by satellite litigation over the imposition of sanctions when the dismissal of a case could have been obtained inexpensively without the court's intervention. Accordingly, the proposed rule provides for pre-filing notice in a manner similar to Federal Rule of Civil Procedure 11(c)(2).

This notice provision draws on the experience of federal courts under Federal Rule of Civil Procedure 11. Absent a pre-filing notice under that rule, "parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11;" accordingly, the federal rule was revised so that, "under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions." FED. R. CIV. P. 11 (Adv. Comm. Note to 1993 am.).

Given the mandatory award of costs and attorney's fees to a prevailing party under the proposed rule, a party's reluctance to abandon questionable contentions may be greater than under the former federal rule. Such reluctance would likely result in additional litigation (and possibly an appeal) to prosecute and defend motions under this rule. The notice provision serves to limit such an undesirable result by encouraging communications between counsel that may result in dismissal of the cause of action or a decision not to file a motion. To further encourage open discussions, the proposed rule provides that the court may consider the content of the communications between the parties in determining whether a party's costs and attorney's fees were actually "reasonable and necessary."

The exception for causes of action that are added or amended "less than 45 days before the date set for trial" recognizes that a 21-day notice requirement may be impractical when a case is near its trial date. While a notice of intent is not necessary in that situation, the trial court may still consider the parties' efforts to confer, or the lack of such efforts, in determining whether costs and attorney's fees are reasonable and necessary. A similar period of 45 days is used in Texas Rules of Civil Procedure 167.2 and 190.2(b).

6. Texas Civil Practice and Remedies Code § 30.021 recognizes that a motion to dismiss may be granted in part and denied in part. In addition, a motion may be denied because a pleading defect was properly identified but was either cured by, or is curable by, amendment. In such circumstances, a court may be justified in finding that neither party was a prevailing party. The proposed rule addresses this situation.

7. Texas Civil Practice and Remedies Code § 30.021 does not specify whether an award of costs and attorney's fees should be assessed against a represented party or its counsel. Federal Rule of Civil Procedure 11(c)(5) and Texas Civil Practice and Remedies Code § 10.004(d) do not permit monetary sanctions against represented parties for legally frivolous pleadings and motions. The Committee believes that a similar provision should be included in the proposed rule. In other situations, the court must determine whether the award of costs and attorney's fees should be assessed against a party, the party's counsel, or both. In making that determination, the court should consider the Federal Rules Advisory Committee notes on the 1983 and 1993 amendments to Federal Rule of Civil

Procedure 11, precedent under that rule, and precedent under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code § 10.004(d).

8. The Committee has some concern that the denial of special exceptions or a motion for summary judgment, under some circumstances, could be treated as a motion under this rule. The Committee does not believe that the Legislature intended such a result for the reasons stated in Comment 1 above. The proposed rule therefore includes a saving clause that preserves all other procedures and remedies that may exist for the dismissal of causes of action, sanctions for pleading misconduct, and any other related subjects.

9. This proposal is being presented only on behalf of the State Bar of Texas Court Rules Committee. It should not be construed as representing the position of the Board of Directors, the Executive Committee, or the general membership of the State Bar.

Respectfully submitted,

*/s/ Russ Meyer*

Russ Meyer
Chair, State Bar Court Rules Committee

Date: November 15, 2011

# Subcommittee Draft (November 17, 2011)

**Rule 94a. Motion to Dismiss Claim Having No Basis in Law or Fact.**

**A. Grounds and content of motion.**

(1) Upon motion and hearing, a court must dismiss a claim for relief that has no basis in law or fact.

(a) A claim has no basis in law when it is not warranted by existing law or by a reasonable argument for the extension, modification, or reversal of existing law or the establishment of new law.

(b) A claim has no basis in fact when no reasonable person could believe that the material allegations are true.

(2) A motion to dismiss must:

(a) state that it is filed pursuant to this rule;

(b) identify each claim subject to the motion and state whether the claim has no basis in law, no basis in fact, or both; and

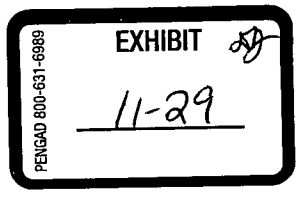
(c) state the specific grounds for dismissal.

**B. Time.** A motion to dismiss a claim must be filed within 60 days after the pleading containing the claim was served and must be decided within 45 days of the hearing.

**C. No evidence.** The court must decide a motion to dismiss on the pleadings, accepting as true the facts pleaded, without considering evidence.

**D. Right to amend.** Before granting a motion to dismiss, the court must, upon request, allow the party asserting the claim to amend at least once.

**E. No waiver of motion to transfer venue or special appearance.** Neither the filing nor the determination of a motion to dismiss under this rule waives the right to seek a transfer of venue or dismissal for lack of personal jurisdiction.



**F. Attorneys' fees.** Upon granting or denying the motion in whole or in part, the court must award costs and reasonable and necessary attorneys' fees to the prevailing party for preparing and presenting, or responding to, the motion. This subsection does not apply to actions by or against the state, other governmental entities, or public officials acting in their official capacity or under color of law.

**G. Family Code.** This rule does not apply in cases brought under the Family Code.

**H. Dismissal procedure cumulative.** This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.

To: Supreme Court Advisory Committee

From: Frank Gilstrap

Date: November 17, 2011

Re: Summary of standards for early dismissal under HB274

---

Here are the various standards which the subcommittee has considered in drafting an early dismissal rule.

1. **No basis in law or fact**

> The court shall grant the motion if the claim has no basis in law or fact.

This language comes verbatim from HB274.[1]

2. **Rule 12(b)(6)**

> The court shall dismiss the claim if the pleading fails to state a claim upon which relief can be granted.

This is the language of Rule 12(b)(6), FED.R.CIV.P.

3. ***Conley v. Gibson***

> The court shall dismiss the claim if it appears beyond doubt that the party asserting the claim can prove no set of facts in support of his claim which would entitle him to relief.

This is the former interpretation of Rule 12(b)(6).[2]

---

[1] *See* HB274 § 1.01 (directing the court to "adopt rules to provide for dismissal of causes of action that have no basis in law or fact on motion and without evidence.") (emphasis added).

[2] *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

**4.** ***Ashcroft v. Iqbal***

> The court shall dismiss the claim if the claim, as pleaded, is not plausible on its face.

This is the current interpretation of the Rule 12(b)(6).[3]

**5. Failure to state a cause of action**

> The court shall dismiss the claim if the pleading fails to state a cause of action.

This is the general demurrer standard.

**6. Failure to give fair notice**

> The court shall dismiss the claim if the pleading fails to contain a short and plain statement of the cause of action sufficient to give fair notice of the claim involved.

This is based on Rules 45(b) & 47(a), TEX.R.CIV.P.

In ¶¶ 1-6 above, there is a single standard for deciding whether a claim has "no basis in law or fact." But the standard also be bifurcated into: (i) a standard when the claim has "no basis in law" (¶¶ 7-8 below) and (ii) a standard when the claim has "no basis in fact" (¶¶ 9-11 below).

**7. No basis in law: Indisputably meritless legal theory**

> The court shall dismiss the claim if it is based on an indisputably meritless legal theory.

This standard is used by some courts in cases decided under Chapter 13 and 14 of the Civil Practice & Remedies Code.[4]

---

[3] *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombley*, 555 U.S. 544, 555 (2007).

[4] Chapters 13 and 14 provide for dismissal of claims, filed by paupers or prisoners, that have "no arguable basis in law or fact." *See* TEX.CIV.PRAC. & REM.CODE §§ 13.001(b) & 14.003(b). *See, e.g., Burnnett v. Sharp*, 328 S.W.3d 594, 604 (Tex.App.--Houston [14th Dist.] 2010, no pet.) (dissent) (citing cases).

**8. No basis in law: frivolousness**

> The court shall dismiss the claim if it is not warranted by existing law or by nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law.

This standard is widely used to impose sanctions for a frivolous suit.[5]

**9. No basis in fact. the reasonable person standard.**

The court shall dismiss a claim if a reasonable person could not believe that the material allegations in the pleading are true.

This standard is based on *City of Keller v. Wilson,* 168 S.W.3d 802, 822 (Tex.2005).

**10. No basis in fact: de minimus probability**

> The court shall dismiss a claim when no reasonable person, from the face of the pleading, could believe that more than a deminimus probability exists that the factual allegations in support of the cause of action could be proved at trial.

This standard was suggested by the State Bar Rules Committee.[6]

**11. No basis in fact: irrational or wholly incredible factual allegations**

> The court shall dismiss a claim that is based on irrational or wholly incredible factual allegations.

This standard is used under Chapters 13 and 14.[7]

---

[5] *See* TEX.CIV.PRAC. & REM.CODE § 10.001(1) & Rule 11(b)(2), FED.R.CIV.P.

[6] *See* SBOT draft rule ¶ (c).

[7] *See, e.g., Nabelek v. Dist. Attorney*, 290 S.W.3d 222, 228 (Tex.App. [14 Dist.] 2005, pet. denied).

## SECTION 2. ATTACHMENT

### Rule ATT 1 (604). Application for Writ of Attachment and Order

(a) ~~*Pending Suit Required for*~~ *Issuance of Writ.* A writ of attachment may be issued at the initiation of a suit or at any time before final judgment. No writ shall issue except on written order of the court after a hearing, which may be ex parte.

Derived from Rule 592 and CPRC 61.003. Statute precludes attachment prior to suit. SCAC: first part of title deleted; last sentence (from current Rule 592) was moved here from draft section (d)(1) Order. .

(b) *Application.* An application for a writ of attachment must:

(1) state the nature of the applicant's underlying claim;

Added to provide trial court with basic context. The term "applicant" has been substituted for "plaintiff" throughout the revisions. "Respondent" replaces "defendant."

(2) state the statutory grounds for issuance of the writ as provided in Chapter 61 of the Civil Practice and Remedies Code and the specific facts justifying attachment; and

Derived from Rule 592 and CPRC 61.001 and 61.002. With the exception of 61.0021 (providing for attachment in sexual assault and indecency cases, the statutes require an applicant to state both general and specific statutory grounds.

(3) state the dollar amount sought to be satisfied by attachment.

Rule 592 currently requires the court to state, in its attachment order, the maximum value of property to be attached. Under CPRC 61.022(a)(2), the applicant must state "the amount of the demand." The re-wording clarifies that the relevant amount is the dollar amount to be satisfied rather than the value of the property. Attachment should remain available even if the value of the property exceeds the amount sought to be attached.

(c) *Verification.* The application must be ~~verified or~~ supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for the belief are specifically stated.

Derived from Rule 592. Initially, we added "verified" to comport with common practice. CPRC 61.022 requires the filing of an "affidavit." Now, with the passage of CPRC

132.001, an unsworn declaration may be used in lieu of an affidavit or verification. Accordingly, we dropped the word "verification" as being unnecessary.

(d) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

Derived from Rule 592. This language had appeared as a subsection of "Order" in the draft revision. SCAC suggested a separate heading.

(e) *Order.*

~~(1) *Issuance Without Notice.* No writ shall issue except on written order of the court after a hearing, which may be ex parte.~~

~~Derived from Rule 592.~~

(1) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

Derived from Rule 606 and CPRC 61.021.

(2) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

Derived from Rule 592.

(3) *Dollar Amount.* ~~*of Property to be Attached*~~. The order must state the dollar amount to be satisfied by attachment.

Derived from Rule 592 which requires the order to "specify the maximum value of property that may be attached." The re-wording clarifies that the relevant amount is the dollar amount to be satisfied rather than the value of the property. Attachment should remain available even if the value of the property exceeds the amount sought to be attached. SCAC suggested dropping part of the title.

(4) *Levy and Safekeeping.* The order must command ~~the~~ any sheriff ~~and~~ or any constable of any county to levy on the property found in the officer's county and keep the property safe and preserved subject to further order of the court.

First part of sentence derived from Rule 593 and 594. Second part derives from Rule 592. SCAC: changed "and" to "or."

(5) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongful attachment.

Derived from Rule 592 and CPRC 61.023. The current rule uses "wrongfully suing out the writ of attachment" while the statute uses "wrongful attachment."

A question was raised concerning whether the applicant's attachment bond would cover continually increasing storage costs. It would, but only if the respondent succeeds in proving wrongful attachment. The applicant's bond is to protect the respondent from "damages and costs" for wrongful attachment. If the respondent succeeds in proving wrongful attachment, an award of "costs" under the bond would be appropriate. For that reason, a respondent would have the right to request that the bond amount be increased periodically to cover increasing costs. If, however, the respondent does not succeed in proving wrongful attachment, the bond is discharged. There is no provision under the current rule that would permit the respondent to recover costs under the bond without proving wrongful attachment.

(6) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the lesser of (a) the value of the property, if established by the evidence, plus one year's interest on the value, or (b) the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

Derived from Rules 592 and 599 which provide the respondent with the option to replevy based on the value of the attached property as estimated by the attaching officer. Constables we consulted did not wish to be involved in determining the amount of the replevy bond by valuing the property. The committee therefore added "property value" into this section to permit the court to determine the replevy bond amount.

(7) *Multiple Writs.* Multiple writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs or constables. In the event multiple writs are issued, the applicant must inform the officers to whom the writs are delivered that multiple writs are outstanding.

Derived from Rule 592, but expanded to clarify when multiple writs may issue and to impose a duty on the applicant to advise the officer of the existence of multiple writs to minimize the chance for excessive levy.

**Rule ATT 2 (605). Applicant's Bond or Other Security**

(a) *Requirement of Bond.* A writ of attachment may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with two or more sufficient ~~surety or~~ sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying, to the extent of the penal amount of the bond, all damages and costs as may be adjudged against the applicant for wrongful attachment.

Derived from Rules 592, 592a and CPRC 61.023. The statute requires "two or more good and sufficient sureties." SCAC: keep the statutory requirement.

Note: Texas Insurance Code §3503.002 permits a surety company authorized to conduct business in Texas to execute one bond, and that one bond satisfies any law or rule that requires the obligation to be executed by one or more sureties.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

New rule that clarifies the applicability of Rule 14c.

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the ~~surety or~~ sureties. The court's determination may be made on the basis of ~~uncontroverted~~ affidavits setting forth uncontroverted facts as would be admissible in evidence. ~~; otherwise, the parties must submit evidence.~~ If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order. ~~on the motion.~~

Derived from Rules 592a and 599 to make them consistent. The wording of the last sentence was changed to clarify that a written order is required. SCAC modified the language and added the second to the last sentence.

**Rule ATT 3. Form of Applicant's Bond**

The following form of bond may be used:

"The State of Texas,
County of _____

"We, the undersigned, _____ as principal, and _____ and _____ as sureties, acknowledge ourselves bound to pay to ~~C.D.~~ [Respondent], the sum of _____ dollars, conditioned that ~~the above bound plaintiff in attachment against the said C.D., defendant~~, [Applicant] will prosecute ~~his said~~ the applicant's suit to effect, and that ~~he~~ the applicant will pay all ~~such~~ damages and costs to the extent of the penal amount of this bond as shall be adjudged against ~~him~~ the applicant for ~~wrongfully suing out such~~ wrongful attachment. Witness our hands this ___ day of _____, 20___."

Derived from Rule 592(b). The rule was adopted in 1978. None of the other ancillary rule remedies provides for a form of the bond. This may be because the form of the bond is self-evident from the section requiring a bond. If so, one questions whether this rule is needed.

I have included this provision where it appears most appropriate, but, for ease of reference in reviewing the SCAC transcript, I have not changed the numbering of the rules as they were discussed at the last SCAC meeting.

**Rule ATT 3 (606). Contents of Writ**

(a) *General Requirements.* A writ of attachment must be dated and signed by the district or county clerk or the justice of the peace, must bear the seal of the court, and must be directed to the sheriff or any constable of any county within the State of Texas.

Derived from Rules 593, 594 and 596. The clause "tested as other writs" has been replaced by clearer language.

(b) *Command of Writ.* The writ must command the sheriff or constable to levy on so much of the respondent's property as may be found within the county and that approximates the amount set by the court order, and to keep the property safe and preserved subject to further order of the court.

Derived from Rules 593, 592 and 597.

(c) ~~*Return of Writ.*~~ *Time for Return*: The writ must be made returnable to the court that ordered the issuance of the writ within thirty, sixty, or ninety days from the date of issuance, as directed by the applicant.

SCAC: change title to "Time for Return."

Derived from Rule 606 and CPRC 61.023. Rule 606 currently requires the officer to return the writ "at or before 10 o'clock a.m of the Monday next after the expiration of fifteen days from the date of issuance of the writ." The language has been changed to conform attachment practice to that of execution returnable in 30, 60 or 90 days as directed by the applicant. (Rule 629).

A question was raised concerning this substitution. I have not found any case law or commentary specifically addressing the significance of the "at or before 10 o'clock a.m. of the Monday next" language. Effective September 1, 1942, the quoted language replaced language allowing the return to be filed at any time before the next term of court. Another issue raised was the effect of a return being filed outside of the return date. All agreed that the execution of the writ outside of its expiration date rendered it void. As to the effect of "late return" of

the writ, there is no recent authority but older case law indicates that a late return does not automatically void the lien.

In *City National Bank v. J.M. Cupp & Co.*, 59 Tex. 268, 1883 Tex. LEXIS 149 (1883), the Texas Supreme Court addressed whether the late return of a writ of attachment (in this case almost one year) invalidated the attachment lien. The court decided that it did not. There was no evidence that the late return was the fault of the plaintiff, and the lien was not foreclosed until after the return had been filed. The court noted that a foreclosure of the lien, without proof of the return, would probably have been erroneous. Finally, the court stated that a different result might also occur if, during the time lapse, other creditors had attached the same property. In *Cook v. Waco Auto Loan Co.*, 299 S.W. 514, 516 (Tex. Civ. App.—Waco 1927, no writ), the court determined that the return date was for the benefit of the officer, and not the defendant; hence, as to the defendant, the return date was immaterial.

The subcommittee believes that the proposed change does not affect any substantive right of the respondent. The respondent can move to dissolve immediately.

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN ATTACHED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

Derived from Rule 598a. Type has been changed from 10-point to 12-point. Another statement has been added to provide express notice that federal and state exemptions may apply.

SCAC members considered the language difficult for a lay person to understand. A suggestion was made that the language be submitted to the subcommittee on plain language. Other members were inclined to keep the language for lack of a better alternative.

(e) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent:

"The State of Texas.

"To the Sheriff or any Constable of any County of the State of Texas, greetings:

"We command that you promptly attach so much of the property of [Respondent], if it be found in your county, as shall be of sufficient value to make the sum of _____ dollars, and the probable costs of suit, to satisfy the demand of [Applicant], and that you keep the attached property safe and preserved, unless replevied, that the same may be liable to further proceedings before the court in _____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

Derived from Rule 594 with modifications made for clearer language and to add the 30, 60, 90 return dates.

**Rule ATT 4 (607). Delivery, Levy, and Return of Writ**

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of attachment must deliver the writ to:

(1) the sheriff or constable; or

(2) the applicant, who must then deliver the writ to the sheriff or constable.

Derived from Rule 596.

(b) *Timing and Extent of Levy.* The sheriff or constable who receives the writ of attachment must:

(1) endorse the writ with the date of receipt;

(2) as soon as practicable proceed to levy on property subject to the writ and found within the sheriff's or constable's county; and

(3) levy on property in an amount that the sheriff or constable determines to be sufficient to satisfy the writ.

Derived from Rules 596 and 597. "As soon as practicable" was inserted to replace "immediately." This raised a question concerning whether the proposed change invites delay. The Task Force subcommittee had proposed the change because current workloads made it impossible to proceed immediately on all writs of attachment.

(c) *Method of Levy.*

(1) *Real Property.* Levy on real property is made by the sheriff or constable describing the property on the return and immediately filing for record a copy of the writ and return with the county clerk of each county in which the property is located.

(2) *Personal Property.* The sheriff or constable may levy on personal property by:

(A) seizing the property and holding it in a location under the control of the sheriff or constable;

(B) seizing the property in place, in which case the sheriff or constable must affix a notice of the seizure to or near the property; or

(C) seizing the property and holding it in a bonded warehouse, or other secure location. ~~in which case the applicant may be held responsible for the costs. In the event the property is released to the respondent by the court, the respondent must pay all expenses associated with storage of the property. Storage fees may be taxed as costs against the non-prevailing party.~~

Derived from Rule 598 which states that the writ of attachment shall be levied in the same manner as a writ of execution. See Rules 639-643 for execution. The language was modified to make it clearer.

SCAC suggested moving all cost provisions to a separate section. That may not be necessary. I have included in several sections a general reference to assessment of costs. That may be sufficient, along with the provisions regarding assessment of costs on final judgment.

(d) *Return of Writ.*

(1) The sheriff's or constable's return must be in writing and must be signed by the sheriff or constable. The writ must be returned to the clerk or justice of the peace from which it issued within the time stated in the writ.

(2) The sheriff's or constable's ~~action must be endorsed on or attached to the writ. In the return, the sheriff or constable~~ return must state what action the sheriff or constable took in levying, describe the property attached with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held.

Derived from Rules 596 and 606 and CPRC 61.021. Language was modified to make it clearer.

In light of amended CPRC 17.030, language in the first sentence was stricken.

(e) When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

**Rule ATT 5 (608). Service of Writ on Respondent After Levy**

As soon as practicable following levy, the applicant must serve the respondent with a copy of the writ of attachment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

Derived from Rule 598a.

**Rule ATT 6 (609). Respondent's Replevy Rights**

(a) ~~*Where Filed*~~. *General.* At any time before judgment, if the attached property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court or the sheriff or constable. ~~and serving the applicant with a copy of the bond. All motions regarding the attached property must be filed with the court having jurisdiction of the suit.~~

(1) A copy of the replevy bond must be served on the applicant.

(2) All motions regarding the attached property must be filed with the court having jurisdiction of the suit.

Derived from Rule 599. The added language is to clarify that the bond may be filed with the court or the sheriff, and that a copy of the bond must be served on the respondent. The final sentence clarifies where any motion must be filed.

SCAC: add subsections (1) and (2).

(b) *Amount and Form of the Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying to the extent of the penal amount of the bond any judgment that may be rendered against the respondent in the suit.

Derived from Rule 599. Currently, the rule provides the respondent with the option to replevy based on the value of the attached property as estimated by the attaching officer. Constables we consulted did not wish to be involved in

determining the amount of the replevy bond by valuing the property. The language was therefore omitted.

Note that the existing rule implies that only one "surety" may be needed for a replevy bond. The statute requires two or more sureties only for the original attachment bond.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

New rule that clarifies the applicability of Rule 14c

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of ~~uncontroverted~~ affidavits setting forth uncontroverted facts as would be admissible in evidence. ~~; otherwise, the parties must submit evidence.~~ If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order. ~~on the motion.~~

Derived from Rule 599 and consistent with proposed new rule ATT 2(c). In addition, the right to seek review is provided to any party.

SCAC modified the language and added the second to the last sentence.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged in the court by the applicant, the sheriff or constable in possession of the attached property must release the property to the respondent ~~within a reasonable time~~ as soon as practicable after a copy of the bond is delivered to the sheriff or constable. ~~Before the property is released to the respondent, the respondent must pay all expenses associated with storage of the property.~~

(1) Before the property is released to the respondent, the respondent must pay all expenses ~~associated~~ incurred in connection with the transfer and storage of the property. These expenses may later be reassessed by the court as taxable costs.

(2) When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk of justice of the peace to be filed with the papers of the suit.

"In the court" was added following "successfully challenged." The rule is designed to clarify that possession of the property is to be released to the respondent ~~within a reasonable time~~ "as soon as practicable," if the bond has not been successfully challenged. In addition, the new rule imposes a burden of paying all expenses ~~associated~~ incurred in connection with the transfer and

storage of the property before it may be released. "Incurred" was suggested as more clear than "associated."

Subsections (1) and (2) were broken out. "Transfer"expenses were added to subsection (1) to make it more clear. The last sentence to subsection (1) was added to make clear that the expenses could be reassessed later as costs. Subsection (2) was moved here from draft rule 4(d)(2).

(f) *Substitution of Property.* On reasonable notice, which may be less than three days, the respondent shall have the right to move the court for a substitution of property of equal value or greater value as the property attached. Unless the court orders otherwise, no property on which a lien exists may be substituted.

The current rule provides that "no property on which liens have become affixed since the date of levy on the original property may be substituted." The new rule is more definitive but still allows the court discretion.

(1) *Court Must Make Findings.* If sufficient property has been attached to satisfy the writ, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property attached. The court must include in the order findings as to the value of the property to be substituted.

Derived from Rule 599.

(2) *Method of Substitution.* No personal property under levy of attachment shall be deemed released until the property to be substituted is delivered to the location named in the order; no real property under levy of attachment shall be deemed released until the order authorizing substitution is filed of record with the county clerk of each county in which the property is located. The original property under levy of attachment may not be released until the respondent pays all costs associated with the substitution of the property, including all expenses associated with storage of the property.

Derived from 599 with clarifying language added with regard to the timing of release, filing of record, and payment of expenses.

(3) *Status of Lien.* Upon substitution, the attachment lien on the released property is deemed released, and a new lien attaches to the substituted property. The new lien is deemed to have been perfected as of the date of levy on the original property.

Derived from Rule 599. Language modified to make it clearer.

**Rule ATT 7 (610). Applicant's Replevy Rights**

This is a new section. The current rules do not provide the applicant with replevy rights in attachment. The sequestration rules do provide an applicant a right of replevy. The attachment subcommittee opted to provide replevy rights primarily because of escalating storage costs. The applicant may be able to store the property at a cost lower than what would be charged by the constable or respondent. The applicant must, however, file a motion with the court.

(a) *Motion.* If the respondent does not replevy attached personal property within ten days after service of the writ on the respondent, and if the attached property has not been previously claimed or sold, at any time before judgment the applicant may move the court to replevy some or all of the property.

Adapted from ATT 6, regarding Respondent's Replevy Rights.

(b) *Notice and Hearing.* The court may in its discretion, after notice and a hearing, grant the applicant's motion to replevy and set the applicant's replevy bond.

Added to clarify that an applicant does not have an absolute right to replevy.

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the value of the property as established by the evidence, plus one year's interest thereon at the legal rate from the date of the bond. The bond must be made payable to the respondent in the amount set by the court's order, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

Adapted from Rule 592, 599 and proposed rule ATT 1(d)(8).

(d) *Conditions of Applicant's Replevy Bond.* The applicant's replevy bond must be conditioned on the applicant satisfying to the extent of the penal amount of the bond any judgment which may be rendered against the applicant in the action. The bond must also contain the conditions that the applicant will:

(1) not remove the personal property from the county;

(2) not waste, ill-treat, injure, destroy, or dispose of the property;

(3) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue derived from the property;

(4) return the property, along with all fruits, hire, or revenue derived therefrom, to the respondent in the same condition if the underlying suit is decided against the applicant; and

(5) to the extent that the property is:

(A) not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(B) returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.

Adapted from Rules 599 (respondent's replevy) and 708 (applicant's replevy in sequestration).

(e) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

New rule that clarifies the applicability of Rule 14c.

(f) *Service on Respondent.* The applicant must serve the respondent with a copy of the court's order and the applicant's replevy bond. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

Adapted from proposed Rules ATT 5 and 6(a).

(g) *Applicant's Right to Possession.* If the court grants the applicant's motion to replevy, a copy of the court's order and applicant's replevy bond must be delivered to the sheriff or constable in possession of the attached personal property. The sheriff or constable must then release the property to the applicant ~~within a reasonable time.~~ as soon as practicable.

(1) Before the property is released to the applicant, the applicant must pay all expenses ~~associated~~ incurred in connection with the transfer and storage of the property. These expenses may later be reassessed by the court as taxable costs.

(2) When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

Adapted from and conformed to proposed Rule ATT 6(e). SCAC: "as soon as practicable" added.

**Rule ATT 8 (611). Dissolution or Modification of Order or Writ**

(a) *Motion.* Any party, or any person who claims an interest in the property under levy of attachment, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to

admit or deny the finding, the movant must set forth the reasons why the movant cannot do so.

Derived from Rule 608.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

Derived from Rule 608

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

Derived from Rule 608

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of attachment. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

Derived from Rule 608 Language added to clarify that the underlying order should also be set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable value of the property attached exceeds the amount necessary to secure the claim, interest for one year, and probable costs. The movant shall also have the burden to prove the facts to justify substitution of property.

Derived from Rule 608

(3) *Hearing.* The court's determination may be made ~~after a hearing involving all parties, or upon the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence. Additional evidence, if tendered by any party, may be received and considered.~~on the basis of ~~uncontroverted~~ affidavits setting forth uncontroverted facts as would be admissible in evidence. ~~; otherwise, the parties must submit evidence.~~ If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order. ~~on the motion.~~

Derived from Rule 608 and conformed to draft rule 2(c).

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the same has been sold), as justice may require. If the court modifies its order granting attachment, it must make further orders with respect to the bond that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the attached property must be released, and all expenses ~~associated~~ incurred in connection with the transfer and storage of the property may be taxed as costs to the applicant.

Derived from rule 614. Language added to provide for the release of the property and payment of expenses. "Incurred" has been substituted for "associated," and "transfer" has been added.

(f) *Third-Party Claimant.* If a motion claiming all or part of the attached property is filed by any person other than the applicant or respondent in the original suit, the court, after hearing, may order the release of the property to that third-party claimant, pending further order of the court. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

Rule 608 permits the filing of a sworn motion by "an intervening party who claims an interest in such property," but does not otherwise address the "intervening party." Most of this proposed rule is new. It provides an expedited procedural vehicle for a third-party claimant as an alternative to the trial of right of property. The statutes provide only for the trial of right of property.

SCAC asked if the order of the court for a successful third-party claimant would be res judicata of the ownership issue. No, the order under the proposed rule is interlocutory. "Pending further order of the court" has been added to make this clear.

(g) *Wrongful Attachment; Attorney's Fees.* A writ of attachment must be dissolved before a respondent may bring a claim for wrongful attachment. In addition to damages for wrongful attachment, the respondent may recover reasonable attorney's fees incurred in obtaining dissolution or modification of the order or writ.

New rule adapted from CPRC 62.043 and 62.044 pertaining to sequestration. In sequestration, the writ must be dissolved before a claim for wrongful sequestration may be filed. In addition, attorney fees are made available by

statute for sequestration. There is no comparable statute for attachment, but the committee believes the same procedure and privilege should apply to attachment.

**Rule ATT 9 (612). Judgment**

(a) *Judgments on Replevy Bond.*

(1) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the attached property, final judgment must be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, according to the terms of the replevy bond. ~~, either for the amount of the judgment plus interest and costs, or for an amount equal to the value of the property replevied as of the date of replevy, plus interest as provided in the bond.~~

The current attachment rules, unlike the sequestration rules, do not address judgments on both bonds. CPRC 61.063 addresses judgment on a respondent's replevy bond. The committee believes the rules should address judgment on both bonds, and, accordingly, has included this new rule, adapted from the sequestration rules. If the SCAC does not provide for an applicant's replevy bond, there would be no need for the following section.

SCAC commented that the stricken language was confusing. The language was deleted as unnecessary. The court sets the amount of the replevy bond in its initial order, and judgment on the bond would therefore be governed by the bond's terms. Note: CPRC 61.063 requires a judgment on the replevy bond to be the amount of the "judgment" rather than the amount of the "claim" as proposed in 1(d)(8).

(2) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the attached property, final judgment must be rendered against all of the obligors on the applicant's replevy bond, jointly and severally, and for the value of the fruits, hire, revenue, or rent derived from the property.

(b) *All Judgments.* In any judgment, all expenses ~~associated~~ incurred in connection with the transfer and storage of the property may be taxed as costs against the non-prevailing party.

This is a new rule to address the assessment of costs.

PROPOSED COMMENT TO RULE **ATT 9 (612)**: See Sections 61.062 and 61.063 of the Texas Civil Practice and Remedies Code.

**Rule ATT 10 (613). Perishable Property**

This rule combines language from Rules 600-605. It has been re-written and appears in substantially the same form in the rules for sequestration, garnishment and distress warrants.

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property under levy of attachment pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the levy of a writ of attachment, the applicant, or other party claiming an interest in the property may file a motion with the court clerk or justice of the peace, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

The rules have been revised to provide for a motion practice.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent, no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any person or party other than the respondent whose property is under levy of attachment, the court shall not grant the order, unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by said court, conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

The rule was revised to delete the requirement of a bond by the applicant because the applicant, under the proposed rule, now may seek to replevy.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a

sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

This rule was added to clarify the process of an order of sale.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

**Rule ATT 11 (614). Report of Disposition of Property**

When attached property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

Derived from Rule 607. Language added to provide for a description of the condition of replevied property as of the date and time of replevy.

**Rule ATT 12 (615). Amendment of Errors**

(a) *Before Order.* Before the court issues an order on an application for writ of attachment, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Levy of the Writ.* After the court issues an order on an application for writ of attachment but before the writ of attachment is levied, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of attachment may also be corrected by the court, without notice.

(c) *After Order and Levy of the Writ.* After levy of the writ of attachment, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of attachment, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of attachment stated in the original application.

Derived from Rule 609 which allows amendment only on application to the court and notice to the opponent. Changes were made to allow free amendment to correct any errors before the court signs an order and to allow free amendment of clerical errors after the order has been signed but before the writ has been served. After levy, amendment may be permitted only after motion, notice and hearing.

## SECTION 4. SEQUESTRATION

### Rule SEQ 1 (630). Application for Writ of Sequestration and Order

(a) *Issuance of Writ.* An application for a writ of sequestration may be filed at the initiation of a suit or at any time before final judgment. No writ shall issue before a final judgment except on written order of the court after a hearing, which may be ex parte.

Derived from Rule 696 and CPRC 62.002.

(b) *Application.* An application for a writ of sequestration must:

(1) set forth specific facts stating the nature of the applicant's claim to the property;

Derived from Rule 696 and CPRC 62.022. The phrase "to the property" was added to clarify that the relevant "claim" is not the cause of action alleged but, rather, the basis for the claim to the property. The term "applicant" has been substituted for "plaintiff" throughout the revisions. "Respondent" replaces "defendant."

(2) state one or more statutory grounds for issuance of the writ as provided in Chapter 62 of the Texas Civil Practice and Remedies Code and the specific facts justifying sequestration of the property;

Derived from Rule 696 and CPRC 62.022.

(3) describe the property to be sequestered with sufficient certainty that it may be identified and distinguished from property of like kind;

Derived from Rule 696.

(4) state the amount in controversy of the underlying suit; and

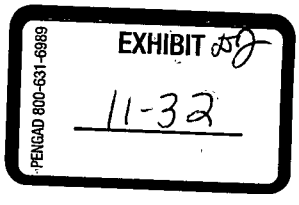
Derived from CPRC 62.022.

(5) state the value of each item of property and the county in which the property is located.

Derived from Rule 696.

(c) *Verification.* The application must be supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

Derived from Rule 696. CPRC 62.022 requires that an application be "under oath."



(d) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

Derived from Rule 696.

(e) *Order*

(1) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

CPRC 62.021 provides that the writ is returnable to the court that issued it. The provision parallels the attachment provision.

(2) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

Derived from Rule 696.

(3) *Property to be Sequestered.* The order must describe the property to be sequestered and state the value of each item of property and the county in which it is located.

Derived from Rule 696.

(4) *Levy and Safekeeping.* The order must command the sheriff and any constable of any county to levy on the property found in the officer's county and keep the property safe and preserved subject to further order of the court.

Derived from Rule 699. Language added to parallel attachment provision.

(5) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect, and pay all damages and costs as may be adjudged against the applicant for wrongful sequestration.

Derived from Rule 698. The current rule uses "wrongfully suing out such writ of sequestration." Specific references to CPRC 62.044 and 62.045 have been removed.

(6) *Respondent's Replevy Bond.*

(A) If the suit is for the enforcement of a mortgage or lien on real or personal property, the order must set the amount of the respondent's replevy bond equal to the lesser of:

(i) the value of the property; or

(ii) the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

Derived from Rules 696, 702 and 703. CPRC 62.046 provides that, if the suit is for enforcement of a mortgage or lien, a respondent who replevies is not required to account for the fruits, hire, revenue or rent.

(B) If the suit is other than for the enforcement of a mortgage or lien on real or personal property, the order must set the amount of the respondent's replevy bond equal to the lesser of:

(i) the value of the property, plus the estimated value of the fruits, hire, revenue, or rent derived from the property; or

(ii) the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

Derived from Rules 696, 702 and 703. CPRC 62.046 provides that, if the suit is for enforcement of a mortgage or lien, a respondent who replevies is not required to account for the fruits, hire, revenue or rent.

(7) *Multiple Writs.* Multiple writs may issue at the same time, or in succession, without requiring return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs or constables. In the event multiple writs are issued, the applicant must inform the officers to whom the writs are delivered that multiple writs are outstanding.

Derived from Rule 696, but expanded to clarify when multiple writs may issue and to impose a duty on the applicant to advise the officer of the existence of multiple writs to minimize the chance for excessive levy.

**Rule SEQ 2 (631). Applicant's Bond or Other Security**

(a) *Requirement of Bond.* A writ of sequestration may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongful sequestration.

Derived from Rule 698. The bond is filed with, and approved by, the clerk or justice of the peace rather than the officer.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

New rule that clarifies the applicability of Rule 14c

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of affidavits setting forth uncontroverted facts as would be admissible in evidence. If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order.

Derived from Rule 698. Language added to parallel attachment rule.

**Rule SEQ 3 (632). Contents of Writ**

(a) *General Requirements.* A writ of sequestration must be dated and signed by the district or county clerk or the justice of the peace, bear the seal of the court, and be directed to the sheriff or any constable of any county within the State of Texas.

Derived from Rule 699. Language added to parallel attachment rules.

(b) *Command of Writ.* The writ must describe the property in the same language as in the court's order for the issuance of the writ, and must command the sheriff or constable to levy on the property found in the officer's county and to keep the property safe and preserved subject to further order of the court.

Derived from Rule 699. Language added to parallel attachment rules.

(c) *Time for Return.* The writ must be made returnable to the court that ordered the issuance of the writ within thirty, sixty, or ninety days from the date of issuance, as directed by the applicant.

CPRC 62.021 requires the writ to be returned to the court of issuance. The balance of this provision is new. Current rules do not provide a return date. The language has been changed to conform sequestration practice to that of execution.

(d) *Notice to Respondent.* The face of the writ must display, in not less than 10-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN SEQUESTERED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

Derived from Rules 699 and 700a, CPRC 62.023. The statute requires 10-point type; "not less than" has been added. The first added statement was included to parallel the attachment rules. The second added statement has been added to provide express notice that federal and state exemptions may apply. "Or modify" has been added following "dissolve."

(e) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent:

"The State of Texas.

"To the Sheriff or any Constable of any County of the State of Texas, greetings:

"We command that you promptly take into your possession the following property of [Respondent], [here describe the property as it is described in the application or affidavits], if it is found in your county, and that you keep the sequestered property safe and preserved, unless replevied, that the same may be liable to further proceedings before the court in _____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

Current sequestrations rules do not provide a form for the writ. This provision derives from Rule 699, 700a and CPRC 62.053, and the parallel attachment rule.

**Rule SEQ 4 (633). Delivery, Levy, and Return of Writ**

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of sequestration must deliver the writ to:

(1) the sheriff or constable; or

(2) the applicant, who must then deliver the writ to the sheriff or constable.

Current rules do not provide for delivery of the writ. This rule is adapted from the parallel attachment rule.

(b) *Timing and Extent of Levy.* The sheriff or constable who receives the writ of sequestration must:

(1) endorse the writ with the date of receipt; and

(3) as soon as practicable, proceed to levy on the property subject to the writ and found within the sheriff's or constable's county.

Current rules do not address this. This rule is adapted from the parallel attachment rule.

(c) *Method of Levy.*

(1) *Real Property.* Levy on real property is made by the sheriff or constable describing the property on the return and immediately filing for record a copy of the writ and return with the county clerk of each county in which the property is located.

(2) *Personal Property.* The sheriff or constable may levy on personal property by:

(A) seizing the property and holding it in a location under the control of the sheriff or constable;

(B) seizing the property in place, in which case the sheriff or constable must affix a notice of the seizure to or near the property; or

(C) seizing the property and holding it in a bonded warehouse, or other secure location.

Current rules do not address this. This rule is adapted from the parallel attachment rule.

(d) *Return of Writ.*

(1) The sheriff's or constable's return must be in writing and must be signed by the sheriff or constable. The writ must be returned to the clerk or justice of the peace from which it issued within the time stated in the writ.

(2) The sheriff's or constable's return ~~action must be endorsed on or attached to the writ~~ must state what action the sheriff or constable took in levying, describe the property sequestered with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held.

Current rules do not address this. This rule is adapted from the parallel attachment rule. The language regarding endorsement has been deleted.

**Rule SEQ 5 (634). Service of Writ on Respondent After Levy**

As soon as practicable following levy, the applicant must serve the respondent with a copy of the writ of sequestration, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

Derived from Rule 700a.

**Rule SEQ 6 (635). Respondent's Replevy Rights**

(a) *General.* At any time before judgment, if the sequestered property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court or the sheriff or constable.

(1) A copy of the replevy bond must be served on the applicant.

(2) All motions regarding the sequestered property must be filed with the court having jurisdiction of the suit.

Derived from Rule 701. Language added to clarify that the bond may be filed with the court or the officer, and that a copy of the bond must be served on the applicant.

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

Derived from Rule 701. Language added to clarify that the court may also approve the sureties. The balance of the section parallels the attachment rules.

(1) *Replevy Bond for Personal Property.* If the property to be replevied is personal property, the bond must also contain the conditions that the respondent will:

(A) not remove the property from the county;

(B) not waste, ill-treat, injure, destroy, or dispose of the property;

(C) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue derived from the property;

(D) return the property, along with all fruits, hire, or revenue derived therefrom, to the applicant in the same condition if the underlying suit is decided against the respondent; and

(E) to the extent that the:

(i) property is not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(ii) property is returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, along with the value of the fruits, hire, or revenue derived therefrom.

Derived from Rule 702.

**Note: In subpart (1)(D), which provides for "return the property, along with all fruits, hire, or revenue derived therefrom, to the applicant in the same condition if the underlying suit is decided against the respondent," the language "in the same condition" has been interpreted to exclude ordinary depreciation in market value.**

(2) *Replevy Bond for Real Property.* If the property to be replevied is real property, the bond must also contain the condition that the respondent will not injure the property and will pay the value of the rents, fruits, and revenues of the property if the underlying suit is decided against the respondent.

Derived from Rule 703.

(4) *Exception.* In a suit for enforcement of a mortgage or lien on real or personal property, a respondent who replevies the property is not required to bond or account for the fruits, hire, revenue or rent of the property. The bond in that case would not include that condition.

New rule incorporating CPRC 62.046.

(5) *Filing of Replevy Bond.* When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

Derived from Rule 704. Language added to clarify that the bond must be filed.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

New rule that clarifies the applicability of Rule 14c

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of affidavits setting forth uncontroverted facts as would be admissible in evidence. If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order.

Derived from Rule 701. In addition, the right to seek review is provided to any party.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged in the court by the applicant, the sheriff or constable in possession of the sequestered property must release the property to the respondent as soon as practicable after a copy of the bond is delivered to the sheriff or constable.

(1) Before the property is released to the respondent, the respondent must pay all expenses incurred in connection with the transfer and storage of the property. These expenses may later be reassessed by the court as taxable costs.

(2) When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

New rule designed to clarify that possession of the property is to be released to the respondent as soon as practicable, if the bond has not been successfully challenged. In addition, the new rule imposes a burden of paying all expenses incurred with the transfer and storage of the property before it may be released.

**Rule SEQ 7 (636). Applicant's Replevy Rights**

(a) *Motion.* If the respondent does not replevy sequestered personal property within ten days after service of the writ on the respondent, and if the sequestered property has not been previously claimed or sold, the applicant may, at any time before judgment, move the court to replevy some or all of the property.

Derived from Rule 708. The current rules allow replevy on the delivery of a bond. A change is made to permit applicant's replevy only on motion to the court.

(b) *Notice and Hearing.* The court may, in its discretion, after notice and hearing, grant the applicant's motion to replevy and set the applicant's replevy bond.

Derived from Rule 708. The current rules allow replevy on the delivery of a bond. A change is made to permit applicant's replevy only on motion to the court.

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the value of the property replevied as of the date of the execution of the replevy bond plus the value of the fruits, hire, revenue or rent. The bond must be made payable to the respondent in the amount set by the court's order, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

Derived from Rule 708 and 709. Rule 698 currently allows an applicant to file a sequestration bond and further condition the bond under Rule 708 without having to post additional bond, unless ordered by the court. The subcommittee believes an additional bond should be posted because the applicant's sequestration bond does not serve the same purpose as a replevy bond.

(d) *Conditions of the Applicant's Replevy Bond.* The applicant's replevy bond must be made payable to the respondent in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The applicant's replevy bond must be conditioned on the applicant satisfying, to the extent of the penal amount of the bond, any judgment which may be rendered against the applicant in the action.

(1) *Replevy Bond for Personal Property.* If the property to be replevied is personal property, the bond must also contain the conditions that the applicant will:

(A) not remove the property from the county;

(B) not waste, ill-treat, injure, destroy, or dispose of the property;

(C) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue derived from the property;

(D) return the property, along with all fruits, hire, or revenue derived therefrom, to the respondent in the same condition if the underlying suit is decided against the applicant; and

(E) to the extent that the:

(i) property is not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(ii) property is returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.

(2) *Replevy Bond for Real Property.* If the property to be replevied is real property, the bond must also contain the condition that the applicant will not injure the property and will pay the value of the rents of the property if the underlying suit is decided against the applicant.

Derived from Rule 708.

**Rule 708 contains the language "regardless of the cause of such difference in value." The implication is that an applicant's replevy bond is chargeable with ordinary depreciation, while a respondent's replevy bond under Rule 702 is not.**

(e) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

New rule that clarifies the applicability of Rule 14c.

(f) *Service on Respondent.* The applicant must serve the respondent with a copy of the court's order and the applicant's replevy bond. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

New rule adapted from parallel attachment rules.

(g) *Applicant's Right to Possession.* If the court grants the applicant's motion to replevy, a copy of the court's order and applicant's replevy bond must be delivered to the sheriff or constable in possession of the sequestered personal property. The sheriff or constable must then release the property to the applicant as soon as practicable. Before the property

is released to the applicant, the applicant must pay all expenses incurred in connection with the transfer and storage of the property. These expenses may later be reassessed by the court as taxable costs.

New rule adapted from parallel attachment rules.

**Rule SEQ 8 (637). Dissolution or Modification of Order or Writ**

(a) *Motion.* Any party, or any person who claims an interest in the property under levy of sequestration, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny the finding, the movant must set forth the reasons why the movant cannot do so.

Derived from Rule 712a. The right to move to modify or dissolve has been extended to any party.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

Derived from Rule 712a and CPRC 62.042.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

Derived from Rule 712a and CPRC 62.041 and 62.042.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of sequestration. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

Derived from Rule 712a and CPRC 62.043. Language added to clarify that the underlying order should also be set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to modify or dissolve the order or the writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable value of the property sequestered exceeds the amount necessary to secure the claim, interest for one year, and probable costs.

Derived from Rule 712a.

(3) *Hearing.* The court's determination may be made on the basis of affidavits setting forth uncontroverted facts as would be admissible in evidence. If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order.

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the property has been sold), as justice may require. If the court modifies its order granting sequestration, it must make further orders with respect to the bond that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the sequestered property must be released, and all expenses incurred in connection with the transfer and storage of the property may be taxed as costs to the applicant.

Derived from Rule 712a. Language added to provide for the release of the property and payment of expenses

(f) *Third-Party Claimant.* If a motion claiming all or part of the sequestered property is filed by any person other than the applicant or respondent in the original suit, the court, after hearing, may order the release of the property to that third-party claimaint, pending further order of the court. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

This is a new rule to provide an expedited procedural vehicle for a third-party claimant as an alternative to the trial of right of property. The language parallels the attachment rules.

(h) *Compulsory Counterclaim; Attorney's Fees.* A writ of sequestration must be dissolved before a respondent may bring a claim for wrongful sequestration. If a writ of sequestration is dissolved, any action by the respondent for damages for wrongful sequestration must be brought as a compulsory counterclaim in the same action. In addition to damages for wrongful sequestration, the respondent may recover reasonable attorney's fees incurred in obtaining dissolution or modification of the order or writ.

This is a new rule incorporating CPRC 62.044.

PROPOSED COMMENT TO **RULE SEQ 8 (637)**: See Sections 62.044 and 62.045 of the Texas Civil Practice and Remedies Code.

**Rule SEQ 9 (638). Judgment**

(a) *Judgment Against Respondent on Replevy Bond.*

(1) If the underlying suit is decided against a respondent who replevied the sequestered property, and the suit is for the enforcement of a mortgage or lien on real or personal property, final judgment must also be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the respondent's replevy bond.

Derived from Rule 704 and CPRC 62.046.

(2) If the underlying suit is decided against a respondent who replevied the sequestered property, and the suit is other than for the enforcement of a mortgage or lien on real or personal property, final judgment must also be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the respondent's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

Derived from Rule 704 and CPRC 62.046.

(b) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the sequestered property, final judgment must be rendered against all of the obligors on the applicant's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the applicant's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

Derived from Rule 709.

(c) *All Judgments.* In any judgment, all expenses incurred in connection with the transfer and storage of the property may be taxed as costs against the non-prevailing party.

New rule to address the assessment of costs.

**Rule SEQ 10 (639). Return Of Replevied Personal Property After Judgment**

(a) *Judgment Against Respondent.* Within ten days after final judgment is signed, the respondent may return personal property replevied by the respondent as follows:

(1) *Judgment for Property or Possession.* If the judgment awards possession of the replevied personal property or the property itself to the applicant, the respondent may deliver the property (A) directly to the applicant upon demand, or (B) to the officer who levied the writ of sequestration who shall then deliver the property to the applicant, upon demand.

(2) *Judgment for Title.* If the judgment awards title to the replevied personal property to the applicant, the respondent may deliver the property (A) to the officer demanding the property under execution on a judgment for title of the property or (B) as otherwise ordered by the court.

(3) *Judgment Foreclosing Lien or Mortgage.* If the judgment orders the foreclosure of a lien or mortgage on the replevied personal property, the respondent may deliver the property to the officer calling for the property under an order of sale on a judgment foreclosing the lien, either in the county of the respondent's residence or in the county where the property was sequestered, as determined by the officer.

(4) *Disposition of Property by Officer.* If the respondent delivers the property to the officer who sequestered the property or to the officer calling for same under an order for sale, the officer must provide the respondent with a receipt for the property and hold or dispose of the property as ordered by the court. Any sale or disposition of the property by the officer under the court's order does not affect or limit any of the applicant's rights under the respondent's replevy bond.

Derived from Rules 705 and 706.

(b) *Judgment Against Applicant.* Within ten days after final judgment is signed, the applicant may return personal property replevied by the applicant (A) directly to the respondent upon demand, or (B) to the officer who levied the writ of sequestration who shall then deliver the property to the respondent upon demand. If the applicant delivers the property to the officer who sequestered the property, the officer must provide the applicant with a receipt for the property and hold or dispose of the property as ordered by the court.

New rule to provide for return of property by applicant.

(c) *Effect of Return on Replevy Bond.* Return by the applicant or respondent of replevied personal property is without prejudice to any party's rights under the returning party's replevy bond.

Derived from Rules 705 and 706.

(d) *Failure to Return Replevied Personal Property.* If the personal property replevied is not returned, or the returned property is insufficient to satisfy the judgment, execution may be issued on the judgment in the underlying suit as in other cases.

Derived from Rule 707.

**Rule SEQ 11 (640). Perishable Property**

Derived from Rules 710-712. Same as attachment language.

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property under levy of sequestration pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the levy of a writ of sequestration, the applicant, or other party claiming an interest in the property, may file a motion with the clerk or justice of the peace, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent, no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any other person or party and the motion is granted, the court shall not issue the order of sale unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by the court conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a

sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

**Rule SEQ 12 (641). Report of Disposition of Property**

When sequestered property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

New rule providing for report of disposition. Adapted from attachment rules.

**Rule SEQ 13 (642). Amendment of Errors**

Derived from Rule 700. Same language as attachment.

(a) *Before Order.* Before the court issues an order on an application for writ of sequestration, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Levy of Writ.* After the court issues an order on an application for writ of sequestration but before the writ of sequestration is levied, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of sequestration may also be corrected by the court, without notice.

(c) *After Order and Levy of Writ.* After levy of the writ of sequestration, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of sequestration, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of sequestration stated in the original application.

Rules 713-716, providing for the sale of property on a debt not yet due, have been deleted. The rules governing perishable property are sufficient to address this rare occasion.

## SECTION 3. GARNISHMENT

### Rule GARN 1 (616). Application for Writ of Garnishment Before Judgment and Order

(a) *Issuance of Writ.* An application for a pre-judgment writ of garnishment may be filed at the initiation of a suit or at any time before final judgment. No writ shall issue before a final judgment except on written order of the court after a hearing, which may be ex parte.

**Derived from Rule 658. Application and bond requirements have been stated separately for prejudgment and post-judgment garnishment.**

(b) *Application.* An application for a writ of garnishment before judgment must:

(1) state the nature of the applicant's claim against the respondent in the underlying proceeding;

(2) state one or more statutory grounds for issuance of the writ as provided in Chapter 63 of the Civil Practice and Remedies Code and the specific facts supporting the statutory grounds for garnishment; and

(3) state the maximum dollar amount sought to be satisfied by garnishment.

**Derived from Rule 658. Subsection (1) was added to provide the court with basic context. Subsection (2) was added to require a specific statement of the statutory basis for the garnishment. Subsection (3) was added to require the applicant to allege the dollar amount. The present rule does not require such an allegation, but the court is required to specify that amount in its order.**

(c) *Verification.* The application must be ~~verified or~~ supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for the belief are specifically stated.

**Derived from Rule 658.**

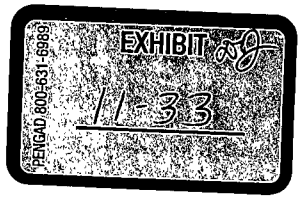
(d) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

**Derived from Rule 658.**

(e) *Order.*

(1) *Return.* The order must provide that the writ is returnable to the court that issued the writ.





**Derived from Rule 663 but language is more specific.**

(2) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

**Derived from Rule 658.**

(3) *Amount of Property ~~to be Garnished~~.* The order must state the maximum dollar amount to be satisfied by garnishment.

**Derived from Rule 658.**

(4) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

**New provision adapted from parallel rules in attachment and sequestration.**

(5) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongful garnishment.

**Derived from Rules 658 and 658a.**

(6) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

**Derived from Rules 658 and 664 which provide the respondent with the option to replevy based on the value of the garnished property as estimated by the garnishing officer. Constables we consulted did not wish to be involved in determining the amount of the replevy bond by valuing the property. The stated option was therefore removed, but the respondent may still move the court to alter the bond amount.**

(f) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

**Derived from Rule 658 but expanded to clarify when multiple writs may issue and to impose a duty on the applicant to advise the officer of the existence of multiple writs to minimize the chance for excessive levy.**

PROPOSED COMMENT TO RULE **GARN 1(b)(1) (657(b)(1))**: In a garnishment action, the respondent is the defendant in the underlying action.

**Rule GARN 2 (617). Applicant's Bond or Other Security for Writ of Garnishment Before Judgment**

(a) *Requirement of Bond.* A writ of garnishment before judgment may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongful garnishment.

**Derived from Rules 658 and 658a. "Wrongful garnishment" replaced "wrongfully suing out such writ of garnishment."**

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

**New rule clarifies the applicability of Rule 14c.**

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of affidavits setting forth uncontroverted facts as would be admissible in evidence. If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order.

**Derived from Rule 658a which provides that "After notice to the opposite party, either before or after the issuance of the writ, the defendant or plaintiff may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties. Upon hearing, the court shall enter its order with respect to such bond and the sufficiency of the sureties." The language parallels the language of attachment and sequestration.**

**Rule GARN 3 (618). Application for Writ of Garnishment After Judgment and Order**

(a) *Garnishment After Final Judgment.* At any time after final judgment, the judgment creditor may file with the clerk or justice of the peace an application for a writ of

garnishment. The judgment, whether based on a liquidated or unliquidated demand, shall be deemed final and subsisting for the purpose of garnishment from and after the date it is signed, unless a supersedeas bond shall have been filed and approved in accordance with the Texas Rules of Appellate Procedure or an appeal bond is filed and approved by the justice of the peace. No writ shall issue except on written order of the court after a hearing, which may be ex parte.

**Derived from Rule 657. The reference to the CPRC has been removed.**

(b) *Application.* An application for a writ of garnishment after judgment must state:

(1) that the applicant has a valid, subsisting judgment;

(2) that, within the applicant's knowledge, the judgment debtor does not possess property in Texas subject to execution sufficient to satisfy the judgment; and

(3) the maximum dollar amount sought to be satisfied by garnishment.

**Derived from CPRC 63.001(3). Subsection (3) of the proposed rule is derived from Rule 658.**

(c) *Verification.* The application must be ~~verified or~~ supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for the belief are specifically stated.

**Derived from Rule 658.**

(d) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

**Derived from Rule 658.**

(e) *Order.*

(1) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

(2) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(3) *Amount of Property ~~to be Garnished~~.* The order must state the maximum dollar amount to be satisfied by garnishment.

(4) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

(5) *No Bond Required.* No bond shall be required to be posted by the applicant for a writ of garnishment after final judgment.

(6) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

**Subsections (4) and (5) are new. Subsection (4) is adapted from parallel rules in attachment and sequestration. Subsection (5) is added to specify no bond requirement. Subsection (6) is derived from Rules 658 and 664 which provide the respondent with the option to replevy based on the value of the garnished property as estimated by the garnishing officer. Constables we consulted did not wish to be involved in determining the amount of the replevy bond by valuing the property. The stated option was therefore removed, but the respondent may still move the court to alter the bond amount.**

(f) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

**Derived from Rule 658 but expanded to clarify when multiple writs may issue and to impose a duty on the applicant to advise the officer of the existence of multiple writs to minimize the chance for excessive levy.**

**Rule GARN 4 (619). Case Docketed**

When the foregoing requirements of these rules have been complied with, the clerk or justice of the peace shall docket the case in the name of the applicant as plaintiff and of the garnishee as defendant, and shall immediately issue a writ of garnishment directed to the garnishee.

**Derived from the first part of Rule 659. The remainder of Rule 659 has been moved to the following section.**

**Rule GARN 5 (620). Contents of Writ of Garnishment**

(a) *General Requirements.* A writ of garnishment must be dated and signed by the clerk or the justice of the peace, bear the seal of the court, and be directed to the garnishee.

**Derived from Rule 662.**

(b) *Command of Writ.* The writ must command the garnishee to:

(1) appear before the court out of which the writ is issued at 10 o'clock a.m. of the Monday next following the expiration of twenty days from the date the writ was served, if the writ is issued out of the district or county court, or the Monday next after the expiration of ten days from the date the writ was served, if the writ is issued out of the justice court; and

**Derived from Rule 659.**

(2) answer under oath:

(A) what, if anything, the garnishee was indebted to the respondent as of the date the writ was served;

(B) what, if anything, the garnishee is indebted to the respondent as of the date the garnishee is required to appear pursuant to the writ;

(C) what effects, if any, of the respondent the garnishee had in its possession as of the date the writ was served;

(D) what effects, if any, of the respondent the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and

(E) what other persons, if any, within the garnishee's knowledge, are indebted to the respondent or have in their possession effects belonging to the respondent.

**Derived from Rule 659 with language modified to clarify the dates with respect to which the garnishee must answer.**

(c) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ in the same manner as a citation.

**Derived from Rule 663.**

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN GARNISHED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

**Derived from Rule 663a. Specific language has been added regarding potential exemptions. "Modify" was added to parallel attachment and sequestration rules.**

(e) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent:

"The State of Texas.

"To _____, Garnishee, greetings:

"Whereas, in the _____Court of _____County (if a justice court, state also the number of the precinct), in a certain cause wherein _____ is plaintiff and _____ is defendant in the underlying proceeding and Respondent in this proceeding, the plaintiff, claiming an indebtedness against _____ [Respondent] of _____dollars, besides interest and costs of suit, has applied for a writ of garnishment against you; therefore you are hereby commanded to be and appear before that court at _____ in said county (if the writ is issued from the county or district court, here proceed: 'at 10 o'clock a.m. on the Monday next following the expiration of twenty days from the date of service hereof.' If the writ is issued from a justice of the peace court, here proceed: 'at 10 o'clock a.m. on the Monday next after the expiration of ten days from the date of service hereof.' In either event, proceed as follows:) then and there to answer under oath: (a) what, if anything, the garnishee was indebted to _____ [Respondent] as of the date the writ was served; (b) what, if anything, the garnishee is indebted to _____ [Respondent] as of the date the garnishee is required to appear pursuant to the writ; (c) what effects, if any, of _____ [Respondent] the garnishee had in its possession as of the date the writ was served; (d) what effects, if any, of _____ [Respondent] the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and (e) what other persons, if any, within the garnishee's knowledge, are indebted to _____ [Respondent] or have in their possession effects belonging to _____ [Respondent]. You are further commanded NOT to pay to _____ [Respondent] any debt or to deliver to _____ [Respondent] any effects, pending further order of this court. Herein fail not, but make due answer as the law directs."

**Derived from Rule 661.**

PROPOSED COMMENT TO RULE **GARN 5(b)(2) (620(b)(2))**. This rule has been modified to make clear that the garnishee must account for property of the respondent

in the garnishee's possession or knowledge on two dates—the date the writ was served, and the date the garnishee is required to appear pursuant to the writ. *See First Nat'l Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.) (affirming judgment against garnishee that failed to account for funds held on both the date the writ was served and the date the garnishee was to answer pursuant to the writ).

PROPOSED COMMENT TO RULE **GARN 5(e) (620(e))**. The form of the writ has been modified as to justice courts to be consistent with **GARN 5(b)(2) (620(b)(2))**.

**RULE GARN 6 (621). Delivery, Service, and Return of Writ**

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of garnishment must deliver the writ to:

(1) the sheriff, constable, or other person authorized by Rule 103 or Rule 536; or

(2) the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103 or Rule 536.

**Derived from Rule 662. Language added to include others authorized to serve.**

(b) *Service on Garnishee.* The sheriff, constable, or other person authorized by Rule 103 or Rule 536 who receives the writ of garnishment must immediately proceed to serve the writ by delivering a copy of it to the garnishee; however, only a sheriff or constable may serve a writ of garnishment that requires the actual taking of possession of property. If the garnishee is a financial institution, service of the writ is governed by the service provisions of the Texas Finance Code.

**Derived from Rule 663. Language added to include others authorized to serve. The last sentence is derived from CPRC 63.008 providing that service of a writ of garnishment on a financial institution is governed by Section 59.008 of the Finance Code. The sentence has been added to alert the practitioner.**

(c) *Return of Writ.* The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 or Rule 536 who served the writ. The return must be filed with the issuing clerk or justice of the peace without delay in the same manner as a citation.

**Derived from Rule 663.**

(d) *Service on Respondent.* As soon as practicable following service of the writ on the garnishee, the applicant must serve the respondent with a copy of the writ of garnishment, the application, accompanying affidavits, and orders of the court. Service may be in any

manner prescribed for service of citation or as provided in Rule 21a. A certificate of service evidencing service of a copy of the writ on the respondent by the applicant must be on file with the court for at least 10 days prior to the entry of a judgment on the garnishment.

**Derived from Rule 663a. The last sentence is new and provides an additional safeguard to the respondent.**

PROPOSED COMMENT TO RULE **GARN 6 (621)**: See Section 63.008 of the Texas Civil Practice and Remedies Code and Section 59.008 of the Texas Finance Code.

**Rule GARN 7 (622). Respondent's Replevy Rights**

(a) *General.* At any time before judgment, if the garnished property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court and serving the applicant with a copy of the bond. All motions regarding the garnished property must be filed with the court having jurisdiction of the suit.

**Derived from Rule 664. Language was added to require service of the bond on the applicant. The final sentence was added to clarify where any motions must be filed.**

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

**Derived from Rule 664. As noted above, the option to replevy based upon the value has been removed.**

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

**New rule clarifies the applicability of Rule 14c.**

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of affidavits setting forth uncontroverted facts as would be admissible in evidence. If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order.

**Derived from Rule 664.**

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged in the court by the applicant, the court must order the release of the garnished property to the respondent as soon as practicable after a copy of the bond is delivered to the garnishee or, if applicable, to the sheriff or constable.

(1) Before the property is released to the respondent, the respondent must pay all expenses incurred in connection with the transfer and storage of the property. These expenses may later be reassessed by the court as taxable costs.

(2) When property has been replevied, and the replevy bond has been delivered to the sheriff or constable, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

**Derived from Rule 664. Highlighted provisions are adapted from similar rules in attachment and sequestration.**

(f) *Substitution of Property.* On reasonable notice, which may be less than three days, the respondent shall have the right to move the court for a substitution of property of equal value or greater value as the property garnished. Unless the court orders otherwise, no property on which a lien exists may be substituted.

**Derived from Rule 664. "Greater value" was added to provide flexibility. The last sentence affords the court discretion regarding property with a pre-existing lien.**

(1) *Court Must Make Findings.* If sufficient property has been garnished to satisfy the writ, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property garnished. The court must include in the order findings as to the value of the property to be substituted.

**Derived from Rule 664.**

(2) *Method of Substitution.* No garnished personal property shall be deemed released until the property to be substituted is delivered to the location designated in the court's order. The original property garnished may not be released until the respondent pays all costs associated with substitution of the property, including all expenses incurred in connection with the transfer and storage of the property.

**New provision adapted from attachment rules to require delivery of substituted property and payment of expenses as prerequisites to release.**

(3) *Status of Garnishment.* Garnishment of substituted property shall be deemed to have existed from the date of service of the original writ of garnishment.

**Derived from Rule 664, but made more clear.**

(g) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the garnished property, final judgment must also be against all of the obligors on the respondent's replevy bond, jointly and severally, according to the terms of the replevy bond.

**New rule adapted from attachment and sequestration.**

**Rule GARN 8 (623). Garnishee's Answer to Writ of Garnishment**

(a) *Garnishee's Answer.* The garnishee's answer must be in writing, sworn to, signed by the garnishee, and respond to each matter inquired of in the writ of garnishment. The garnishee's answer may be filed as in any other civil case at any time before default judgment.

**Derived from Rule 665. The last sentence has been added to clarify that the garnishee's answer may be filed as in other civil cases.**

(b) *Judgment by Default.* If the garnishee fails to file an answer to the writ of garnishment at or before the time directed in the writ, the court may, at any time after final judgment has been signed against the respondent, and on or after the garnishee's appearance day, sign a default judgment against the garnishee for the full amount of the judgment against the respondent together with all interest and costs that have accrued in the main case and also in the ancillary garnishment proceedings. However, if the garnishee is a financial institution, default judgment must be determined by the Texas Finance Code.

**Derived from Rule 667. Last sentence added to alert the practitioner to the different procedure regarding a financial institution.**

PROPOSED COMMENT TO RULE **GARN 8 (623)**: See Section 276.002 of the Texas Finance Code.

**Rule GARN 9 (624). Garnishee's Answer May Be Controverted**

(a) *Either Party May Controvert the Answer.* If the applicant is not satisfied with the answer of any garnishee, the applicant may controvert the answer by affidavit stating that the applicant has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular the applicant believes the answer to be incorrect. The respondent may also, in like manner, controvert the answer of the garnishee.

**Derived from Rule 673. The order of the rules has been changed to be more sequential.**

(b) *Place for Trial When Answer Controverted.* If the garnishee whose answer is controverted is a resident of the county in which the garnishment proceeding is pending, or a foreign corporation, the matter shall be tried in the county in which the garnishment proceeding is pending. Otherwise, the matter shall be tried in the county in which the garnishee resides.

**Derived from Rule 674 and CPRC 63.005 with clarifying language added. CPRC 63.005 provides that, if a party controverts the answer of a non-resident garnishee (who is also not a foreign corporation), the proceeding must be transferred to the county of the non-resident's residence. The statute is jurisdictional.**

(c) *Procedure for Docketing of Action Against Non-Resident Garnishee.* The clerk or the justice of the peace of the county of residence of the non-resident garnishee, on receipt of certified copies filed by the applicant under the provisions of section 63.005 of the Texas Civil Practice & Remedies Code, shall docket the case in the name of the applicant as plaintiff, and of the garnishee as defendant, and issue a notice to the garnishee, stating that the answer has been controverted, and that the issue will stand for trial on the docket of the court. The notice shall be directed to the garnishee, be dated and signed as other process from the court, and served by delivering a copy thereof to the garnishee. It shall be returnable, if issued from the district or county court, at ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of its service; and if issued from the justice court, at ten o'clock a.m. of the Monday next after the expiration of ten days from the date of service. Upon the return of the notice served, the matter shall be tried as in other cases.

**Derived from Rule 675 and CPRC 63.005 .**

**Rule GARN 10 (625). Judgment After Answer**

(a) *Judgment When Answer Uncontroverted And Garnishee Is Neither Indebted Nor Has Effects.*

(1) The court must enter a take-nothing judgment against the applicant and in favor of the garnishee if it appears from the garnishee's answer that:

(A) the garnishee is not indebted to the respondent, and was not indebted when the writ was served on the garnishee;

(B) the garnishee does not have in its possession any effects of the respondent and did not have such effects in its possession when the writ was served;

(C) the garnishee has either denied that any other persons within its knowledge are indebted to the respondent or have in their possession effects belonging to the respondent, or else has named all persons within its knowledge who are indebted to the respondent or have in their possession effects belonging to the respondent; and

(D) the answer of the garnishee has not been controverted.

(2) *Costs.* Costs of the garnishment proceeding, including reasonable compensation to the garnishee, shall be taxed against the applicant.

**Derived from Rules 666 and 677. "Take nothing" judgment was added to clarify meaning of "discharging the garnishee."**

(b) *Judgment When Garnishee is Indebted.*

(1) If the garnishee's answer admits, or the court finds, that the garnishee is indebted to the respondent in any amount, or was indebted when the writ of garnishment was served, the court must render judgment for the applicant against the garnishee. The judgment must be the lesser of:

(A) the amount admitted or found to be due to the respondent from the garnishee; or

(B) if that amount is in excess of the amount of the applicant's judgment against the respondent with interest and costs, for the full amount of the judgment already rendered against the respondent, together with interest and costs of the suit in the main case and also in the ancillary garnishment proceedings.

**Derived from Rule 668 with clarifying language added.**

(2) *Costs.*

(A) If the garnishee's answer is not controverted, and the court enters judgment for the amount admitted by the garnishee, costs, including reasonable compensation to the garnishee, shall be taxed against the respondent.

(B) If the garnishee's answer is successfully controverted, the garnishee is not entitled to recover its costs.

(C) If the garnishee's answer is not successfully controverted, the court may award and apportion the costs, including reasonable compensation to the garnishee, as may be appropriate.

(D) Notwithstanding the above, if the garnishee is determined to be indebted to the respondent for less than the amount of the costs of the garnishment proceeding, costs in the amount of the indebtedness shall be taxed against the respondent, and the balance of the costs shall be taxed against the applicant.

**Derived from Rule 677 with clarifying language added to address different scenarios, and, in particular, to remove the unclear command that "costs shall abide the issue of such contest."**

(c) *Judgment When Garnishee Has Effects.*

(1) If the garnishee's answer admits, or the court finds, that the garnishee has in its possession, or had in its possession when the writ was served, any personal property of the respondent subject to execution, the court must order sale of the personal property by execution to satisfy the applicant's judgment against the respondent. The order must direct the garnishee to deliver so much of the personal property necessary to satisfy the judgment to the sheriff or constable for execution.

**Derived from Rule 669.**

(2) If the garnishee fails to deliver personal property to the sheriff or constable on demand, on motion of the applicant, the garnishee must be ordered to appear and show cause why it should not be held in contempt of court.

**Derived from Rule 670 and shortened.**

(3) *Costs.*

(A) If the garnishee's answer is not controverted, and the court enters judgment ordering the sale of any effects in the possession of the garnishee, costs, including reasonable compensation to the garnishee, shall be taxed against the respondent.

(B) If the garnishee's answer is successfully controverted, the garnishee is not entitled to recover its costs.

(C) If the garnishee's answer is not successfully controverted, the court may award and apportion the costs, including reasonable compensation to the garnishee, as may be appropriate.

**Parallel provision derived from Rule 677 with clarifying language added to address different scenarios, and, in**

**particular, to remove the unclear command that "costs shall abide the issue of such contest."**

(d) *Garnishee Discharged on Proof of Compliance with Order.* It shall be a sufficient answer to any claim of the respondent against the garnishee founded on an indebtedness of the garnishee, or on the possession by the garnishee of any effects, for the garnishee to show that the indebtedness has been paid, or that the effects, including any certificates of stock in any incorporated or joint stock company, have been delivered to any sheriff or constable as provided in these rules.

**Derived from Rule 678.**

(e) *Costs If Writ Dissolved or Overturned.* If a writ of garnishment is dissolved or overturned on appeal, the costs of the garnishment proceeding, including reasonable compensation to the garnishee, shall be taxed against the applicant.

**New provision to address this scenario.**

**Rule GARN 11 (626). Dissolution or Modification of Order or Writ**

(a) *Motion.* Any party, or any person who claims an interest in the garnished property, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny a finding, the movant must set forth the reasons why the movant cannot do so.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of garnishment. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable value of the property garnished exceeds the amount necessary to secure the claim, interest for one year,

and probable costs. The movant shall also have the burden to prove the facts to justify substitution of property.

(3) *Hearing.* The court's determination may be made on the basis of affidavits setting forth uncontroverted facts as would be admissible in evidence. If the facts are controverted, the court must conduct an evidentiary hearing. After a hearing on the motion, the court must issue a written order.

**Derived from Rule 664a.**

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the property has been sold), as justice may require. If the court modifies its order granting garnishment, it must make further orders with respect to the bond, if any, that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the garnished property must be released and all expenses incurred in connection with the transfer or storage of the property may be taxed as costs to the applicant.

**Derived from Rule 664a. Last sentence added to parallel attachment and sequestration rules.**

(f) *Third-Party Claimant.* If a motion claiming all or part of the garnished property is filed by any person other than the applicant or respondent in the original suit, the court, after hearing, may order the release of the property to that third-party claimant, pending further order of the court. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

This is a new rule to provide an expedited procedural vehicle for a third-party claimant as an alternative to the trial of right of property. The language parallels the attachment rules.

**Rule GARN 12 (627). Perishable Property**

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property garnished pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the garnishment, the applicant or other party claiming an interest in the property may file a motion with the clerk or justice of the peace, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property, and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any other person or party, and the motion is granted, the court shall not issue the order unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by the court, conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

**Rule GARN 13 (628). Report of Disposition of Property**

When garnished property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

**New provision to parallel attachment rules.**

**Rule GARN 14 (629). Amendment of Errors**

(a) *Before Order.* Before the court issues an order on an application for writ of garnishment, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Service of Writ.* After the court issues an order on an application for writ of garnishment but before the writ of garnishment is served, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of garnishment may also be corrected by the court, without notice.

(c) *After Order and Service of Writ.* After service of the writ of garnishment, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of garnishment, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of garnishment stated in the original application.

## SECTION 5. DISTRESS WARRANT

### Rule DW 1 (643). Application for Distress Warrant and Order

(a) *Pending Suit Required for Issuance of Warrant.* An application for a distress warrant may be filed at the initiation of a suit or at any time before final judgment.

(b) *Filing.* The application must be filed with a justice of the peace having jurisdiction.

(c) *Application.* An application for a distress warrant must:

(1) state that the amount sued for is rent or advances described by Chapter 54 of the Texas Property Code, or attach a writing signed by the tenant to that effect;

(2) state the amount in controversy of the underlying suit;

(3) state the statutory grounds for issuance of the warrant as provided in Chapter 54 of the Texas Property Code and the specific facts justifying issuance of the warrant; and

(4) identify the underlying suit by court, cause number, and style.

(d) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(e) *Order.*

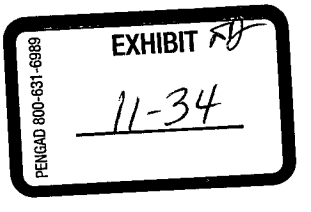
(1) *Issuance Without Notice.* No distress warrant shall issue except on written order of the justice of the peace after a hearing, which may be ex parte.

(2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) *Return.* The order must provide that the warrant is returnable to the court where the underlying suit is pending.

(4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the warrant.

(5) *Amount of Property to be Seized.* The order must state the maximum dollar amount of the property to be seized.



(6) *Seizure and Safekeeping.* The order must command the sheriff and any constable of any county to seize the property found in the officer's county and keep the property safe and preserved subject to further order of the court having jurisdiction.

(7) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the justice of the peace's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongfully suing out the warrant.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(f) *Multiple Warrants.* Multiple warrants may issue at the same time, or in succession, without requiring the return of the prior warrant or warrants. Warrants may be sent to different counties for service by the sheriffs or constables. In the event multiple warrants are issued, the applicant must inform the officers to whom the warrants are delivered that multiple warrants are outstanding.

**Rule DW 2 (644). Applicant's Bond or Other Security**

(a) *Requirement of Bond.* A distress warrant may not be issued unless the applicant has filed with the justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongfully suing out the warrant.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. If the warrant has not issued, the motion must be filed with the justice of the peace; after the warrant has issued, the

motion must be filed with the court where the underlying suit is pending. The court's determination may be made on the basis of uncontroverted affidavits, setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After hearing, the court must issue a written order on the motion.

**Rule DW 3 (645). Contents of Distress Warrant**

(a) *General Requirements.* A distress warrant must be dated and signed by the justice of the peace, bear the seal of the court, and be directed to the sheriff or any constable of any county within the State of Texas.

(b) *Command of Warrant.* The warrant must command the sheriff or constable to seize so much of the respondent's property subject to the agricultural or building landlord's lien that approximates the amount set by the court order, and to keep the property safe and preserved subject to further order of the court.

(c) *Return of Warrant.* The warrant must be made returnable to the court where the underlying suit is pending within five days from the date service of the warrant is completed.

(d) *Notice to Respondent.* The face of the warrant must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN SEIZED UNDER A DISTRESS WARRANT. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WARRANT.

"ANY ANSWER, RESPONSE, OR MOTION RELATING TO THIS WARRANT MUST BE FILED WITH THE _____COURT, CAUSE NUMBER _____, STYLED _____, WHERE THE UNDERLYING SUIT IS PENDING."

**Rule DW 4 (646). Delivery, Execution, and Return of Warrant**

(a) *Delivery of Warrant.* The justice of the peace issuing a distress warrant must deliver the warrant to:

(1) the sheriff or constable; or

(2) the applicant, who must then deliver the warrant to the sheriff or constable.

(b) *Timing and Extent of Seizure.* The sheriff or constable who receives the warrant must:

(1) endorse the warrant with the date of receipt;

(2) as soon as practicable proceed to seize the property subject to the warrant and found within the sheriff's or constable's county; and

(3) seize an amount of property that the sheriff or constable determines to be sufficient to satisfy the warrant.

(c) *Method of Execution.* The sheriff or constable may execute the warrant by:

(1) seizing the property and holding it in a location under the control of the sheriff or constable;

(2) seizing the property in place, in which case the sheriff or constable must affix a notice of the seizure to or near the property; or

(3) seizing the property and holding it in a bonded warehouse, or other secure location.

(d) *Return of Warrant.*

(1) The return must be in writing and signed by the sheriff or constable. The return must be filed with the clerk or justice of the peace of the court where the underlying suit is pending within the time stated in the warrant.

(2) The sheriff's or constable's action must be endorsed on or attached to the warrant. In the return, the sheriff or constable must state what action the sheriff took in seizing, describe the property seized with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held. When property has been replevied, the sheriff or constable must deliver

the replevy bond to the clerk or justice of the peace of the court where the underlying suit is pending to be filed with the papers of the suit.

**Rule DW 5 (647). Service of Distress Warrant on Respondent**

As soon as practicable following execution of the warrant, the applicant must serve the respondent with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

**Rule DW 6 (648). Response to Distress Warrant**

The respondent is not required to file an answer, response, or motion relating the distress warrant, but if one is filed, it must be filed with the court where the underlying suit is pending. Unless replevied or otherwise ordered by the court, the seized property will remain under the control of the court where the underlying suit is pending until final judgment.

**Rule DW 7 (649). Respondent's Replevy Rights**

(a) *Where Filed.* At any time before judgment, if the seized property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court or the sheriff or constable and serving the applicant with a copy of the bond. All motions regarding the seized property must be filed with the court where the underlying suit is pending.

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the underlying suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the

respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged by the applicant, the sheriff or constable in possession of the seized property must release the property to the respondent within a reasonable time after a copy of the bond is delivered to the sheriff or constable. Before the property is released to the respondent, the respondent must pay all expenses associated with storage of the property.

(f) *Substitution of Property.* On reasonable notice, which may be less than three days, the respondent shall have the right to move the court for a substitution of property of equal value or greater value as the property seized. Unless the court orders otherwise, no property on which a lien exists may be substituted.

(1) *Court Must Make Findings.* If sufficient property has been seized to satisfy the warrant, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property seized. The court must include in the order findings as to the value of the property to be substituted.

(2) *Method of Substitution.* No personal property seized under a warrant shall be deemed released until the property to be substituted is delivered to the location designated in the court's order. The original property seized under a warrant may not be released until the respondent pays all costs associated with the substitution of the property, including all expenses associated with storage of the property.

(3) *Status of Lien.* Upon substitution, the landord's lien on the released property is deemed released, and a new landlord's lien attaches to the substituted property. The new lien is deemed to have been perfected as of the date of seizure of the original property.

**Rule DW 8 (650). Applicant's Replevy Rights**

(a) *Motion.* If the respondent does not replevy seized personal property within ten days after the execution of the warrant, and if the seized property has not been previously claimed or sold, the applicant may, at any time before judgment in the underlying suit, move the court to replevy some or all of the property.

(b) *Notice and Hearing.* The court may, in its discretion, after notice and hearing, grant the applicant's motion to replevy and set the applicant's replevy bond.

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The bond must be made payable to the respondent in the amount set by the court where the underlying suit is pending, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

(d) *Conditions of Applicant's Replevy Bond.* The applicant's replevy bond must be conditioned on the applicant satisfying to the extent of the penal amount of the bond any judgment which may be rendered against the applicant in the underlying suit. The bond must also contain the conditions that the applicant will:

(1) not remove the personal property from the county;

(2) not waste, ill-treat, injure, destroy, or dispose of the property;

(3) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire, or revenue derived from the property;

(4) return the property, along with all fruits, hire, or revenue derived therefrom, to the respondent in the same condition if the underlying suit is decided against the applicant; and

(5) to the extent that the property is:

(A) not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(B) returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.

(e) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(f) *Service on Respondent.* The applicant must serve the respondent with a copy of the court's order and the applicant's replevy bond. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

(g) *Applicant's Right to Possession.* If the court grants the applicant's motion to replevy, a copy of the court's order and applicant's replevy bond must be delivered to the sheriff or constable in possession of the seized personal property. The sheriff or constable must then release the property to the applicant within a reasonable time. Before the property is released to the applicant, the applicant must pay all expenses associated with storage of the property.

**Rule DW 9 (651). Dissolution or Modification of Order or Distress Warrant**

(a) *Motion.* Any party, or any person who claims an interest in the seized property, may move the court to dissolve or modify the order or warrant, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the warrant. If the movant is unable to admit or deny a finding, the movant must set forth the reasons why the movant cannot do so.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the warrant, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the warrant. If the applicant fails to carry its burden, the warrant must be dissolved and the underlying order set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or warrant. If the movant seeks to modify the order or warrant based upon the value of the property, the movant has the burden to prove that the reasonable value of the property seized exceeds the amount necessary to secure the claim, interest for one year, and probable costs.

(3) *Hearing.* The court's determination may be made after a hearing involving all parties, or upon the basis of affidavits setting forth facts as would be admissible in evidence. Additional evidence, if tendered by any party, may be received and considered.

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or warrant, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the property has been sold), as justice may require. If the court modifies the order or the warrant, it must make further orders with respect to the bond that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the warrant must release the replevy bond and discharge the sureties thereon. If the warrant is dissolved, the order must be set aside, the property seized must be released, and all expenses associated with storage of the property may be taxed as costs to the applicant.

(f) *Third-Party Claimant.* If any person other than the applicant or respondent in the underlying suit claims all or part of the seized property, the court, on motion and hearing, may order the release of the property to that third-party claimant. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court, with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

**Rule DW 10 (652). Judgment**

(a) *Judgments on Replevy Bond.*

(1) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the property seized under a distress warrant, final judgment must be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, for the lesser of the amount of the judgment plus interest and costs, or the amount equal to the value of the property replevied as of the date of the execution of the respondent's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

(2) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the property seized under a distress warrant, final judgment must be rendered against all of the obligors on the applicant's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the applicant's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

(b) *All Judgments.*

(1) *Expenses Associated with Storage.* In any judgment, all expenses associated with storage of the property may be taxed as costs against the non-prevailing party.

(2) *Disposition of Property.* The final judgment must dispose of the property seized under a distress warrant.

**Rule DW 11 (653). Perishable Property**

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property seized under a distress warrant.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after it has been seized under a distress warrant, the applicant, or other party claiming an interest in the property, may file a motion in the underlying suit, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable personal property and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent, no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any other person or party and the motion is granted the court shall not issue the order unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by the court, conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Personal Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace where the underlying suit is pending. The sheriff or constable must sign and file in the underlying suit a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

**Rule DW 12 (654). Report of Disposition of Property**

When property seized under a distress warrant is claimed, replevied, or sold, or otherwise disposed of after the warrant has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace where the underlying suit is pending.

**Rule DW 13 (655). Amendment of Errors**

(a) *Before Order.* Before the court issues an order on an application for a distress warrant, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the justice of the peace at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Execution of Warrant.* After the court issues an order for the issuance of a distress warrant but before the distress warrant is executed, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the justice of peace at a time that will not

operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the distress warrant and the distress warrant may also be corrected by the court, without notice.

(c) *After Execution of Order and Execution of Warrant.* After the distress warrant is executed, on motion, notice, and hearing, the court where the underlying suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the distress warrant, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds for issuance of a distress warrant stated in the original application.

## Distress Warrant Statutes
## Texas Civil Practice & Remedies Code

**§ 54.001. Lien**

A person who leases land or tenements at will or for a term of years has a preference lien for rent that becomes due and for the money and the value of property that the landlord furnishes or causes to be furnished to the tenant to grow a crop on the leased premises and to gather, store, and prepare the crop for marketing.

**§ 54.002. Property to Which Lien Attaches**

(a) Except as provided by Subsections (b) and (c), the lien attaches to:

(1) the property on the leased premises that the landlord furnishes or causes to be furnished to the tenant to grow a crop on the leased premises; and

(2) the crop grown on the leased premises in the year that the rent accrues or the property is furnished.

(b) If the landlord provides everything except labor, the lien attaches only to the crop grown in the year that the property is furnished.

(c) The lien does not attach to the goods of a merchant, trader, or mechanic if the tenant sells and delivers the goods in good faith in the regular course of business.

(d) A law exempting property from forced sale does not apply to a lien under this subchapter on agricultural products, animals, or tools.

**§ 54.003. Exceptions**

The lien does not arise if:

(1) a tenant provides everything necessary to cultivate the leased premises and the landlord charges rent of more than one-third of the value of the grain and one-fourth of the value of the cotton grown on the premises; or

(2) a landlord provides everything except the labor and directly or indirectly charges rent of more than one-half of the value of the grain and cotton grown on the premises.

**§ 54.004. Duration of Lien**

The lien exists while the property to which it is attached remains on the leased premises and until one month after the day that the property is removed from the premises. If agricultural products to which the lien is attached are placed in a public or bonded warehouse regulated by state law before the 31st day after the day that they are removed from the leased premises, the lien exists while they remain in the warehouse.

**§ 54.005. Removal of Property**

(a) If an advance or rent is unpaid, a tenant may not without the landlord's consent remove or permit the removal of agricultural products or other property to which the lien is attached from the leased premises.

(b) If agricultural products subject to the lien are removed with the landlord's consent from the leased premises for preparation for market, the lien continues to exist as if the products had not been removed.

**§ 54.006. Distress Warrant**

(a) The person to whom rent or an advance is payable under the lease or the person's agent, attorney, assign, or other legal representative may apply to an appropriate justice of the peace for a distress warrant if the tenant:

(1) owes any rent or an advance;

(2) is about to abandon the premises; or

(3) is about to remove the tenant's property from the premises.

(b) The application for a warrant must be filed with a justice of the peace:

(1) in the precinct in which the leasehold is located or in which the property subject to the landlord's lien is located; or

(2) who has jurisdiction of the cause of action.

**§ 54.007. Judgment on Replevin Bond**

If a final judgment is rendered against a defendant who has replevied property seized under a distress warrant, the sureties on the defendant's replevy bond are also liable under the judgment, according to the terms of the bond.

**§ 54.008. to 54.020 [Reserved for expansion]**

**§ 54.021. Lien**

A person who leases or rents all or part of a building for nonresidential use has a preference lien on the property of the tenant or subtenant in the building for rent that is due and for rent that is to become due during the current 12-month period succeeding the date of the beginning of the rental agreement or an anniversary of that date.

**§ 54.022. Commercial Building**

(a) The lien is unenforceable for rent on a commercial building that is more than six months past due unless the landlord files a lien statement with the county clerk of the county in which the building is located.

(b) The lien statement must be verified by the landlord or the landlord's agent or attorney and must contain:

(1) an account, itemized by month, of the rent for which the lien is claimed;

(2) the name and address of the tenant or subtenant, if any;

(3) a description of the leased premises; and

(4) the beginning and termination dates of the lease.

(c) Each county clerk shall index alphabetically and record the rental lien statements filed in the clerk's office.

**§ 54.023. Exemptions**

This subchapter does not affect a statute exempting property from forced sale.

**§ 54.024. Duration of Lien**

The lien exists while the tenant occupies the building and until one month after the day that the tenant abandons the building.

**§ 54.025. Distress Warrant**

The person to whom rent is payable under a building lease or the person's agent, attorney, assign, or other legal representative may apply to the justice of the peace in the precinct in which the building is located for a distress warrant if the tenant:

(1) owes rent;

(2) is about to abandon the building; or

(3) is about to remove the tenant's property from the building.