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FORECLOSURES AND COLLECTION REMEDIES IN UTAH

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1. **General Information**

Utah permits the foreclosure of an interest in real property by *either* a judicial foreclosure or private sale. A private sale may be used if the security is in the form of a Deed of Trust. A judicial foreclosure is required if the security is a mortgage. Mortgages are rarely used in modern commercial lending practice in Utah, and virtually all security agreements on land are Deeds of Trust. In lieu of a foreclosure, or in connection therewith, an action for the appointment of a receiver may be an appropriate remedy to preserve or liquidate assets. The Utah Rules of Civil Procedure also provide several pre- and postjudgment remedies for collecting obligations, but these procedures are limited by Utah's exemption statute. All of these matters are discussed below.

2. **Judicial Foreclosure - § 78B-6-901 et seq. UCA¹**

- a. File complaint to foreclose the Trust Deed as a Mortgage;
- b. Seek entry of a "Decree of Foreclosure" establishing the amount of the debt and directing the sheriff to sell the property to satisfy the debt;
- c. Considerations:
 - (i) Provides a forum for resolution of any disputes about the nature, validity and priority of liens and claims; Also provides a forum for the borrower to assert defenses and affirmative claims;
 - (ii) Obtain a title report showing all liens and encumbrances against the property. No person who does not appear of record at the time of the action needs to be made a party and any judgment is conclusive as against any unrecorded interests. § 78-37-3, UCA.

¹ UCA is "Utah Code Annotated."

- junior lien holders;
 - (iii) Name, as defendants, the borrowers, any guarantors and all
 - (iv) Possible to seek alternative forms of relief;
 - (v) Possible to use the action as a vehicle for obtaining equitable remedies, such as injunctions or appointment of a receiver;
 - (vi) Provides a single forum for resolution of all claims;
- d. Sale Procedures after entry of Decree of Foreclosure
 - (i) Rule 69B, URCP², governs
 - (ii) Sheriff sets the date, time and place of sale, and serves the notices;
 - (iii) Notice of sale must be published;
 - (a) Posting on the property;
 - (b) Posting at the place of sale;
 - (c) Posting at the courthouse;
 - (d) Posting at no less than 3 public places in the county or city where the real property is located;
 - (e) Posting for at least 21 days;
 - (f) Publication of the notice of sale at least once a week for 3 successive weeks before the sale in a newspaper of general circulation;
 - (iv) Postponement for "sufficient cause" for up to 72 hours without need to reschedule and advertise again
 - (v) Sale method
 - (a) Auction
 - (b) Between 9 a.m. and 8 p.m.
 - (c) District courthouse in the county where the property is located
 - (d) Sell only so much as is necessary to satisfy the judgment

² URCP is "Utah Rules of Civil Procedure."

- price
 - (e) Sold in such parcels as is likely to bring the highest
 - (f) Lots may be sold separately
 - (g) Defendant may direct the order in which the
- property is sold
 - (vi) Application of proceeds:
 - (a) Reasonable and necessary costs of seizing and
 - (b) Balance to the plaintiff;
 - (c) Any remaining to the defendant
 - (vii) Sheriff's Certificate of sale to the buyer
- e. Right of redemption ó Rule 69C, URCP
 - (i) Applies to all real property, except an unexpired leasehold
 - (ii) The defendant or any junior lienholder may redeem;
 - (a) If Defendant redeems, effect of the sale is
 - terminated and defendant is restored to the original estate;
 - (iii) How made
 - (a) Certified copy of judgment or lien under which
 - (b) Affidavit showing amount due;
 - (c) Payment of redemption price
 - (iv) Timing: within 180 days after the sale;
 - (v) Price:
 - (a) Initial redemption: Sale price plus 6 percent,
 - (b) Subsequent redemptions: redemption price plus 3
 - percent;
 - (c) Taxes, assessments, insurance, maintenance, repairs
 - or other liens paid by holder, plus 6% or 3% as applicable;

(vi) Certificate of redemption must be promptly delivered ó see Rule 69C(g), URCP, for details

(vii) Special rules for rents, profits, and waste ó See Rule 69C(i) & (j), URCP.

f. Automatic deficiency judgment for difference between Decree and sale amount - § 78-37-2, UCA.

3. **Non-judicial foreclosure**

a. Procedures governed by § 57-1-19 to -44 UCA

b. Must be a qualified trustee (see § 57-1-21, UCA) or qualified successor trustee (see § 57-1-22, UCA)

(i) Active member of the Bar

(ii) Depository Institution

(iii) Trust Business

(iv) Title Insurance Company

(v) Agency of the US Government

(vi) Agency of the Farm Credit Administration

c. Alternative remedy of judicial foreclosure also available even though the obligation is a Deed of Trust (see § 57-1-22, UCA)

(i) Notice of Default - § 57-1-24, UCA

(a) Filed in the office of the county recorder;

(b) Identifies the trust deed, name of trustor, book and page where recorded, and legal description;

(c) Statement of breach and nature of breach;

(d) Election to sell

(ii) Service of Notice of Default - § 57-1-26, UCA

(a) Persons who have requested notice ó see § 57-1-26(1), UCA for how to request notice;

(b) To the persons named in the Trust Deed, with the name of the trustee, mailing address of the trustee, hours during which trustee can be contacted, and telephone number;

(c) Notice sent to required persons by certified or registered mail, with postage prepaid;

(iii) Opportunity to Cure ó reinstatement - § 57-1-31, UCA

(a) Due within three months of the filing for record of the notice of default;

(b) Pay the entire amount due, without acceleration, but including attorney's fees and costs;

(c) If paid, obligation is reinstated;

(d) Notice of cancellation must be recorded within 30 days;

(e) Form of notice of cancellation - § 57-1-31(2), UCA.

(iv) Notice of Sale - § 57-1-25, UCA

(a) Publication ó at least three times, once a week for three consecutive weeks; last publication at least 10 days, but not more than 30 days before the date of sale; newspaper having a general circulation in each county in which the property to be sold, or some part thereof, is situated;

(b) Posting ó at least 20 days prior to the sale; in some conspicuous place on the property; and at the office of the county recorder;

(c) Time and Place of Sale ó as designated in the notice of sale; between 8 a.m. and 5 p.m.; at a courthouse in the county where the property is located;

(d) Form of Notice ó see § 57-1-25(3), UCA;

(e) Service of Notice ó see § 57-1-26(2)(b), UCA;

(v) Sale of Property - § 57-1-27, UCA

(a) Public auction;

(b) Trustee, successor trustee or attorney for trustee acts as auctioneer;

(c) Trustor (borrower) may direct the order in which the trust property shall be sold, if the property consists of several known lots or parcels which can be sold separately;

(d) Any person may bid, including the beneficiary (but trustee can bid for the beneficiary);

(e) Each bid is an irrevocable offer;

(f) If high bidder refuse to pay the amount bid, trustee can either renounce the sale, or sell the property to the next highest bidder;

(g) A bidder who refuses to pay the bid price is *liable for any loss resulting*, plus interest, fees and costs;

(vi) Postponing the Sale - § 57-1-27(2), UCA

(a) for any cause the trustee considers expedient;

(b) Notice by public declaration, written notice or oral postponement, at the time and place last appointed for the sale;

(c) No further notice required unless the postponement exceeds 45 days, in which case a new notice of sale is required.

(vii) Payment of Purchase Price - § 57-1-28, UCA

(a) as directed by the trustee;

(b) Beneficiary's credit bid limited to principal, interest up to date of sale; out of pocket advances for taxes, insurance, maintenance, etc., cost, attorney's fees;

(viii) Trustee's deed - § 57-1-28(2), UCA

(a) Within 3 business days after trustee receives payment;

(b) Trustee liable for any loss to the purchaser for failure to comply;

(c) Deed may contain recitals of compliance with the statute;

(d) Recitals in the deed are prime facie evidence of compliance with the statute and conclusive evidence in favor of a bona fide purchaser, without notice;

(e) Effect of conveyance to the purchaser, without any right of redemption, of all of the trustee's right, title and interest in the property;

(ix) Application of Sale Proceeds - § 57-1-29, UCA

- fees;
- (a) Costs and expenses of sale, including attorney's fees;
 - (b) Payment of the underlying obligation;
 - (c) Payment of balance to the person legally entitled thereto;
 - (d) Balance may be deposited with clerk of district court with names and addresses of known claimants; deposit discharges trustee from any further responsibility;
 - (e) Clerk gives notice to claimants and claimants may petition the court for the proceeds of see § 57-1-29(2) of (5), UCA.

(x) Special Circumstances:

(a) Corporate stock evidencing water rights used, intended to be used or suitable for use with the property, and that are pledged to secure an obligation secured by the trust deed, may be sold with the trust property at the trustee's sale - § 57-1-30, UCA;

(b) Accounting - § 57-1-31.5, UCA

- (1) Trustor may request an accounting from the trustee;
- (2) Trustee then obligated to provide a *detailed accounting* of the amounts necessary to reinstate or payoff the loan. See § 57-1-31.5((2) & (3), UCA for details.

(c) Limitations Periods - § 57-1-34, UCA

- (1) Trustee's sale must be conducted within the period prescribed by law for commencement of an action on the underlying obligation;

(d) Transfers of Trust Deeds - § 57-1-35, UCA

- (1) A transfer of a debt secured by a trust deed operates as a transfer of the security therefor.

(e) Release of Security Interests - § 57-1-38, UCA

- (1) Lender or servicer who fails to release the trust deed within 90 days after receipt of final payment is liable to another secured lender or the owner for *greater of* \$1,000 or treble actual damages incurred because of the failure, plus costs and attorney's fees, including the same incurred in a quiet title action.

(2) Exceptions for good faith compliance with internal procedures or other reasons, see § 57-1-38(4), UCA.

(3) Exceptions for trust deeds securing revolving lines of credit, see § 57-1-38(5), UCA

(4) Special provisions permitting reconveyance of trust deeds by title insurer or title agent. See § 57-1-40 to -42, UCA

4. **One Action Rule** - § 78B-6-901, UCA.

a. One Action Rule provides: “There is only one action for the recovery of any debt, or the enforcement of any right, secured solely by mortgage upon real estate and that action shall be in accordance with the provisions of [the mortgage foreclosure laws of the state of Utah]. This rule applied to trust deeds as well as to mortgages. *City Consumer Services, Inc. v. Peters*, 815 P.2d 234, 236 (Utah 1991). The rule essentially requires that the creditor foreclose on the property *before suing the debtor personally on the debt*. See *id.* at 235-36. The rule advances two purposes. First, it attempts to minimize the debtor’s liability by forcing the creditor to look first to the security before suing the debtor, and it attempts to eliminate multiple lawsuits. *APS v. Briggs*, 927 P.2d 670, 673 (Utah App. 1996). Under the common law rule, a creditor could both foreclose on the security and simultaneously sue the debtor personally. This statute “directs the court to ascertain the balance due by using a two-step process: (1) determine the remaining total indebtedness and the fair market value of the trust deed property; and (2) subtract the fair market value of the trust deed property from the total indebtedness.” *First Southwestern Financial Services v. Sessions*, 875 P.2d 553, 555 (Utah 1994). “Viewed in such straightforward terms, determining the prevailing party under [the Statute] is a simple matter. If a party seeking a deficiency judgment can convince the court that the debt exceeds the fair market value of the property then that party is entitled to a deficiency judgment and prevails under [the Statute].” *Id.* at 556. If the said sale price is *greater* than the fair market value, then the deficiency is the difference between the sale price and the debt.

b. “Sold-out” junior liens. In *Peters* the court held that the “one action rule” does not apply to a “sold-out” junior creditor. “Where the security has been lost through no fault of the mortgagee, an action may be maintained directly upon the personal obligation evidenced by the note without going through the idle and fruitless procedure of foreclosure.” *Peters*, 815 P.2d at 236. For fault to lie with the creditor, such “fault must consist of blameworthy or negligent conduct” such as, (1) the creditor loses its lien because of failure to record a notice or assignment of mortgage, (2) the creditor releases its lien because of its belief that there is no equity in the collateral, (3) the creditor disposes of the collateral by private sale under an illegal self-help remedy, or (4) the creditor loses its interest in the collateral because of its failure to present a claim in a related probate proceeding. *Id.* at 237. Applying these principles, the Court held that “failure to participate in the senior’s foreclosure is not a “fault” on the part of the junior.” *Id.* The junior creditor in *Peters* refused to purchase the property at the senior’s foreclosure, even though the junior’s appraisal showed that the property’s value could satisfy its debt and that of the senior creditor. See *id.* Nevertheless the Court reasoned that it “was no fault of the plaintiff junior lienor that the security for its note was lost. The fault is rather with defendant debtor for failing to pay the first mortgage and thus causing it to be

foreclosed. . . . Therefore, once the senior had exhausted the security, the junior was free to proceed on its note.ö *Id.* at 236 (alterations, quotation and citation omitted). *See also., G. Adams, Ltd. v. Durbano*, 782 P.2d 962 (Utah 1989); *First Security Bank of Utah, N.A. v. Felger*, 658 F.Supp. 175, 181-84 (D. Utah 1987)

5. **Deficiency Actions** ó§ 57-1-32, UCA

a. This statute limits ö[a] deficiency judgment after the sale of the security . . . to the amount by which the amount of indebtedness exceeds the fair market value of the security foreclosed on at the time of foreclosure.ö The purpose of the fair market value provision öis to protect the debtor, who in a non-judicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a larger deficiency.ö *Peters*, 815 P.2d at 238.

b. The statute does not apply to a sold-out junior lienholder. *See id.* at 238-39. In *Peters*, the Court held that since the junior creditor was öa sold-out junior, [it was] unsecured, it [was] not pursuing a ædeficiency judgmentø and, therefore, the [deficiency judgment] statute would not apply.ö *Peters*, 815 P.2d at 239. Although the propertyø fair market value at the date of sale was in dispute, the court entered summary judgment in favor of the junior creditor for the full amount due on the junior debt. *See id.* The Court reasoned that the value of the property was not relevant because the junior creditorø action was not for a ödeficiency judgment,ö but, instead, was simply a suit on the note. *See id.* öTherefore, the fair market value of the property would not limit [the junior creditorø] recovery.ö *Id.* at 240. Query: If the second ösold-outö junior lien is held by the same lender that forecloses the senior lien, and there are no intervening liens, does the anti-deficiency statute apply to a determination of the debt on the second lien, or is the creditor entitled to sue for the entire balance due on the note? See, *George v. Simon*, 5 Cal. Rptr. 2d 428 (Cal. Ct. App. 1992). *Simon* stands for the proposition that under California law, ö[a] creditor who holds two liens on the same property securing separate debts may lose the right to enforce the note secured by the junior lien *when it purchases the property at the sale of the senior lien.*ö This rule has not yet been applied in Utah and it may not be applicable at all if the lender does not purchase the property at the sale.

c. Timing ó an action to recover a deficiency must be brought *within 3 months* after any sale of the property under the trust deed. Failure to timely bring such an action is a waiver of the right to a deficiency.

d. Requirements ó the action must set forth the amount of the indebtedness, the sale price, and the alleged fair market value on the date of sale.

e. Limitation on recovery ó the court cannot enter judgment for more than the amount by which the indebtedness, plus interest, costs and fees, exceeds the fair market value on the date of sale, or the sale price, whichever is greater.

f. Prevailing party ó is entitled to recover their costs and attorneyø fees.

6. **Receiverships**

a. Rule 66, URCP, governs.

b. Must be sought in an action.

c. Grounds:

(i) Property in danger of being lost, removed, damaged or is insufficient to satisfy a judgment, order or claim;

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

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

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

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

d. Powers of a receiver ó determined by the scope of the order

(i) Bring and defend actions;

(ii) Seize property;

(iii) Collect, pay and compromise debts;

(iv) Invest funds;

(v) Make transfers and õtake other actions as the court authorizes.ö

e. Security.

(i) The court may require security from a receiver in accordance with Rule 64, URCP. Rule 64(b) allows a court to require security from a party in connection with pre and post-judgment writs of attachment, replevin, garnishment and execution. The sum and form of the security is õas the court deems adequate.ö For a plaintiff, the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a wrongful appointment. For a defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider õany relevant factor.ö The court also may relieve a party of the necessity to provide security if it appears that none of the parties will incur damages, costs or attorney fees as a result of the receiver being wrongfully obtained. The amount of

security does not establish or limit the amount of damages, costs or attorney fees recoverable if the appointment is wrongfully obtained.

(ii) Any surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The surety's liability, however, is limited to the sum specified in the surety's contract.

(iii) The court may consider objections to the nature or amount of any proposed security or surety. Proceedings on objections are expedited. See Rule 64(b)(3), URCP, and the burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

f. Disinterestedness and Qualifications. No party or attorney to a party in the action may be appointed as a receiver, and any person appointed must be impartial and disinterested as to all the parties and the subject matter of the action, unless all parties consent. There is no pre-approved list of receivers, and there are no other limitations on who can be a receiver. The receiver's ability to obtain a bond, however, may be a limiting factor if the proposed receiver is not creditworthy, or has been subject to any previous prosecutions or disciplinary proceedings where fidelity, trustworthiness or honesty has been called into question. Typically, a disinterested, third-party attorney, real estate property manager or accountant, in good standing, is proposed by the plaintiff to serve as the receiver. In addition, there is no residency requirement for a receiver.

g. Oath. The receiver must swear or affirm to perform duties faithfully.

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

i. Real Property. Before a receiver is vested with real property, the receiver must file a certified copy of the appointment order in the office of the county recorder of the county in which the real property is located.

j. Appointment Process. There are no rules or official forms governing the appointment process. Typically, a plaintiff will file a separate action seeking the appointment, or seek the appointment as a separate claim in an action that also seeks other forms of relief, i.e. a collection action or a suit for judicial foreclosure of a lien. To obtain the appointment, the plaintiff typically files a separate motion, with a supporting memorandum, declaration and a proposed form of order, obtains a hearing date from the court, and serves the Complaint, Summons, Motion, Memorandum, Declaration, Proposed Order and Notice of Hearing on the defendant.

Depending upon the exigencies of the case, the plaintiff also may file a separate *ex parte* motion for a separate order shortening times for the filing of opposing memoranda and declarations, and fixing the hearing date, both of which also would be served on the defendant with the other papers. Absent such an *ex parte* motion and order, the plaintiff may not obtain an expeditious hearing because the matter may be set on the normal motion calendar. Under Rule 7, URCP, when a general motion is filed opposing memoranda are not due for ten (10) *business* days after service, plus three (3) *additional calendar* days, if the pleadings are served by mail. Since receivers usually are sought to preserve assets and prevent loss, most plaintiffs seek expedited relief and have the pleadings served by a process server.

If the appointment is sought *without notice to the defendant*, then the applicable procedures under Rule 65A, URCP, for granting temporary injunctive relief without notice will govern. Usually, a showing by declaration, of the four (4) tests for injunctive relief will be required, i.e. a sufficient legal basis, irreparable injury, a balance of harm in favor of the plaintiff, and the absence of a public injury or interest, is required. In addition, for orders without notice the plaintiff also must make a clear showing that some immediate and irreparable injury, loss, or damage is likely to occur before notice can be given the plaintiff's attorney also must show the efforts made to give notice or explain why notice should not be given. Understandably, courts are reluctant to appoint receivers without notice in a commercial context, unless there are egregious circumstances, i.e. evidence the waste, destruction or improper disposition of collateral is in process. In addition, courts are more likely to require a bond, or a larger bond, where the relief is sought without notice. Thus, it is more common for plaintiffs to seek an expedited hearing, than to seek appointment of a receiver without notice.

k. Order Appointing Receiver. The Order appointing the receiver is a critically important document. In essence, this Order is the roadmap, blueprint or operating manual of the receiver and, to a large extent, it governs the future course of the receivership case. The order should be both broad and specific, but, there are no applicable rules or requirements. More importantly, the order should address whether the receiver is being appointed for an entity or for an asset, as the rights, duties and powers of the receiver will vary accordingly. For example, a receiver for an operating business will need the power to control bank accounts, sign checks, sign agreements, hire / fire employees and incur debt. On the other hand, a receiver for specific property needs far less authority, except the power to take possession of the property and control its subsequent use and disposition. In addition, the Order appointing the receiver typically governs such things as reporting, payment of fees, duration of the receivership, discharge of the receiver and other administrative matters. A sample form of order appointing a receiver for an operating business is attached as Appendix A.

l. Cases. There are very few published decisions in Utah on receivership proceedings, and those cases that have been published generally recognize the broad, equitable power of the trial court to structure appropriate relief in a wide variety of situations. The leading cases in Utah are *Interlake Co. vs. Von Hake*, 697 P.2d 238 (Utah 1985), where the Utah Supreme Court recognized the inherent equitable power of a court to appoint a receiver, and *Shaw vs. Robinson*, 537 P.2d 487 (Utah 1975), where the court approved the appointment of a receiver to conduct a business and prevent loss in the face of a disagreement among the company's management. In federal cases, the leading authority is *Inland Empire Insurance Co. vs. Freed*, 239 F.2d 289 (10th Cir. 1956) which is a case where a receiver was

appointed in a federal diversity action under the federal court's equitable powers because the defendant had operations in several states, but was "hopelessly insolvent." The court in *Inland* concluded that it would be proper for the federal court to appoint a receiver with authority to control the company and its assets in all of the affected federal districts, rather than rely on separate receivership proceedings in each of the several states. See also *Pusey & Jones Co. vs. Hanssen*, 261 U.S. 491.

Courts in Utah also have appointed receivers in situations where misappropriation of corporate assets by insiders is asserted, *Richardson vs. Arizona Fuels Corp.*, 614 P.2d 636 (Utah 1980), and at the request of stockholders, suing individually or derivatively, to protect the company's assets, *Stevens vs. S. Ogden Land, Bldg. & Improvement Co.*, 47 P. 81 (Utah 1896). In lieu of appointment of a receiver, the Utah Supreme Court also has authorized the appointment of an "interim CEO" for a company, *Jau-Fei Chen vs. Jau-Hwa Stewart*, 100 P.3d 1177 (Utah 2004), although in the *Jau-Fei Chen* case the appointment initially was made with consent of both parties. In *Jau-Fei Chen*, the Court articulated the principle that once a receiver, interim CEO or special master is appointed, the opposing party can waive their right to object to the receiver's appointment and subsequent actions, if the objection is not presented to the court in a timely manner.

7. Pre and Post-Judgment Collection Remedies.

a. Time Frame.

(i) During Pendency of Judgment. Supplemental proceedings may be had at any time during which execution which may be had on a judgment.

(ii) Eight Years. The time frame in which a party may take steps to execute a judgment is eight years. Except with respect to child support orders, judgments shall continue from eight (8) years from the date of entry, unless satisfied or stayed in accordance with law. § 78B-2-311.

(iii) Extensions of Time. Utah has no mechanism to extend the period of time in which a judgment lien may be enforced. See *Cox Corp. v. Vertin*, 754 P.2d 938 (Utah 1988). However, in certain circumstances a judgment may be "renewed."

b. Examination of Judgment Debtor. Rule 64(c)(2), URCP allows a judgment creditor to conduct an examination of a judgment debtor regarding the debtor's assets and liabilities. "The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order." A judgment creditor may issue a subpoena valid as against any other third party if the witness has material information relevant to execution of the judgment. Such other third persons may include colleagues, relatives, accountants or even attorneys.

When it is shown by the examination of the judgment debtor that "he has in his possession or under his control any money or other thing capable of delivery," which is the subject of litigation, belongs to another party, or is being held by him as trustee for another party, "the court may order it to be deposited in court or delivered to such party." URCP 67.

c. Post Judgment/Pre Execution Orders. A judgment creditor can get an order from the court prohibiting the judgment debtor from transferring, assigning, selling or otherwise disposing of his nonexempt property prior to satisfaction of the judgment. *See* URCP 64(c)(3). Similarly, a judgment creditor can obtain an order prohibiting a third party, in possession of the judgment debtor's property, from assigning, transferring, selling or otherwise disposing of the judgment debtor's property prior to execution of the judgment. *Id.* At any time when the judgment creditor finds the judgment debtor to have nonexempt property in his possession, including at a hearing on the supplemental proceedings, the judgment creditor has the right to ask the court to take that property into the court's custody and apply it towards judgment. *See* URCP 69(s).

d. Writs in General. Rule 64 contains general definitions, terms and standards that apply to all of the provisional remedies. The principal subdivisions of this rule consist of (a) Definitions, (b) Security, (c) Referees, (d) Issuance of writs and service, (e) claims to property by third persons, and (f) Discharge of Writs and release of property. There are four essential concepts underlying the issuance and enforcement of writs to aid the satisfaction of claims: (1) "justification," i.e. the proper legal and factual basis for issuance of a writ, (2) "seizure," i.e. taking actual or constructive possession of the property, (3) "sale," i.e. the method of disposing of the property to satisfy the claim, and (4) "redemption," i.e. the procedures for recovering the property after it has been sold.

e. Pre-Judgment Writs. Rule 64A governs *pre-judgment* writs, but the requirements of this rule also affect the provisional remedies of attachment and replevin (see below). Writs of attachment, garnishment and replevin may be obtained *before* entry of a final judgment. Such writs may be issued only after a claim has been *filed* and upon *written order* of the court, however. There are ten (10) separate requirements that must be met in order to obtain a pre-judgment writ, the first three of which are *mandatory*, and the remaining seven of which are "optional," in that only one of these remaining seven conditions needs to be proved. A pre-judgment writ may *not* be obtained against property that is "earnings" or that is "exempt from execution." In addition, the writ cannot be sought to "hinder, delay or defraud a creditor, and the proponent of the writ must prove "a substantial likelihood" of prevailing on the merits of the underlying claim. The proponent then needs to establish *one* of the following conditions: (c)(4) that the defendant is avoiding service of process; (c)(5) that the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, the property with intent to defraud creditors; (c)(6) that the defendant has left or is about to leave the state with intent to defraud creditors; (c)(7) that the defendant has fraudulently incurred the obligation that is the subject of the action; (c)(8) that the property will materially decline in value; (c)(9) that the plaintiff has an ownership or special interest in the property; or (c)(10) probable cause of losing the remedy unless the court issues the writ. Subpart (d) of the Rule also requires the proponent to verify specific information about the property by affidavit. A pre-judgment writ may only be issued upon notice to the defendant and an opportunity for a hearing, although the defendant can be required to reply to the application within 24 hours. A pre-judgment writ may only be issued *ex parte* upon a showing, by affidavit, that "irreparable injury" is likely to occur before notice and a hearing, and, if such a showing is made, the court must schedule the hearing "for the earliest reasonable time." The *ex parte* writ also must contain certain information and expires after 10 days. *See* Rule 64A(i).

f. Attachment. Attachment is governed by Rule 64C, and is considered to be a *pre-judgment* provisional remedy. After judgment, assets can be seized by writ of *execution*. In addition to establishing the requirements for issuance of a pre-judgment writ under Rule 64A, to obtain an attachment, the proponent also must establish *all* of the following grounds: (b)(1) that the defendant is indebted to the plaintiff; (b)(2)(i) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state; or (b)(2)(ii) the writ is authorized by statute; and (b)(3) that payment of the claim has not been secured by a lien upon property in this state.

g. Replevin. Replevins are governed by Rule 64B, and, like attachments, are considered a pre-judgment provisional remedy. In addition to establishing the requirements for issuance of a pre-judgment writ under Rule 64A, to obtain an order of replevin, the proponent must establish *all* of the following: (b)(1) that the plaintiff is entitled to possession; and (b)(2) that the defendant wrongfully detains the property.

h. Garnishments. Unlike Attachments and Replevins, Garnishments may be issued either before or after entry of a judgment. The principal use of a garnishment is to obtain property that is *owed to* the defendant or judgment debtor *by a third party*, or is in the possession of a third party. With respect to the disposable earnings of an individual, however, a garnish is limited to the *lesser of* (a)(1) 50% of the defendant's disposable earnings for a writ to enforce payment of a judgment for failure to support dependent children or 25% of the defendant's disposable earnings for any other judgment; or (a)(2) the amount by which the defendant's disposable earnings for a pay period exceeds the number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable. If the garnishment is sought *pre-judgment*, then, in addition to establishing all of the elements of Rule 64A, the proponent also must prove (b)(1) that the defendant is indebted to the plaintiff; (b)(2) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state; (b)(3) that payment of the claim has not been secured by a lien upon property in this state; (b)(4) that the garnishee possesses or controls property of the defendant; and (b)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78-7-44. Note, however, that one of the elements of Rule 64A(c)(1) is that the property sought is *not earnings*. Thus, notwithstanding the disposable earnings limitations in subpart (a) of Rule 64D, it is questionable whether a plaintiff can obtain a pre-judgment garnishment on *any* of an individual defendant's *earnings* before obtaining a judgment. The garnishor (the proponent of the writ) serves *interrogatories* upon the garnishee (the third person) inquiring about the nature, location and value of the defendant's property. See Rule 64D(e). The writ provides instructions to the garnishee about how to answer and serve the interrogatories. See Rule 64D(g). The proponent also can challenge the sufficiency of the garnishee's answers and the court can hold a hearing on the matter. See Rule 64D(h). The garnishee must deliver the property either in accordance with a subsequent order of the court, if the answers are challenged, or in accordance with the instructions in the writ. See Rule 64D(i). The garnishee may deduct any *liquidated* claim against either the plaintiff or the defendant before turning over the property. See Rule 64D(j)(5). Property subject to a security interest in favor of the garnishee is also subject to such a writ, and the Rule 64D(k) contains special provisions to deal with such interests. Finally, after judgment, the judgment creditor also may

obtain a continuing garnishment that would apply to all payments due to the judgment debtor for a period of 120 days. See Rule 64D(1).

i. Executions. Writs of Execution are governed by Rule 64E. They are available to seize property in the possession or under the control of the defendant following entry of a final judgment or order requiring the delivery of property or the payment of money. To obtain such a writ, the plaintiff files an application with the court stating (b)(1) the amount of the judgment or order and the amount due on the judgment or order; (b)(2) the nature, location and estimated value of the property; and (b)(3) the name and address of any person known to the plaintiff to claim an interest in the property. The defendant may reply to the writ and request a hearing. The reply shall be filed and served within 10 days after service of the writ and accompanying papers upon the defendant. The court shall set the matter for an evidentiary hearing. If the court determines that the writ was wrongfully obtained, or that property is exempt from seizure, the court shall enter an order directing the officer to release the property. If the court determines that the writ was properly issued and the property is not exempt, the court shall enter an order directing the officer to sell or deliver the property. If the date of sale has passed, notice of the rescheduled sale shall be given. No sale may be held until the court has decided upon the issues presented at the hearing. If a reply is not filed, the officer shall proceed to sell or deliver the property.

j. Seizure of Property. The disposition of property that has been seized pursuant to a writ, is governed by Rule 69A. Unless otherwise directed by the writ, the officer shall seize property as follows: (a) When there is more property than necessary to satisfy the amount due, the officer shall seize such part of the property as *the defendant may indicate*. If the defendant does not indicate a preference, the officer shall first seize personal property, and if sufficient personal property cannot be found, then the officer shall seize real property. Real property shall be seized by filing the writ and a description of the property with the county recorder and leaving the writ and description with an occupant of the property. If there is no occupant of the property, the officer shall post the writ and description in a conspicuous place on the property. If another person claims an interest in the real property, the officer shall serve the writ and description on the other person. If the seized assets are personal property, then special rules apply. For example, farm products, as that term is defined in Utah Code Section 70A-9a-102, may be seized by filing the writ and description of the property with the central filing system established by Utah Code Section 70A-9a-320. Securities shall be seized as provided in Utah Code Section 70A-8-111. In addition, if the property is of extraordinary size or bulk, would be costly to take into custody or to store or is not capable of delivery, the officer has discretion to seize the property by serving the writ and a description of the property on the person holding the property. The officer shall then request of the person holding the property an affidavit describing the nature, location and estimated value of the property. Otherwise, personal property shall be seized by serving the writ and a description of the property on the person holding the property and taking the property into custody.

k. Sales of Property. Rule 69B governs the sale of property that has been seized pursuant to a writ. The rule addresses both sales of property that has been seized *pre-judgment* as well as seizures that occur post-judgment. If the seizure is before judgment, the officer may sell the property only if it is perishable or likely to decline speedily in value. However, the court may order the officer to sell the property before judgment if the court finds

that the interest of the parties will be served by sale. The officer must give notice of the date, time and place of the sale and serve the notice on the defendant and on any third party named by the plaintiff or garnishee. Service shall be not later than the initial publication of the notice of the sale. The officer shall publish notice of the date, time and place of sale as follows: (1) If the property is perishable or likely to decline speedily in value, the officer shall post written notice of the date, time and place of sale and a general description of the property to be sold (A) in the courthouse from which the writ was issued and (B) in at least three other public places in the county or city in which the sale is to take place. The officer shall post the notice for such time as the officer determines is reasonable, considering the character and condition of the property; (2) If the property is personal property, the officer shall post written notice of the date, time and place of sale and a general description of the property to be sold (A) in the courthouse from which the writ was issued and (B) in at least three other public places in the county or city in which the sale is to take place. The officer shall post the notice for at least seven days and publish the notice at least one time not less than one day preceding the sale in a newspaper of general circulation, if there is one, in the county in which the sale is to take place; (3) If the property is real property, the officer shall post written notice of the date, time and place of sale and a particular description of the property to be sold (A) on the property, (B) at the place of sale, (C) at the district courthouse of the county in which the real property is located, and (D) in at least three other public places in the county or city in which the real property is located. The officer shall post the notice for at least 21 days and publish the notice at least once a week for three successive weeks immediately preceding the sale in a newspaper of general circulation, if there is one, in the county in which the real property is located. If the officer finds sufficient cause, the officer may postpone the sale. The officer shall declare the postponement at the time and place set for the sale. If the postponement is longer than 72 hours, notice of the rescheduled sale shall be given in the same manner as the original notice of sale. All sales shall be at auction to the highest bidder, Monday through Saturday, legal holidays excluded, between the hours of 9 o'clock a.m. and 8 o'clock p.m. at a place reasonably convenient to the public. Real property shall be sold at the district courthouse of the county in which the property is located. The officer shall sell only so much property as is necessary to satisfy the amount due. The officer shall not purchase property or be interested in any purchase. Property capable of delivery shall be within view of those who attend the sale. The property shall be sold in such parcels as are likely to bring the highest price. Severable lots of real property shall be sold separately. Real property claimed by a third party shall be sold separately if requested by the third party. Note that *the defendant may direct the order in which the property is sold*, and, upon request of the defendant, the plaintiff shall deliver an accounting of the sale. The officer is entitled to recover the reasonable and necessary costs of seizing, transporting, storing and selling the property, and the proceeds of the sale shall be applied in the following order up to the amount due or the value of the property, whichever is less: (1) to pay the reasonable and necessary costs of seizing, transporting, storing and selling the property; and (2) to deliver to the plaintiff the remaining proceeds of the sale.

1. Redemption Rights. Once *real property* has been sold, it may be subsequently redeemed within a certain time and in a certain manner. Rule 69C governs redemptions. Note that there is no comparable right to redeem personal property once the same has been sold. Also note, that if the sale of real property is pursuant to a private *Trust Deed Foreclosure* that is conducted in accordance with § 57-1-19 *et seq.* there is *no right of redemption*. See § 57-1-28(3). Moreover, real property may not be redeemed under Rule 69C if

the estate is less than a leasehold of a two-years' unexpired term. Real property may be redeemed by the defendant *or by a creditor having a lien on the property junior to that on which the property was sold or by their successors in interest*. If the defendant redeems, the effect of the sale is terminated and the defendant is restored to the defendant's estate. If the property is redeemed by a creditor, any other creditor having a right of redemption may redeem. To redeem, the redemptioner must pay the amount required to the purchaser and shall serve on the purchaser: (1) a certified copy of the judgment or lien under which the redemptioner claims the right to redeem; (2) an assignment, properly acknowledged if necessary to establish the claim; and (3) an affidavit showing the amount due on the judgment or lien. The redemption must occur *within 180 days after the sale*. The price to redeem is the *sale price plus six percent*. However, the price for a *subsequent redemption* is the redemption price *plus three percent*. If the purchaser or redemptioner *files with the county recorder* notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. *Failure to file notice* of the amounts with the county recorder *waives* the right to claim such amounts. Rule 69C(f) establishes mechanisms to resolve disputes regarding the redemption price. Rule 69C(g) also establishes procedures for recording deeds respecting the redeemed property. Subject to a superior claim, the purchaser is entitled to the rents of the property or the value of the use and occupation of the property from the time of sale until redemption, and, subject to a superior claim, a redemptioner is entitled to the rents of the property or the value of the use and occupation of the property from the time of redemption until a subsequent redemption. Rents and profits are a credit upon the redemption price. Rule 69C(j) contains remedies for waste or for failure to obtain the property after a purchase. (j)(2) Failure to obtain property. (j)(2)(C) Interest on a judgment in favor of a purchaser or redemptioner is governed by Utah Code Section 15-1-4. Interest on a revived judgment in favor of the plaintiff against the defendant is at the rate of the original judgment. The effective date of a revived judgment in favor of plaintiff against defendant is the date of the original judgment except as to an intervening purchaser in good faith.

8. **Exemptions – Property Not Available to Judgment Creditors**

a. **General Considerations.**

(i) Utah Statutory exemptions *apply only to individuals*, not to corporations, limited liability companies, partnerships or other entities.

(ii) There are many nuances in the exemption statutes that may or may not apply to your circumstances. It is important to read the statute carefully.

b. **Homestead Exemption - Homestead Exemption - § 78B-5-503.**

(i) An individual is entitled to a homestead exemption consisting of "property" in this state in an amount not exceeding \$5,000.00 in value, if the property consists in whole or in part of property which is not the primary personal residence of the individual, or \$20,000.00 in value if the property claimed is the primary personal residence of the individual. § 78B-5-503(2)(a).

(ii) If the property is jointly owned, each joint owner is entitled to a homestead exemption, provided, however, for property that it is not a primary personal residence, the maximum exemption may not exceed \$10,000.00 per household; and for property which is a primary personal residence, the maximum exemption may not exceed \$40,000.00 per household. § 78B-5-503(2)(b).

(iii) A person may claim a homestead in one or more parcels of real property together with appurtenances and improvements, or a mobile home in which the claimant resides. § 78B-5-503(2)(c).

(iv) As used in this statute, a "household" means a group of persons related by blood or marriage living together in the same dwelling as an economic unit, sharing furnishings, facilities, accommodations and expenses. A "primary personal residence" means a dwelling or mobile home and the land surrounding it, not exceeding one acre, as is reasonably necessary for the use of the dwelling or mobile home in which the individual and household reside. Finally, "property" means either a primary personal residence, real property or an equitable interest in real property awarded to a person in a divorce decree by a court.

(v) Water rights necessarily employed in supplying water to the homestead also are exempt, except for calls or assessments by corporations issuing the water shares. § 78B-5-503(4).

(vi) The proceeds of any sale, to the amount of the exemption existing at the time of sale, are exempt from levy, execution or other process for one (1) year after the receipt of the proceeds by the person entitled to the exemption. § 78B-5-503(5)(b).

(vii) Exception: The homestead exemption does not include:

- (a) consensual liens obtained on debts created by mutual contract;
- (b) statutory liens for property taxes and assessments;
- (c) security interests and judicial liens created for the purchase price of the property; and
- (d) judicial liens for child support and maintenance.

(viii) Declaration of Homestead. An individual may select and claim a homestead by complying with the filing requirements of § 78B-5-504, which include a signed and acknowledged declaration that is recorded with the county recorder, or served upon the sheriff or other officer conducting an execution prior to the execution, and containing the statements and information required by § 78B-5-504(2).

(ix) Property that includes a homestead cannot be sold at execution if there is no bid which exceeds the amount of the declared homestead exemption. § 78B-5-504(5).

5-505. c. Specific Property Exempt Regardless of Amount or Value - § 78B-

- (i) A burial plot for the individual and his family.
- (ii) Health aids reasonably necessary to enable the individual or a dependent to work or sustain health.
- (iii) Disability, illness, or unemployment benefits the individual or his dependent have received or are entitled to receive.
- (iv) Medical, surgical, or hospital care benefits.
- (v) Veterans benefits.
- (vi) Child support.
- (vii) One washer and dryer, one refrigerator, one freezer, one stove, one microwave, one sewing machine, all carpets in use, provisions sufficient for 12 months actually provided for individual or family use, all wearing apparel of every individual and dependent (not including jewelry or furs), and all beds and bedding for every individual or dependent. [Note: There are no "value limitations" for this specific property. Consider: Are oriental rugs exempt, regardless of value, if they are "in use." Are investment grade wines "provisions" within the meaning of the statute? What about a closet full of \$2,000 suits? There also is no definition about what is "sufficient" for 12 months.]
- (viii) Works of art depicting debtor and his resident family, or produced by the debtor or the debtor and his resident family, except works of art held by the debtor as part of a trade or business.
- (ix) Proceeds of insurance, a judgment, or settlement, or other rights accruing as a result of bodily injury of the individual or the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent those proceeds are compensatory. [Note: Is a recovery for "defamation" a "bodily injury."]
- (x) The proceeds are benefits of any life insurance contracts or policies paid or payable to the debtor upon the death of the spouse or children of the debtor, provided that the contract or policy has been owned by the debtor for a continuous unexpired period of one year. The same is true for proceeds or benefits of any life insurance contracts or policies paid or payable to the spouse or children of the debtor upon the death of the debtor.
- (xi) The proceeds and avails of any unmatured life insurance contracts owned by the debtor, excluding any payments made on the contract during the one year immediately preceding a creditor's levy or execution. Also note that the exemption does not apply to proceeds and avails of any matured or unmatured life insurance contract that is assigned or pledged as collateral for repayment of a loan or other legal obligations.

(xii) Retirement funds held in a qualified IRS retirement plan or arrangement, including funds held in an IRA. The exemption also includes the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order, per § 414(p) of the IRC. The retirement funds exemption *does not* apply to: (i) the interest of an alternate payee under a QDRO, or (ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy. § 78B5-505(1)(b).

d. Certain property based on value. § 78B-5-506.

(i) An individual is entitled to exemption of the following property up to an aggregate value of items *in each subsection of \$500*.

(a) Sofas, chairs, and related furnishings reasonably necessary for one household.

(b) Dining and kitchen tables and chairs reasonably necessary for one household.

(c) Animals, books, and musical instruments, if reasonably held for personal use.

(d) Heirlooms or other items of particular sentimental value to each individual.

(ii) An individual is entitled to an exemption, not exceeding \$3,500 in aggregate value, of implements, professional books, or tools of trade.

(iii) An individual is entitled to an exemption, not exceeding \$2,500 in value of one motor vehicle. Motor vehicles do not include vehicles designed for or used primarily for recreational purposes such as motorcycles, ATVs and RVs, except where such vehicles are regularly used for daily transportation. § 78B-5-506(3).

e. Exemption of Proceeds from Property Sold. § 78B-5-507. An individual who owns certain property is entitled to an exemption of proceeds that are traceable for one year after the compensation for the property is received so long as the property, or part of the property, could have been claimed as exempt as a burial plot or health aid, and the property was sold or taken by condemnation, or lost, damaged, or destroyed, and the owner has been compensated for the property. In addition, money or property that is otherwise exempt remains exempt after its receipt by, and while it is in the possession of, the individual, including any other form into which it is traceable. The tracing principles may either be first-in first-out, last-in last-out, or any other reasonable basis selected by the individual.

f. Exemptions to Exemptions. § 78B-5-508. A creditor may levy against exempt property to enforce a claim for:

(i) Alimony, support or maintenance.

(ii) Unpaid earnings of up to one month's compensation or the full-time equivalent of one month's compensation for personal services of an employee.

(iii) State or local taxes.

(iv) The purchase price of the property or a loan made for the purpose of enabling an individual to purchase the specific property used for that purpose.

(v) Labor or materials furnished to make, repair, improve, preserve, store, or transport the specific property.

(vi) A special assessment imposed to defray costs of a public improvement benefiting the property.

g. Waiver of Exemptions Unenforceable if in Favor of an Unsecured Creditor. § 78B-5-509.

h. Sanctions for Violations. § 78B-5-511. A violation of the exemption statutes can subject the violator to injunction relief, damages, costs and *reasonable attorney's fees*.