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.