SECTION 4. SEQUESTRATION

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

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

Derived from Rule 696 and CPRC 62.002.

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

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

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

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

Derived from Rule 696 and CPRC 62.022.

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

Derived from Rule 696.

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

Derived from CPRC 62.022.

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

Derived from Rule 696.

We added "if known." We did not, however, add that language to the order section. The order, in (d)(5) below, must state the value, without equivocation. Because a plaintiff in sequestration should have an idea of the property's value, and because the property value may impact the amount of the bond, I think we should delete the "if known" and make the two consistent.

(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 belief are specifically stated.

Derived from Rule 696, which refers only to an affidavit. CPRC 62.022 requires that an application be "under oath." Verified" was added to comport with common practice.

(d) *Order*.

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

Derived from Rule 696.

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

Derived from Rule 696.

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

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

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

Derived from Rule 696.

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

Derived from Rule 696.

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

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

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

Derived from Rule 698. The current rule uses "wrongfully suing out such writ of sequestration."

(8) *Respondent's Replevy Bond*.

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

(i) the value of the property; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New rule that clarifies the applicability of Rule 14c

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

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

Rule SEQ 3 (632). Contents of Writ

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

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

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

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

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

> CPRC 62.021 requires the writ to be returned to the court of issuance. The balance of this provision is new. Current rules do not provide a return date. The language has been changed to conform sequestration practice to that of other writs returnable in 30, 60 or 90 days as directed by the applicant.

(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 SEQUESTERED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

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

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

> Derived from Rules 699 and 700a. Type has been changed from 10-point to 12-point. The statute requires 10-point type. The first added statement was included to parallel the attachment rules. The second added statement has been added to provide express notice that federal and state exemptions may apply.

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

"The State of Texas.

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

"We command that you promptly take into your possession the following property of [Respondent], [here describe the property as it is described in the application or affidavits], if it is found in your county, and that you keep the sequestered property safe and preserved, unless replevied, that the same may be liable to further proceedings before

the court in _____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

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

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

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

(1) the sheriff or constable; or

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

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

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

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

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

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

(c) *Method of Levy*.

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

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

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

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

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

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

(d) *Return of Writ*.

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

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

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

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

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

Derived from Rule 700a.

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

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

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

(b) *Amount and Form of Respondent's Replevy Bond*. The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient

surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

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

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

(A) not remove the property from the county;

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

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

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

(E) to the extent that the:

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

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

Derived from Rule 702. The language "regardless of the cause of the difference in value" has been added to parallel current Rule 708.

Inclusion of the language "regardless of the cause of the difference in value" would appear to overrule the cases stating that normal depreciation should not be considered in determining difference in value. The theory is that normal depreciation would occur whether the property is in the possession of the sheriff or the respondent. Nonetheless, the language does appear in current Rule 708. I have found no case interpreting its effect. The language has been in Rule 708 since 1941.

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

Derived from Rule 703.

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

New rule incorporating CPRC 62.046.

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

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

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

New rule that clarifies the applicability of Rule 14c

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

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

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

New rule designed to clarify that possession of the property is to be released to the respondent within a reasonable time, if the bond has not been successfully challenged. In addition, the new rule imposes a burden of paying all expenses associated with storage of the property before it may be released.

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

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

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

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

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

(c) *Order*. The order must set the amount of the applicant's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The bond must be made payable to the respondent in the amount set by the court'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.

We changed the applicant's replevy bond in attachment to limit it to the property value. I think we need to make the same change here, as follows:

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.

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

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

(A) not remove the property from the county;

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

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

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

(E) to the extent that the:

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

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

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

Derived from Rule 708.

Rule 708 contains the language "regardless of the cause of such difference in value." It appears nowhere else in the rules. Rule 702, regarding a bond for personal property, uses the "difference in value" language without the "regardless of the cause of the difference in value." Cases interpreting the "difference in value" language (including the predecessor statute) state that normal depreciation cannot be considered because depreciation would have occurred whether or not the property was sequestered. I cannot recall if we reached consensus on the inclusion of the Rule 708 language. If so, please refresh my tired old memory. We will need to be prepared to address this issue. Seems to me that, if we keep the "regardless of the cause" language in Rule 708, it should also appear in Rule 702. Alternatively, it should be deleted from both, and the parties left to the case law on difference in value. One other point is that Rule 709, providing for forfeiture of an applicant's

replevy bond and for judgment against an applicant and sureties, and Rule 704, its counterpart for the defendant's replevy, both require the judgment to be for the value of the property "as of the date of the execution of the replevy bond." There would therefore be no depreciation to consider. Rule 709 continues by incorporating the rules governing discharge or enforcement of a defendant's replevy bond. Thus, the present rules seem to conflict. Adding the "regardless of the cause" language into Rule 702 would resolve that conflict, and implicitly overrule the case law on depreciation.

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

New rule that clarifies the applicability of Rule 14c.

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

New rule adapted from parallel attachment rules.

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

New rule adapted from parallel attachment rules.

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

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

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

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

Derived from Rule 712a and CPRC 62.042.

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

Derived from Rule 712a and CPRC 62.041 and 62.042.

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

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

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

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

Derived from Rule 712a.

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

Need to add "uncontroverted" before affidavits, as we did in attachment.

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

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

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

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

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

This is a new rule incorporating CPRC 62.044.

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

Rule SEQ 9 (638). Judgment

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

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

Derived from Rule 704 and CPRC 62.046.

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

replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

Derived from Rule 704 and CPRC 62.046.

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

Derived from Rule 709.

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

New rule to address the assessment of costs**.**

Rule SEQ 10 (639). Obligation to Return Replevied Personal Property After Judgment

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

We added "must" and deleted "may." I think we should go back to "may." Using "must" makes me wonder if the failure to return would be punishable by contempt. It should not be. If the respondent fails to return the property, the remedy is continue collection and sue on the bond.

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

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

Does anyone recall why we added "as otherwise ordered by the court?"

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

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

Derived from Rules 705 and 706.

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

New rule to provide for return of property by applicant.

We should change "must" to "may."

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

Derived from Rules 705 and 706.

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

Derived from Rule 707.

Rule SEQ 11 (640). Perishable Property

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

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until

the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property under levy of sequestration pursuant to court order.

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

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

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

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

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

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

(h) *Return of Order of Sale*. The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written

return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

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

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

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

Rule SEQ 13 (642). Amendment of Errors

Derived from Rule 700. Same language as attachment.

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

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

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

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