

Subcommittee Draft (December 7, 2011)

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

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

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5 (1) On motion a court must dismiss a claim that is not supported by existing law or by
6 a reasonable argument for extending, modifying, or reversing existing law.

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8 (2) In deciding the motion to dismiss the court must not hear evidence, except as to
9 attorneys' fees, and must accept all allegations as true unless a reasonable person could
10 not believe them.

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12 (3) The motion to dismiss must state that it is filed pursuant to this rule, identify
13 each claim subject to the motion, and state the specific reasons supporting the
14 motion.

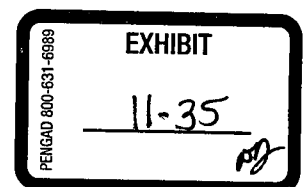
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16 **B. Time.** A motion to dismiss a claim must be filed within 60 days after the pleading, or
17 amended pleading, containing the claim was served and must be decided within 45 days
18 after the motion was filed.

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20 **C. Right to amend.** The court must allow the party asserting the claim and the party filing
21 the motion to amend before the date of hearing or submission.

22
23 **D. Hearing.** Upon request the court must hold an oral hearing. Each party must be given
24 at least seven days' notice of the date of hearing or submission.

25
26 **E. No waiver of venue motion or special appearance.** Notwithstanding the provisions
27 of rules 86 and 120a, neither the filing nor the determination of a motion to dismiss under
28 this rule waives the right to seek a transfer of venue or dismissal for lack of personal
29 jurisdiction.

30
31 **F. Dismissal procedure cumulative.** This rule is in addition to, and does not supersede
32 or affect, other procedures that authorize dismissal; but a motion filed under this rule must
33 seek dismissal pursuant to this rule only and not pursuant to special exceptions or any
34 other motion or pleading.

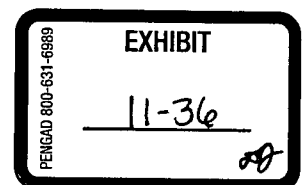


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**Additional language for proposed Rule 94a
from some members of subcommittee**

December 8, 2011

1 The hearing or submission of a motion under this rule must not occur until at least seven days
2 after the date the motion is filed. If at any time prior to the date of hearing or submission, the
3 movant withdraws the motion or the claimant nonsuits the challenged claim, the court may not
4 decide the motion or award attorneys' fees to either party under subsection G of this rule. At any
5 time prior to the date of hearing or submission, the claimant may amend the challenged claim
6 once and the court may not decide the motion or award attorneys' fees to either party under
7 subsection G of this rule. If the claimant amends the claim, the movant may file and serve a
8 notice of intent to proceed with the motion, or may file a new motion to dismiss the claim as
9 amended, in which case the court must proceed to determine whether the claim as amended
10 should be dismissed under this rule and must award costs and attorneys' fees, cumulative through
11 the prior amendment, to the prevailing party under subsection G of this rule.



Yellow Highlighting Denotes New Language from Task Force

Red Highlighting Denotes SCAC Modifications to Prior Rules

SECTION 5. DISTRESS WARRANT

Rule DW 1 (643). Application for Distress Warrant and Order¹

~~(a) Pending Suit Required for~~ *Issuance of Warrant.* An application for a distress warrant may be filed at the initiation of a suit² or at any time before final judgment³. ~~No distress warrant shall issue except on written order of the court after a hearing, which may be ex parte⁴.~~

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

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

- (1) state that the amount sued for is rent or advances described by Chapter 54 of the Texas Property Code, or attach⁵ a writing signed by the tenant to that effect;
- (2) state the amount in controversy of the underlying suit;
- (3) state the statutory grounds for issuance of the warrant as provided in Chapter 54 of the Texas Property Code and the specific facts justifying issuance of the warrant⁶; and
- (4) identify the underlying suit by court, cause number, and style.

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

(e) *Order.*

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

¹ Current TEX. R. CIV. P. 610.

² Note current TEX. R. CIV. P. 620 provides: "When the warrant is made returnable to the district or county court, the plaintiff shall file his petition within ten days from the date of the issuance of the writ."

³ Original language was "at any time during its [a suit's] progress."

⁴ Moved *verbatim* from DW1(e)(1).

⁵ Original language was "produce a writing signed by the tenant to that effect."

⁶ Original language was "specific facts relied upon by the Plaintiff to warrant the required findings by the justice of the peace."

⁷ Moved to DW1(a).



- (2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.
- (3) *Return.* The order must provide that the warrant is returnable to the court where the underlying suit is pending.
- (4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the warrant.
- (5) ~~Dollar Amount of Property to be Seized.~~ The order must state the maximum dollar amount⁸ of the property to be seized.
- (6) *Seizure and Safekeeping.* The order must command ~~the any~~ sheriff ~~and or~~ any constable of any county to seize the property found in the officer's county and keep the property safe and preserved subject to further order of the court having jurisdiction.
- (7) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the justice of the peace's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongfully suing out the warrant.
- (8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(f) *Multiple Warrants.* Multiple warrants may issue at the same time, or in succession, without requiring the return of the prior warrant or warrants. ~~In the event multiple warrants are issued, the applicant must inform the officers to whom the warrants are delivered that multiple warrants are outstanding. Warrants may be sent to different counties for service by the sheriffs or constables⁹.~~

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Rule DW 2 (644). Applicant's Bond or Other Security¹⁰

- (a) *Requirement of Bond.* A distress warrant may not be issued unless the applicant¹¹ has filed with the justice of the peace a bond:
 - (1) payable to the respondent in the amount set by the court's order¹²;
 - (2) with sufficient ~~surety or~~ sureties as approved by the justice of the peace¹³; and

⁸ Original language was "value of property."

⁹ The SCAC requested that sentences two and three be reversed; this version reflects the SCAC's request.

¹⁰ Current TEX. R. CIV. P. 611.

¹¹ Original language was "... party applying therefor ..."

¹² Original language was "... amount approved by the justice of the peace."

- (3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongfully suing out the warrant.
- (b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.
- (c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the ~~surety or~~ sureties. If the warrant has not issued, the motion must be filed with the justice of the peace; after the warrant has issued, the motion must be filed with the court where the underlying suit is pending. The court's determination may be made on the basis of ~~uncontroverted affidavits~~ setting forth facts as would be admissible in evidence; ~~otherwise, the parties must submit evidence~~. After hearing ~~on the motion~~, the court must issue a written order ~~on the motion~~.

Rule DW 3 (645). Contents of Distress Warrant¹⁴

- (a) *General Requirements.* A distress warrant must be dated and signed by the justice of the peace, bear the seal of the court, and be directed to the sheriff or any constable of any county within the State of Texas.
- (b) *Command of Warrant.* The warrant must command the sheriff or constable to seize¹⁵ so much of the respondent's property subject to the agricultural or building landlord's lien that approximates the amount set by the court order¹⁶, and to keep the property safe and preserved subject to further order of the court.
- (c) ~~*Return of Warrant Time for Return.*~~ The warrant must be made returnable to the court where the underlying suit is pending within five days from the date service of the warrant is completed.
- (d) *Notice to Respondent.* The face of the warrant must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

¹³ Original language was "... as provided by statute ..."

¹⁴ Current TEX. R. CIV. P. 612.

¹⁵ Original language was "attach and hold".

¹⁶ Original language was "of reasonable value in approximately the amount fixed by the justice of the peace".

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

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

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

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

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

- (a) *Delivery of Warrant.* The justice of the peace issuing a distress warrant must deliver the warrant to:
 - (1) the sheriff or constable; or
 - (2) the applicant, who must then deliver the warrant to the sheriff or constable.

- (b) *Timing and Extent of Seizure.* The sheriff or constable who receives the warrant must:
 - (1) endorse the warrant with the date of receipt;
 - (2) as soon as practicable proceed to seize the property subject to the warrant and found within the sheriff's or constable's county; and
 - (3) seize an amount of property that the sheriff or constable determines to be sufficient to satisfy the warrant.

- (c) *Method of Execution.* The sheriff or constable may execute the warrant by:
 - (1) seizing the property and holding it in a location under the control of the sheriff or constable;

- (2) seizing the property in place, in which case the sheriff or constable must affix a notice of the seizure to or near the property; or
 - (3) seizing the property and holding it in a bonded warehouse, or other secure location.
- (d) ~~Form of~~ Return of Warrant.
- (1) The ~~sheriff's or constable's~~ return must be in writing and ~~must be~~ signed by the sheriff or constable ~~executing the warrant~~. The ~~return warrant~~ must be ~~filed with~~ ~~returned to~~ the clerk or justice of the peace of the court where the underlying suit is pending within the time stated in the warrant.
 - (2) The sheriff's or constable's ~~action must be endorsed on or attached to the warrant.~~ ~~In the~~ return, ~~the sheriff or constable~~ must state what action the sheriff took in seizing, describe the property seized with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held. ~~When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace of the court where the underlying suit is pending to be filed with the papers of the suit.~~¹⁷

Rule DW 5 (647). Service of Distress Warrant on Respondent¹⁸

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

Rule DW 6 (648). Response to Distress Warrant

The respondent is not required to file an answer, response, or motion relating the distress warrant, but if one is filed, it must be filed with the court where the underlying suit is pending. Unless replevied or otherwise ordered by the court, the seized property will remain under the control of the court where the underlying suit is pending until final judgment.¹⁹

¹⁷ Moved to DW7(e)(2)

¹⁸ Current TEX. R. CIV. P. 613.

¹⁹ Current TEX. R. CIV. P. 619 provides: "The justice at the time he issues the warrant shall issue a citation to the defendant requiring him to answer before such justice at the first day of the next succeeding term of court, stating the time and place of holding the same, if he has jurisdiction to finally try the cause, and upon its being returned served, to proceed to judgment as in ordinary cases; and, if he has not such jurisdiction, the citation shall require the defendant to answer before the court to which the warrant was made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, stating the place of holding the court, and shall be returned with the other papers to such court. If the defendant has removed from the county

The following rules have new language that is the result of the harmonization process (no further yellow highlighting):

Rule DW 7 (649). Respondent's Replevy Rights²⁰

- (a) ~~*Where Filed General.*~~ At any time before judgment, if the seized property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court or the sheriff or constable ~~and serving the applicant with a copy of the bond. All motions regarding the seized property must be filed with the court where the underlying suit is pending.~~²¹
- (1) ~~A copy of the replevy bond must be served on the applicant.~~
- (2) ~~All motions regarding the seized property must be filed with the court where the underlying suit is pending.~~
- (b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the underlying²² suit.
- (c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.
- (d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of ~~uncontroverted~~ affidavits setting forth ~~uncontroverted~~ facts as would be admissible in evidence; ~~otherwise, the parties must submit evidence.~~ After a hearing ~~on the motion~~, the court must issue a written order ~~on the motion~~.
- (e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged ~~in the court~~ by the applicant, the sheriff or constable in possession of the seized property must release the property to the respondent

without service, the proper officer shall state this fact in his return on the citation; and the court shall proceed to try the case ex parte, and may enter judgment."

²⁰ Current TEX. R. CIV. P. 614, but now harmonized.

²¹ Moved below to subparagraph (2).

²² "Underlying" added to address the issue of bifurcated proceedings.

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.²³~~

- (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. ~~If 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 the justice of the peace to be filed with the papers of the underlying²⁴ suit.~~

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

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

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

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

Rule DW 8 (650). Applicant's Replevy Rights²⁵ [No Applicant Replevy Right in Current Rules]

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

²³ Moved below to subparagraph (1).

²⁴ "Underlying" added to address the issue of bifurcated proceedings.

²⁵ Harmonized.

- (b) *Notice and Hearing.* The court may, in its discretion, after notice and hearing, grant the applicant's motion to replevy and set the applicant's replevy bond.
- (c) *Order.* The order must set the amount of the applicant's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The bond must be made payable to the respondent in the amount set by the court where the underlying suit is pending, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.
- (d) *Conditions of Applicant's Replevy Bond.* The applicant's replevy bond must be conditioned on the applicant satisfying to the extent of the penal amount of the bond any judgment which may be rendered against the applicant in the underlying suit. The bond must also contain the conditions that the applicant will:
 - (1) not remove the personal property from the county;
 - (2) not waste, ill-treat, injure, destroy, or dispose of the property;
 - (3) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire, or revenue derived from the property;
 - (4) return the property, along with all fruits, hire, or revenue derived therefrom, to the respondent in the same condition if the underlying suit is decided against the applicant; and
 - (5) to the extent that the property is:
 - (A) not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and
 - (B) returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.
- (e) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.
- (f) *Service on Respondent.* The applicant must serve the respondent with a copy of the court's order and the applicant's replevy bond. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.
- (g) *Applicant's Right to Possession.* If the court grants the applicant's motion to replevy, a copy of the court's order and applicant's replevy bond must be delivered to the sheriff or

constable in possession of the seized personal property. The sheriff or constable must then release the property to the applicant within a reasonable time as soon as practicable. ~~Before the property is released to the applicant, the applicant must pay all expenses associated with storage of the property.²⁶~~

- (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 underlying²⁷ suit.~~

Rule DW 9 (651). Dissolution or Modification of Order or Distress Warrant²⁸

- (a) *Motion.* Any party, or any person who claims an interest in the seized property, may move the court to dissolve or modify the order or warrant, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the warrant. If the movant is unable to admit or deny a finding, the movant must set forth the reasons why the movant cannot do so.
- (b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.
- (c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the warrant, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.
- (d) *Conduct of Hearing; Burdens of Proof.*
 - (1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the warrant. If the applicant fails to carry its burden, the warrant must be dissolved and the underlying order set aside.
 - (2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or warrant. If the movant seeks to modify the order or warrant based upon the value of the property, the movant

²⁶ Moved to subparagraph (1) below.

²⁷ "Underlying" added to address the issue of bifurcated proceedings.

²⁸ Current TEX. R. CIV. P. 614a; harmonized.

has the burden to prove that the reasonable value of the property seized exceeds the amount necessary to secure the claim, interest for one year, and probable costs.²⁹

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

- (e) *Orders Permitted.* The court may order the dissolution or modification of the order or warrant, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the property has been sold), as justice may require. If the court modifies the order or the warrant, it must make further orders with respect to the bond that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the warrant must release the replevy bond and discharge the sureties thereon. If the warrant is dissolved, the order must be set aside, the property seized must be released, and ~~any~~ expenses ~~associated incurred~~ with ~~the transfer and~~ storage of the property may be taxed as costs to the applicant.
- (f) *Third-Party Claimant.* If any person other than the applicant or respondent in the underlying suit claims all or part of the seized property³⁰, the court, on motion and hearing, may order the release of the property to that third-party claimant, ~~pending subject to 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.

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Rule DW 10 (652). Perishable Property³²

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

²⁹ Reference to substitution of property was deleted as the property under lawful seizure is subject to a landlord's lien.

³⁰ Does not conform to harmonized version because of bifurcated proceedings.

³¹ The Task Force did not include here a rule titled *Wrongful Seizure; Attorney's Fees* or as appears in other harmonized rule sets; *Judgment* is in DW 12.

³² Current Tex. R. Civ. P. 615,616, 617; harmonized.

- (b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.
- (c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after it has been seized under a distress warrant, the applicant, or other party claiming an interest in the property, may file a motion in the underlying³³ suit, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.
- (d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable 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 was seized pursuant to the warrant, 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.
- (f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.
- (g) *Procedure for Sale of Perishable Personal Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.
- (h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace where the underlying suit is pending. The sheriff or constable must sign and file in the underlying³⁴ suit a written return of the order of sale, stating the time and place of the

³³ "Underlying" added to address the issue of bifurcated proceedings.

³⁴ "Underlying" added to address the issue of bifurcated proceedings.

sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale³⁵.

Rule DW 11 (653). Report of Disposition of Property³⁶

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

Rule DW 12 (654). Judgment³⁷

(a) *Judgments on Replevy Bond.*

- (1) *Judgment Against Respondent on Replevy Bond.* If the underlying³⁸ suit is decided against a respondent who replevied the property seized under a distress warrant, final judgment must be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, according to the terms of the replevy bond.
- (2) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the property seized under a distress warrant, final judgment must be rendered against all of the obligors on the applicant's replevy bond, jointly and severally, and for the value of the fruits, hire, revenue, or rent derived from the property.

(b) *All Judgments.*

- (1) *Expenses Associated with Storage.* In any judgment, expenses associated incurred in connection with the transfer and storage of the property may be taxed as costs against the non-prevailing party.
- (2) *Disposition of Property.* The final judgment must dispose of the property seized under a distress warrant.³⁹

Rule DW 13 (655). Amendment of Errors⁴⁰

³⁵ Current TEX. R. CIV. P. 618.

³⁶ Harmonized.

³⁷ Harmonized.

³⁸ "Underlying" added to address the issue of bifurcated proceedings.

³⁹ Added by the Task Force to subparagraph (b) to address the bifurcated proceedings.

⁴⁰ Harmonized.

- (a) *Before Order.* Before the court issues an order on an application for a distress warrant, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the justice of the peace at such time as not to operate as a surprise to the respondent.
- (b) *After Order, Before Execution of Warrant.* After the court issues an order for the issuance of a distress warrant but before the distress warrant is executed, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the justice of peace at such time as not to operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the distress warrant and the distress warrant may also be corrected by the court, without notice.
- (c) *After Order and Execution of Warrant.* After the distress warrant is executed, on motion, notice, and hearing, the court where the underlying suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the distress warrant, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds for issuance of a distress warrant as stated in the original application.

STATUTORY AUTHORITY FOR TRIAL OF RIGHT OF PROPERTY

TEX. PROP. CODE § 25.001. JURISDICTION. A trial of the right of property is an action that applies only to personal property. A trial of the right of property must be tried in a court with jurisdiction of the amount in controversy.

TEX. PROP. CODE § 25.002. DAMAGES. If a claimant in a trial of the right of property does not establish a right to the property, the court shall adjudge damages against the obligors in the claimant's bond equal to 10 percent of the letter of:

- (1) the property's value; or
- (2) the amount claimed under the writ levied against the property.

Yellow Highlighting Denotes New Language from Task Force

Teal Highlighting Denotes SCAC Modifications to Prior Rules

SECTION 8. TRIAL OF RIGHT OF PROPERTY

Rule TRP 1 (680). Verified Application to Obtain Possession of Personal Property

- (a) *Basis for Application.* Whenever a distress warrant or writ of execution, sequestration, attachment, garnishment or other like writ is levied upon personal property, and any portion of the property¹ is claimed by any claimant² who is not a party to the writ, the claimant may file in the court in which such suit is pending an application³ to obtain possession of the personal property.⁴
- (b) *Application.* An application to obtain possession of personal property must:
 - (1) state the legal and factual grounds on which the claimant asserts superior right to possession or title to the property as against the plaintiff in the writ or distress warrant⁵;
 - (2) state the value of all property subject to the levy or distress warrant against which the claim is asserted;
 - (3) state that the claim is made in good faith⁶; and

¹ Original language was "... and such property, or any part thereof, ..."

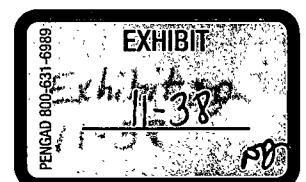
² Notwithstanding the convention adopted by the Task Force to refer to the proponent of an extraordinary remedy as the "Applicant," the Task Force elected to continue the use of "Claimant" here as it better describes the proponent.

³ Current TEX. R. CIV. P. 717.

⁴ Current TEX. R. CIV. P. 718.

⁵ Current TEX. R. CIV. P. 718.

⁶ Current TEX. R. CIV. P. 717.



- (4) admit or deny each finding of any order directing the issuance of the writ or distress warrant; however, if the claimant is unable to admit or deny any finding, the claimant must set forth the reasons why the claimant cannot admit or deny.⁷
- (c) *Verification.* The application must be ~~verified or~~ supported by affidavit⁸ 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.
- (d) *Effect of Filing Application.* The filing of the application stays any further proceedings under the writ or distress warrant, except for any orders concerning the care, preservation, or sale of any perishable property, until the claim is tried.⁹
- (e) *Docketing Cause.* The clerk or justice of the peace shall docket the cause in the name of the plaintiff in the writ or distress warrant as the plaintiff, and the claimant of the property as intervening claimant.¹⁰
- (f) *Notification of Officer.* The clerk or justice of the peace shall promptly notify the officer executing the original writ or distress warrant that an application to obtain possession of personal property has been filed.

Rule TRP 2 (681). Preliminary Hearing and Order on Application

- (a) *Preliminary Hearing.*
 - (1) Unless the parties agree to an extension of time, the application must be heard promptly, after reasonable notice to the parties (which may be less than three days), and be determined at a preliminary hearing not later than 10 days after it is filed.¹¹
 - (2) At the preliminary hearing, the court must determine the amount in controversy based upon the value of the property subject to the claim.
 - (3) The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.¹²
 - (4) At the preliminary hearing, the burden of proof is on the claimant to show superior right to possession or title to the property claimed as against the parties to the writ or distress warrant.¹³

⁷ Current TEX. R. CIV. P. 718.

⁸ Current TEX. R. CIV. P. 718 provides "by sworn written motion."

⁹ Current TEX. R. CIV. P. 718.

¹⁰ Current TEX. R. CIV. P. 723; however, in current rule, docketing does not occur until the bond for the trial of right of property is returned.

¹¹ Current TEX. R. CIV. P. 718.

¹² Current TEX. R. CIV. P. 717.

- (5) The court's determination on the application may be made upon the basis of uncontroverted affidavits setting forth such facts as would be admissible in evidence, but additional evidence, if tendered by either party, may be received and considered at the preliminary hearing.¹⁴
- (b) *Transfer.* If the court determines at the preliminary hearing that the value of the property subject to the claim exceeds the jurisdictional limit of the court, the court or justice of the peace shall immediately issue an order transferring the proceeding to a court of competent jurisdiction and delivering the transcript of all docket entries and original papers to the clerk of the court having jurisdiction. After the proceeding has been transferred, the clerk of the transferee court shall docket the cause in the name of the plaintiff in the writ or distress warrant as the plaintiff and the claimant of the property as intervening claimant, mail notification to the parties that transfer of the proceeding has been completed, that the filing fee in the transferee court is due and payable within five days from the mailing of the notification and that the proceeding may be dismissed if the filing fee is not timely paid. A preliminary hearing in the transferee court shall be conducted in accordance with 2(a).
- (c) *Temporary Order Following Preliminary Hearing.*
- (1) Following the preliminary hearing, the court must issue a written order¹⁵ that:
- (A) includes specific findings of fact in support of the legal grounds for the application¹⁶;
 - (B) sets the amount of bond required¹⁷ to release custody of the property to the claimant¹⁸ in an amount of at least the value of the property¹⁹;
 - (C) describes the property to be released to the claimant with such certainty that it may be identified and distinguished from property of like kind;
 - (D) sets a deadline by which each party must file a written signed statement of the party's right to title or possession of the property at issue; and
 - (E) sets a date for the expedited trial of the claim, not to exceed 21 days from the deadline by which the parties are to file their written statements. For good cause shown, or by agreement of the parties, the court may continue

¹³ Current TEX. R. CIV. P. 718.

¹⁴ Current TEX. R. CIV. P. 718.

¹⁵ Current TEX. R. CIV. P. 717.

¹⁶ Current TEX. R. CIV. P. 717.

¹⁷ Current TEX. R. CIV. P. 717.

¹⁸ Implied in current TEX. R. CIV. P. 719 wherein it states that “[n]o property shall be put in the custody of the claimant until the claimant has filed with the officer who made the levy, a bond . . .”

¹⁹ Current TEX. R. CIV. P. 719 provides that the bond be in “. . . an amount fixed by the court's order equal to double the value of the property so claimed . . .”

the trial of the claim by a period not to exceed 14 days. Thereafter, any further continuance must be by agreement of the parties.

- (2) The court may make additional orders, including orders concerning the possession, care, preservation, or disposition of the property, or the proceeds therefrom if the same has been sold, as justice may require²⁰.
 - (3) The court may order reasonable discovery. Discovery is limited to that considered appropriate and permitted by the court and must be expedited. In accordance with Rule 215, the court may impose any appropriate sanctions on any party who fails to respond to a court order for discovery.
 - (4) The temporary order will remain in effect until the court issues its judgment in the trial of right of property.
- (d) *Modification of Underlying Order.* If the court modifies its order or writ or distress warrant issued pursuant to the order, it shall make such further orders with respect to the bond as may be consistent with its modification²¹.

Rule TRP 3 (682). Bond

- (a) *Requirement of Bond.* Property may not be released to the claimant unless the claimant has filed²² with the clerk or the justice of the peace²³ a bond:
- (1) payable to the plaintiff on the writ or distress warrant in the amount set by the court²⁴;
 - (2) with sufficient surety or sureties as approved by the clerk or justice of the peace²⁵; and
 - (3) conditioned that, in the event the claimant fails to establish a right to the property:
 - (A) the claimant will return the property to the officer making the levy, or the officer's successor, in as good a condition as when the claimant received it, and pay the reasonable value of the use, hire, increase and fruits thereof from the date of the bond; or
 - (B) the claimant will pay the plaintiff the value of the property in the event the claimant fails to return the property, with legal interest thereon from the

²⁰ Current TEX. R. CIV. P. 718.

²¹ Current TEX. R. CIV. P. 718.

²² Current TEX. R. CIV. P. 719.

²³ Current TEX. R. CIV. P. 719 provides that the bond is "filed with the officer who made the levy."

²⁴ Current TEX. R. CIV. P. 719

²⁵ Current TEX. R. CIV. P. 717 and 719.

date of the bond, and will also pay all damages and costs that may be awarded against the claimant for wrongfully suing out the claim²⁶.

- (b) *Other Security.* In lieu of a bond, the claimant may deposit cash or other security in compliance with Rule 14c.
- (c) *Review of Claimant's Bond.* On reasonable notice, which may be less than three days, any party²⁷ shall have the right to prompt judicial review of the claimant's bond. Any party may move the court to increase or reduce the amount of the bond, or to question the sufficiency of the sureties in the court in which the trial of right of property is pending²⁸. 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 ~~on the motion,~~ the court must issue a written order²⁹. ~~on the motion.~~

Rule TRP 4 (683). Claimant's Right to Immediate Possession

If the claimant files a proper bond in the amount set by the court³⁰, the officer in possession of the personal property subject to the writ or distress warrant must release the property described in the court's temporary order to the claimant within a reasonable period of time after receipt of a certified copy of the temporary order and bond.

Rule TRP 5 (684). Return of Original Writ or Distress Warrant

Upon notification that an application has been filed, the officer executing the original writ or distress warrant, if it is in the officer's possession, shall endorse on the writ or distress warrant³¹:

- (a) the date and time of the notification;
- (b) the manner of the notification; and
- (c) if the notification was not by the clerk or justice of the peace, the date and time the officer confirmed with the clerk or justice of the peace that the application had been filed³².

²⁶ Current TEX. R. CIV. P. 719.

²⁷ Current TEX. R. CIV. P. 719 limits the authority to request review to the "[p]laintiff or claimant."

²⁸ Current TEX. R. CIV. P. 719.

²⁹ Current TEX. R. CIV. P. 719 provides that the court is to enter its order "with respect to such bond and sufficiency of the sureties.

³⁰ Implied by current TEX. R. CIV. P. 719 which provides: "No property shall be put in the custody of the claimant until . . .".

³¹ Current TEX. R. CIV. P. 720.

³² Current TEX. R. CIV. P. 720 provides the "officer receiving such application and bond shall endorse on the writ that such claim has been and application and bond given and by whom; and shall also endorse on such bond he value

The officer shall promptly return the original writ or distress warrant to the court from which it issued³³.

Rule TRP 6 (685). Trial

- (a) *Failure of Claimant to File a Written Statement or Appear.* If the claimant fails to file a written statement by the deadline set by the court, or if the claimant fails to appear for trial and the plaintiff in the original writ or distress warrant appears for trial, the plaintiff shall have judgment against the claimant by default as to the trial of right of property³⁴.
- (b) *Failure of Plaintiff to File a Written Statement or Appear.* If the plaintiff in the writ or distress warrant fails to file a written statement by the deadline set by the court, or if the plaintiff fails to appear for trial and the claimant appears for trial, then the plaintiff shall be non-suited as to the trial of right of property³⁵.
- (c) *Trial Proceedings.* The proceedings and practice on the trial shall be governed by the Texas Rules of Civil Procedure and the Texas Rules of Evidence³⁶.
- (d) *Burden of Proof.*
 - (1) *Property Originally in Possession of Claimant.* If the property was taken from the possession of the claimant pursuant to the original writ or distress warrant, the burden of proof shall be on the plaintiff in the writ or distress warrant.
 - (2) *Property Originally in Possession of Others.* If the property was taken from the possession of any person other than the claimant, the burden of proof shall be on the claimant³⁷.

Rule TRP 7 (686). Judgment Following Trial

- (a) *If Claimant Prevails.* If the claimant prevails at the trial of right of property, the judgment shall:

of the property as assessed by himself, and shall forthwith return such bond with a copy of the writ to the proper court having jurisdiction to try such claim.

³³ Current TEX. R. CIV. P. 722.

³⁴ Current TEX. R. CIV. P. 725 provides: "If the plaintiff appears and the claimant fails to appear or neglects or refuses to join issue under the direction of the court or justice within the time prescribed for pleading, the plaintiff shall have judgment by default.

³⁵ Current TEX. R. CIV. P. 726.

³⁶ Current TEX. R. CIV. P. 727 provides: "The proceedings and practice on the trial shall be as nearly as may be the same as in other cases before such court or justice."

³⁷ Current TEX. R. CIV. P. 728.

- (1) order the property released to the claimant, or that the property remain in possession of the claimant if the claimant obtained possession pursuant to the temporary order; and
 - (2) discharge the principal and sureties on the claimant's surety bond, or, if other security was posted, direct that the other security be released or returned to the claimant.
- (b) *If Claimant Does Not Prevail.*
- (1) *Claimant Not in Possession of Property.* If the claimant is not in possession of the property at the time of the trial of right of property, and the claimant fails to establish a superior right to possession or title the property, judgment shall be entered against the claimant.
 - (2) *Claimant in Possession of Property.* If the claimant is in possession of the property at the time of the trial of right of property, and the claimant fails to establish a superior right to possession or title to the property, judgment shall be entered against the claimant and the sureties on claimant's bond, or for recovery from other security posted, for:
 - (A) the value of the property, with legal interest from the date of posting of the bond³⁸ or other security;
 - (B) loss of the use, hire, increase, and fruits thereof from the date of the posting of the bond or other security; and
 - (C) additional statutory damages under section 25.002 of the Texas Property Code.
- (c) *Satisfaction of the Judgment.*
- (1) *Property Returned.* If, within ten days of the date the judgment determining the trial of right of property is signed, the claimant returns the property in as good a condition as when the claimant received it, and pays the reasonable value of the use, hire, increase, and fruits thereof from the date of posting of the bond or other security, and costs, then the delivery and payment shall operate as a satisfaction of the judgment³⁹.
 - (2) *Execution Shall Issue if Property Not Returned.*⁴⁰ If the judgment is not satisfied by the delivery or return of the property, then after ten days from the date of the judgment, execution shall issue thereon in the name of the plaintiff or defendant

³⁸ Current TEX. R. CIV. P. 730.

³⁹ Current TEX. R. CIV. P. 732.

⁴⁰ This rule remains in substantially in the form in existing Rule 733. Please advise your recommendations, if any, concerning any modification to this subparagraph.

for the amount of the claim, or all of the plaintiffs or defendants for their several claims, provided the amount of such judgment shall inure to the benefit of any person who shall show superior right or title to the property claimed as against the claimant; but if such judgment be for a less amount than the sum of the several plaintiffs' or defendants' claims, then the respective rights and priorities of the several plaintiffs or defendants shall be fixed and adjusted in the judgment.

Rule TRP 8 (687). Claim is a Release of Damages

A claim made to the property, under the provisions of this section, shall operate as a release of all damages by the claimant against the officer who levied upon the property⁴¹ or seized the property pursuant to a distress warrant.

Rule TRP 9 (688). Levy on Other Property

Proceedings for the trial of right of property under these rules shall in no case prevent the plaintiff in the original writ or distress warrant from having a levy made upon any other property of the defendant⁴².

⁴¹ Current TEX. R. CIV. P. 733.

⁴² Current TEX. R. CIV. P. 734.