Alabama Rules of Civil Procedure

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64.

Seizure of person or property.

(a) *Seizure of person or property.* At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law except that there can be no seizure of property through judicial process prior to the entry of judgment other than by a judicial officer acting pursuant to the procedure set forth in paragraph (b) of this rule.

(b) *Procedure for seizure of property.* Whenever any provision of law is invoked through which there is an attempt to seize property through judicial process prior to the entry of judgment, the procedure on application for such a pre-judgment seizure shall be as follows:

(1) *AFFIDAVIT*. The plaintiff shall file with the court an affidavit on personal knowledge, except where specifically provided otherwise, containing the following information:

(A) Description of Property. A description of the claimed property that is sufficient to identify the property and its location.

(B) Statement of Title or Right. A statement that the plaintiff is the owner of the claimed property or is entitled to possession of it, describing the source of such title or right and, if the plaintiff's interest in such property is based on a written instrument, a copy of said instrument must be attached to the affidavit.

(C) Statement of Wrongful Detention. A statement of specific facts which show that the property is wrongfully detained by the defendant and a statement of the cause of such detention according to the best knowledge, information and belief of the plaintiff.

(D) Statement of Risk of Injury. A statement of specific facts in support of the contention, if any, that there is risk of concealment, transfer or other disposition of or damage to the property to the injury of the plaintiff.

(2) PROCEEDINGS.

(A) Preliminary Examination by the Court. The court, without delay, shall examine the complaint, the application and supporting affidavit and its attachments and any further showing offered by the plaintiff in support of the plaintiff's right to the immediate possession of the property.

(B) Preliminary Finding for the Plaintiff; Writ of Seizure Without Hearing; Hearing on Dissolution. If the court upon preliminary examination finds that the risk of concealment, transfer or other disposition of or damage to the property by permitting it to remain in the possession of the defendant between the filing of the action and the time of a hearing is real, then the court shall forthwith enter an order authorizing the issuance of a writ of seizure but the court shall provide in said order that the defendant is entitled, as a matter of right, to a pre-judgment hearing on the issue of dissolution of the writ if a written request for hearing is served on counsel for the plaintiff within five (5) days from the date of seizure of the property by the sheriff or other duly constituted officer. If such a request is made, the writ shall expire upon the fifteenth day from said date of seizure unless the court, after hearing, continues the order in effect. The expiration of the writ shall not prejudice the right of the plaintiff to a reinstatement thereof but any such reinstatement shall not be made without notice and hearing. If no request for a hearing is made within the five- (5-) day period, the writ shall remain in effect pending further order of the court but, the court, in its discretion, may hear a request for dissolution of the writ although said request is served more than five (5) days from the date of seizure.

(C) Failure to Make Preliminary Finding for the Plaintiff; Order for Hearing; Hearing on Writ of Seizure or Attachment. If the court fails to make a preliminary finding for the plaintiff under subdivision (b)(2)(B) of this rule, the court shall order and direct that the plaintiff's application to the court for a writ of seizure or attachment or such other writ be set down for a hearing before the court at the earliest practical time and notice of the time, date and place of said hearing shall be forthwith served on the defendant. Said notice to the defendant shall provide that the defendant shall not dispose of or alter in any form the personalty therein described pending the hearing of the application and shall state that if the defendant does dispose of or alter the personalty sought to be recovered, the defendant shall be subject to punishment for contempt of court. At such hearing the plaintiff shall have the burden of showing good cause for the pre-judgment seizure or attachment, but the failure of the defendant to appear shall be deemed a waiver of any objections to the pre-judgment seizure or attachment.

(dc) *District court rule*. Rule 64 applies in the district courts.

[Amended eff. 10-28-75; Amended 2-28-89, eff. 3-8-89; Amended eff. 10-1-95.]

Committee Comments on 1973 Adoption

This revision of ARCP 64 responds to the need to strike a reasonable balance between the creditor's right to enforce his remedy and the debtor's right to procedural due process. The original rule was drawn at a time when *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) was the authoritative precedent. Since *Fuentes*, the law in this area has been supplemented by *Mitchell v. W.T. Grant Co*., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) and *North Georgia Finishing Co. v. Di-Chem, Inc*., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). In *Fuentes*, the Court recognized that there could be instances where a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. See *Fuentes*, supra at 93. This reference to such a possibility was made in a context which gave rise to the implication that a narrowly drawn procedural guideline could constitutionally permit summary seizure without a hearing. The Committee Comments to original ARCP 64 referred to this construction of *Fuentes* as the authority for the last sentence of former ARCP 64 which authorized pre-judgment seizure without notice in cases where the defendant was about to remove or conceal the property. However, former ARCP 64 did not give any outline of the procedure to be followed in such instances. The Alabama statute (Tit. 7, Sec. 918 Code of Ala.) had been declared constitutionally defective in light of *Fuentes* at the instance of a plaintiff who had received no notice or hearing prior to seizure of personalty in *Yates v. Sears, Roebuck, and Company*, 362 F.Supp. 520 (M.D.Ala.1973) but the District Court expressly reserved the question of the unconstitutionality of the detinue statute when applied subject to original ARCP 64.

Fuentes became the object of a rather narrow construction as many courts interpreted it to require notice and hearing. *Mitchell* has been said to have " … repudiate(d) aspects of the *Fuentes* decision which established 'a Procrustean rule of a prior adversary hearing' while clearly not rejecting the decision itself in *Fuentes*". *Hutchinson v. Bank of North Carolina*, 392 F.Supp. 888 (M.D.N.C.1975). Now that *Mitchell* and *Di-Chem* have clarified the procedures to be followed in an application for pre-judgment seizure without a hearing and have eliminated the doubt that once existed as to whether such seizure was appropriate under any circumstances, revised ARCP 64 has been promulgated so as to keep this aspect of Alabama law current with the latest pronouncements of the United States Supreme Court.

ARCP 64(a) makes available all statutory procedures for seizure of person or property except to the extent that these laws are invoked for the purpose of recovery of a security interest in personal property prior to judgment. An effort to use these laws in the excepted area calls into play the additional requirements of ARCP 64(b).

When the action is for recovery or possession of specific personal property under the detinue statute (Code of Ala., § 6-6-250 et seq.) or any other provision of law whereby the owner of a security interest in personal property seeks to recover specific personal property prior to judgment, the requirements of ARCP 64(b) are superimposed over the statutory procedure that otherwise exists in such cases. Thus, the provisions for pre-judgment seizure that have long been found in the Code still apply but with and subject to the additional requirements of ARCP 64(b). By way of example, the requirement of posting a bond as a necessary step in obtaining pre-judgment seizure as set forth at Code of Ala., § 6-6-250, remains in effect but subject to the further requirements of ARCP 64(b) in the area of affidavit and proceedings thereon.

The affidavit called for at ARCP 64(b)(1) must be on personal knowledge except where allegation on information and belief is permitted by ARCP 64(b)(1)(C) dealing with the cause of wrongful detention, a circumstance which, by its nature, would not ordinarily be within actual knowledge.

While ARCP 64(b)(2)(B) does authorize a pre-judgment seizure without notice when the risk of concealment, transfer or other disposition of or damage to the property is real, ARCP 64(b)(1)(D), the subsection providing for a statement in the affidavit of risk of injury, was drawn in contemplation of the eventuality that a risk of injury which would justify pre-judgment seizure without notice will not be present in many cases where an affidavit is filed. In cases where no allegation or risk of injury is appropriate under the facts, the further proceedings on the affidavit and application for pre-judgment seizure will be governed by ARCP 64(b)(2)(C), the subsection providing for notice and hearing in advance of pre-judgment seizure.

The events as to which there must be a real risk of occurrence before pre-judgment seizure without notice or hearing include “concealment, transfer or other disposition of or damage to the property”. See ARCP 64(b)(1)(D). These categories should be broad enough to protect the plaintiff from abuse of the property by a debtor through such practices as “stripping” of automobiles or hiding out consumer goods with relatives. At the same time, the requirement that the Court, not a clerk, find that such risk be “real” before pre-judgment seizure without notice can be ordered (ARCP 64(b)(2)(B)) should safeguard against abuse of the procedure by a creditor who makes a “boiler-plate” allegation of risk

of injury. While use of the official forms is encouraged, the promulgation of a form for the necessary affidavit should not be construed as an invitation to prepare such boiler-plate allegations of critical aspects of the affidavit, particularly in the area of the statement of risk of injury under ARCP 64(b)(1)(D). Use of such a technique might justify judicial discounting of the creditor's assertion of "real" risk when the Court is asked to issue the writ without notice under ARCP 64(b)(2)(B).

Unlike the predecessor rule, this revision sets out clearly the procedure to be followed when the judge is called upon to enter an order for pre-judgment seizure without notice. The official forms that have been promulgated with this rule are drawn so as to simplify implementation of the time limits. Note that, under ARCP 64(b)(2)(B), when a defendant requests a hearing, the writ expires unless a hearing is held within fifteen days from the seizure and, after such hearing, the Court orders the seizure to remain in effect. This procedure puts the burden of getting the matter set down for a hearing on the party who seeks the fruits of the court-ordered seizure. Of course, once a hearing date has been set, notice must issue to the defendant of the time and place of the hearing. A failure to appear at the hearing after proper notice, regardless of whether the hearing is on the issue of dissolution under ARCP 64(b)(2)(B) or on the issue of allowance of the writ of seizure under ARCP 64(b)(2)(C) shall be deemed a waiver of any objections to pre-judgment seizure. Further, since the initial findings under ARCP 64(b)(2)(B) and ARCP 64(b)(2)(C) are both preliminary, the burden of proof on a hearing under either subdivision remains on the plaintiff since he is the party who has made the affidavit for pre-judgment seizure and who has sought the benefit of judicial intervention in the creditor-debtor relationship. ARCP 64(b)(2)(C), last sentence, speaks expressly to this point in connection with a hearing on initial issuance of the pre-judgment seizure but the standard should also be applied when a hearing is held under ARCP 64(b)(2)(B) when the issue is dissolution of a writ issued without notice.

Committee Comments to Amendment
Effective March 8, 1989

The revision to Rule 64 that became effective on October 28, 1975, sought to eliminate constitutional objections to Alabama statutory law dealing with process calculated to disrupt possession of property rights without a hearing. The revision superimposed provision for notice and opportunity to be heard over the statutory procedure for recovery of possession of specific personal property under the detinue statute or any other provision of law whereby the owner of a security interest in personal property seeks to recover specific personal property prior to judgment. Consequently, the revision, by its terms, did not deal with attempts to interfere with possession of property through a writ of attachment. In *Jones v. Preuit & Mauldin*, 822 F.2d 998 (11th Cir.1987) (on rehearing, modifying 808 F.2d 1435 (11th Cir.1987)), the question of the constitutionality of Alabama's

attachment procedure was directly addressed. The court found that Alabama's attachment procedure was not constitutionally defective in that § 6-6-148, providing a remedy to the defendant in an attachment case, constituted adequate safeguard. In a dissenting opinion, Judge Johnson, the author of the initial panel decision, which had proceeded on an assumption of unconstitutionality, questioned the majority's conclusion that the statutory procedure of § 6-6-148 was an adequate substitute for the procedure set forth at Rule 64(b). In any event, both the majority and the minority were in accord with the unconstitutionality of attachment procedure in Alabama if the writ was issued by the clerk as opposed to a judicial officer.

Rather than have separate processes govern essentially the same activity, it is logical and constitutionally appropriate to amend Rule 64 so as to bring the attachment procedure within the sweep of the constitutional protection as available under former Rule 64(b) which, as earlier noted, was limited to seizure involving protection of a security interest in personal property.

Committee Comments to October 1, 1995,
Amendment to Rule 64

The amendment is technical. No substantive change is intended.