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Utah Court of Appeals

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Jamis M. Gardner; Robinson Seiler & Anderson.
Brian W. Steffensen; Steffensen Law Office.

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UTAH APPELLATE COURTS

DEC 17 2010

IN THE UTAH COURT OF APPEALS

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v.
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Appellant's Brief

Appellate Case No. 20100418-CA

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Appeal from Order of Dismissal entered in the Fourth Judicial District Court, Utah County, State of Utah, Honorable Claudia Laycock

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STATEMENT SHOWING JURISDICTION

Pursuant to Utah Code 78-2-2(3)(a) this civil appeal is within the jurisdiction of the Utah Supreme Court and was transferred to the Utah Court of Appeals pursuant to Utah Code 78-2-2(4).

STATEMENT OF ISSUES ON APPEAL

1. Was it error for the Court to allow the defendants to raise numerous issues for the first time in their Reply memorandum in support of their Motion to Dismiss – thereby depriving Appellants of an opportunity to adequate brief those issues?

Standard of Review: This is an issue of law, and is reviewed for correctness. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, trial record p 294, at pp. 19, 20 and 40.

2. Is the Utah Consumer Sales Practices Act "preempted" by the Rules of Small Claims Procedures?

Standard of Review: This is an issue of law, and is reviewed for correctness. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, Record 294 – pp. 17-34.

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3. Is the Utah Consumer Sales Practices Act "preempted" by Rule 64d of the Utah Rules of Civil Procedure?

Standard of Review: This is an issue of law, and is reviewed for correctness. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, Record 294 - pp. 17-34.

4. Was it error for the Court to rule that Appellants' complaint failed to plead civil conspiracy properly, and then to deny Appellants the opportunity to amend?

Standard of Review: This is an issue of law, and is reviewed for correctness. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, Record 294 - pp. 17-34.

5. Was it error for the Court to rule that defendants' conduct of deliberately and intentionally inflating the amounts they were garnishing from the Appellants was not deceptive and a violation of the Utah Consumer Sales Practices Act?

Standard of Review: This is an issue of law, and is reviewed for correctness. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

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Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, Record 294 - pp. 17-34.

6. Was it error for the Court to rule that the defendants' conduct of deliberately and intentionally inflating the amounts they were garnishing from the Appellants was not unconscionable and a violation of the Utah Consumer Sales Practices Act?

Standard of Review: This is an issue of law, and is reviewed for correctness. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, Record 294 - pp. 17-34.

7. Was it error for the Court to rule that Appellants' Complaint failed to state a claim under the Utah Consumer Sales Practices Act?

Standard of Review: This is an issue of law, and is reviewed for correctness. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, Record 294 - pp. 17-34.

8. Was it error for the Court to dismiss Appellants' complaint with prejudice and refuse to allow the Appellants the opportunity to amend their pleadings to cure any alleged defects therein?

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Standard of Review: This is an issue of law, and is reviewed for correctness.

McKay v. Hardy, 973 P.2d 941 (Utah 1998)

Preserved for Appeal in Plaintiff's oral argument at the hearing on February 16, 2010, Record 294 - pp. 17-34.

DETERMINATIVE STATUTES AND RULES

Determinative Statutes. The following Statute is determinative, a copy of which is attached in the Addendum.

Utah Consumer Sales Practices Act – UCA 13-11-1 et seq.

Determinative Rules. Appellants do not believe that there are any rules which are determinative.

Determinative Cases. The seminal case on the Civil Conspiracy claim for relief is *Jedrziewski v. Smith*, 2005 UT 85, 128 P.3d 1146 (2005 Utah).

STATEMENT OF CASE

The Appellants each borrowed money from defendant Feria Access at a business establishment in Salt Lake County, Utah.

Feria Access did not have a business license for that location at the time that the loans were made.

Each of the Appellants were sued in Small Claims court in Provo, Utah on their loans. They did not appear and default judgments were entered against them.

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During the course of collecting the default judgments, Feria Access presented Applications for Garnishment to the court in order to get Writs of Garnishment issued which knowingly and falsely stated that more was due and owing on the judgment than was really due and owing. Feria Access also included in those Applications and Writs "fees" which exceeded the amount allowed by law. Feria Access obtained multiple Writs of Garnishment against the Appellants and via those Writs, garnished more money from each of the Appellants than the Appellants owed. One of the Appellants – after her judgment was paid in full – was garnished again. When she complained, she was told that her brother owed Feria Access money and that Feria Access was garnishing her for that debt too.

The Appellants did not appeal the small claims judgments.

The Appellants did not object to the writs of garnishment.

The Appellants are all low income, Hispanic persons who could not afford to travel to Provo from Salt Lake County to defend themselves, did not understand how to defend themselves, and were intimidated by the process and just did nothing – which the Defendants knew and took advantage of.

Appellants counsel became aware of the situation and was retained to seek redress for the intentional and wrongful over-garnishing and theft from the Appellants.

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Appellants originally filed separate complaints in Salt Lake County. These complaints were transferred to Utah County and then consolidated into this single case.

The defendants filed a Motion to Dismiss – alleging that since the Appellants had not appeared at the small claims hearings and had not availed themselves of their right to appeal a small claims judgment, they were barred from pursuing their (1) Utah Consumer Sales Practices Act ("UCSPA") claims and (2) their Civil Conspiracy claims.

Appellants opposed the motion stating that they had valid statutory and common law claims which they had the right to pursue.

Defendants – for the first time in their Reply memorandum – asserted that (a) the failure to challenge the writs of garnishment timely barred any UCSPA or Civil Conspiracy claims, and (b) Appellants had not properly pled all of the elements of civil conspiracy (among other new assertions).

Appellants did not have the opportunity to oppose these assertions via a memorandum.

At oral argument, the Appellants objected to these new issues being raised and was forced to argue them without having been given a fair opportunity to analyze and address them. The Court proceeded to essentially elicit and hear

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argument not just on the narrow issue of the original motion, but the new issues raised in the Reply and all of the new issues raised by defendants during the oral argument.

Appellants' counsel moved the Court for leave to amend the civil conspiracy claim and other matters if the Court felt like there was any defect therein. The court insisted that the same be made in writing.

The Court took the matter under advisement and issued an oral ruling a few weeks later. The Court ruled essentially that the Utah Small Claims Court Rules and Procedures and URCP Rule 64D trumped or "preempted" the UCSPA and any common law Civil Conspiracy claims - - i.e, failure to follow the appeal rules and/or the Rule 64D procedures for requesting a hearing on a writ of garnishment, resulted in a waiver of any UCSPA claims of deception and unconscionability.

The Court also ruled that even if the Defendants had intentionally and deliberately submitted false Applications for Writs of Garnishment, and used those Writs of Garnishment to take more money from each of the Appellants than those Appellants owed – those were not "deceptive acts," "deceptive practices," "unconscionable acts" or "unconscionable practices" under the UCSPA.

The Court also ruled that Appellants had not properly pled Civil Conspiracy.

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The Court signed Findings and Conclusions prepared by defendants' counsel, and entered an order dismissing Appellants' Complaint with prejudice and without any opportunity to amend.

Appellants have appealed these findings, conclusions and dismissal of their complaint.

STATEMENT OF FACTS

1. The Plaintiff(s) is/are individual(s) who reside in Salt Lake County, Utah. Judge Layton's Finding No. 1. R 272 - 277

2. Defendant, Feria Access LLC., is a business engaged in the practice of payday loans and has an office in Salt Lake County, Utah ("Feria Access"). Judge Layton's Finding No. 2. R 272 - 277

3. The Defendant, Robin Mendoza, is an individual who owns or owned a majority interest in Feria Access, and who masterminded the civil conspiracy and wrongful practices complained of herein. As a result of his direct personal involvement in the torts and other wrongdoing alleged herein, he is personally liable to the plaintiff(s) for the damages which they have suffered at his hands. Judge Layton's Finding No. 3. R 262 -277

4. Southern Management Professional Limited Liability Company is a Utah limited liability company formed by Almanza and Mendoza in an attempt to

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hide and/or protect assets from creditors such as Appellants and through which Almanza and Mendoza decided to utilize to perpetrate fraud and wrongdoing upon the Appellants as alleged herein ("Southern Management"). Judge Layton's Finding No. 4. R 272-277

5. Defendant Fred W. Almanza, is an individual who at all relevant times purported to be the principal owner of Southern Management, and who masterminded the civil conspiracy and wrongful practices complained of herein. As a result of his direct personal involvement in the torts and other wrongdoing alleged herein, he is personally liable to the plaintiff(s) for the damages which they have suffered at his hands. Judge Layton's Finding No. 5.R 272-277

6. The Defendants opened a business in South Salt Lake, Utah to make payday loans without first having obtained a license. Consequently, the Defendants are barred from making payday loans. Any payday loans which they made from the South Salt Lake office were and are illegal and unenforceable. Judge Layton's Finding No. 10. R 272-277

7. Appellants went to Defendants' South Salt Lake office not knowing the Defendants' were engaged in an unauthorized and illegal business, and were given a payday advance loan by Feria Access. Judge Layton's Finding No.

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11. R 272-277

8. The lending business is illegal, and the loan obtained is knowingly void and unenforceable, yet the Defendants defamed the Appellants by making false and inaccurate credit reports. Judge Layton's Finding No. 12. R 272-277

9. Feria Access did not have a proper license in South Salt Lake, Utah, to make payday loans, when it made the loan to Appellants. The loan is therefore, void and unenforceable. Judge Layton's Finding No. 13. R 272-277

10. Despite the fact that the loan was illegal and void, the defendants filed a lawsuit against the plaintiff(s) in small claims court in the Fourth District Court, in and for the County of Utah, even though the Appellants reside outside of Utah County. This was done with the express intent and hope that the Plaintiff(s) and others similarly situated might be unable to appear in Utah County and thus be defaulted. Judge Layton's Finding No. 14. R 272-277

11. Despite the fact the loan is void and unenforceable, and specifically and intentionally as a result of selecting a deliberately inconvenient forum, Defendant obtained a Default Judgment against the Plaintiff(s) for amounts which the Plaintiff(s) do not legally owe. Judge Layton's Finding No. 15. R

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272-277

12. Thereafter the defendants have requested and obtained through fraud upon the Court writs of execution and/or writs of garnishment against the Plaintiff(s) which included unjustified and deliberately inflated "costs" or "judgement" amounts, and the like. These writs were also issued improperly because the judgment is illegal, and seeks recovery of more than would be due if the debt were not void and invalid. Judge Layton's Finding No. 16. R 272-277

13. The defendants and each of them joined together for the common purpose and with the common intent to force the plaintiff(s) and others similarly situated into paying more money to the defendants than the plaintiff(s) rightfully owe. The defendants committed one or illegal or unlawful acts in furtherance of this civil conspiracy, including but not limited to (a) committed fraud upon the court in connection with the issuance of the writs of execution and/or garnishment, (b) defrauding the plaintiff(s) out of the unjustified and inflated amounts of the writs of execution and/or garnishment, (c) violating the FDCPA, (d) violating the UCSPA, (e) violating the Fair Credit Reporting Act ("FCRA") and (f) defaming the plaintiff(s) via the publication through various Credit Reporting Agencies of

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false information about what the plaintiff(s) owe to the defendants. Judge Layton's Finding No. 18. R 272-277

14. The plaintiff(s) and each of them [were] damaged as a result of this civil conspiracy in an amount ... not less than $4500.00 per defendant. Judge Layton's Finding No. 19. R 272-277

15. The defendants are each a supplier with in the meaning of Section §13-11-3(6), Utah Code. Judge Laycock's Finding No. 22, R 272 -277

16. The payday loan to Appellants was a consumer transaction within the meaning of Section §13-11-4(2)(a), Utah Code. Judge Laycock's Finding No. 16 [the second "16"], R 272 -277

17. The making of consumer loans without a proper license was illegal, deceptive and unconscionable. The filing of a consumer lawsuit in Provo on a void and unenforceable debt was unconscionable. The obtaining of a default judgment on a void and unenforceable debt was unconscionable. The issuance of a Writ of Garnishment or Execution which seeks recovery of more than is owed, is deceptive and unconscionable. Judge Laycock's Finding No. 18 [the second "18"], R 272 -277

Procedural History of the Case

18. The Appellants' various complaints were transferred to Fourth District

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Court, and then consolidated into this single case. (Court Docket)

19. The Defendants filed a Motion for Judgment on the Pleadings – which had essentially one argument: the UCSPA and Civil Conspiracy claims were barred by the Appellants' failure to timely file a proper appeal of the small claims judgments against each of them. (See Motion and Memorandum, R. 210, 230)

20. Appellants opposed the motion, asserting that (a) the UCSPA provides important and independent statutory claims for relief , and (b) the common law Civil Conspiracy claim is well recognized – and neither of these claims are barred by any failure to appeal the small claims court judgments. (See Opposition, R. 240)

21. The Defendants filed a Reply memorandum which argued for the first time that (a) the UCSPA does not apply to lawsuits to collect consumer debts, and (b) the Civil Conspiracy claim was not properly pled. (See Reply, R 247)

22. At oral argument on February 16, 2010, Appellants counsel objected to these new issues being raised in a Reply memorandum. (R. 294)

23. At oral argument, Defendants raised for the first time (a) the argument that Rule 64D trumped or preempted the UCSPA and civil conspiracy claims,

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and (b) that Defendants' alleged conduct vis a vis the inflated and wrongful garnishments was not "deceptive" or "unconscionable." (R. 294)

24. At oral argument, Appellants objected to Defendants making the argument that Rule 64D trumped or preempted the UCSPA and civil conspiracy claims. (R. 294)

25. There was no notice to Appellants or opportunity to brief the issues raised in the Reply and at oral argument. (Docket, R. 247 and 294)

26. The Court issued its Findings and Conclusions which adopted all of the Defendants' belated assertions, over Appellants' objections and in violation of Appellants' due process rights. (R. 278)

SUMMARY OF ARGUMENTS

Plaintiffs/ Appellants Were Denied Their Due Process Rights of Notice and the Opportunity to Brief the Issues. The only issue raised in the original Motion to Dismiss was whether failure to (a) appear at the small claims court hearings, and then (b) to timely and properly appeal the small claims court judgments barred Appellants' claims under the UCSPA and the common law of Civil Conspiracy.

All other issues were raised either in the Reply memorandum or during oral argument itself. Appellants were not given proper and timely notice of these

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issues and where therefore deprive of a full and fair opportunity to brief them. This deprived Appellants of their due process rights.

The Courts conclusions numbers 20-27 (R. 267-268) are all based upon issues not timely and properly raised and briefed and should be reversed.

The Utah Consumer Sales Practices Act is Not Trumped or Preempted by the Small Claims Court Rules and Procedures or URCPA 64D . It is true that there are rules regarding appeals of small claims judgments and for objecting to a writ of garnishment. However, it is also true that the Utah legislature enacted the UCSPA in order to protect consumers from deceptive and unconscionable acts or practices. The analysis that should be followed in determining this issue is that related to "preemption." When does one statutory scheme "preempt" another? In this case, the legislature clearly established statutory rights and private causes of action. This broad statutory scheme and expression of legislative intent is not and should not be preempted by the small claims court rules and Rule 64D.

Appellants' Civil Conspiracy Claim is not Trumped or Preempted by the Small Claims Court Rules and Procedures or URCP 64D. The same analysis applies to the Civil Conspiracy common law claim. This state's courts have recognized and ruled that if the elements of Civil Conspiracy are met, a

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remedy and right to recovery are available to the aggrieved entity. Is this claim for relief "preempted" by the small claims court rules and URCP 64d? No, of course not.

Appellants Pled Their Civil Conspiracy Claim Properly – Or Should Have Been Allowed to Amend to Remedy Any Defect. Appellants believe that their Complaint properly set forth the elements of Civil Conspiracy. However, the claim should not have been dismissed with prejudice and without leave to amend.

Making Knowing False Representations in Applications for Writs of Garnishment In Order to Take More Money from the Appellants than They Owed Was Deceptive Under the UCSPA. Defendants' alleged conduct clearly was deceptive.

Making Knowing False Representations in Applications for Writs of Garnishment In Order to Take More Money from the Appellants than They Owed Was Unconscionable Under the UCSPA. Defendants' conduct and pattern and practice of doing so was clearly unconscionable.

Appellants' Complaint Clearly Stated a Claim for Relief Under the UCSPA. Appellants' Complaint properly pleaded a claim for relief under the UCSPA. Appellants are consumers; Defendants are "suppliers," the loans were "consumer transactions;" and the conduct was "deceptive" and/or

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"unconscionable" "acts or practices."

The Complaint Should Not Have Been Dismissed With Prejudice Without Leave to Amend. Absent being barred in their entirety, Appellants' claims should not have been dismissed with prejudice. Leave to amend should have been afforded in order to make sure that substantial justice is done.

ARGUMENT

I. All Rulings Based Upon Issues Untimely Raised Must be Reversed

Fundamental fairness and due process require that notice and an opportunity to fully brief an issue must be afforded a party against whom relief is sought via one or more motions.

In this case, the original motion raised only one issue – whether the Appellants' Complaint was barred by Appellants' failures to timely appeal their small claims judgments. Appellants' opposing memorandum addressed this issue and this issue alone.

Defendants thereafter raised numerous other issues either (a) in their Reply memorandum or (b) at oral argument. There was no timely notice of these other issues. There was no opportunity to research them and submit a fully thought out and developed memorandum in opposition to them. This motion was "trial by ambush."

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The conclusions of law numbers 20 through 27 must all be reverse due to lack of notice and denial of due process. See *State of Utah v. Phathammavong*, 860 P. 2d 1001 (1993), *Stevens v. Laverkin*, 2008 Utah App 129.

II. The Small Claims Court Rules and URCPA 64D Do Not "Preempt" the UCSPA

Situations do arise where one state statute may overlap another state statute – or, as in this situation, where it seems possible that there is some overlap between the Small Claims Court Rules and URCPA 64D and the UCSPA. The Courts which have dealt with these situations have articulated some principles to assist in the courts in resolving potential overlaps. These include:

1. If at all possible, the overlapping statutes and/or rules should be construed to be consistent with each other, and one should not be held to preempt the other only if there is a manifest inconsistency between them. See *Showpiece Homes Corp. v. Assurance Co. Of Am.*, 38 P. 3d 47 (Colo. 2001); *Ciardi v. F. Hoffman-La Roche, Ltd.*, 436 Mass. 53, 762 No.E. 2d 303 (2002)

2. The fact that the consumer could obtain adequate relief through a non-UDAP (unfair and deceptive acts or practices statute) claim does not bar a UDAP claim. See *Pappas v. Pella Corp.*, 844 N.E. 2d 995 (Ill. App. Ct. 2006) *Williamson v. Amrani*, 152 P.3d 60, 71 (Kan. 2007)(existence of common law remedy does not

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preclude UDAP remedy).

3. The fact that another statute is narrower than the UDAP statute does not mean that is displaces the UDAP statute. *Thomas v. Arrow Fin. Servs., LLC*, 2006 WL 2438346 (N.D. Ill Aug. 17, 2006)(state debt collection statute does not displace UDAP statute)

4. There should be no preemption unless it is clear that the legislature intended for one scheme to overrule the UDAP statute. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7th ed. 2008), Section 2.3.3.5.1, p. 100

5. Given the strong and sweeping remedial purpose of the typical UDAP statute, it should ordinarily be presumed that the UDAP statute applies to a practice. See *Lemelledo v. Beneficial Mgmt. Corp.*, 150 N.J. 255, 696 A. 2d 546 (1997)

6. This is especially true since the rights, remedies and prohibitions created by UDAP statutes are intended to be cumulative to those created by other sources of law. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7th ed. 2008), Section 2.3.3.5.1, p. 100

The Small Claims Court Rules can be honored by holding that the judgment can not be set aside because it was not appealed properly and timely. But the

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UCSPA can also be given its full effect by allowing the Appellants herein the opportunity to plead and obtain relief under its provisions. They are not mutually exclusive and should not be.

The same is true with respect to URCP 64D. The garnishment was issued. The garnishment was not challenged. The Appellants were garnished and the money was taken. The Appellants are not seeking to have the Writ withdrawn. The Appellants are not seeking to have the garnishments released.

Rather, the Appellants are seeking relief pursuant to the UCSPA for damages suffered as a result of deceptive acts or practices, and/or unconscionable acts or practices. As argued trial, there must be a remedy for this outrageous conduct – and there is under both the UCSPA and the common law of civil conspiracy.

Otherwise, there would be a serious question as to whether the Appellants' constitutional rights to open courts would be deprived. See *Jedrziewski v. Smith*, 2005 UT 85, 128 P. 3d 1146 (Utah 2005)

There is no over lap and should not be. Given the *Jedrziewski* opinion, there can not be any preemption.

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III The Small Claims Court Rules and URCP 64D Do Not Preempt the Common Law of Civil Conspiracy

The same analysis applies to the Civil Conspiracy common law claim. This state's courts have recognized and ruled that if the elements of Civil Conspiracy are met, a remedy and right to recovery are available to the aggrieved entity. The Small Claims Court Rules and Procedures and URCP 64D can be given their own limited force and effect, while at the same time allowing the common law of Civil Conspiracy to be applicable and provide a remedy where appropriate.

As the Utah Supreme Court stated in *Jedrziewski*:

> Utah courts have continuously recognized the validity of civil conspiracy claims. See, e.g., *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835 (Utah 1996) (analyzing the use of a civil conspiracy claim to establish higher damages than previously claimed); *Alta Indus. Ltd. v. Hurst*, 846 P.2d 1282, 1290 n. 17 (Utah 1993) (stating that civil conspiracy claims can be established using the five factors established in *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah Ct.App. 1987)). Utah courts have decided civil conspiracy claims after the amendments made by the legislature to the LRA, illustrating their belief that civil conspiracy has not been preempted. See, e.g., *Patterson v. Am. Fork City*, 2003 UT 7, 67 P.3d 466; *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, 54 P.3d 1054; *Tanner v. Carter*, 2001 UT 18, 20 P.3d 332; *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974; *Peterson v. Delta Air Lines*, 2002 UT App 56, 42 P.3d 1253. *Ibid.*

There are sound policies undergirding the common law of Civil Conspiracy which will be eroded and thwarted if it were to be preempted as ruled by Judge

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Laycock.

IV. Appellants Pled Their Civil Conspiracy Claim Properly – Or Should Have Been Allowed to Amend to Remedy Any Defect

The elements of Civil Conspiracy are:

1) a combination of two or more persons,

2) an object to be accomplished,

3) a meeting of the minds on the object or course of action,

4) one or more unlawful, overt acts, and

5) damages as a proximate result

Israel Pagan Estate v. Cannon, 746 P.2d 785, 790 (Utah Ct. App. 1987)

Appellants' Complaint alleged:

18. The defendants and each of them [ELEMENT NO. 1]joined together for the common purpose and with the common intent [ELEMENT NO. 3] to force the plaintiff(s) and others similarly situated into paying more money to the defendants than the plaintiff(s) rightfully owe [ELEMENT 2]. The defendants committed one or illegal or unlawful acts in furtherance of this civil conspiracy, including but not limited to (a) committed fraud upon the court in connection with the issuance of the writs of execution and/or garnishment, (b) defrauding the plaintiff(s) out of the unjustified and inflated amounts of the writs of execution

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and/or garnishment, (c) violating the FDCPA, (d) violating the UCSPA, (e) violating the Fair Credit Reporting Act ("FCRA") and (f) defaming the plaintiff(s) via the publication through various Credit Reporting Agencies of false information about what the plaintiff(s) owe to the defendants [ELEMENT 4].

19. The plaintiff(s) and each of them have been damaged as a result of this civil conspiracy in an amount to be determined at trial, but not less than $4500.00 per defendant. [ELMEMENT 5]

Judge Laycock's conclusion that Appellants did not plead these elements is clearly erroneous.

Even if there were a defect in the pleading – which there was not – Judge Laycock should have allowed Appellants the opportunity to amend. (See section below)

V. Defendants' Conduct Was Deceptive

The Complaint alleged that the defendants made knowing false representations in Applications for Writs of Garnishment in order to take more money from the Appellants than that which Plaintiff owed. This is clearly deceptive.

The Applications for Writs of Garnishment contained the false representation that an amount of money was owed by the Appellants which was

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knowingly greater than the amount actually owed. This is not only deceptive, but fraud on the court. But, deception is a much less stringent concept to prove:

> "The modern concept of deception, as shaped by federal court interpretations of the Federal Trade Commission Act, substantially eliminates [the common law fraud] proof requirements. To show deception under the FTC Act, intent, scienter, actual reliance or damage, and even actual deception are unnecessary. All that is required is proof that a practice has a tendancy or capacity (or, under the FTC's latest formulation, is likely to deceive .... "

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (7th ed. 2008), Section 4.2.3.1, p 190

The FTC definition of deception does not require intent; a practice is deceptive even if there is no intent to deceive. Ibid., p. 193 Citing *Federal Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Federal Trade Comm'n v. Freecomm Communications, Inc.*, 401 F. Ed 1192, 1203 (10th Cir. 2005)(key question is not intent to deceive, but 'the likely effect of the claim on the mind of the ordinary consumer')

The conduct complained of was clearly deceptive.

VI. The Defendants' Conduct was Unconscionable

The Utah UDAP – the UCSPA – was based on the Uniform Consumer Sales Practices Act adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. National Consumer Law Center,

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Unfair and Deceptive Acts and Practices (7th ed. 2008), Section4.4.2, pp. 266-267. That uniform act states that in determining whether a practice is unconscionable, the court should consider circumstances which the supplier had reason to know, such as:

"1) That the supplier took advantage of the inability of the consumer to protect his or her interests reasonably because of physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors; and

6) That the consumer made a misleading statement of opinion on which the consumer was likely to rely to his or her detriment."

7A Uniform Laws Annotated; Council of State Governments, 1973 Suggested State Legislation (Vo. XXXII), Clearinghouse No. 31,036.

New Jersey Courts define unconscionability as the absence of good faith, honesty in fact, and observance of fair dealing. *Cox v. Sears, Roebuck & Co*, 138 N.J. 2, 647 A. 2d 454 (1994)

Under these definitions, the conduct alleged in Appellants' complaint – including more than just the Writ of Garnishment fraud (which resulted in legally sanctioned theft of monies from these Appellants) – was clearly unconscionable.

VII. Appellants' Complaint Stated a Claim for Relief Under the UCSPA

The UCSPA provides in pertinent part as follows:

" 13-11-4. Deceptive act or practice by supplier.
(1) A deceptive act or practice by a supplier in connection with a consumer

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transaction violates this chapter whether it occurs before, during, or after the transaction.

13-11-5. Unconscionable act or practice by supplier.
(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

13-11-19. Actions by consumer.
(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is greater, plus court costs.

13-11-3. Definitions.
As used in this chapter:
(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer."

Appellants' Complaint properly pleaded a claim for relief under the UCSPA. Appellants are consumers; Defendants are "suppliers," the loans were "consumer transactions;" and the conduct was constituted "deceptive" and/or "unconscionable" "acts or practices."

VIII. The Complaint Should Not Have Been Dismissed With Prejudice Without Leave to Amend

Absent being barred in their entirety, Appellants' claims should not have been dismissed with prejudice. Leave to amend should have been afforded in order to make sure that substantial justice is done. See *Hudgens v. Prosper, Inc.*, 2010 UT 68, *Aurora Credit Services, Inc. v. Liberty West Development, Inc.*, 970

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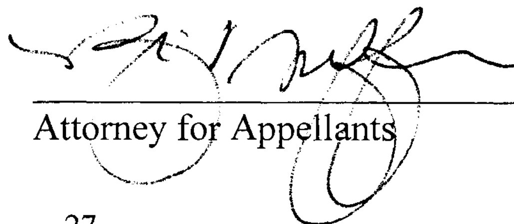
P. Wd 1273 (Utah 1998)

Relief Sought – Plaintiffs/Appellants request the following relief:

1. Reversal and remand for proper briefing Conclusions of Law Nos. 20-27;
2. Reversal of the Rulings that Appellants can not proceed with their Complaint because they did not (a) timely appeal the small claims court judgments and/or (b) object to the issuance of the various writs of garnishment;
3. Reversal of the Rulings that Defendants alleged conduct was not deceptive or unconscionable;
4. Reversal of the Rulings that Appellants' Complaint did not state a claim under the UCSPA or the common law of Civil Conspiracy;
5. Reversal of the dismissal of Appellants' Complaint;
6. Alternatively, for an Order reversing the dismissal of Appellants' Complaint with prejudice, and a direction that Appellants be allowed to make a motion to amend.

DATED this 17th day of December, 2010.

Steffensen ❖ Law ❖Office



Attorney for Appellants

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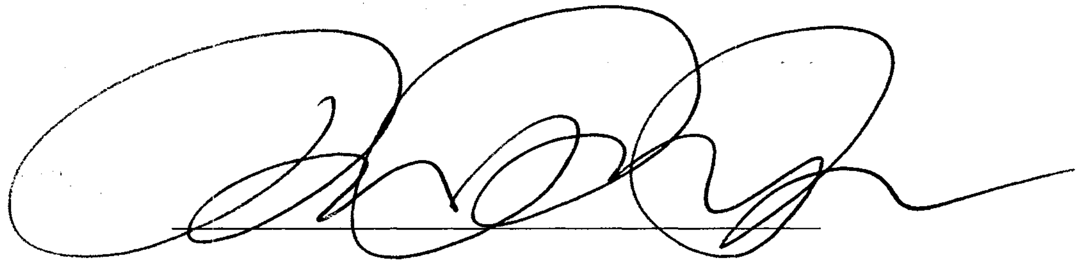
Certificate of Mailing

I hereby certify that on the 17th day of December, 2010, that I caused two (2) true and correct copies of the foregoing instrument to be ✓ mailed, postage prepaid; and/or_____hand delivered by ____fax and/or by____courier; to each of the following:

Jamis M. Gardner
Robinson Seiler & Anderson LC
2500 North University Ave.
PO Box 1266
Provo, Utah 84604
Fax 801 377 - 9405



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Addendum

1. Judge Laycock's Findings and Conclusions

2. UC 13-11-3 through 5 and 19

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1. Judge Laycock's Findings and Conclusions

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FILED
APR 2 0 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

VILMA ESTRADA, Plaintiff, vs. ROBIN MENDOZA, FRED W. ALMANZA, FERIA ACCESS, LLC, SOUTHERN MANAGEMENT PROFESSIONAL LIMITED LIABILITY COMPANY; DOES 1-50, Defendants. AND CONSOLIDATED ACTIONS.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 090402579 Judge Claudia Laycock

The Court has reviewed the Defendants' Motion for Judgment on the Pleadings ("Motion"), and memoranda in support, opposition, and reply thereto, heard oral argument on the above motion on February 16, 2010, and issued its decision telephonically on March 11, 2010, has been fully advised in the premises, and for good cause appearing, does hereby enter the following:

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STANDARD OF REVIEW

After the pleadings are closed, "any party may move for judgment on the pleadings." UTAH R. CIV. P. 12(c). In a motion for judgment on the pleadings, the court is not required to accept Plaintiffs' *legal* allegations as true, rather, the court "accepts the *factual* allegations in the complaint as true; [the court] then consider such allegations and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff." *Miller v. Gastronomy, Inc.*, 2005 UT App 80, ¶1 (Utah Ct. App. 2005) (citing *Healthcare Servs. Group v. Utah Dep't of Health,* 2002 UT 5, ¶3, 40 P.3d 591 (Utah 2002)) (emphasis added). "The grant of a motion for judgment on the pleadings is reviewed under the same standard as the grant of a motion to dismiss, i.e., we affirm the grant of such a motion only if, as a matter of law, the plaintiff could not recover under the facts alleged." *Id.* at ¶6.

FINDINGS OF FACT

For the purposes of the Motion, Defendants accepted Plaintiffs' facts as alleged in the Complaints. The allegations contained in Plaintiffs' Complaints are repeated ***verbatim*** here below:[1]

PARTIES

1. The Plaintiff(s) is/are individual(s) who reside in Salt Lake County, Utah.
2. Defendant, Feria Access LLC., is a business engaged in the practice of payday loans and has an office in Salt Lake County, Utah ("Feria Access").
3. The Defendant, Robin Mendoza, is an individual who owns or owned a majority interest

[1] Plaintiffs each originally filed independent Complaints, which were subsequently consolidated into this one action, but the content of each of the six separate Complaints were exactly the same, and thus will be collectively referenced hereinafter as "Plaintiffs' Complaint".

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in Feria Access, and who masterminded the civil conspiracy and wrongful practices complained of herein. As a result of his direct personal involvement in the torts and other wrongdoing alleged herein, he is personally liable to the plaintiff(s) for the damages which they have suffered at his hands.

4. Southern Management Professional Limited Liability Company is a Utah limited liability company formed by Almanza and Mendoza in an attempt to hide and/or protect assets from creditors such as plaintiffs and through which Almanza and Mendoza decided to utilize to perpetrate fraud and wrongdoing upon the plaintiffs as alleged herein ("Southern Management").

5. Defendant Fred W. Almanza, is an individual who at all relevant times purported to be the principal owner of Southern Management, and who masterminded the civil conspiracy and wrongful practices complained of herein. As a result of his direct personal involvement in the torts and other wrongdoing alleged herein, he is personally liable to the plaintiff(s) for the damages which they have suffered at his hands.

6. Does 1-50 are individuals or other entities who have either participated directly in the wrongdoing alleged herein, or who have received fraudulent conveyances of the other defendants' property. Plaintiff(s) reserve the right to amend this complaint to specifically identify these entities when sufficient information about them and the nature of their involvement is obtained.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction of the claims alleged below pursuant to the provisions of Section §78A-5-102(l), Utah Code.

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8. Venue is properly laid before the Third Judicial District Court, Salt Lake County, pursuant to the provisions of Section §78B-3-307(1)(a), Utah Code, in that the causes of action alleged below arose within said District's boundaries.

9. The Defendants are subject to the jurisdiction of this Court pursuant to the provisions of Section 78-27-24(1) and (2) Utah Code, in that Defendants transacted business within this State and claims arise from that transaction of business.

GENERAL ALLEGATIONS

10. The Defendants opened a business in South Salt Lake, Utah to make payday loans without first having obtained a license. Consequently, the Defendants are barred from making payday loans. Any payday loans which they made from the South Salt Lake office were and are illegal and unenforceable.

11. Plaintiffs went to Defendants' South Salt Lake office not knowing the Defendants' were engaged in an unauthorized and illegal business, and were given a payday advance loan by Feria Access.

12. The lending business is illegal, and the loan obtained is knowingly void and unenforceable, yet the Defendants defamed the Plaintiffs by making false and inaccurate credit reports.

13. Feria Access did not have a proper license in South Salt Lake, Utah, to make payday loans, when it made the loan to Plaintiffs. The loan is therefore, void and unenforceable.

14. Despite the fact that the loan was illegal and void, the defendants filed a lawsuit against the plaintiff(s) in small claims court in the Fourth District Court, in and for the County of Utah, even though the Plaintiffs reside outside of Utah County. This was done with the

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express intend and hope that the Plaintiff(s) and others similarly situated might be unable to appear in Utah County and thus be defaulted.

15. Despite the fact the loan is void and unenforceable, and specifically and intentionally as a result of selecting a deliberately inconvenient forum, Defendant obtained a Default Judgment against the Plaintiff(s) for amounts which the Plaintiff(s) do not legally owe.

16. Thereafter the defendants have requested and obtained through fraud upon the Court writs of execution and/or writs of garnishment against the Plaintiff(s) which included unjustified and deliberately inflated "costs" or "judgement" amounts, and the like. These writs were also issued improperly because the judgment is illegal, and seeks recovery of more than would be due if the debt were not void and invalid.

FIRST CAUSE OF ACTION
Civil Conspiracy

17. Plaintiffs, by this reference, hereby incorporate all of the allegations of this Complaint, as if fully set forth herein.

18. The defendants and each of them joined together for the common purpose and with the common intent to force the plaintiff(s) and others similarly situated into paying more money to the defendants than the plaintiff(s) rightfully owe. The defendants committed one or illegal or unlawful acts in furtherance of this civil conspiracy, including but not limited to (a) committed fraud upon the court in connection with the issuance of the writs of execution and/or garnishment, (b) defrauding the plaintiff(s) out of the unjustified and inflated amounts of the writs of execution and/or garnishment, (c) violating the FDCPA, (d) violating the UCSPA, (e) violating the Fair Credit Reporting Act ("FCRA") and (f)

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defaming the plaintiff(s) via the publication through various Credit Reporting Agencies of false information about what the plaintiff(s) owe to the defendants.

19. The plaintiff(s) and each of them have been damaged as a result of this civil conspiracy in an amount to be determined at trial, but not less than $4500.00 per defendant.

20. The plaintiffs are entitled to recover a judgment against each of the defendants for their actual damages and exemplary damages of not less than $4500.00.

SECOND CAUSE OF ACTION

Utah Consumer Sales Practices Act

21. Plaintiffs, by this reference, hereby incorporate all of the allegations of this Complaint, as if fully set forth herein.

22. The defendants are each a supplier with in the meaning of Section §13-11-3(6), Utah Code.

16. The payday loan to Plaintiffs was a consumer transaction within the meaning of Section §13-ll-4(2)(a), Utah Code.

17. Defendant's judgment against Plaintiffs, is void based upon the fact Defendant Feria Access, LLC., did not have a license in South Salt Lake, Utah.

18. The making of consumer loans without a proper license was illegal, deceptive and unconscionable. The filing of a consumer lawsuit in Provo on a void and unenforceable debt was unconscionable. The obtaining of a default judgment on a void and unenforceable debt was unconscionable. The issuance of a Writ of Garnishment or Execution which seeks recovery of more than is owed, is deceptive and unconscionable.

19. By reason of the wrongful actions complained of herein, pursuant to section § 13-11-

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19(2), Utah Code, Plaintiffs, are entitled to recover their actual damages or $2,000.00, whichever is greater, plus costs and attorney fees.

THIRD CAUSE OF ACTION
Fair Credit Reporting Act
Defamation

23. Plaintiffs, by this reference, hereby incorporate all of the allegations of this Complaint, as if fully set forth herein.

24. It is a violation of the Fair Credit Reporting Act to make false reports about a consumer.

25. Plaintiffs do not yet have a private cause of action under this statute, but this violation is a wrongful and/or illegal act committed in furtherance of the Civil Conspiracy among the defendants.

26. The reporting of false information to the credit reporting agencies with the intent that said information be reconveyed to third parties which may access their credit reports, constituted defamation of the plaintiffs.

27. The plaintiffs have suffered damages as a result of this defamation of not less than $4500 each from each defendant.

28. Plaintiffs are entitled to judgment against each defendant for their actual damages and exemplary damages of not less than $4500 per defendant.

CONCLUSIONS OF LAW

1. The Utah Code provisions governing small claims courts direct that "small claims matters shall be managed in accordance with simplified rules of procedure and evidence promulgated by the Supreme Court." Utah Code Ann. § 78A-8-102(6).

2. "In accord with this statutory provision, this court promulgated the Utah Rules of

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Small Claims Procedure, which 'constitute the simplified rules of procedure and evidence in small claims cases required by Utah Code,' UTAH RULES SMALL CLAIMS P. 1(a), and 'apply to the initial trial and any appeal under rule 12 of all actions pursued as a small claims action under Utah Code.' *Id.* 1(b)." *Panos v. Third Judicial Dist. Court*, 2004 UT 87, ¶14 (Utah 2004).

3. The Utah Rules of Small Claims Procedure "are to be interpreted to carry out the statutory purpose of small claims cases, dispensing speedy justice between the parties." UTAH RULES SMALL CLAIMS P. 1(a).

4. Rule 10 of the Utah Rules of Small Claims Procedure states that "[a] party may request that the default judgment or dismissal be set aside by filing a motion to set aside within 15 calendar days after entry of the judgment or dismissal." UTAH RULES SMALL CLAIMS P. 10(a). The 15-day deadline may be extended by the court "for good cause if the motion is made in a reasonable time." UTAH RULES SMALL CLAIMS P. 10(b).

5. Rule 12 of the Utah Rules of Small Claims Procedure provides that "[a]ny party may appeal a final order or judgment within 30 calendar days after entry of judgment or order or after denial of a motion to set aside the judgment or order, whichever is later." UTAH RULES SMALL CLAIMS P. 12.

6. If a rule of Small Claims Procedure intends to incorporates a rule of Civil Procedure, then it specifically lists the rule.[2]

7. Rules 10 and 12 of the Rules of Small Claims Procedure discuss the avenues provided for revisiting a judgment.

8. In Small Claims actions, if a party appeals, they are granted a trial de novo in

[2] The following Rules of Civil Procedure are specifically listed in the Rules of Small Claims Procedure: Rule 45 (subpoenas), Rule 22 (interpleader), and rules related to collecting judgments (Rules 64 and 69).

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district court. If a party disagrees with the decision reached in the trial de novo, "[t]he decision of the trial de novo may not be appealed unless the court rules on the constitutionality of a statute or ordinance." UTAH CODE ANN. § 78A-8-106(2).

9. Plaintiffs' remedies are limited to the remedies that the Utah Supreme Court deemed appropriate when it drafted the Rules of Small Claims Procedures. To impute additional remedies into the Rules of Small Claims Procedure is to usurp the authority that the Utah Legislature specifically granted to the Utah Supreme Court.

10. Plaintiffs should have availed themselves of available Small Claims remedies, however they did not do so, and therefore this action is precluded.

11. Plaintiffs are only entitled to bring an independent action if they show "fraud upon the court" has occurred. *See* UTAH R. CIV. P. 60(b).

12. "Rule 60(b) authorizes the trial court, on motion, to relieve a party from a final judgment or a decree procured by fraud, whether intrinsic or extrinsic, but only if the motion is made within three months after the judgment. That rule, with its short time limitation, does not, however, limit the power of a court to entertain an independent common law action to set aside a judgment or decree for fraud or duress after the three-month period has expired. Indeed, Rule 60(b) expressly recognizes and preserves the court's historic powers to relieve a party from the operations of an unconscionable judgment or order. 'It remains clear, as it has from the beginning, that Rule 60(b) does not limit the power of a court to entertain an independent action.' *St. Pierre v. Edmonds*, 645 P.2d 615, 618 (Utah 1982).

13. Whether intrinsic fraud or extrinsic fraud, Utah Courts are still left with the same decision: "determining when an independent action may lie to set aside a judgment or decree on

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the ground that it was obtained by fraud." *Id.* at 619. *See also Bayles v. Bayles*, 1999 UT App 128, P16 (Utah Ct. App. 1999) (citing *St. Pierre* and holding that for an independent action to lie, the fraud must have occurred during the court proceedings, or that the fraud was contemplated in the context of the court proceeding).

14. "Extrinsic fraud arises from acts preventing the fair submission of the case for adjudication. Intrinsic fraud refers to matters occurring during the course of the proceedings, such as false testimony during the trial, which may have influenced the judgment." *St. Pierre v. Edmonds*, 645 P.2d at 618 (citations omitted).

15. Relief under Rule 60(b) of the Utah Rules of Civil Procedure does not concern itself with any allegations of fraud related to the underlying causes of action—only fraud upon the court.

16. Even in the light most favorable to the Plaintiffs, the only allegations that potentially involve fraud upon the Court were made in paragraphs 16 and 18 of Plaintiffs' Complaint, relating to the writs of execution and/or writs of garnishment.[3]

17. Only those allegations relating to potential fraud upon the court may be examined independently by this Court, as all other allegations are precluded for failure to pursue the proper Small Claims remedies.

18. Whether in small claims or district court, garnishments are governed by Rule 64D of the Utah Rules of Civil Procedure.[4]

19. Rule 64D(h) of the Utah Rules of Civil Procedure outlines the procedures by

[3] These references are to the first paragraph 16 and the first paragraph 18 of Plaintiffs' Complaint. Plaintiffs' Complaint had inconsistent numbering, resulting in repeated paragraph numbers.
[4] Rule 11 of the Utah Rules of Small Claims Procedures states that "[j]udgments may be collected under the Utah Rules of Civil Procedure."

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which a litigant who has a judgment taken against them can come back to the court during the garnishment or execution process and ask for a hearing, their remedy through the procedures that are outlined and even actually notices supposed to be served upon them along with the garnishment papers.

20. Plaintiffs did not pursue any relief through Rule 64D(h) of the Utah Rules of Civil Procedure, and therefore Plaintiffs have waived any objections to the writs of garnishment and amounts garnished therewith.

21. Civil conspiracy consists of five elements. *Alta Industries v. Hurst*, 846 P.2d 1282 (Utah 1993).

22. Plaintiffs' Complaint fails to satisfy all five elements of civil conspiracy, and therefore Plaintiffs' First Cause of Action shall be dismissed.

23. Plaintiffs' allegations related to the improper writs of execution and/or writs of garnishment are not deceptive acts or practices, as defined by the Utah Consumer Sales Practices Act.

24. Plaintiffs' allegations related to the improper writs of execution and/or writs of garnishment are not unconscionable, as defined by the Utah Consumer Sales Practices Act.

25. Plaintiffs' Complaint fails to state a claim under the Utah Consumer Sales Practices Act, and therefore Plaintiffs' Second Cause of Action shall be dismissed.

26. Plaintiffs', through their Complaint and oral arguments, concede that they do not have a cause of action under Fair Credit Reporting Act/Defamation, and therefore Plaintiffs' Third Cause of Action shall be dismissed.

27. Where the Plaintiffs' have undertaken an action which as a matter of law was not

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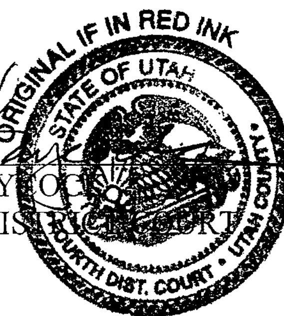
available to them, there are no circumstances which would enable Plaintiffs' to correct a deficiency and refile, therefore Plaintiffs' Complaint is dismissed with prejudice.

28. The Court finds no bad faith on the part of Plaintiffs, and therefore an award of attorneys' fees to Defendants is not appropriate at this time.

DATED and signed this 16th day of April, 2010.

BY THE COURT



Claudia Laycock
JUDGE CLAUDIA LAYCOCK
FOURTH JUDICIAL DISTRICT COURT

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CERTIFICATE OF DELIVERY

I hereby certify that on this 24 day of March 2010, I mailed, postage prepaid, a true and correct copy of the foregoing to the following:

Brian W. Steffensen
Steffensen Law Office
2159 S 700 E, Ste 240
Salt Lake City, UT 84105
brian@steffensenlaw.com

Janis M. Garcia

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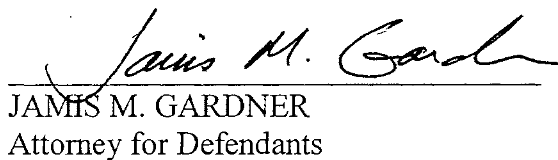
NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

TO: Brian W. Steffensen
Steffensen Law Office
2159 S 700 E, Ste 240
Salt Lake City, UT 84106
brian@steffensenlaw.com

Please take notice that the undersigned attorney for Defendants will submit the above and foregoing Findings of Fact and Conclusions of Law to the Honorable Claudia Laycock for her signature upon the expiration of five (5) days from the date of this notice, plus three days for mailing, unless written objection is filed prior to that time pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 24 day of March, 2010.

ROBINSON, SEILER & ANDERSON



JAMIS M. GARDNER
Attorney for Defendants

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2. UC 13-11-3 through 5 and 19

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Utah Code
Title 13 Commerce and Trade
Chapter 11 Utah Consumer Sales Practices Act
Section 3 Definitions.

13-11-3. Definitions.

As used in this chapter:

(1) "Charitable solicitation" means any request directly or indirectly for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including a telephone request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication; or

(c) the sale of, offer or attempt to sell, or request of donations for any book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or where the name of any charitable organization or movement is used or referred to as an inducement or reason for making any purchase donation, or where, in connection with any sale or donation, any statement is made that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose. A charitable solicitation is considered complete when made, whether or not the organization or person making the solicitation receives any contribution or makes any sale.

(2) (a) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for:

(i) primarily personal, family, or household purposes; or

(ii) purposes that relate to a business opportunity that requires:

(A) expenditure of money or property by the person described in Subsection (2)(a); and

(B) the person described in Subsection (2)(a) to perform personal services on a continuing basis and in which the person described in Subsection (2)(a) has not been previously engaged.

(b) "Consumer transaction" includes:

(i) any of the following with respect to a transfer or disposition described in Subsection (2)(a):

(A) an offer;

(B) a solicitation;

(C) an agreement; or

(D) performance of an agreement; or

(ii) a charitable solicitation.

(3) "Enforcing authority" means the Division of Consumer Protection.

(4) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

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Amended by Chapter 55, 2004 General Session
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13-11-4. Deceptive act or practice by supplier.

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist, including any of the following reasons falsely used in an advertisement:

(i) "going out of business";

(ii) "bankruptcy sale";

(iii) "lost our lease";

(iv) "building coming down";

(v) "forced out of business";

(vi) "final days";

(vii) "liquidation sale";

(viii) "fire sale";

(ix) "quitting business"; or

(x) an expression similar to any of the expressions in Subsections (2)(d)(i) through (ix);

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier does not have;

(j) (i) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false; or

(ii) fails to honor a warranty or a particular warranty term;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to

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ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to:

(i) cancel the sales agreement and receive a refund of all previous payments to the supplier if the refund is mailed or delivered to the buyer within 10 business days after the day on which the seller receives written notification from the buyer of the buyer's intent to cancel the sales agreement and receive the refund; or

(ii) extend the shipping date to a specific date proposed by the supplier;

(m) except as provided in Subsection (3)(b), fails to furnish a notice meeting the requirements of Subsection (3)(a) of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase if:

(i) the sale is made other than at the supplier's established place of business pursuant to the supplier's personal contact, whether through mail, electronic mail, facsimile transmission, telephone, or any other form of direct solicitation; and

(ii) the sale price exceeds $25;

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a, Pyramid Scheme Act;

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false;

(p) if a consumer indicates the consumer's intention of making a claim for a motor vehicle repair against the consumer's motor vehicle insurance policy:

(i) commences the repair without first giving the consumer oral and written notice of:

(A) the total estimated cost of the repair; and

(B) the total dollar amount the consumer is responsible to pay for the repair, which dollar amount may not exceed the applicable deductible or other copay arrangement in the consumer's insurance policy; or

(ii) requests or collects from a consumer an amount that exceeds the dollar amount a consumer was initially told the consumer was responsible to pay as an insurance deductible or other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that amount is less than the full amount the motor vehicle insurance policy requires the insured to pay as a deductible or other copay arrangement, unless:

(A) the consumer's insurance company denies that coverage exists for the repair, in which case, the full amount of the repair may be charged and collected from the consumer; or

(B) the consumer misstates, before the repair is commenced, the amount of money the insurance policy requires the consumer to pay as a deductible or other copay arrangement, in which case, the supplier may charge and collect from the consumer an amount that does not exceed the amount the insurance policy requires the consumer to pay as a deductible or other copay arrangement;

(q) includes in any contract, receipt, or other written documentation of a consumer transaction, or any addendum to any contract, receipt, or other written documentation of a consumer transaction, any confession of judgment or any waiver of any of the rights to which a consumer is entitled under this chapter;

(r) charges a consumer for a consumer transaction that has not previously been agreed to by the consumer;

(s) solicits or enters into a consumer transaction with a person who lacks the mental ability to comprehend the nature and consequences of:

(i) the consumer transaction; or

(ii) the person's ability to benefit from the consumer transaction;

(t) solicits for the sale of a product or service by providing a consumer with an unsolicited check or

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negotiable instrument the presentment or negotiation of which obligates the consumer to purchase a product or service, unless the supplier is:
(i) a depository institution under Section **7-1-103**;
(ii) an affiliate of a depository institution; or
(iii) an entity regulated under Title 7, Financial Institutions Act;
(u) sends an unsolicited mailing to a person that appears to be a billing, statement, or request for payment for a product or service the person has not ordered or used, or that implies that the mailing requests payment for an ongoing product or service the person has not received or requested;
(v) issues a gift certificate, instrument, or other record in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount without printing in a readable manner on the gift certificate, instrument, packaging, or record any expiration date or information concerning a fee to be charged and deducted from the balance of the gift certificate, instrument, or other record; or
(w) misrepresents the geographical origin or location of the supplier's business in connection with the sale of cut flowers, flower arrangements, or floral products.
(3) (a) The notice required by Subsection (2)(m) shall:
(i) be a conspicuous statement written in dark bold with at least 12 point type on the first page of the purchase documentation; and
(ii) read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period reflecting the supplier's cancellation policy but not less than three business days) AFTER THE DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS LATER".
(b) A supplier is exempt from the requirements of Subsection (2)(m) if the supplier's cancellation policy:
(i) is communicated to the buyer; and
(ii) offers greater rights to the buyer than Subsection (2)(m).
(4) (a) A gift certificate, instrument, or other record that does not print an expiration date in accordance with Subsection (2)(v) does not expire.
(b) A gift certificate, instrument, or other record that does not include printed information concerning a fee to be charged and deducted from the balance of the gift certificate, instrument, or other record is not subject to the charging and deduction of the fee.
(c) Subsections (2)(v) and (4)(b) do not apply to a gift certificate, instrument, or other record useable at multiple, unaffiliated sellers of goods or services if an expiration date is printed on the gift certificate, instrument, or other record.

Amended by Chapter 54, 2010 General Session
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Utah Code
Title 13 Commerce and Trade
Chapter 11 Utah Consumer Sales Practices Act
Section 5 Unconscionable act or practice by supplier.

13-11-5. Unconscionable act or practice by supplier.

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

Enacted by Chapter 188, 1973 General Session

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13-11-19. Actions by consumer.

(1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:

(a) obtain a declaratory judgment that an act or practice violates this chapter; and

(b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is greater, plus court costs.

(3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter.

(4) (a) A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority under Subsection **13-11-8**(2) before the consumer transactions on which the action is based, or declared to violate Section **13-11-4** or **13-11-5** by a final judgment of the appropriate court or courts of general jurisdiction and appellate courts of this state that was either officially reported or made available for public dissemination under Subsection **13-11-7**(1)(c) by the enforcing authority 10 days before the consumer transactions on which the action is based, or with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(b) If an act or practice that violates this chapter unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

(c) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, in which the supplier was unjustly enriched by the violation.

(5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment or required by the court to be settled under Subsection **13-11-21**(1)(a).

(6) Except for consent judgment entered before testimony is taken, a final judgment in favor of the enforcing authority under Section **13-11-17** is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(7) When a judgment under this section becomes final, the prevailing party shall mail a copy to the enforcing authority for inclusion in the public file maintained under Subsection **13-11-7**(1)(e).

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(8) An action under this section shall be brought within two years after occurrence of a violation of this chapter, or within one year after the termination of proceedings by the enforcing

authority with respect to a violation of this chapter, whichever is later. When a supplier sues a consumer, he may assert as a counterclaim any claim under this chapter arising out of the transaction on which suit is brought.

Amended by Chapter 378, 2010 General Session
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