

Utah Debt Collection Laws

Submitted by Gregory M. Constantino, Founder & President of Constantino Law Office, P.C.

<http://www.constantinolaw.com/>

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Gregory M. Constantino is the Founder and President of [Constantino Law Office, P.C.](#) He graduated from the University of Utah, cum laude, with a B.S. degree in Political Science. He received his J.D. from Pepperdine University School of Law. He has extensive experience in civil litigation, commercial collections, retail collections, replevin actions, foreclosures, creditors' rights in bankruptcy and construction claims. His firm has regularly collected debts for major credit card companies, banks, large national debt buyers, local Utah hospitals and collection agencies.

Since 2005, Gregory has focused his practice exclusively on debt collection. He has served on the Unauthorized Practice of Law Committee (1996-99) and the Governmental Relations Committee (2012) of the Utah State Bar. He is the former Chairman of the Collection Section of the Utah State Bar during the 2011-12 term. He regularly speaks on FDCPA and Collection Law matters and is a regular presenter for Continuing Legal Education events sponsored by the Utah State Bar. He is an active member in [National Association of Retail Collection Attorneys](#) (NARCA) and a member of the [Commercial Law League of America](#) (CLLA).

I. Doing Business in Utah

Utah is a great State for business. For 2012, the Forbes list of "Best Places to Do Business" ranks Provo, Utah number 1 and Ogden, Utah number 6, in its 2012 ranking of metropolitan areas to do business. One reason for the high ranking is that Utah's legal and regulatory environment is unapologetically "pro-business." Utah is a State that believes in the summary enforcement of contract rights. Utah's laws reflect that belief. For example, Utah does not have any usury laws and will enforce any agreed upon rate of interest.

As a result, more than one credit card issuer has chosen Utah as its base of operations. American Express has American Express Centurion Bank, a state chartered industrial loan bank chartered in the State of Utah, and American Express Bank, FSB, a federally chartered thrift institution with its principle place of business located in Salt Lake City. In addition, GE Capital Retail Bank is located in Draper, Utah. Credit related businesses and debt buyers regularly report a robust business environment in the State of Utah.

II. Licensing, Bonding, Registering to Do Business in the State of Utah

Collection Agencies and Debt Buyers: Utah requires that “no person shall conduct a collection agency, collection bureau, or collection office in this state . . . unless that person is registered with Division of Corporations and has on file a good and sufficient bond.” [Utah Code § 12-1-1](#). The activity of “conducting a collection agency” is loosely described as: (1) receiving accounts, bills or other debts for the purpose of collections; or (2) Soliciting the right to collect or receive payment for another. *Id.* But, the statute requires that the activity must be done by the person in the State of Utah. *Id.* Thus, a clear and consistent reading of the statute would not include passive debt buyers who do not take any activity to collect debt, which they have purchased, outside of hiring Utah licensed collection agencies and Utah licensed attorneys. That being said, the Division of Corporations has broadly defined a “Collection Agency” on its website as “a business that pursues payments on debts owed by individuals or businesses.” See <http://corporations.utah.gov/business/ca.html> . Some employees at the Division of Corporation have espoused that a “Collection Agency” is any business that pursues payments on debts, which is not specifically exempted in [Utah Code § 12-1-7](#). While this overly broad reading is not suggested by the specific language of the statute, it is suggested by employees at the Division of Corporations.

If a person does engage in collection for another within the State of Utah, that person must be bonded, and the bond required is a surety bond in the amount of \$10,000. [Utah Code § 12-1-2](#). A person who engages in “Collection Agency Activity” and fails to be properly registered and bonded, commits a class A misdemeanor. [Utah Code § 12-1-6](#). Certain persons are exempted from the registration and bonding requirements, specifically, attorneys licensed to practice in the State of Utah, National Banks, Utah State Banks and Trust Companies, Title Insurers and Title Insurance Agencies. [Utah Code § 12-1-7](#).

A properly licensed and bonded “Collection Agency” can only collect debts that are “within the statute of limitations” and such “Agencies” are required to use a “duly licensed attorney” to prepare all legal processes and pleadings. [Utah Code § 12-1-8](#).

If a debt buyer has an office located in Utah, and takes assignments of consumer debt, then the business is required to file a notification and pay the notification fee prior to commencing business. [Utah Code § 70C-8-201](#) and see <http://www.dfi.utah.gov/ConNote.htm> A Debt Buyer, who has an office in the State of Utah, is also required to file a Consumer Credit Notification Form and pay the required fees for certain debt purchases. See [Utah Code § § 70C-8-202 and 203](#) and see <http://www.dfi.utah.gov/>

III. Court costs and Process Servers

In Utah, Court filing fees are set by statute and can be found at [Utah Code §78A-2-301](#). Filing a collection lawsuit for \$2,000 or less is a filing fee of \$75.00. Filing a collection lawsuit greater than \$2,000 and less than \$10,000 is a filing fee of \$185.00. Filing a collection lawsuit for \$10,000 or more is a filing fee of

\$360.00. See [Utah Code §78A-2-301](#). Applications for Writs of Garnishment cost \$50.00 per application. See [Utah Code §78A-2-301](#). The garnishee fee for Continuing Writs of Garnishment served on employers is \$25.00. [Utah Code § 78A-2-216](#). The garnishee fee for a Writ served on a Bank is \$10.00. [Utah Code § 78A-2-216](#).

Service costs that are charged by County Sheriffs are set by statute. See [Utah Code §17-22-2.5](#). The Sheriff is to charge \$20 for a service of a Summons, plus \$2.50 per mile measured from the Courthouse. [Utah Code § 17-22-2.5](#) Service of Bench Warrants, Orders of Restitution and Executions must be served by a Constable or Sheriff at a cost of \$50.00 per paper plus \$2.50 per mile. [Utah Code § 17-22-2.5](#).

Complaints, summons, and subpoenas may be served by any person 18 years of age or older who is not a party to the action or a party's attorney. [Utah Code § 78B-8-302](#). Private Investigators are licensed to serve complaints, summonses, supplemental orders, orders to show cause, writs of garnishment, garnishee orders and subpoenas duces tecum. See [Utah Code § 78B-8-302](#). Generally, Sheriffs are the most expensive option for serving papers. More favorable rates can be negotiated with process servers that are Constables, Licensed Private Investigators, or non-licensed individuals who are over the age of 18. There is a balance to be achieved between "quality and integrity" and "cost". Many Constables and some Private Investigators hire off duty peace officers who are looking to make some extra money by serving papers. Quality, reliability and cost go up when the proof of service declaration is being signed by a constable or off duty peace officer. That being said, the best prices are found with Private Investigators and non-licensed businesses who hire younger, less costly, and less experienced process servers.

Constables and Sheriffs will be required for Writs of Execution, if a creditor wants to execute against personal property and for Bench Warrants, and if a creditor wants to pursue a warrant for a debtor who does not appear for a post judgment examination. As a result, most collection attorneys in Utah will have a variety of relationships and can meet client requests and expectations.

IV. Contract Law applied in Utah Collections

Utah Law Applicable to Credit Card collections.

A. Contract law which is applicable to credit card collections:.

The acceptance of the terms of the credit card occurs when the cardholder uses the card. See [Citibank \(South Dakota\), N.A. v. Santoro, 150 P.3d 429, 429, 432-3 \(Or.App. 2006\)](#). Upon such use, the card holder agrees to all provisions in the cardholder agreement and the agreement becomes a binding contract between the cardholder and the issuer. *Id.* This principle of contract formation for credit card accounts was accepted by the Utah Court of Appeal in two unpublished cases, those being [Wells Fargo Bank Nevada, NA v. Toronto, 2008 WL 2764638 \(Utah App.\)](#), and [Capital One Bank \(USA\), N.A. v.](#)

[Wilkerson, 2009 WL 3792434 \(Utah App.\)](#).

The two most important published Utah cases concerning credit card contract formation are the *Walker Bank* and *Goodman* cases.

In *Walker Bank*, Wife informed the Bank, by two separate letters, that she would no longer honor charges made by her husband on the two accounts. Upon receiving the letters, the Bank immediately revoked both accounts and requested the return of the credit cards. Despite numerous notices of revocation and requests for surrender of the cards, both Wife and her husband retained their cards and continued to make charges against the accounts. Finally, four months after Wife sent the letter, Wife finally surrendered the credit cards to the Bank. At that point, there was a balance owing on the credit card account in the amount of \$2,685.70. Wife refused to pay, and the Bank instituted a collection lawsuit to collect the balance. The Utah Supreme Court ruled that because Husband had a card issued in his name, bearing his own signature on the back of the card, that Husband was an authorized user on Wife's account. As such, the Truth in Lending Act provisions limiting liability of card holder for unauthorized charges was inapplicable in that the Husband had "apparent" authority to use the cards. [*Walker Bank & Trust Company v. Jones*, 672 P.2d 73, 77 \(Utah 1983\)](#).

In *Goodman*, a credit card issuer brought action against cardholder, alleging that cardholder defaulted on credit agreement by failing to make payments on his balance. The trial court granted cardholder's motion to dismiss. Issuer appealed. The Utah Court of Appeals reversed the trial court's decision, holding that the issuer was not required to produce a signed copy of its credit agreement with the cardholder in order to bring a breach of contract claim. [*MBNA America Bank v. Goodman*, 140 P.3d 589 \(Utah App. 2006\)](#).

B. Evidentiary Issues and Statute of Frauds considerations.

Generally, under Utah law, every credit agreement is void unless written and signed. [*Utah Code Ann. § 25-5-4 \(f\)*](#). A debtor or a creditor may not maintain an action on a credit agreement unless the agreement: (A) is in writing, (B) expresses consideration, (C) sets forth the relevant terms and conditions, and (D) is signed by the party against whom enforcement of the agreement would be sought. But, under [*Utah Code Ann. § 25-5-4\(e\)*](#), a credit agreement is binding and enforceable without any signature by the party to be charged if: (i) the debtor is provided with a written copy of the terms of the agreement; (ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and (iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered. See [*MBNA America Bank v. Goodman*, 140 P.3d 589 \(Utah App. 2006\)](#).

The Utah Court's have consistently ruled that any affidavit or declaration which summarized the account

history and the business records of a credit card issuer is inadmissible under *Rule 803(6) of the Utah R. of Evid.*, unless the underlying records have been produced. The controlling case is *Trolley Square Associates v. Nelson*, 886 P.2d 61, 66 (Utah App. 1994). In *Trolley Square*, the Court of Appeal held that while the monthly statements upon which the summaries are based may qualify as business records under *Rule 803(6)*, a summary of those records is not admissible under the business record exception. *Trolley Square* cites *Shurtleff v. Jay Tuft & Co.*, 622 P.2d 1168 (Utah 1980), where the Utah Supreme Court held that a summary of invoices did not qualify as a “business record” because it was “apparently prepared in anticipation of, and preparation for, this lawsuit,” and “not made in the regular course of business.” *Id.* at 1174.

Summaries of business records may be admitted as evidence, however, under *Rule 1006 of the Utah Rules of Evidence*. Under *Rule 1006*, “[t]he contents of voluminous writings ... which cannot conveniently be examined in court may be presented in the form of a ... summary.” Whether the records are too voluminous to conveniently be examined in court is a determination to be made at the discretion of the trial judge. However, the records must be made available for examination by other parties. *Utah R.Evid. 1006* (2012). The party offering the summaries has the burden of making the records available to the other parties' satisfaction. *Trolley Square* citing *Gull Labs., Inc. v. Louis A. Roser Co.*, 589 P.2d 756, 758-9 (Utah 1978).

C. Statute of Limitations considerations for credit card collections.

Utah law has established that credit card agreements are governed by the six-year limitations period of [Utah Code § 78B-2-309](#), not the four year “open account” statute, [Utah Code § 78B-2-307](#).

[Utah Code. § 78B-2-307](#) provides in pertinent part, “An action may be brought within four years

(1) after the last charge is made or the last payment is received:

- (a) upon a contract, obligation, or liability not founded upon an instrument in writing;
- (b) on an open store account for any goods, wares, or merchandise; or
- (c) on an open account for work, labor or services rendered, or materials furnished....”

[Utah Code § 78B-2-309](#) states in pertinent part that “An action may be brought within six years, (2) upon any contract, obligation, or liability founded upon an instrument in writing....” By the plain language of section [78B-2-309](#), it is to apply to all written contracts, obligations, or liabilities. In contrast, section [78B-2-307](#) specifically begins by explicitly stating that it applies to contracts, obligations, or liabilities **not founded upon an instrument in writing**. (Emphasis Added.)

The Utah Court of Appeals has applied this Statute of Fraud language to credit card cases. See [MBNA America Bank v. Goodman](#), 2006 UT App 276, 140 P.3d 589. Thus, a lawsuit to collect a delinquent credit

card suit is an action based “upon any contract, obligation, or liability founded upon an instrument in writing.” See [Utah Code § 78B-2-309](#).

While the Utah appellate courts have not yet specifically addressed whether a six year or four year statute of limitations applies to credit card cases, the author knows of several Utah district courts that have issued written rulings applying [Utah Code § 78B-2-309](#) to credit card agreements. While these decisions are not binding here, they do offer insight as to how the courts have reached their decisions.

VI. Utah Law Applicable to NSF Check collections

Utah has enacted a law to apply to Dishonored Instruments. That law can be found at [Utah Code § 7-15-1 et. seq.](#) The Dishonored Instruments code section requires that, if a creditor wants the opportunity to obtain the “Bad Check” penalties available in [Utah Code § 7-15-1](#), the creditor must first send out the Notice described in [Utah Code § 7-15-2](#). The Notice may be given orally or in writing. *Id.* The Notice can be mailed first class postage prepaid, or mailed certified or registered mail, return receipt requested. *Id.* If the notice is given orally or by regular mail, then there could be a factual issue as to whether Notice was actually given or received by the debtor. *Id.* But, if the notice is given by certified mail, return receipt requested, then the notice is conclusively presumed to have been given when the notice is deposited in the United States mail. *Id.* Because the right to NSF fees, interest, court costs, attorneys’ fees, actual costs of collection, and damages in an amount of triple the face value of the check, but not more than \$500, is tied to the issue of “Notice,” most all collection law firms send the required “Notice” by certified mail, return receipt requested, so that the creditor receives the presumption. *Id.*

The Notice allows the debtor to pay the face amount of the check plus \$20.00 within the first 15 calendar days from when the notice was received. *Utah Code §§ 7-15-1 and 2.* Thereafter, the Notice allows the debtor to pay the face amount of the check plus \$40 within the first 30 days from when the notice was received. *Id.* If the debtor does not pay the face amount of the check plus the appropriate “service charge,” then 30 days after the notice is sent, the creditor may file a civil action and seek: (1) the check amount, (2) interest, (3) court costs, (4) attorneys’ fees, (5) actual costs of collection, and (6) damages in an amount equal to triple the value of the check, but not to exceed \$500. *Id.*

VII. Utah Law Applicable to Writs of Replevin and Auto Deficiencies

Utah has enacted Article 9 of the Uniform Commercial Code. Article 9 can be found at Title 70A, Chapter 9. The provisions that specifically concern the repossession and re-sale of the collateral and then the right to pursue a deficiency are found in [Utah Code § 70A-9a-601 et. seq.](#)

[Utah Code Section 70A-9a-609](#) gives a creditor the right “after default” to “take possession of the collateral.” A secured party may “take possession of the collateral” . . . “pursuant to a judicial process” or “without judicial process, if it proceeds without breach of the peace.” *Id.*

As a practical matter, after default on a vehicle loan, or other personal property typically stored outside, most creditors obtain the collateral without judicial process. Most creditors simply hire a repossession company to take possession of the collateral.

But, in a certain limited number of accounts, a defaulting debtor will wrongfully retain possession of the collateral. In such an instance, a creditor can file a civil action under [Utah Code § 70A-9a-609](#), and request that the Court determine that the creditor is secured, the debtor is in default, and the creditor is entitled to take possession of collateral. *Rule 64B of the Utah Rules of Civil Procedure* allows a creditor to take possession of the collateral, prejudgment, if the creditor establishes that the creditor is entitled to possession, and the debtor is wrongfully retaining the collateral. In addition, the creditor will need to comply with the grounds set out in *Rule 64A of the Utah Rules of Civil Procedure* in order to obtain the collateral before judgment is entered.

As a matter of practice, if the creditor files an affidavit or declaration establishing all the elements required by [Utah Code § 70A-9a-609](#) and *Rule 64A* and *Rule 64B*, the Court will place the request for a Writ of Replevin on the Order to Show Cause calendar. In the typical automobile repossession case, the elements of *Rule 64A* and *Rule 64B* that the Plaintiff establishes are: (1) The property is not exempt; (See [Utah Code §§ 78B-5-502, 504, and 505](#)); (2) The Writ is not sought to hinder, delay or defraud another creditor; (3) There is a substantial likelihood that Plaintiff will prevail on the merits; (4) The Plaintiff has a special relationship to the collateral, i.e., the Plaintiff has a purchase-money security interest in consumer goods, (See [Utah Code §§ 70A-9a-103, 203 and 309](#)); (5) Plaintiff is entitled to possession of the collateral; and (6) the Defendant wrongfully detains the collateral.

After the creditor Plaintiff obtains and deposes of the collateral, the creditor may pursue a deficiency judgment. Pursuing that deficiency is governed by [Utah Code §§ 70A-9a-610, 611 and 615](#).

Typically, the creditor has disposed of the collateral at a commercially reasonable sale. In the typical auto deficiency case, this would be a sale at the wholesale automobile auction. Then, the creditor will have sent a notification of the disposition to the debtor, describing the credit the loan obligation received from the sale and the balance owing. [Utah Code § 70A-9a-611](#). If the creditor gave the Defendant notice of the deficiency and notice of the sale of the collateral, and the collateral was sold in a commercially

reasonable manner, then the creditor will be entitled to a deficiency judgment for the balance remaining after the sale proceeds are properly applied. [Utah Code § 70A-9a-615](#).

VIII. Utah Law Applicable to Commercial Collection for Goods and Services

Utah has passed the Uniform Commercial Code. The provisions relating to contracts for sale of goods (Article 2) can be found at *Utah Code § 70A-2-101 et. seq.*

IX. Recovering Court Costs and Attorney fees

A. The Creditor's right to recover Attorney fees.

The Utah Courts will award attorney fees even on default judgments, if a creditor produces a written contract in which the debtor agreed to pay reasonable attorney fees if the debt went to collection. [Utah Code Ann. § 78B-5-826](#). Utah Courts will also award attorney fees on actions to collect NSF checks. [Utah Code § 7-15-1](#). The Utah Courts will award a flat statutory amount for attorney fees, rather than requiring an attorney to file an affidavit establishing the actual time the attorney spent in the collection matter. *Rule 73 of the Utah R. of Civ. Proc.* For actions over \$5,000.00, the flat rate for attorney fees is \$775.00. *Id.*

B. Risk to the Creditor of paying the debtor's Attorney fees.

Pursuant to [Utah Code Ann. § 78B-5-826](#), "a court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing . . . [sic] . when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees."

The Utah Supreme Court interpreted this provision such that if a contract contains an attorney fee provision, whereby the creditor is permitted to recover the creditor's attorneys fees, and, for whatever reason, the creditor is not the prevailing party in the lawsuit, then the debtor may recover his/her attorney fees. See [Bilanzich v. Lonetti, 2007 UT 26, 160 P.3d 1041](#).

Thus, creditors need to understand that if they produce the written contract terms, then they must be prepared to support the lawsuit with credible and admissible evidence, and the creditor may even need to appear for trial, or accept the burden of paying the debtor's legal fees.

X. Post Judgment Collection Law

A. Post Judgment Debtor Examinations.

In Utah, the judgment creditor may conduct hearings as necessary to identify property and to apply the

property toward the satisfaction of the judgment. *Rule 64(C)(2) of the Utah R. of Civ. Proc.* Witnesses may be subpoenaed to appear, testify and produce records post judgment. *Id.* The Court may issue orders forbidding a judgment debtor from transferring, disposing or interfering with property. *Id.*

B. Post Judgment Writs of Garnishment and Execution

The Utah Courts will issue post judgment Writ of Garnishments and Execution, which seize a debtor's non-exempt assets. See *Rule 64D and Rule 64E, Utah R. of Civ. Proc.* Writs of Garnishment and Execution require a filing fee of \$50.00. [Utah Code §78A-2-301](#).

Writs of Continuing Garnishments (Wage) require an employer to hold 25 percent of a debtor's net wages (after taxes and deductions), for each pay period, for a period of 120 days. The Employer served with a writ is required to fill out and sign an affidavit describing the debtor's wages for each pay period and is required to remit the 25 percent to the creditor's attorney at the end of each pay period. *Rule 64D of the Utah R. of Civ. Proc.* Wage Garnishments require a payment of \$25.00 to the Employer. [Utah Code § 78A-2-216](#).

In Utah, the Courts issue Writs of Garnishment which require a financial institution to seize all of the debtor's checking accounts, savings accounts, and other similar payment on demand accounts and deliver the seized money to the creditor's attorney, after a period of twenty (20) days. *Rule 64D of the Utah R. of Civ. Proc.* Bank Garnishments require a payment of \$10.00 to the Financial Institution. [Utah Code § 78A-2-216](#).

In Utah, the Courts issue Writs of Execution, where a judgment creditor may seize and store, pending a Constable or Sheriff's sale, all the debtors non-exempt personal property, (see exemptions listed below) including motor vehicles, stocks, bonds, art, household goods and furnishings. The money realized at the sale will be applied to the judgment. The judgment creditor may bid at the sale. *Rule 64E of the Utah R. of Civ. Proc.*

In Utah, the Courts issue Writs of Real Property Execution. A judgment creditor may record a judgment on the judgment debtor's real property owned in the County where the judgment is recorded. [Utah Code § 78B-5-201](#). The recorded judgment becomes a lien on the real property, having priority over all liens attaching to the property after the date of recording. A judgment creditor may then conduct a Constable or Sheriff's sale, on all the debtor's non-exempt real property. *64E of the Utah R. of Civ. Proc.*

C. Exemptions.

1. Personal Property.

The following are exempt: Burial plots, unemployment benefits, welfare benefits, Social Security, disability benefits, veterans benefits, benefits paid for medical care, child support, alimony and property settlement payments, certain household items, personal injury insurance payments and settlements, life insurance and benefits paid under life insurance contracts, 401K Plans and other retirements plans, [Utah Code § 78B-5-505](#), alimony, death benefits, all pension and retirement benefits, *Id.*, certain necessary personal and household items. *Id.*

The following are exempt if valued under the amount stated:

- Household goods, not already specifically exempted by item, up to \$500.00.
- Tools of trade and professional books, up to \$3,500.
- One motor vehicle, not exceeding \$2,500.00 in value. [Utah Code § 78B-5-506](#).

2. Real Property.

- Personal residence exemption. \$20,000 in value for individual debtor. \$40,000 for married co-debtors. [Utah Code § 78B-5-503](#).
- Homestead, non-personal residence. \$5,000 in value for each debtor. \$10,000 for married co-debtors. [Utah Code § 78B-5-503](#)

XI. Utah Cases Specific to Collections

Under Utah statute, “parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.” [Utah Code Ann. § 15-1-1](#) (2005). The Utah Courts will not intervene to save a contracting party from a bad bargain. See *The Cantamar, L.L.C. v. Carlton J. Campagne*, 142 P.3d 140, 151-2 (2006 Utah App.) (quoting *Bekins Bar v. Ranch v. Huth*, 664 P.2d 455, 459 (Utah 1983)). The law recognizes the right of people “to freely contract, establishing terms and allocating risks between them.” *Id.* quoting *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998). Utah Courts will not “assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable.” *Bekins Bar v. Ranch v. Huth*, 664 P.2d 455, 459 (Utah 1983).

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