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SENATE FILE 72

By Rush

Passed Senate, Date \_\_\_\_\_ Passed House, Date \_\_\_\_\_  
 Vote: Ayes \_\_\_\_\_ Nays \_\_\_\_\_ Vote: Ayes \_\_\_\_\_ Nays \_\_\_\_\_  
 Approved \_\_\_\_\_

### A BILL FOR

1 An Act relating to the provisional remedies of attachment,  
 2 garnishment and replevin.

3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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DIVISION I

PROCEDURES APPLICABLE TO PROVISIONAL REMEDIES

Section 1. NEW SECTION. DEFINITIONS. As used in division one (I) of this Act, unless the context otherwise requires:

1. "Party" does not include a garnishee.

2. "Property" means property which is subject to attachment, garnishment, or replevin under a chapter of the Code referred to in subsection three (3) of this section. This division of this Act does not expand the scope of a remedy provided in any of those chapters.

3. "Provisional remedy" means any of the following:

a. A writ of attachment issued under chapters six hundred thirty-nine (639), six hundred forty (640), or six hundred forty-one (641), of the Code when sought prior to judgment.

b. An attachment by garnishment under chapter six hundred forty-two (642) of the Code when sought prior to judgment.

c. A writ of replevin under chapter six hundred forty-three (643) of the Code.

4. "Judicial officer" means a district judge, a district associate judge, or a magistrate. This subsection does not grant jurisdiction to a judicial officer.

Sec. 2. NEW SECTION. APPLICATION--GENERAL LIMITATIONS.

1. A party may petition the court for issuance of a provisional remedy at any time after the commencement of a civil action. The petition must be verified.

2. A provisional remedy shall not be issued except upon the written order of a judicial officer.

3. A petition for a provisional remedy shall not be granted by a judicial officer until the petitioner establishes with particularity by affidavit or otherwise the existence or satisfaction of all statutory prerequisites for issuance of the provisional remedy.

Sec. 3. NEW SECTION. PROVISIONAL REMEDY WITHOUT PRIOR NOTICE.

1. A provisional remedy other than an attachment of wages

1 by garnishment may be issued by a judicial officer without  
2 prior notice to the defendant in the following cases:

3 a. When the defendant is about to remove himself or herself  
4 permanently from the state and has refused to secure the debt,  
5 or has secreted property for the purpose of defrauding  
6 creditors, or has disposed of property, wholly or in part,  
7 with intent to defraud creditors, or is about to dispose of  
8 property with intent to defraud creditors.

9 b. When the plaintiff is the owner or lessor, or otherwise  
10 is lawfully entitled to possession of property and is seeking  
11 a writ of replevin with respect to that property. However,  
12 a writ of replevin shall not be issued under this section  
13 to enforce any security interest other than a purchase money  
14 security interest.

15 c. When the provisional remedy is required to obtain  
16 jurisdiction.

17 d. When the plaintiff has received a bulk sales notice  
18 pursuant to section five hundred fifty-four point six thousand  
19 one hundred five (554.6105) of the Code involving the property  
20 of the defendant and the bulk sale will not provide for full  
21 payment of the plaintiff's claim.

22 2. When issuing a provisional remedy without prior notice  
23 the clerk of court shall issue a notice which is prepared  
24 by the plaintiff in the form specified by the supreme court  
25 and which is directed to the defendant. The notice shall  
26 contain the following:

27 a. Identification of the persons whose interests are  
28 involved.

29 b. A brief statement of the effects of the provisional  
30 remedy.

31 c. A statement that the defendant has the right to demand  
32 a hearing, a brief description of the purpose of the hearing,  
33 and directions informing the defendant how and when the demand  
34 for hearing must be made.

35 d. Additional matters specified by the supreme court.

1 Prior to issuing the notice the clerk of court shall determine  
2 that the form of notice is accurate and complete.

3 3. When a provisional remedy is issued without prior  
4 notice, the plaintiff shall, at the time the process is  
5 executed or within three days thereafter, exercise reasonable  
6 diligence to serve the defendant with a copy of the notice  
7 specified in subsection two (2) of this section, a copy of  
8 the petition for the provisional remedy, and a copy of the  
9 order granting the petition.

10 4. When a provisional remedy is issued without prior  
11 notice, the defendant may demand a hearing within five days  
12 after being served with notice. The failure to file a timely  
13 demand for hearing is a waiver of the right to a hearing under  
14 this division of this Act.

15 Sec. 4. NEW SECTION. PROVISIONAL REMEDY WITH NOTICE.

16 1. Except when permitted by section three (3) of this  
17 Act, a provisional remedy shall not be issued until the  
18 defendant has been given notice as provided in this section,  
19 and until the defendant has been afforded an opportunity for  
20 hearing or a hearing has been held as provided in this division  
21 of this Act.

22 2. Upon the filing of a petition for a provisional remedy  
23 which requires prior notice the clerk of court shall issue  
24 a notice which is prepared by the plaintiff in the form  
25 specified by the supreme court and which is directed to the  
26 defendant. The notice shall contain the following:

27 a. Identification of persons whose interests are involved.

28 b. A brief statement of the effects of the provisional  
29 remedy.

30 c. A statement that the defendant has the right to demand  
31 a hearing, a brief description of the purpose of the hearing,  
32 and directions informing the defendant how and when the demand  
33 for hearing must be made.

34 d. Additional matters specified by the supreme court.

35 Prior to issuing the notice the clerk of court shall

1 determine that the form of notice is accurate and complete.

2 3. Upon issuance of the notice required by subsection  
3 two (2) of this section the plaintiff shall cause to be served  
4 on the defendant, one copy of the petition for provisional  
5 remedy and one copy of the notice specified in subsection  
6 two (2) of this section.

7 4. The defendant may demand a hearing on the petition  
8 by filing a written demand for hearing with the clerk of court  
9 within five days after being served with notice.

10 The failure to file a timely demand is a waiver of the  
11 right to a hearing under this division of this Act.

12 Sec. 5. NEW SECTION. DEFAULT--ISSUANCE OF PROVISIONAL  
13 REMEDY.

14 1. If a demand for hearing is not filed within the time  
15 provided in subsection four (4) of section four (4) of this  
16 Act, the party seeking the provisional remedy, or that party's  
17 attorney, shall file an affidavit of default setting forth  
18 that service was made, that no demand for hearing was filed  
19 and that the defendant is in default. Upon the filing of  
20 an affidavit of default, the clerk shall enter the default  
21 of record.

22 2. After entry of default, a judicial officer shall examine  
23 all pleadings, affidavits and documents filed in the action  
24 to determine the following:

25 a. That a return of service has been filed by the person  
26 who served a copy of the petition and notice.

27 b. That the affidavit of default required by subsection  
28 one (1) of this section has been filed and the default entered  
29 by the clerk.

30 c. That the claim of the plaintiff is based on facts  
31 stated in the record which are sufficient to establish probable  
32 cause that the claim is valid.

33 d. That statutory prerequisites for the issuance of the  
34 provisional remedy exist or have been satisfied.

35 3. If the judicial officer finds that the requirements

1 of subsection two (2) of this section have been met, the  
2 petition for the provisional remedy shall be granted.

3 4. Written findings that the requirements of subsection  
4 two (2) of this section have been met shall be included in  
5 the order granting a provisional remedy.

6 Sec. 6. NEW SECTION. HEARINGS.

7 1. Upon the filing of a demand for hearing under section  
8 three (3) or four (4) of this Act, the clerk of court shall  
9 set a date for hearing and shall give notice thereof by  
10 ordinary mail to each party. A hearing shall be held within  
11 five days, exclusive of weekends and holidays, after the date  
12 of filing of the demand for hearing, or at a later date with  
13 the consent of the parties.

14 2. A hearing under sections three (3) or four (4) of this  
15 Act shall be limited to the following issues:

16 a. The validity of the applicant's claim, and any defenses  
17 and claims of personal property exemptions of the defendant.

18 b. The satisfaction of statutory requirements for the  
19 issuance of the provisional remedy.

20 3. If upon hearing the court finds probable cause to  
21 believe that the claim of the plaintiff is valid and that  
22 the statutory requirements for the provisional remedy have  
23 been met, the petition for the provisional remedy shall be  
24 granted immediately, or the provisional remedy previously  
25 issued shall be sustained, whichever is appropriate.

26 4. The court may issue any other order in conjunction  
27 with the hearing which is necessary to protect the rights  
28 or interests of the parties.

29 5. The burden of proof at a hearing held under this sec-  
30 tion shall be upon the plaintiff, except with respect to de-  
31 fenses and exemptions of the defendant.

32 Sec. 7. NEW SECTION. SERVICE--RETURN. Service of the  
33 notice required in sections three (3) and four (4) of this  
34 Act shall be in the manner provided in the rules of civil  
35 procedure for service of original notice, and the person

1 making service shall make a return in the manner provided  
2 in the rules of civil procedure for return of service of  
3 original notice.

4 Sec. 8. NEW SECTION. ATTORNEY'S FEES. If a hearing is  
5 held pursuant to section six (6) of this Act and the plain-  
6 tiff fails to establish probable cause, the court may award  
7 reasonable attorney's fees to the defendant.

8 Sec. 9. NEW SECTION. WAIVER OF RIGHT TO A HEARING VOID.  
9 Notwithstanding an agreement to the contrary, a waiver of  
10 the right to demand a hearing provided by this division of  
11 this Act is void.

12 Sec. 10. NEW SECTION. FORMS. The supreme court shall  
13 prescribe standard forms of notice to be used under sections  
14 three (3) and four (4) of this Act.

15 DIVISION II

16 CORRELATING AMENDMENTS

17 Sec. 11. Section six hundred thirty-nine point one (639.1),  
18 Code 1979, is amended to read as follows:

19 639.1 METHOD. The Subject to the provisions of division  
20 one (I) of this Act, the plaintiff in a civil action may cause  
21 the property of the defendant not exempt from execution to  
22 be attached at the commencement or during the progress of  
23 the proceeding, by pursuing the course hereinafter prescribed.

24 Sec. 12. Section six hundred thirty-nine point two (639.2),  
25 Code 1979, is amended to read as follows:

26 639.2 PROCEEDINGS AUXILIARY. ~~if-it-be-subsequent-to-the~~  
27 ~~commencement-of-the-action, a~~ A separate petition ~~or-an~~  
28 ~~amendment-to-the-petition~~ must be filed, and in all cases  
29 the proceedings relative to the attachment are to be deemed  
30 independent of the ordinary proceedings and only auxiliary  
31 thereto.

32 Sec. 13. Section six hundred thirty-nine point three  
33 (639.3), unnumbered paragraph one (1), Code 1979, is amended  
34 to read as follows:

35 The petition ~~or-amendment-to-petition~~ which asks an attach-

1 ment, ~~must in all cases be sworn to,--it~~ must state one or  
2 more of the following grounds:

3 Sec. 14. Section six hundred thirty-nine point eight  
4 (639.8), Code 1979, is amended to read as follows:

5 639.8 ALLOWANCE OF VALUE IN OTHER CASES. If the demand  
6 is not founded on contract, the original petition must be  
7 presented to ~~some judge of the supreme or district court,~~  
8 ~~or the judge of the court from which the issuance of a writ~~  
9 ~~of attachment is sought, who~~ a judicial officer of the district  
10 court who has jurisdiction to preside over the action. The  
11 judicial officer shall make an allowance thereon of the amount  
12 in value of the property that may be attached.

13 Sec. 15. Section six hundred thirty-nine point fifteen  
14 (639.15), Code 1979, is amended to read as follows:

15 639.15 REMEDY FOR FALSELY SUING OUT--COUNTERCLAIM. The  
16 fact stated as a cause of attachment shall not be contested  
17 in the action by a mere defense. The defendant's remedy shall  
18 be on the bond, but he or she may in his or her discretion  
19 sue thereon by way of counterclaim, and in such case shall  
20 recover damages as in an original action on such bond. This  
21 section does not prevent the court, in a hearing under division  
22 one (I) of this Act, from denying a petition for attachment  
23 or vacating a writ of attachment when the plaintiff fails  
24 to establish probable cause.

25 Sec. 16. Section six hundred thirty-nine point thirty-  
26 one (639.31), Code 1979, is amended to read as follows:

27 639.31 NOTICE TO DEFENDANT--RETURN. When any property  
28 is attached, the officer making the levy shall at once give  
29 written notice thereof to the defendant, if found within the  
30 county in which the levy is made, and the fact of the giving  
31 of such notice, or that the defendant is not found within  
32 the county, shall be shown by the officer's return. The  
33 notice required by this section is in addition to the notice  
34 requirements of division one (I) of this Act.

35 Sec. 17. Section six hundred thirty-nine point forty

1 (639.40), Code 1979, is amended to read as follows:

2 639.40 PERSONAL PROPERTY SUBJECT TO SECURED INTEREST.

3 ~~Personal~~ Subject to division one (I) of this Act, personal  
4 property subject to a security interest may be levied on under  
5 attachment in the method provided for levying execution  
6 thereon.

7 Sec. 18. Section six hundred thirty-nine point sixty-three  
8 (639.63), Code 1979, is amended to read as follows:

9 639.63 DISCHARGE ON MOTION. A motion may be made to  
10 discharge the attachment or any part thereof, at any time  
11 before trial, for insufficiency of statement of cause thereof,  
12 or for other cause making it apparent of record that the  
13 attachment should not have issued, or should not have been  
14 levied on all or on some part of the property held. The  
15 provisions of division one (I) of this Act do not limit the  
16 remedy provided by this section except with respect to issues  
17 which are determined after a hearing held pursuant to section  
18 six (6) of this Act.

19 Sec. 19. Section six hundred thirty-nine point sixty-five  
20 (639.65), Code 1979, is amended to read as follows:

21 639.65 PERFECTING APPEAL FROM ORDER OF DISCHARGE. When  
22 If at the time an attachment has-been is denied, vacated or  
23 discharged, if the plaintiff then announces his or her purpose  
24 to appeal from such-order-of-discharge,--he the order, the  
25 plaintiff shall have two days in which to perfect his or her  
26 appeal,--and-during. During that time such-discharge an order  
27 vacating or discharging the attachment shall not operate to  
28 divest any a lien or claim under the attachment, nor shall  
29 the property be returned, and the appeal, if so perfected,  
30 shall operate as a supersedeas-thereof stay of the order.

31 Sec. 20. Section six hundred thirty-nine point sixty-seven  
32 (639.67), Code 1979, is amended to read as follows:

33 639.67 LIBERAL CONSTRUCTION--AMENDMENTS. This chapter  
34 shall be liberally construed, and the plaintiff, at any time  
35 when objection is made thereto, shall be permitted to amend

1 any defect in the petition, affidavit, bond, writ, or other  
2 proceeding; and no attachment shall be quashed or dismissed,  
3 or the property attached released, if the plaintiff establishes  
4 that the defect in any of the proceedings has been or can  
5 be amended so as to show that a legal cause for the attachment  
6 existed at the time it was issued; and the court shall give  
7 the plaintiff a reasonable time to perfect such defective  
8 proceedings.

9 Sec. 21. Section six hundred forty point three (640.3),  
10 Code 1979, is amended to read as follows:

11 640.3 GRANTED BY COURT OR JUDGE--TERMS. The attachment  
12 in the cases mentioned in sections 640.1 and 640.2 may be  
13 granted by the court in which the action is brought, subject  
14 to the provisions of division one (I) of this Act, upon such  
15 terms and conditions as to security by the plaintiff for the  
16 damages which may be occasioned, and with such directions  
17 as to the disposition to be made of the property attached  
18 as may be just and proper under the circumstances of each  
19 case.

20 Sec. 22. Section six hundred forty-one point two (641.2),  
21 Code 1979, is amended to read as follows:

22 641.2 ATTACHMENT AUTHORIZED. In all actions for money  
23 due to the state, or to any agent or officer for the use of  
24 the state, it shall be lawful for an attachment to issue  
25 against the property or debts of the defendant not exempt  
26 from execution, upon the filing of an affidavit by the county  
27 attorney of the proper county, or of the attorney general,  
28 that he or she verily believes that a specific amount therein  
29 stated is justly due, and the defendant therein has refused  
30 to pay or secure the same, and unless an attachment is issued  
31 against the property of the defendant there is danger that  
32 the amount due will be lost to the state. Attachment shall  
33 not be issued on behalf of the state except in compliance  
34 with division one (I) of this Act and other applicable law.

35 Sec. 23. Section six hundred forty-two point fourteen

1 (642.14), Code 1979, is amended to read as follows:

2 642.14 NOTICE. Judgment against the garnishee shall not  
3 be entered until the principal defendant shall have had ten  
4 days' notice of the garnishment proceedings, to be served  
5 in the same manner as original notices. The notice required  
6 by section three (3) or four (4) of this Act is in addition  
7 to the requirements of this section.

8 Sec. 24. Section six hundred forty-three point five  
9 (643.5), Code 1979, is amended to read as follows:

10 643.5 WRIT ISSUED. ~~Upon direction of the court after~~  
11 ~~notice and opportunity for such hearing as it may prescribe~~  
12 Subject to the provisions of division one (I) of this Act,  
13 the clerk shall issue a writ under ~~his hand,~~ and the seal  
14 of the court, directed to the proper officer, requiring ~~him~~  
15 the officer to take the property therein described and deliver  
16 it to the plaintiff.

17 Sec. 25. The provisions of this Act apply to all pro-  
18 visional remedies petitioned for on or after the effective  
19 date of this Act, irrespective of the date of occurrence of  
20 any act or omission upon which the issuance of the provi-  
21 sional remedy is premised.

22 Sec. 26. The code editor shall not codify sections one  
23 (1) through ten (10) of this Act as a part of chapter six  
24 hundred thirty-nine (639), six hundred forty (460), six hundred  
25 forty-one (641), six hundred forty-two (642) or six hundred  
26 forty-three (643) of the Code.

27 Sec. 27. This Act shall take effect January first following  
28 its enactment.

29 EXPLANATION

30 This bill deals with what are referred to as "provisional"  
31 or prejudgment remedies, i.e., attachment, replevin and  
32 garnishment, which are proceedings at law supplementing  
33 ordinary actions. In ordinary actions the parties incur  
34 rights or duties only when the court renders judgment. Because  
35 of the unavoidable lapse of time between commencement of an

1 action and satisfaction of judgment, it is possible for the  
2 defendant to transport property out of state or take other  
3 actions which would have the effect of thwarting a judgment  
4 issued in favor of the plaintiff. A writ of attachment, a  
5 writ of replevin, and a "garnishment", are statutory remedies  
6 which can be used by a plaintiff, under specific conditions,  
7 to obtain custody of or preserve personal or real property  
8 during the pendency of an action and until the plaintiff can  
9 obtain satisfaction of a judgment or obtain other security.

10 Historically, a defendant had limited opportunities to  
11 challenge the issuance of a provisional remedy. The United  
12 States Supreme Court, in interpreting the due process clause,  
13 has issued a series of decisions since 1969 which have  
14 established minimum statutory requirements to protect a  
15 defendant from unconstitutional deprivations of the possession  
16 or use of property. These cases are discussed in a legal  
17 review contained in volume 63 of the University of Iowa Law  
18 Review, at page 151. Although there are differing  
19 interpretations of the exact requirements imposed by the  
20 Supreme Court decisions, they essentially provide that state  
21 law must afford a defendant notice of the issuance or proposed  
22 issuance of a provisional remedy and a meaningful opportunity  
23 to contest the issuance of a provisional remedy.

24 This bill amends chapters 639, 640, 641, 642 and 643 of  
25 the Code, which contain the statutory authority for the  
26 provisional remedies, by establishing requirements for giving  
27 notice to the defendant and for determining at a hearing held  
28 specifically for the purpose whether the issuance of a  
29 provisional remedy is warranted. Sections 1 through 10 contain  
30 the procedural requirements for applying for, issuing and  
31 hearing contests relating to provisional remedies. The  
32 remainder of the bill contains correlating amendments.  
33 Generally speaking, the new provisions would require notice  
34 and opportunity for hearing before a provisional remedy could  
35 be issued, except in a limited number of circumstances. In

1 those instances where a provisional remedy could be issued  
2 prior to notice, opportunity for hearing must be afforded  
3 within a reasonable time after issuance.

4 The bill would take effect January first following its  
5 enactment.

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