

## **CHAPTER 32-08.1 ATTACHMENT**

**32-08.1-01. Attachment availability.** Any creditor may attach the property of the creditor's debtor, in the cases, upon the conditions, and in the manner prescribed in this chapter.

**32-08.1-02. Issuance of writ - Hearing and notice requirement - Form and contents.** A writ of attachment may be issued on the request of the plaintiff before final judgment and after a summons and a complaint is filed. Except as provided in section 32-08.1-02.1, the writ may only be issued following a hearing at which the plaintiff shall present the affidavit described in section 32-08.1-03. The court may issue the writ of attachment only if the plaintiff has provided the required affidavit, has executed a sufficient bond as required under sections 32-08.1-03 and 32-08.1-05, and has made a prima facie showing of the right to attachment. The plaintiff shall provide the defendant with a copy of the request for the writ and the accompanying affidavit and notice of the time of the hearing. The writ, if issued, must be directed to the sheriff of some county in which the property of the defendant is supposed to be and must require the sheriff to attach all the property of the defendant within the sheriff's county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses. The writ must be in the name of the court and be sealed with its seal and signed by its judge.

**32-08.1-02.1. Prehearing attachment - Issuance of order - Notice of hearing.** A writ of attachment may be issued on the plaintiff's request and prior to the hearing required under section 32-08.1-02 if the plaintiff's request is accompanied by an affidavit stating the basis and amount of claim against the defendant and describing facts that constitute grounds for attachment under subdivision a, b, c, or d of subsection 1 of section 32-08.1-03. The court may issue the writ prior to the hearing required under section 32-08.1-02 only if the plaintiff demonstrates the probability of success on the merits, the existence of one or more of the grounds specified in subdivision a, b, c, or d of subsection 1 of section 32-08.1-03, and that, due to extraordinary circumstances, the plaintiff's interests cannot be protected by an appropriate order of the court, other than by directing the prehearing attachment of property. The defendant must be served immediately after the attachment is completed with a copy of the plaintiff's request for the writ, a copy of the affidavit and all other documents offered in support of the request, and a notice of the availability of a hearing under section 32-08.1-17.

### **32-08.1-03. Basis for attachment.**

1. Before any writ of attachment may be executed, the plaintiff or someone on the plaintiff's behalf shall make and attach thereto an affidavit stating the basis and amount of the claim against the defendant, that the same is due upon contract or upon a judgment, and that the affiant knows or has good reason to believe any of the following:
  - a. The defendant is absent from this state, or is concealed therein so that summons cannot be served on the defendant.
  - b. The defendant has disposed of or concealed or is about to dispose of or conceal the defendant's property or some part thereof with intent to defraud the defendant's creditors.
  - c. The defendant has removed or is about to remove property out of this state with intent to defraud the defendant's creditors.
  - d. The defendant fraudulently incurred the obligation respecting which the action is brought.
  - e. The defendant is not a resident of this state.

- f. The defendant is a foreign corporation or limited liability company; or is a domestic corporation or limited liability company and no officer, manager, or agent thereof on whom to serve the summons exists or resides in this state or can be found.
  - g. The action is against a defendant as principal on an official bond to recover money due the state or to some political subdivision thereof, or that the action is against the defendant as principal upon a bond or other instrument given as evidence of debt for or to secure the payment of money embezzled or misappropriated by such defendant as an officer of the state or of a political subdivision thereof.
  - h. The action is against a defendant to recover purchase money for personal property sold to the defendant, in which case the property must be specifically described, if one of the conditions under subdivision a, e, or i and one of the conditions under subdivision b or c is also alleged.
  - i. The action is against the owner of any motor vehicle for damages alleged to have been caused by the negligence of such owner or the owner's duly authorized agent, the motor vehicle alleged to have been driven, occupied, or owned by a negligent driver or owner thereof, at the time of such accident, may be attached, if one of the conditions under subdivision a or e and one of the conditions under subdivision b or c is also alleged.
2. In tort actions the affidavit must state that a claim for relief in tort exists in favor of the plaintiff and against the defendant, that the damages sustained exceed fifty dollars specifying the amount claimed and either:
    - a. The defendant is not a resident of this state; or that the defendant's residence is unknown and cannot with due diligence be ascertained; or
    - b. The defendant is a foreign corporation or foreign limited liability company.
  3. An action may be maintained and a writ of attachment issued on a demand not yet due in any case mentioned in this section, except the cases mentioned in subdivision e, f, or g of subsection 1 and the same proceedings in the action shall be had and the same affidavit shall be required as in actions upon matured demands except that the affidavit shall state that the debt is to become due. The bond specified in section 32-08.1-05 shall be for three times the amount demanded. In case an attachment is issued before the maturity of the debt and a defense to such attachment is sustained, the court shall render a judgment for damages and costs against the plaintiff.

**32-08.1-04. Amendment to affidavit.** The affidavit required by section 32-08.1-03 may be amended at any time before the trial by the substitution of a new affidavit containing allegations of facts existing at the time of making the former affidavit.

**32-08.1-05. Bond - Justification.** Before the writ of attachment shall be executed, a bond on the part of the plaintiff in the sum of at least five hundred dollars executed by sufficient surety shall be delivered to the officer, to the effect that if the defendant recover judgment the plaintiff shall pay all costs that may be awarded to the defendant and all damages which the defendant may sustain by reason of the attachment. The affidavit of the surety annexed to such bond shall state that the surety is a resident of this state and worth double the sum specified in the bond in property therein above the surety's debts and exclusive of property exempt from execution. No bond is necessary when this state or any political subdivision thereof is plaintiff.

**32-08.1-06. Additional security.** In case the defendant is not satisfied with the amount specified in the bond or with the surety the defendant may, upon five days' notice to the plaintiff, apply to a judge for additional security and such judge may require the plaintiff to give and file

another bond, to be approved by the judge, in such sum as the judge shall deem proper, not exceeding the appraised value of the property attached. The surety shall justify as provided in section 32-08.1-05; but if there be more than one surety they may be accepted if they are jointly responsible for the required sum.

**32-08.1-07. Officer's return - Action on bond.** The officer executing the writ shall return thereon all the officer's proceedings and within ten days from receipt of the bond shall file the writ, affidavit, and bond with the clerk of the court.

**32-08.1-08. Directions to sheriff - Several writs - Limitations on seizure.**

1. The sheriff shall without delay serve copies of the writ, affidavit, and bond upon the defendant in the same manner as the summons. In the case of a nonresident, a foreign corporation, or a foreign limited liability company, the sheriff shall serve such copies on any agent of such defendant in the county, if any be known to the sheriff. The court may, or on demand of the defendant shall, appoint a competent appraiser to appraise the property of the defendant which is subject to the writ. Copies of the appraisal, if any, and inventory shall be served upon the defendant.
2. If two or more writs against the same defendant shall be executed on the same property, an inventory shall be made in but one of the actions, and the sheriff shall endorse on the copy served upon the defendant in the other action a notice that the property attached is the property attached in the action in which the inventory are made, giving the title of such action; and such officer shall state in the officer's return the fact of such endorsement.
3. If the defendant has not filed a special answer, pursuant to section 32-08.1-17, within ten days after notice of the issuance of a writ of attachment, the sheriff shall seize, in the sheriff's county, so much of the property of the defendant as will satisfy the demand of the plaintiff with costs and expenses. The sheriff shall attach real property and perishable property without delay, notwithstanding the right of the defendant to file a special answer.

**32-08.1-09. Attachment of real estate.** To attach real estate the sheriff shall file in the office of the recorder a copy of the writ with the sheriff's certificate that by virtue of the original writ the sheriff has attached all the interest of the named defendant in such real estate, describing the same.

**32-08.1-10. What may be attached - How attached.** All the property of the defendant, not exempt from execution, may be attached. Personal property shall be attached as upon an execution and the provisions respecting the levy of an execution thereon shall be applicable to an attachment.

**32-08.1-11. Indemnity to sheriff.** If there is reasonable doubt as to the ownership of the property or as to its liability to be attached, the sheriff may require sufficient security from the plaintiff to indemnify the sheriff for attaching such property.

**32-08.1-12. Sale of perishable property attached or garnished.** When any property taken on a writ of attachment is likely to depreciate in value before the end of the action or the keeping thereof could cause much loss or expense, the court or a judge may order it sold in such manner as the best interests of the parties demand, and the money realized shall be held by the sheriff in lieu of the property sold.

**32-08.1-13. Care of property - Collection of debts.** The officer shall deposit with the court the property seized by the officer and the proceeds of such as shall have been sold to answer any judgment which may be recovered in such action; and shall, subject to the direction of the court or judge, collect and deposit with the court all the debts, credits, and effects of the defendant. The retention, protection, and final disposition of the property must be determined by the court.

**32-08.1-14. Bond for release of property - Estoppel.** The defendant may, at any time before judgment, deliver to the officer who attached the defendant's property a bond executed by two sureties, to the effect that they will, on demand, pay to the plaintiff the amount of the judgment, with all costs, that may be recovered against such defendant in the action, not exceeding the sum specified in the bond with interest. Such a bond shall be in the amount alleged by the plaintiff to be due. The sureties shall justify as provided in section 32-08.1-05, and may be accepted if they are jointly responsible for the required sum.

**32-08.1-15. Exception to defendant's sureties - Release of property - Costs.** The officer shall forthwith give the plaintiff a copy of the bond received pursuant to section 32-08.1-14 with notice of the time when the same was delivered to the officer. The plaintiff shall, within three days thereafter, give notice to the officer that the plaintiff objects to the sureties or waives all objections to them. When the plaintiff objects, the sureties shall justify as provided in section 32-08.1-05. The officer shall be responsible for the sufficiency of such sureties and may retain possession of the attached property until they justify or until the objection is waived. Thereafter, the officer shall deliver the property attached to such defendant. If real estate is attached, the sheriff shall file a certificate of the discharge thereof in the office of the recorder. If judgment is for the plaintiff, all the plaintiff's costs and disbursements on the attachment shall be included in the judgment.

**32-08.1-16. Vacation or modification of writ.** The court may, at any time before the trial of the action or a release of the property under section 32-08.1-15, vacate or modify the writ of attachment for irregularity or other sufficient cause, upon five days' notice of motion. The motion therefor may be combined with a motion to increase the plaintiff's security under section 32-08.1-06.

**32-08.1-17. Answer to writ - Trial.** Within ten days after notice of the issuing of a writ of attachment against the defendant's property, the defendant may, by special answer, deny the existence, at the time of the making of the attachment affidavit, of the material facts stated in the affidavit and may assert undue hardship as a defense. The court shall try the issue so raised before the trial of the action, but in no event later than fourteen days after the writ of attachment is issued. The plaintiff has the burden of proving the conditions for issuance of the prehearing writ of attachment as described in section 32-08.1-02.1. If the defendant has made an assignment for the benefit of the defendant's creditors, the defendant's assignee may answer and defend pursuant to this section.

**32-08.1-18. Trial or special answer.** In making its determination of the issue raised by the special answer, the court shall consider any undue hardship on the defendant that would result from an issuance of the warrant. If the court finds for the defendant, the judge presiding shall tax the defendant's costs of such trial, and an order shall be entered dismissing the writ or that the property attached be delivered to the defendant; and the jury or the court shall, on the trial of the action or thereafter, assess the damages sustained by the defendant by reason of the taking and detention or sale of the property attached or by reason of any injury thereto. The same, together with the costs so taxed, shall be a setoff to the plaintiff's demand, and if in excess of it, or the plaintiff fails to recover, the defendant shall have judgment for the amount due. If the court on the trial of such special issue finds for the plaintiff, the presiding judge shall tax the plaintiff's costs of such trial, and the amount so taxed shall, if the plaintiff recovers, be taxed by the clerk as disbursement in the action. If the defendant or the defendant's assignee recovers judgment in the action, said costs and the judgment shall be offset.

**32-08.1-19. Damages - When defendant to recover.** If the defendant prevails in the action or if the action be discontinued, the defendant shall have judgment for the damages sustained by the defendant for any damages to the defendant's property by reason of the taking and detention or sale thereof.

**32-08.1-20. Return of property - Damages on dismissal - Entry in recorder's office.** When the defendant recovers judgment, all the money or property held by any writ of attachment shall be delivered to the defendant, subject to the plaintiff's rights on appeal, and the defendant may maintain an action on the plaintiff's bond for the assessed damages sustained by reason of

the writ of attachment. Upon the entry of final judgment in favor of the defendant or on satisfaction of a plaintiff's judgment, the clerk of court shall, if real estate was attached, certify the fact of such judgment or satisfaction, and on filing such certificate with the recorder in any county in which attached lands are situated, such recorder shall enter such certificate upon the records of the recorder's office in discharge of such attachments.

**32-08.1-21. Judgment for plaintiff - How satisfied.** When the plaintiff recovers judgment in the action, the sheriff or officer shall satisfy the same out of the property attached, if sufficient therefor:

1. By paying over to such plaintiff all money attached or received upon sales of property, or upon any debts or credits, or so much thereof as shall be necessary.
2. By selling, under such execution as may be issued on such judgment, so much of the attached property, real or personal, as shall be necessary to satisfy the balance unpaid, according to the provisions regulating sales upon execution, except as provided in subsection 4.
3. If any of the attached property belonging to the defendant is not in the sheriff's hands, without having been sold or converted into money, by repossessing the same, and for that purpose, the sheriff shall have all the authority which the sheriff had to seize the same under the writ of attachment. Any person who shall willfully conceal or withhold such property from the sheriff shall be liable to double damages at the suit of the party injured.
4. Until the judgment against the defendant shall be paid, by proceeding to collect the evidences of debt that may have been seized or attached by virtue of the writ of attachment, and to prosecute any bond the sheriff may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment and costs. When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the property attached, or the proceeds thereof.

**32-08.1-22. Action by sheriff - Who to prosecute.** The actions herein authorized to be brought by the sheriff or officer may be prosecuted by the plaintiff or under the plaintiff's direction, upon the delivery by the plaintiff to the sheriff or officer of an undertaking, with two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff or officer for all damages, costs, and expenses thereon not exceeding five hundred dollars in any one action. Such sureties shall, when required by the sheriff or officer, justify by making an affidavit that each is worth double the amount of the penalty named in the undertaking over and above all debts and exemptions.

**32-08.1-23. Execution after defendant's death.** If any defendant whose property is attached shall die and the judgment is in favor of the plaintiff, the property attached shall be applied to the payment of the judgment and execution may be issued on such judgment and satisfied out of the property so attached in the same manner as if such defendant were living.

**32-08.1-24. Stranger may intervene.** Any person not a party to the action, whose property is attached, may, at any time, either before or after judgment, be made a party upon application for the purpose of removing or discharging the attachment. The court may grant such summary relief as shall be just, and may in proper cases try appropriate issues by jury.