

1 SB196
2 164570-2
3 By Senator Smitherman
4 RFD: Judiciary
5 First Read: 10-MAR-15

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8 SYNOPSIS: Under current law, the primary remedy
9 against asset dissipation has traditionally been an
10 "in rem" order prohibiting the transfer of specific
11 assets. Such prejudgment attachments are based in
12 equity and require particularized showings of
13 fraud.

14 This bill would enact the Alabama Uniform
15 Asset-Preservation Orders Act. The bill would
16 create a process for the issuance of asset
17 preservation orders, which are in personam orders
18 that prevent the dissipation of assets of parties
19 to a civil action and imposing collateral restraint
20 on nonparties such as the party's bank, in order to
21 preserve assets from dissipation, pending judgment.

22
23 A BILL
24 TO BE ENTITLED
25 AN ACT
26

1 To enact the Alabama Uniform Asset-Preservation
2 Orders Act; to provide procedures in civil actions for the
3 court to issue asset-preservation orders against parties and
4 nonparties to the civil action under certain conditions.

5 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

6 Section 1. This act may be cited as the Uniform
7 Asset-Preservation Orders Act.

8 Section 2. DEFINITIONS. In this act:

9 (1) "Asset" means anything that may be the subject
10 of ownership, whether real or personal, tangible or
11 intangible, or legal or equitable, or any interest therein,
12 which is not exempt from execution under applicable law. The
13 term includes the plural unless the context indicates
14 otherwise.

15 (2) "Asset-preservation order" means an in personam
16 order preserving an asset by restraining or enjoining a person
17 from dissipating an asset directly or indirectly.

18 (3) "Consumer debt" means a debt incurred primarily
19 for personal, family, or household purposes. The term includes
20 a debt that has been reduced to judgment.

21 (4) "Debtor" means a person that allegedly owes
22 money to a party.

23 (5) "Nonparty" means a person that is not a party
24 and has custody or control of an asset of a party which is
25 subject to an asset-preservation order. The term includes a
26 person that holds a joint ownership interest in an asset with

1 a party against which an asset-preservation order has been
2 entered.

3 (6) "Party" means a person that brings an action or
4 against which an action is brought, whether or not service has
5 been made on or notice given to the person.

6 (7) "Person" means an individual, estate, business
7 or nonprofit entity, public corporation, government or
8 governmental subdivision, agency, or instrumentality, or other
9 legal entity.

10 (8) "Record" means information that is inscribed on
11 a tangible medium or that is stored in an electronic or other
12 medium and is retrievable in perceivable form.

13 (9) "State" means a state of the United States, the
14 District of Columbia, Puerto Rico, the United States Virgin
15 Islands, or any territory or insular possession subject to the
16 jurisdiction of the United States.

17 Section 3. SCOPE.

18 (a) This act applies to a right accruing to a
19 nonparty after the entry of an asset-preservation order if:

20 (1) the nonparty has been served with the order
21 pursuant to Section 6(a); or

22 (2) the party obtaining the order has filed,
23 recorded, or docketed the order in the appropriate
24 jurisdiction and office in which the party would be required
25 under applicable law to file, record, or docket the order to
26 give notice of, establish, or perfect a lien, security
27 interest, mortgage, or comparable interest, and the order as

1 filed, recorded, or docketed, if it were a judicial lien in
2 favor of a party, would give priority to the interest of a
3 party over the interest of the nonparty under applicable law.

4 (b) This act does not apply in an action:

5 (1) against an individual for a consumer debt; or

6 (2) that arises under the family or domestic
7 relations law of this state.

8 (c) This act does not apply to or limit a right or
9 remedy available to a party or nonparty to the extent that a
10 law, regulation, or treaty of the United States preempts this
11 act.

12 (d) This act does not affect a right or remedy
13 including a right or remedy arising from the creation,
14 perfection, priority, or enforcement of a security interest or
15 other interests that existed before an order takes effect.

16 (e) This act does not prevent recognition under
17 principles of comity of an asset-preservation order not within
18 the scope of this act.

19 (f) This act does not prevent the exercise of other
20 remedies not inconsistent with this act.

21 Section 4. ASSET-PRESERVATION ORDER ISSUED WITH
22 NOTICE.

23 (a) In an action in which monetary damages are
24 sought, a court may issue an asset-preservation order on
25 motion with notice to the party against which the order is
26 sought and with an expedited opportunity to be heard prior to
27 the issuance of the order if the court finds that:

1 (1) there is a substantial likelihood that the party
2 seeking the order will prevail on the merits of the action;

3 (2) if the order is not granted, there is a
4 substantial likelihood the assets of the party against which
5 the order is sought will be dissipated so that the moving
6 party will be unable to receive satisfaction of a judgment
7 because of the dissipation;

8 (3) any harm the party against which the order is
9 sought may suffer by complying with the order is clearly
10 outweighed by the risk of harm to the moving party if the
11 order is not issued; and

12 (4) the order, if issued, would not be adverse to
13 the public interest.

14 (b) A party against which an asset-preservation
15 order is issued may apply for relief from the order by posting
16 a bond or other security in the amount of the damages sought
17 or in an amount determined by the court.

18 (c) On at least 24 hours' notice to the party that
19 obtained an asset-preservation order, a party against which
20 the order is issued may apply for an order permitting it to
21 pay its reasonable and ordinary living expenses, business
22 expenses, and legal representation.

23 (d) The court may limit an asset-preservation order
24 to a certain amount or type of assets and may order
25 appropriate accounting requirements.

26 (e) Unless otherwise affected by operation of law,
27 an asset-preservation order remains in effect until it is

1 vacated by the court, or satisfaction of the judgment entered
2 against the party against which the order was issued is
3 satisfied.

4 Section 5. ASSET-PRESERVATION ORDER ISSUED WITHOUT
5 NOTICE.

6 (a) In an action in which monetary damages are
7 sought, the court may issue an asset-preservation order on
8 motion without the notice required by Section 4(a) if the
9 court finds that facts in an affidavit offered in support of
10 the motion establish that the moving party is entitled to the
11 order under Section 4(a).

12 (b) A party moving for an asset-preservation order
13 under subsection (a) shall:

14 (1) conduct a reasonable inquiry and disclose in the
15 affidavit all material facts that weigh against the issuance
16 of the order; and

17 (2) disclose in the affidavit all efforts to give
18 notice or the reasons why notice should not be required.

19 (c) An asset-preservation order issued without
20 notice expires on a date set by the court, not later than 10
21 days after the court issues the order, unless before that
22 time:

23 (1) the court, for good cause, extends the order and
24 states in the order of extension the reason for the extension;
25 or

26 (2) the nonmoving party consents in a record to an
27 extension.

1 (d) If an asset-preservation order is issued without
2 notice, the party against which the order is issued may move
3 to dissolve or modify the order after notice to the party that
4 obtained the order and may apply for relief under Section 4(c)
5 and (d). The court shall hear and decide the motion or
6 application on an expedited basis.

7 Section 6. OBLIGATION OF NONPARTY SERVED WITH
8 ASSET-PRESERVATION ORDER.

9 (a) An asset-preservation order may be served, in
10 compliance with the applicable law, on a nonparty. If the
11 party that obtained the order serves a nonparty with the
12 order, the party shall give notice to all parties in the
13 action of the name and address of the nonparty not later than
14 one day after service.

15 (b) Subject to subsection (e), a nonparty served
16 with an asset-preservation order shall take all necessary and
17 appropriate actions to preserve assets by preventing any use
18 of the assets of the party against which the order is issued
19 which would violate the order until further order of the
20 court. The nonparty shall comply promptly with this
21 subsection, taking into account the manner, time, and place of
22 service and other factors that reasonably affect the
23 nonparty's ability to comply. If the nonparty believes, in
24 good faith, that complying with the asset-preservation order
25 would violate foreign law, create liability under a foreign
26 legal system or violate an order issued by a foreign sovereign
27 or tribunal, the nonparty immediately may move the court that

1 issued the asset-preservation order to dissolve or modify the
2 order. If the court finds that the nonparty acted in good
3 faith, it may not find the nonparty in contempt of court for
4 failing to comply with the order during the pendency of the
5 petition. The court shall hear and decide the motion on an
6 expedited basis.

7 (c) If an asset-preservation order is vacated or
8 modified, a party who serves a nonparty under subsection (a)
9 shall give notice within 10 days from such order to the
10 nonparty that was served with the order in the same manner as
11 the nonparty was originally given notice.

12 (d) Except as otherwise provided for in subsection
13 (b), a nonparty served with an asset-preservation order may
14 not knowingly assist in or permit a violation of the order.

15 (e) A nonparty served with an asset-preservation
16 order may move to dissolve or modify the order. The court
17 shall hear and decide the motion on an expedited basis.

18 Section 7. SECURITY; INDEMNITY.

19 (a) The court shall require security from a party on
20 whose behalf an asset-preservation order is issued under
21 Section 5. The court may require security from a party on
22 whose behalf an asset-preservation order is issued under
23 Section 4 . If the court determines that security is required,
24 it shall require the party to give security to pay for costs
25 and damages sustained by the party against which the order is
26 issued if the order is later determined to have been
27 improvidently granted.

1 (b) A party on whose behalf an asset-preservation
2 order is issued shall indemnify a nonparty for the reasonable
3 costs of compliance with the order and compensate for any loss
4 caused by the order.

5 Section 8. RECOGNITION OF ASSET-PRESERVATION ORDER
6 ISSUED BY ANOTHER COURT.

7 (a) A court of this state shall recognize an
8 asset-preservation order issued by a court in another state
9 unless:

10 (1) recognition would violate the public policy of
11 this state; or

12 (2) the order was issued without notice and the
13 issuing court did not use procedures substantially similar to
14 those in Section 5.

15 (b) Except as otherwise provided in subsection (c)
16 and subject to subsection (d), a court of this state shall
17 recognize an asset-preservation order issued by a court
18 outside the United States.

19 (c) A court of this state may not recognize an
20 asset-preservation order issued by a court outside the United
21 States if:

22 (1) the order was rendered under a judicial system
23 that does not provide impartial tribunals or procedures
24 compatible with the requirements of due process of law;

25 (2) the issuing court did not have personal
26 jurisdiction over the party against which the order was
27 issued; or

1 (3) the issuing court did not have jurisdiction over
2 the subject matter.

3 (d) A court of this state need not recognize an
4 asset-preservation order issued by a court outside the United
5 States if:

6 (1) the order was issued without notice to the party
7 against which the order was issued and the issuing court did
8 not use procedures substantially similar to those in Section
9 5;

10 (2) the party against which the order was issued did
11 not receive notice of the proceeding in sufficient time to
12 allow the order to be modified or dissolved and the interest
13 of justice requires a hearing to determine the issue;

14 (3) the order was obtained by fraud that deprived
15 the losing party of an opportunity to oppose the order;

16 (4) the order or the underlying claim for relief is
17 repugnant to the public policy of this state or the United
18 States;

19 (5) the order conflicts with another order;

20 (6) the proceeding in the issuing court was contrary
21 to an agreement of the parties under which the dispute in
22 question was to be determined otherwise than by proceedings in
23 the court outside the United States;

24 (7) jurisdiction was based only on personal service
25 and the court outside the United States was a seriously
26 inconvenient forum for the hearing regarding the order;

1 (8) the order was issued in circumstances that raise
2 substantial doubt about the integrity of the issuing court
3 with respect to the order; or

4 (9) the specific proceedings in the issuing court
5 leading to the issuance of the order were not compatible with
6 the requirements of due process of law.

7 (e) A party resisting recognition of an
8 asset-preservation order issued by a court outside the United
9 States has the burden of proving that a ground for
10 nonrecognition in subsection (c) or (d) applies.

11 Section 9. PERSONAL JURISDICTION: ORDER ISSUED BY
12 COURT IN FOREIGN COUNTRY.

13 (a) An asset-preservation order issued by a court in
14 a foreign country may not be refused recognition for lack of
15 personal jurisdiction if the party against which the order was
16 entered:

17 (1) was served with process personally in a foreign
18 country in which the issuing court is located;

19 (2) voluntarily appeared in the proceeding other
20 than for the purpose of protecting property seized or
21 threatened with seizure in the proceeding or contesting the
22 jurisdiction of the court over the defendant;

23 (3) before the commencement of the proceeding, had
24 agreed to submit to the jurisdiction of the court with respect
25 to the subject matter involved;

26 (4) was domiciled in the foreign country when the
27 proceeding was instituted or was a corporation or other form

1 of business organization that had its principal place of
2 business in, or was organized under the laws of, the foreign
3 country;

4 (5) had a business office in the foreign country and
5 the proceeding involved a cause of action arising out of the
6 business done by the party through that office; or

7 (6) operated a motor vehicle or airplane in the
8 foreign country and the proceeding involved a cause of action
9 arising out of that operation.

10 (b) The list of bases for personal jurisdiction in
11 subsection (a) is not exclusive. A court of this state may
12 recognize a basis for personal jurisdiction other than those
13 listed in subsection (a) as sufficient to support an
14 asset-preservation order issued by a court outside the United
15 States.

16 Section 10. AUTHORIZATION TO FILE, RECORD OR DOCKET.

17 Issuance of an asset-protection order grants the
18 party obtaining the order authorization to file, record or
19 docket the order in the appropriate jurisdiction or office. In
20 the event following the filing, recordation or docketing of
21 the asset-protection order in a jurisdiction or office, the
22 order is vacated or modified then the party filing, recording
23 or docketing the order in such jurisdiction or office, shall
24 within ten (10) days from the order being vacated or modified
25 cause the filing, recording or docketing to be amended to
26 reflect the change of the order.

27 Section 11. ENFORCEMENT OF ASSET-PRESERVATION ORDER.

1 An asset-preservation order issued or recognized by
2 a court of this state is entitled to full faith and credit in
3 the same manner as a judgment.

4 Section 12. APPEAL.

5 The Supreme Court of Alabama has jurisdiction of an
6 appeal from an order granting, continuing, modifying,
7 refusing, or dissolving an asset-preservation order.

8 Section 13. UNIFORMITY OF APPLICATION AND
9 CONSTRUCTION.

10 In applying and construing this uniform act,
11 consideration must be given to the need to promote uniformity
12 of the law with respect to its subject matter among the states
13 that enact it.

14 Section 14. RELATION TO ELECTRONIC SIGNATURES IN
15 GLOBAL AND NATIONAL COMMERCE ACT.

16 This act modifies, limits, or supersedes the
17 Electronic Signatures in Global and National Commerce Act, 15
18 U.S.C. Section 7001 et seq., but does not modify, limit, or
19 supersede Section 101(c) of that act, 15 U.S.C. Section
20 7001(c), or authorize electronic delivery of any of the
21 notices described in Section 103(b) of that act, 15 U.S.C.
22 Section 7003(b).

23 Section 15. SEVERABILITY. If any provision of this
24 act or its application to any person or circumstance is held
25 invalid, the invalidity does not affect other provisions or
26 applications of this act which can be given effect without the

1 invalid provision or application, and to this end, the
2 provisions of this act are severable.

3 Section 16. This act shall be effective January 1,
4 2016.