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FOR DISCUSSION ONLY

ASSET FREEZING ORDERS ACT

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ASSET FREEZING ORDERS ACT

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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May 31, 2011

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TABLE OF CONTENTS

Prefatory Note.....	1
SECTION 1. SHORT TITLE.....	2
SECTION 2. DEFINITIONS.....	2
SECTION 3. APPLICABILITY.....	3
SECTION 4. ASSET FREEZING ORDER ISSUED WITH NOTICE.....	4
SECTION 5. ASSET FREEZING ORDER ISSUED WITHOUT NOTICE.....	5
SECTION 6. OBLIGATION OF NON-PARTY SERVED WITH ASSET FREEZING ORDER.....	6
SECTION 7. SECURITY.....	7
SECTION 8. RECOGNITION OF ASSET FREEZING ORDER ISSUED BY OTHER COURT.....	8
SECTION 9. ENFORCEMENT OF ASSET FREEZING ORDER.....	9
SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	10
SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	10
SECTION 11. SEVERABILITY.....	10

ASSET FREEZING ORDERS ACT

Prefatory Note

For decades, courts in the other common law jurisdictions of the world have issued asset freezing orders. In the words of a leading English Civil Procedure text

A freezing injunction is an in personam order compelling a defendant to refrain from dealing with his assets and imposing collateral restraint on non-parties such as the defendant's bank. The function of such an injunction is to preserve assets from dissipation pending final execution against the defendant.

While asset freezing orders are, by their very nature, extraordinary remedies, they are considered by courts in other common law jurisdictions to be valuable procedural tools for use in an appropriate case. Their value is magnified in the modern world of technology where assets can be transferred by the simple stroke of a computer key. There is no codified procedure for the issuance and enforcement of asset freezing orders by courts in the United States. This act is designed to remedy that deficiency.

Because of the extraordinary nature and potentially harmful effects of an asset freezing order, it is important that there be rigorous standards which must be met before such an order can be issued. Those standards appear in Sections 4, 5 and 7. The standards contained in those sections borrow heavily from the procedural protections found in two sources - the already existing law relating to asset freezing orders in England and Canada and the already existing law in the United States relating to the issuance of Temporary Restraining Orders and Preliminary Injunctions.

Since asset freezing orders also impact non-parties, it is important that the obligations of non-parties be set out with specificity. Those obligations are set out in Section 6.

Lastly, the act must contain a mechanism for recognition and enforcement of asset freezing orders issued by other states and from courts outside the United States. Those mechanisms appear in Sections 8 and 9. The recognition and enforcement mechanism borrows heavily from the Uniform Foreign Country Money Judgments Recognition Act.

1 (6) "Record" means information that is inscribed on a tangible medium or that is stored in
2 an electronic or other medium and is retrievable in perceivable form.

3 **SECTION 3. APPLICABILITY.**

4 (a) This [act] does not apply to an action against a consumer debtor or in a domestic
5 relations case or similar matter.

6 (b) This [act] does not prevent recognition and enforcement of an asset freezing order
7 under comity.

8 (c) This [act] does not apply or limit remedies to the extent that:

9 (1) a statute, regulation, or treaty of the United States preempts this [act];

10 (2) another statute of this state expressly governs the creation, perfection, priority,
11 or enforcement of a security interest, judgment lien, or lien on real property created by this state
12 or a governmental unit of this state; or

13 (3) a statute of another state, foreign country, or governmental unit of another
14 state or foreign country expressly governs the creation, perfection, priority, or enforcement of a
15 security interest, judgment lien or lien on real property created by the state, foreign country, or
16 governmental unit of the state or foreign country.

17 **Comment**

18 This section is designed to clarify the scope of this act. Section 3(a) makes clear that this
19 [act] does not apply to actions against consumer debtors. Such actions would include actions
20 relating to bankruptcy, collection and foreclosure actions. For example, a party seeking to collect
21 on a credit card debt could not use the provisions of this act to attempt to freeze the assets of the
22 debtor.

23
24 The [act] also does not apply in domestic relations cases which would include actions for
25 divorce, child custody and child support. A wife in a divorce action, for example, could not use
26 the provisions of this act to attempt to freeze the assets of her husband. Likewise, this act could
27 not be used to enforce an asset freezing order in a divorce action issued by a court outside the
28 United States.

1 Section 3(b) also makes clear that this [act] does not prevent a court from recognizing an
2 asset freezing order from a court of another state or a court outside the United States as matter of
3 comity.
4

5 Section 3(c) reinforces the notion that this [act] is not intended to limit or supercede any
6 currently existing remedies that a secured creditor or lienholder may have. The asset freezing
7 order does not establish any liens, choate or inchoate, in the property which is the subject of the
8 asset freezing order. The purpose of the asset freezing order is the prevention of wrongful
9 voluntary conveyances of any interest in the subject property. Absent fraud or collusion with the
10 party against whom the asset freezing order is issued, it would not prevent other creditors of that
11 party from obtaining involuntary liens against the subject property.
12

13 The issuance of an asset freezing order would not prevent a secured creditor or lienholder
14 from commencing, continuing or completing any available remedies to realize its collateral. It
15 would not, for example, affect a creditor's right to foreclose on its mortgage or other security
16 interest. It would not prevent, inhibit or affect the validity of a subsequent sale of the property
17 which was the subject of the secured creditor's enforcement action. It would also not prevent an
18 unrelated person from initiating a lawsuit against a party which is the subject of an asset freezing
19 order and obtaining a judgment against that party's assets.
20

21 **SECTION 4. ASSET FREEZING ORDER ISSUED WITH NOTICE.**

22 (a) A court may issue an asset freezing order on motion with notice and an expedited
23 opportunity to be heard if the court finds that:

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

26 (2) there is a substantial likelihood that the assets of the party against which the
27 order is sought will be disposed of by a means specified in Section 2(2) and the moving party
28 will be unable to receive satisfaction of a judgment in the action if the order is not granted;

29 (3) any harm the party against which the order is sought may suffer through
30 having to comply with the order is clearly outweighed by the risk of injustice to the moving party
31 if the order is not issued; and

32 (4) the order if issued would not be adverse to the public interest.

33 (b) An asset freezing order must be served in compliance with [cite applicable rules or

1 statutes of this state for service appropriate to this type of order].

2 (c) A party against which an asset freezing order is issued may be relieved of the
3 obligations imposed under the order by posting a bond, or other security, in the amount of the
4 damages sought or in an amount determined by the court.

5 (d) A party against which an asset freezing order is issued may apply for an order, on at
6 least 24 hour notice to the party that has obtained the order, specifying the amount the party is
7 entitled to spend on ordinary living expenses and/or business expenses, and legal representation.

8 (e) An asset freezing order remains in effect until vacated by the court, dissolved by
9 agreement of the parties or resolved by application of law or a judgment entered against the party
10 against which the order was entered is satisfied.

11 **Comment**

12 Section 4(a) mirrors the standard for the issuance of a preliminary injunction under
13 currently existing law. All of the requirements of section 4 must be met before asset freezing
14 order can be issued. Sections 4(c) and (d) provide a mechanism for a party against which an asset
15 freezing order has been issued to immediately obtain full or partial relief from the order. These
16 sections mitigate the potentially harmful effects of an asset freezing order.
17

18 **SECTION 5. ASSET FREEZING ORDER ISSUED WITHOUT NOTICE.**

19 (a) The court may issue an asset freezing order without notice only if specific facts in an
20 affidavit or verified pleading offered in support of the motion to freeze assets clearly show that
21 the moving party is entitled to the order under Section 4(a).

22 (b) Counsel for the moving party must disclose all material facts in the affidavit or
23 verified pleading presented in support of a motion to have an asset freezing order issued without
24 notice, including any known material facts favorable to the non-moving party.

25 (c) The moving party must also certify to the court in a record all efforts to give notice or
26 the reasons why notice should not be required.

1 (d) If an asset freezing order is issued without notice, the order expires at the date set by
2 the court, not to exceed 14 days after the issuance of the order, unless before that time:

3 (1) the court, for good cause, extends the order and states in the order of extension
4 the reasons for the extension; or

5 (2) the non-moving party consents, in a record, to an extension.

6 (e) If an asset freezing order is issued without notice, the party against which the order is
7 issued may appear and move to dissolve or modify the order on notice and may apply for the
8 relief provided by 4(c) and (d). The court shall hear and decide the motion on an expedited basis.

9 **Comment**

10
11 This section provides for the issuance of an asset freezing order without notice. Sections
12 5(a) and (c)-(e) reflect currently existing law for the issuance of a temporary restraining order
13 issued without notice. Section 5(b) is an extremely important provision drawn from English and
14 Canadian law and reflects the heightened disclosure obligation imposed on a party who seeks an
15 asset freezing order without notice. When counsel seeks the issuance of an asset freezing order
16 without notice, he or she must include in the pleadings all material facts “including any known
17 material facts favorable to the non-moving party”. The inclusion of this provision insures that the
18 court has before it all of the known facts before it issues an asset freezing order without notice. A
19 party seeking an asset freezing order without notice must also satisfy the requirements for
20 issuance of the order contained in Section 4(a)
21

22 **SECTION 6. OBLIGATION OF NON-PARTY SERVED WITH ASSET**
23 **FREEZING ORDER.**

24 (a) If the court issues an asset freezing order, the order may be served on a non-party that
25 holds assets of the party against which the order is issued. If the party that obtained the order
26 serves a non-party with the order, the party shall notify all parties of record in the action within []
27 days of the name and address of the non-party served.

28 (b) A non-party served with an asset freezing order promptly shall freeze the assets of the
29 party against which the order is issued which are held in any account or on credit on behalf of the

1 party until further order of the court.

2 (c) A party obtaining an asset freezing order shall give notice to a non-party that was
3 served with the order if the order is vacated or modified.

4 (d) A non-party that is served with an asset freezing order violates the order only if it
5 knowingly and intentionally acts or fails to act with the result that the order is undermined or if it
6 knowingly and intentionally aids or abets the person against which the order is issued in
7 violating the order.

8 **Comment**

9 This section recognizes that an asset freezing order applies in personam to the party
10 against whom it is issued and also to non-parties who hold the assets of that party. This section
11 draws on currently existing English and Canadian law.

12
13 Section 6(b) is a self-executing provision which requires a non-party in a state that has
14 adopted this [act] to comply with the asset freezing order without the need for further action. If
15 the non-party is in a state which has not adopted this [act], the non-party is not required to
16 comply with the order unless and until the party on whose behalf the asset freezing order has
17 been issued has obtained an order recognizing the asset freezing order from the jurisdiction
18 where the non-party is located.

19
20 **SECTION 7. SECURITY.**

21 (a) The court shall determine whether security must be given by a party on whose behalf
22 an asset freezing order has been issued. If the court determines that security must be given, it
23 shall require the party to give security in an amount the court considers proper to pay for costs
24 and damages sustained by the party against which the order is issued if the order is later found to
25 have been granted improvidently.

26 (b) A party on whose behalf an asset freezing order is issued shall indemnify a non-party
27 for the reasonable costs of compliance with the order or compensate for any loss caused by the
28 order whether or not the motion for the asset freezing order was properly granted.

1 **Comment**

2 This section authorizes a court to require a party on whose behalf an asset freezing order
3 has been issued to provide security for a party against whom the order has been issued and any
4 non-party served with the order. The security is for damages sustained as the result of an order
5 later found to have been improvidently granted. Section 7(b) also requires a party on whose
6 behalf an asset freezing order has been issued to indemnify a non-party for the reasonable costs
7 of compliance.

8
9 This section is intended to draw on currently existing law relating to the provision of
10 security. The court, for example, could accept a personal bond or surety bond as security.
11

12 **SECTION 8. RECOGNITION OF ASSET FREEZING ORDER ISSUED BY**
13 **OTHER COURT.**

14 (a) A court of this state shall recognize an asset freezing order issued by a court in
15 another state unless;

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

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

19 (b) Except as otherwise provided in subsection (c), a court of this state shall recognize an
20 asset freezing order issued by a court outside the United States.

21 (c) A court of this state shall not recognize an asset freezing order issued by a court
22 outside the United States if:

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

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

27 (3) the issuing court did not have jurisdiction over the subject matter;

28 (4) the order was issued without notice to the party against which the order was

1 issued and the issuing court did not utilize procedures substantially similar to those provided in
2 Section 5;

3 (5) the party against which the order was entered in the proceeding outside the
4 United States did not receive notice of the proceeding in sufficient time to allow the order to be
5 modified or dissolved and the interest of justice requires a hearing to determine this issue;

6 (6) the order was obtained by fraud;

7 (7) the claim for relief is repugnant to the public policy of this state or the United
8 States;

9 (8) the proceeding in the issuing court was contrary to an agreement between the
10 parties under which the dispute in question was to be determined;

11 (9) the order was issued in circumstances that raise substantial doubt about the
12 integrity of the issuing court with respect to the order;

13 (10) the specific proceedings in the issuing court leading to the issuance of the
14 order were not compatible with the requirements of due process of law.

15 (d) A party resisting recognition of an asset freezing order issued by a court outside the
16 United States has the burden of establishing that a ground for nonrecognition stated in subsection
17 (c) exists.

18 **Comment**

19 This section concerns the recognition of asset freezing orders issued by courts in other
20 states and countries. Because asset freezing orders are not final judgments, there is a lack of
21 uniformity in the present law concerning their recognition. Section 8(a) relates to the recognition
22 of asset freezing orders issued by courts in other states and 8(b) - (d) relate to the recognition of
23 asset freezing orders issued by courts outside the United . Sections 8(b)-(d) borrow freely from
24 the architecture and language of section 4 of the Uniform Foreign-Country Money Judgments
25 Recognition Act.
26

27 **SECTION 9. ENFORCEMENT OF ASSET FREEZING ORDER.** An asset freezing

1 order issued or recognized by a court of this state is valid and enforceable in the same manner as
2 a judgment.

3 **Comment**

4 Some courts have refused to recognize and enforce asset freezing orders because they are
5 not final. This section read in conjunction with Section 8 will require that an appropriately issued
6 or recognized asset freezing order be enforceable like a judgment.

7
8 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

11 **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

12 **NATIONAL COMMERCE ACT.** This [act] modifies, limits and supersedes the federal
13 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
14 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
15 authorize delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section
16 7003(b).

17 **SECTION 11. SEVERABILITY.** If any provision of this [act] or its application to any

18 person or circumstance is held invalid, the invalidity does not affect other provisions or
19 applications of this [act] which can be given effect without the invalid provision or application,
20 and to this end, the provisions of this [act] are severable.

21 *Legislative Note: Include this section only if this state lacks a general severability statute or a*
22 *decision by the highest court stating a general rule of severability.*

23
24 **SECTION 12. EFFECTIVE DATE.** This [act] takes effect...