

# National Conference of Commissioners on Uniform State Laws

## Project Proposal Guidelines & Form

Twice each year the NCCUSL Committee on Scope and Program solicits proposals for new study and drafting projects. While many of our project proposals come from state uniform law commissioners, we also encourage outside groups and individuals to submit proposals. The following guidelines are derived from NCCUSL's "Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts", and are intended to assist those submitting proposals to better anticipate the kinds of questions that typically arise when the Committee on Scope and Program is considering a suggested new project. Please feel free to use the attached optional form, or to submit in another format (memo, model text, etc.) but to the extent possible, in addition to submitting a description of the proposed project or law also provide analysis of the following issues:

1. (a) Is uniformity of state law for the proposed subject matter desirable and realistic? While not every NCCUSL act is uniformly adopted verbatim by all U.S. States and Territories, we do focus on acts that (directly or indirectly) will promote uniformity among the states in their respective subject matter areas. NCCUSL generally avoids subjects that are of purely local concern or which are unlikely to be widely enacted because of political differences among the states.

(b) Please address whether widespread enactment of the proposal would produce significant benefits to the public. Acts which reduce uncertainty or compliance costs because the law is made uniform among the states or which respond to a need common to a number of jurisdictions produce generally produce such results. Legislation that is drafted by NCCUSL avoids each jurisdiction having to develop its own solution to that need. Consider whether the proposed project will:

- I. Facilitate the flow of commercial and other transactions across state lines?
- II. Avoid conflicts of law in situations where the law of more than one state might apply?
- III. Fill an emergent need, modernize an antiquated concept, or codify the common law?

2. What have the states already done with regard to this subject? Information about existing state statutes and ongoing trends is very helpful; conversely, NCCUSL tends to avoid subjects that are entirely novel in character.

3. Does the proposed project require changes in federal laws or regulations? This is an important question as NCCUSL works exclusively in subject matter areas that are appropriate for state legislation.

4. What organizations or interest groups are likely to have an interest in the subject matter of the act, and are they likely to support or oppose a uniform or model act in this area? NCCUSL strives to produce balanced, enactable legislation, and it is important to identify the appropriate stakeholders and assess whether they are willing to participate in the development of a proposed project.

5. Are there resources available to support the development of the proposed project? The development of a uniform or model act generally requires a minimum of one year of study and two years of drafting meetings. The identification of an existing source of expertise with regard

to a particular subject and/or the availability of outcome-neutral financial support (from a government or foundation source) is helpful information.

## NCCUSL Committee on Scope and Program

### Project Proposal Form

Submitted by:

Name	Steven M. Richman	Address	Duane Morris 100 American Metro Blvd. Hamilton, NJ 08619
Affiliated Entity (if applicable)	ABA SIL	Phone	(609) 631.2426
Email	<a href="mailto:smrichman@duanemorris.com">smrichman@duanemorris.com</a>	Fax	(609) 631.2401

#### Description of Project

Various common-law jurisdictions provide a remedy for a freezing order or its equivalent in civil lawsuits to recover monies, with the purpose of curtailing the defendant's ability to dispose of property that might render satisfaction of a money judgment, which freezing orders are commonly referred to as "Mareva" injunctions or orders ("Mareva Injunctions"). The International Litigation Committee of the American Bar Association Section of International Law ("SIL") established a task force to consider the viability of a uniform state law to address so-called "Mareva Injunctions" and circumstances under which they could be issued, recognized and enforced, in both domestic and international contexts. The United States Supreme Court considered and rejected application of Mareva Injunctions in Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund Inc., 527 U.S. 308 (1999) under the Federal Rules of Civil Procedure. Mareva Injunctions or orders are provisional remedies that are more appropriately the subject of state law, yet there is inconsistency among jurisdictions as to the interplay of pre-judgment attachment, freezing orders and equivalent remedies, as well as the reach of Grupo Mexicano.

Consequently, there is a need to codify the remedy of Mareva Injunctions, and inasmuch as Mareva Injunctions fall within the province of state law, it is appropriate that uniform legislation be proposed to address the issue. A uniform law expressly recognizing freezing orders, and the ability to enforce foreign-issued freezing orders in a domestic context, provides a necessary remedy, removes uncertainty and establishes consistency of approach. This facilitates cross-border enforcement, both domestically and of foreign judgments, while at the same time ensuring due process. As such freezing orders can accommodate the issuance of a bond or other security, the defendant's rights remain protected.

This project is to draft such a law to fill a gap left by pre-judgment attachment, fraudulent transfer and enforcement of foreign money judgment statutes and rules, and make express the existence of a remedy currently being fashioned in ad-hoc manner by the courts.

#### 1. (a) Need for and benefits of uniformity in this subject matter area:

A money judgment on a legal claim is less than worthless if there are no assets to attach, after taking into account the cost of obtaining the judgment. There are various practical and legal issues involved in seeking to locate and possibly preserve assets prior to judgment in an arbitration or court proceeding, particularly in the context of fraudulent activity by defendant. However, it is important to note that the need for such a freezing order may arise in non-fraudulent contexts as well, where the debtor may be about to dispose of assets in the normal course of its business, or otherwise transparently; should an injunction issue simply to preserve a

pool of assets to collect in the event of judgment? Remedies of pre-judgment attachment and fraudulent transfer or conveyance do not cover all such circumstances in which the relief may be appropriate, nor does a traditional preliminary injunction analysis necessarily provide appropriate standards. Following Grupo Mexicano certain state courts have followed that reasoning; others have not. Federal courts have sought to distinguish the case; the ability to get such relief may depend upon contract rights or the extent to which an equitable claim, as opposed to one pleaded simply in law, is pleaded. This may lead, if it has not already done so, to inconsistency of result and approach. The issue arises domestically in terms of seeking an order or injunction to prevent dissipation of assets in a domestic suit, as well as in consideration of enforcement of a foreign-issued Mareva Injunction in aid of the foreign proceeding. Mareva Injunctions are essentially injunctions against the transfer of assets to preserve a sufficient asset base for collection once judgment is obtained. An uniform model law would also address the enforcement of such an injunction issued in one state by the courts of a sister state.

A uniform law is desirable since there is no specific or uniform remedy within existing pre-judgment attachment statutes or other legislation to deal with a freezing order to prevent dissipation of assets in the absence of fraud and to ensure feasibility of collection. Different state courts have taken different positions. This is a national and indeed, international, issue that will only generate more conflicting analyses if a uniform statute is not promulgated.

See attached Report for details. Those points are incorporated herein and throughout this form by reference.

(b) Because the statute would promote uniformity in creating and defining a remedy, it would facilitate certainty, that facilitates the flow of commercial and other transactions across state lines. Commercial parties want to know that if they are forced to resort to litigation, there is a real prospect of collection in the event of a successful judgment. As noted, state courts have issued, or refused to issue, freezing orders, with some looking to the Supreme Court precedent in Grupo Mexicano and others relying on general analytical principles underlying preliminary injunctions.

## 2. Summary/analysis of existing state law and trends concerning this subject

The American Bar Association Section of International Law Task Force on Mareva Injunctions had prepared a survey of all states as to their existing pre-judgment attachment statutes and judicial approaches to freezing orders. That is attached. It appears that certain language in some states' pre-judgment statutes might provide authority for the remedy here under discussion, and some states have judicial precedent, but it is not uniform. State law is not consistent on the subject. While there is a trend towards enforcement of non-final judgments (such as injunctions) across borders, the ten-year old Supreme Court decision in Grupo Mexicano has been cited by at least one state high court as authority for rejecting the remedy, but other states have embraced it, without necessarily analyzing it in terms of Grupo Mexicano or Mareva injunctions. (The appendix has not been formatted for consistency and is submitted purely as a resource that underlies the conclusions of the Report.)

## 3. Impact of federal laws and regulations on this proposed subject:

We have approached this purely from a state law perspective as it is a matter of state law.

## 4. Identity of organizations or persons interested in this subject area, and assessment of support/opposition

Financial institutions are likely to be interested and support the legislation. Commercial business entities doing business across state and international borders in general are likely to support this.

5. Availability of existing research and/or financial support?

See attached report and appendix. A bibliography of current writing on Mareva injunctions can be prepared.

## STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS (January 13, 2001)

The Conference and its committees shall conform to the following criteria and procedures in proposing or considering Acts:

### 1. CRITERIA.

(a) The subject matter must be appropriate for state legislation in view of the powers granted by the Constitution of the United States to the Congress. If it properly falls within the exclusive jurisdiction of the Congress, it is obviously not appropriate for legislation by the several States. However, if the subject matter is within the concurrent jurisdiction of the federal and state governments and the Congress has not pre-empted the field, it may be appropriate for action by the States and hence by the Conference.

(b) The subject matter must be such that approval of the Act by the Conference would be consistent with the objectives of the Conference, as stated in Article 1.2 of its Constitution: "to promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable."

(c) Every Act drafted by the Conference shall conform to the following requirements:

(i) there shall be an obvious reason for an Act on the subject such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing its diversity;

(ii) there must be a reasonable probability that an Act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity indirectly;

(iii) the subject of the Act shall be such that uniformity of law among States will produce significant benefits to the public through improvements in the law (for example, facilitating interstate economic, social or political relations, or responding to a need common to many States as to which uniform legislation may be more effective, more efficient, and more widely and easily understood) or will avoid significant disadvantages likely to arise from diversity of state law (for example, the tendency of diverse laws to mislead, prejudice, inconvenience or otherwise adversely affect the citizens of the States in their activities or dealings in other States or with citizens of other States or in moving from State to State).

(d) Experience demonstrates that Acts to accomplish the following purposes have met with the widest acceptance by state legislatures;

(i) *Acts to facilitate the flow of commercial transactions across state lines*, such as the Uniform Commercial Code;

(ii) *Acts to avoid conflict of laws when the laws of more than one State may apply to a transaction or series of transactions*, such as the Uniform Act on Transfers to Minors, the Uniform Certification of Questions of Law Act, the Uniform Child Custody Jurisdiction and Enforcement Act, the Uniform Interstate Family Support Act, and the Uniform Attendance of Out of State Witnesses Act;

(iii) *Acts without substantial interstate implications but conceived and drafted to fill emergent needs, to modernize antiquated concepts, or to codify the common law*, such as the Uniform Acts on Simultaneous Death, Limited Partnership, Partnership, Limited Liability Company, Rules of Evidence, Common Trust Fund, Principal and Income, and Fraudulent Transfers.

(e) Acts may promote uniformity indirectly as well as by substantially verbatim adoptions, as, for example, by:

(i) extensive adoptions in principle, such as the Uniform Alcoholism and Intoxication Treatment Act;

(ii) impact on case law and teaching practices, such as the Uniform Rules of Evidence;

(iii) gradually increasing adoptions, either in statutes or in case law, of particular sections or parts of a Uniform or Model Act addressing specific problems within the larger area to which the Act is directed, as for example, the Uniform Acts on Intestacy, Wills and Donative Transfers, Testamentary Additions to Trusts, Disclaimer of Property Interests, Statutory Rule Against Perpetuities, International Wills, Succession without Administration, Trustee Powers, Estate Tax

Apportionment, Guardianship and Protective Proceedings, Durable Power of Attorney, and Nonprobate Transfers on Death, which address specific and discrete problems within the larger area to which the Uniform Probate Code is directed.

(f) As a general rule, the Conference should consider past experience in determining future projects and should avoid consideration of subjects that are:

(i) entirely novel and with regard to which neither legislative nor administrative experience is available;

(ii) controversial because of disparities in social, economic or political policies or philosophies among the various States; and

(iii) of purely local or state concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts.

## **2. DESIGNATION OF ACTS AS UNIFORM OR MODEL**

The above criteria are equally applicable to Uniform and Model Acts. In determining whether an Act should be designated as a "Uniform" Act or a "Model" Act, the following procedures and criteria should be applied:

(a) The Executive Committee, in appointing a special committee for the consideration of an Act, may do so without indicating whether the product will be a "Uniform" or "Uniform Law Commissioners' Model" Act. The committee may be designated initially as the "Special Committee on [subject matter] Act" and any drafts circulated as "Uniform Law Commissioners' [subject matter] Act."

(b) Before the first reading, the Special Committee, after considering the criteria for designation, shall make a recommendation to the Executive Committee as to whether the Act should be circulated as a "Uniform" or "Uniform Law Commissioners' Model" Act.

(c) The Executive Committee shall review the recommendation of the Special Committee and decide whether the Act should be circulated as a "Uniform" or "Uniform Law Commissioners' Model" Act.

(d) After the Act's first reading, the Executive Committee shall reconsider whether the Act should be circulated as a "Uniform" or "Uniform Law Commissioners' Model" Act. A subsequent draft must be presented and circulated in the form approved by the Executive Committee.

(e) The Conference may change the designation assigned by the Executive Committee.

(f) Criteria for designation:

(i) An act shall be designated as "Uniform" if

(A) there is a substantial reason to anticipate enactment in a large number of jurisdictions; and

(B) "uniformity" of the provisions of the proposed enactment among the various jurisdictions is a principal objective.

(ii) An act shall be designated as a "Uniform Law Commissioners' Model" Act if

(A) "uniformity" may be a desirable objective, although not a principal objective;

(B) the Act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the Act in its entirety; or

(C) the purposes of the Act can be substantially achieved, even though it is not adopted in its entirety by every State.

## **3. ACTS RECOMMENDED BY OUTSIDE ORGANIZATIONS.**

When an affiliated or responsible non-affiliated organization recommends a subject for an Act or requests the Conference to draft an Act, it should be informed of the criteria to which Acts proposed for action by the Conference must conform and be requested to demonstrate such conformity as well as to submit recommendations as to the substance of the Act.

## **4. PRODEDURE IN CONSIDERING PROPOSED SUBJECTS OF ACTS.**

(a) *Committee on Scope and Program.* Whenever a subject for an Act is proposed to the Conference, the proposal shall first be submitted to the Committee on Scope and Program,

which shall have the responsibility to determine whether the subject merits consideration by the Conference and:

(i) if so, to report that determination to the Executive Committee, together with its reasons; or

(ii) if not, to report its recommendation to the Executive Committee, together with its reasons.

(b) *Executive Committee.*

(i) The Executive Committee shall review the recommendations of the Committee on Scope and Program as to any subject for a proposed Act and either approve or disapprove its recommendations. If the Executive Committee determines that a subject for a proposed Act merits consideration by the Conference, the President of the Conference shall assign the subject to a Standing or Special Committee, as the Executive Committee directs, either for further study and recommendations or to proceed with the drafting of an Act on the subject.

(ii) Before proceeding with the drafting of an Act, the Executive Committee must find that a proposed Act:

(A) comports with the criteria of the Conference;

(B) has the potential, in comparison with other pending proposals, of substantially contributing to the objectives of the Conference; and

(C) will have adequate agenda time for its consideration.

(c) *Standing or Special Study Committee.* Unless otherwise directed by the Executive Committee, the Standing or Special Study Committee to which the President assigns the subject will be charged with the responsibility not of drafting an Act, but of studying the subject and of conducting research to determine whether, in the opinion of that Committee, the subject is one on which an Act should be drafted and whether the Act should be designated as "Uniform" or "Uniform Law Commissioners' Model". The Standing or Special Study Committee shall address the criteria and report by a given date its recommendations, based on those criteria, to the Committee on Scope and Program.

If the Standing or Special Study Committee recommends to the Committee on Scope and Program that an Act on the subject be drafted by the Conference, the Committee on Scope and Program, after addressing the Criteria of the Conference for designating Acts, shall report its recommendations to the Executive Committee for further action.

(d) *Identifying Outside Resources.* If consideration of the proposal will require outside resources in addition to the work of members, Associate Members, and staff of the Conference, reasonably promising prospects for obtaining the required resources must be identifiable.

(e) *Reference of Adverse Report to Executive Committee.* If the Standing or Special Study Committee recommends to the President that no Act be drafted on the subject, the report of the Standing or Special Study Committee shall be referred to the Executive Committee, which shall review all reasons advanced for and against an Act on the subject and determine, subject to review by the Conference, whether or not an Act should be drafted on the subject.

(f) *Procedure for Reexamination of Pending Subjects.* Each Special Drafting Committee shall report semi-annually, in accordance with Section 28.3 of the Bylaws, and at any intervening time, if so requested by the Executive Committee, on the progress of its work and its current views about

(i) whether the subject of its work meets the criteria of the Conference for considering Acts and, if so

(ii) whether the Act should be recommended as a "Uniform" Act or, instead, as a "Uniform Law Commissioners' Model" Act.

## **5. OBLIGATION OF COMMISSIONERS.**

Approval of an Act as a Uniform Act carries with it the obligation of the Commissioners from each State to endeavor to procure consideration by the legislature of the State, unless the Commissioners deem the Act inappropriate for enactment in their State. (See Section 6.1 of the Constitution.)

"Uniform" Acts should be proposed and supported for adoption as promulgated to achieve necessary and desirable uniformity. "Uniform Law Commissioners' Model" Acts must be

proposed and supported to minimize diversity and improve the law, but without the same emphasis on adhering to the verbatim text.