



## **THE MODEL ASSET-PRESERVATION ORDERS ACT**

### *- A Summary -*

The Model Asset-Preservation Orders Act (MAPOA) creates a uniform process for the issuance of asset-preservation orders. These orders freeze a defendant's assets and impose collateral restraint on nonparties, such as the defendant's bank, while waiting for a judgment.

In the United States, the primary remedy against asset dissipation has traditionally been an *in rem* order prohibiting the transfer of specific assets. Such pre-judgment attachments are based in equity and require particularized showings of fraud. On the other hand, some courts in this country have issued *in personam* asset-preservation orders to prevent a defendant from dissipating assets when it appeared no assets would be left to satisfy a potential judgment even if fraud did not underlie the claim.

The United States Supreme Court called into question the viability of asset-preservation orders when it decided the case of *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). In that case, the trial court issued an *in personam* order restraining a Mexican company from dissipating assets which were pledged to satisfy notes held by American investors. The appellate court affirmed the order but the Supreme Court found that federal courts lacked the jurisdiction to issue asset-preservation orders because they were not part of the common law at the time the federal court system was created. The court further noted that the legislature, not the judiciary, should decide whether to provide federal courts the power to issue asset-preservation orders.

Although the *Grupo Mexicano* decision involved the jurisdiction of the federal courts, it caused some confusion in the state court system over the propriety of asset-preservation orders. Some state supreme courts concluded, in the wake of that decision, that courts in their state lacked the authority to issue those types of orders. At least one state supreme court concluded the opposite. The MAPOA remedies this current lack of uniformity on the question of whether courts have the power to issue and recognize asset-preservation orders by providing states with a uniform act that authorizes the issuance of asset-preservation orders and provides for the recognition and enforcement of asset-preservation orders by other states and courts outside the United States.

An asset-preservation order is, by its very nature, an extraordinary remedy with potentially significant impact on the debtor whose assets are frozen and on third-parties holding those assets. Accordingly, it is important to have rigorous standards which must be met before such an order can be issued. The MAPOA provides appropriate procedural safeguards to both debtors and nonparties.

Section 4 of MAPOA provides a rigorous process for the issuance of an asset-preservation order with notice. The process described borrows heavily from the procedural protections found in two well-developed sources: existing law related to asset-preservation orders in England and Canada,

and existing law in the United States related to the issuance of Temporary Restraining Orders and Preliminary Injunctions.

Under MAPOA, a party can obtain an asset-preservation order only if it establishes that there is substantial likelihood that the assets of a party against which the order is sought will be dissipated so that the party seeking the asset-preservation order will be unable to receive satisfaction of the judgment.

Section 5 of MAPOA describes how to obtain issuance of an asset-preservation order without notice. A party seeking an asset-preservation order without notice must satisfy all requirements under Section 4 and must 1) conduct a reasonable inquiry and disclose all material facts that weigh against issuance of the order; and 2) explain in the affidavit or verified pleading all efforts to give notice or why notice should not be required.

Section 7 of MAPOA authorizes a court to require security to protect a party against the wrongful issuance of an asset-preservation order. It also requires a party on whose behalf an asset-preservation order has been entered to indemnify a nonparty for the reasonable costs of the compliance and to compensate the nonparty for any loss caused by the order. This requirement exists whether or not the motion for the order was properly granted.

Since asset-preservation orders also impact nonparties, it is important that the obligations of nonparties be set out with specificity. Those obligations are set out in the MAPOA. Under Section 6 of the Act, nonparties served with an asset-preservation order must promptly take all necessary and appropriate actions to preserve the assets held on behalf of the party against which the order is issued. The nonparty is provided significant protection because a court, assessing the promptness of a nonparty's response to an asset-preservation order, must take into account the manner, time of service, and other factors that reasonably affect a nonparty's ability to comply.

Lastly, Sections 8 and 9 of MAPOA contain mechanisms for the recognition and enforcement of asset-preservation orders issued by other states and foreign courts. The recognition and enforcement mechanism borrows heavily from the Uniform Foreign-Country Money Judgments Recognition Act. The MAPOA, thus, provides valuable protection for a citizen or business entity that has obtained an asset-preservation order from another state court or foreign court.

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