

DRAFT
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ASSET FREEZING ORDERS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

February 25 – 26, 2011 Committee Meeting Draft

With Prefatory Note and Comments

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February 4, 2011

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ASSET FREEZING ORDERS ACT

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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,¹

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 3, 4 and 6. 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 5.

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 7 and 8. The recognition and enforcement mechanism borrows heavily from the Uniform Foreign Country Money Judgments Recognition Act.

¹ Neil Andrews, English Civil Procedure ¶ 17.06 (2003)

1 **ASSET FREEZING ORDERS ACT**

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4 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Asset Freezing Orders

5 Act.

6 **SECTION 2. [DEFINITIONS].** As used in this [act]:

7 (1) “Asset” means anything that may be the subject of ownership whether real or
8 personal, tangible or intangible, legal or equitable or any interest therein.

9 (2) “Asset freezing order” means an in personam order restraining or enjoining a party
10 from directly or indirectly by any means whatsoever:

11 (A) selling, removing, dissipating, alienating, transferring,
12 assigning, encumbering, or similarly dealing with the assets of that party,
13 wherever situated;

14 (B) instructing, requesting, counseling, demanding, or encouraging
15 any other person to do so; and

16 (C) facilitating, assisting in, aiding, abetting or participating in any
17 of the acts the effect of which is to do so.

18 (3) “State” means a state of the United States, the District of Columbia, a federally
19 recognized Indian tribe or any territory or insular possession subject to the jurisdiction of the
20 United States.

21 (4) “Party” means any entity who brings a suit (action) or against whom a suit (action) is
22 brought whether or not service has been made or notice given.

23 **SECTION 3. ASSET FREEZING ORDER ISSUED WITH NOTICE.**

24 (a) A court may issue an asset freezing order upon motion if the court finds that:

25 (1) there is a substantial likelihood that the party seeking the asset freezing order

1 will prevail on the merits of the action;

2 (2) there is a substantial likelihood that the assets of the party against whom the
3 order is sought will be dissipated and the moving party will be unable to receive satisfaction of a
4 judgment in the action if the order is not granted;

5 (3) any harm the party against whom the order is sought may suffer
6 through having to comply with the order is clearly outweighed by the risk of injustice to
7 the moving party if the order is not issued; and

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

9 (b) An asset freezing order shall be served in compliance with [cite applicable rules or
10 statutes of this state for service of injunctions].

11 (c) The party against whom an asset freezing order is issued may be relieved of the
12 obligations imposed under the order by posting a bond in the amount of the damages sought.

13 (d) The party against whom an asset freezing order is issued may apply for an order, on at
14 least twenty-four hour notice to the party who has obtained the order, specifying the amount of
15 funds which that party is entitled to spend on ordinary living and/or business expenses and legal
16 advice and representation.

17 (e) An asset freezing order remains in effect until vacated by the court, dissolved by
18 agreement of the parties, resolved by application of law or until a judgment entered is satisfied.

19 **Comment**

20 Sections 3(a) - (d) mirror the standard for the issuance of a preliminary injunction under
21 currently existing law. All of the requirements of those sections must be met before asset
22 freezing order can be entered. Sections 3(f) - (g) provide a mechanism for a party against who an
23 asset freezing order has been entered to have full or partial relief from the order.

1 in an amount the court considers proper to pay for costs and damages sustained by the party
2 against whom the order has been issued if the order is later found to have been improvidently
3 granted.

4 (b) The party against whom an asset freezing order has been issued shall indemnify a
5 non-party for the reasonable costs of compliance with the order or compensate for any loss
6 caused by the order whether or not the motion for the asset freezing order was properly granted.
7 However, if the order is later found to have been improvidently granted, the court may order
8 reimbursements from the party on whose behalf an asset freezing order has been entered.

9 **Comment**

10 This section provides for security for a party against whom an asset freezing order has
11 been entered and any non-party served with the order for damages sustained as the result of an
12 order later found to have been improvidently granted. Section 6(b) also requires a party who has
13 obtained an asset freezing order to indemnify a non-party for the reasonable costs of compliance.
14

15

16 **SECTION 7. RECOGNITION OF ASSET FREEZING ORDERS ISSUED BY**
17 **OTHER COURTS.**

18 (a) A court of this state shall recognize an asset freezing order in another state unless:

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

20 (2) it was issued without notice and the issuing court did not comply with Section

21 4 of this act.

22 (b) A court of this state may not recognize an asset freezing order issued by a court
23 outside the United States if:

24 (1) the asset freezing order was rendered under a judicial system that does not

25 provide impartial tribunals or procedures compatible with the requirements of due process of

26 law;

1 (2) the issuing court did not have personal jurisdiction over the party against
2 whom the order was issued; or

3 (3) the order was issued without notice to the party against whom the order was
4 issued and the issuing court did not comply with Section 4 of this act.

5 (c) A court of this state need not recognize an asset freezing order issued by a court
6 outside the United States if:

7 (1) the party against whom an asset freezing order has been entered in the
8 proceeding outside the United States did not receive notice of the proceeding in sufficient time to
9 allow the order to be modified or dissolved and the interest of justice requires a hearing to
10 determine this issue:

11 (2) the order was obtained by fraud;

12 (3) the claim for relief is repugnant to the public policy of this state or the United
13 States;

14 (4) the proceeding in the court outside of the United States was contrary to an
15 agreement between the parties under which the dispute in question was to be determined;

16 (5) the order was issued in circumstances that raise substantial doubt about the
17 integrity of the issuing court with respect to the order; or

18 (6) the specific proceedings in the court outside the United States was leading to
19 the issuance of the order were not compatible with the requirements of due process of law.

20 (d) A party resisting recognition of an asset freezing order outside the United States has
21 the burden of establishing that a ground for non-recognition stated in subsection (b) or (c) exists.

22 **Comment**

23 This section concerns the recognition of asset freezing orders by courts other than the
24 court that issued the order. Because asset freezing orders are not final judgments, there is a lack

1 of uniformity in the present law concerning their recognition. Section 7(a) relates to the
2 recognition of asset freezing orders issued by courts in other states and 7(b) - (d) relates to the
3 recognition of asset freezing orders issued by courts outside the United States.
4

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6 **SECTION 8. ENFORCEMENT OF ASSET FREEZING ORDERS.** An asset

7 freezing order issued or recognized by a court of this state is presumed to be valid and
8 enforceable and entitled to full faith and credit in the same manner as a judgment.

9 **Comment**

10 Some courts have refused to recognize and enforce asset freezing orders because they are
11 not final. This section read in conjunction with Section 7 will require that an appropriately issued
12 or recognized asset freezing order like a judgment.
13

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15 **SECTION 9.** This act does not apply to actions against consumer debtors or in domestic

16 relations cases or similar matters.

17 *Legislative Note: Language to be added by the drafting committee.*