DRAFT

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ASSET FREEZING ORDERS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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With Prefatory Note and Comments

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February 4, 2011

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ASSET FREEZING ORDERS ACT

TABLE OF CONTENTS

Prefatory Not	e	1
SECTION 1.	SHORT TITLE.	2
SECTION 2.	[DEFINITIONS].	2
SECTION 3.	ASSET FREEZING ORDER ISSUED WITH NOTICE	2
SECTION 4.	ASSET FREEZING ORDER ISSUED WITHOUT NOTICE	4
SECTION 5.	OBLIGATIONS OF NON-PARTIES SERVED WITH AN ASSET FREEZING	
ORDE	ER	5
SECTION 6.	SECURITY.	5
SECTION 7.	RECOGNITION OF ASSET FREEZING ORDERS ISSUED BY OTHER	
COUR	RTS	6
SECTION 8.	ENFORCEMENT OF ASSET FREEZING ORDERS	8
SECTION 9.		8

1	ASSET FREEZING ORDERS ACT
2	Ducfotowy Note
3 4	Prefatory Note
5	For decades, courts in the other common law jurisdictions of the world have issued asset freezing
6	orders. In the words of a leading English Civil Procedure text:
7	
8	A freezing injunction is an in personam order compelling a
9	defendant to refrain from dealing with his assets and imposing
10	collateral restraint on non-parties such as the defendant's bank.
11	The function of such an injunction is to preserve assets from
12	dissipation pending final execution against the defendant, 1
13	
14	While asset freezing orders are, by their very nature, extraordinary remedies, they are considered
15	by courts in other common law jurisdictions to be valuable procedural tools for use in an
16 17	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
17 18	issuance and enforcement of asset freezing orders by courts in the United States. This act is
10	designed to remedy that deficiency.
20	designed to remedy that deficiency.
21	Because of the extraordinary nature and potentially harmful effects of an asset freezing order, it
22	is important that there be rigorous standards which must be met before such an order can be
23	issued. Those standards appear in Sections 3, 4 and 6. The standards contained in those sections
24	borrow heavily from the procedural protections found in two sources - the already existing law
25	relating to asset freezing orders in England and Canada and the already existing law in the
26	United States relating to the issuance of Temporary Restraining Orders and Preliminary
27	Injunctions.
28	
29	Since asset freezing orders also impact non-parties, it is important that the obligations of non-
30	parties be set out with specificity. Those obligations are set out in Section 5.
31	
32 33	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
33 34	appear in Sections 7 and 8. The recognition and enforcement mechanism borrows heavily from
34 35	the Uniform Foreign Country Money Judgments Recognition Act.
35 36	the Omform Foreign Country Money Judgments Recognition Act.
20	

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

ASSET FREEZING ORDERS ACT

1 2	ASSET FREEZING ORDERS ACT
3 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

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

SECTION 4. ASSET FREEZING ORDER ISSUED WITHOUT NOTICE.

(a) An order freezing the assets of a party may be issued without notice but only if the
specific facts in an affidavit or verified complaint offered in support of the motion to freeze
assets clearly show that the moving party is entitled to the order under the provisions of Sections
3(a) - (d).

- (b) The moving party must disclose all material facts in the affidavit or verified complaint
 presented in support of a motion to have an asset freezing order issued without notice, including
 any known facts favorable to the non-moving party.
- 9 (c) The moving party must also certify to the court in writing all efforts to give notice and 10 the reasons why notice should not be required.
- (d) If the asset freezing order is issued without notice, the order will expire at the date set by the court, not to exceed 14 days, unless before that time the court, for good cause, extends it for a like period or the non-moving party consents to a longer extension. The reasons for the extension must be entered in the order.
- (e) If an asset freezing order is issued without notice, the party against whom the order is
 issued may appear and move to dissolve or modify the order with two days notice on the party
 who obtained the order without notice. The court must then hear and decide the motion as

18 promptly as justice requires.

19 20

Comment

21 This section provides for the issuance of an asset freezing order without notice. Sections 22 4(a) and (c) - (e) reflect currently existing law for the issuance of a temporary restraining order. 23 Section 4(b) is an extremely important provision drawn from English and Canadian law and 24 reflects the heightened disclosure obligation imposed on a party who seeks an asset freezing 25 order without notice. When counsel seeks the issuance of an asset freezing order without notice, 26 he or she must include in the pleadings all material facts "including any facts favorable to the 27 non-moving party. The inclusion of this provision is to insure that the court has before it all of 28 the known facts before it issues an asset freezing order without notice.

SECTION 5. OBLIGATIONS OF NON-PARTIES SERVED WITH AN ASSET FREEZING ORDER.

(a) If the court issues an asset freezing order, the court shall require that the order be
served on non-parties within the court's jurisdiction that hold assets of the party against whom
the order is issued. The party who has obtained the order shall provide the court with a list of all
known non-parties on whom the order shall be served.

(b) A non-party served with an asset freezing order shall forthwith freeze and prevent
removal or transfer of monies or assets of the party against whom the order is issued held in any
account or on credit on behalf of that party until further order of the court.

10 (c) The party obtaining an asset freezing order shall give notice to a non-party who has

11 been served with an asset freezing order if the order is vacated or modified.

12 (d) A non-party who has been served with an asset freezing order violates the order only

13 if it knowingly and intentionally acts or fails to act with the result that the injunction is

14 undermined or if it knowingly and intentionally aids or abets the person against whom the order

15 is issued in violating the order.

(e) Nothing in this section should be construed as prohibiting a non-party from exercisingany of its legal rights.

18

Comment

19 This section recognizes that an asset freezing order applies in personam to the party 20 against whom it is issued and also to non-parties within the court's jurisdiction that hold assets 21 of that party. The section, which draws on currently existing English and Canadian law also sets 22 out the obligations of non-parties which have been served with the order.

23 24

25 SECTION 6. SECURITY.

26 (a) The party on whose behalf an asset freezing order has been issued shall give security

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 11 12 13 14 15 16	This section provides for security for a party against whom an asset freezing order has been entered and any non-party served with the order for damages sustained as the result of an order later found to have been improvidently granted. Section 6(b) also requires a party who has obtained an asset freezing order to indemnify a non-party for the reasonable costs of compliance. 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 24	This section concerns the recognition of asset freezing orders by courts other than the court that issued the order. Because asset freezing orders are not final judgments, there is a lack

1 2 3	of uniformity in the present law concerning their recognition. Section 7(a) relates to the recognition of asset freezing orders issued by courts in other states and 7(b) - (d) relates to the recognition of asset freezing orders issued by courts outside the United States.
4	
5	
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	
14	
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.