

DRAFT
FOR DISCUSSION ONLY

ASSET FREEZING ORDERS

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For November 11-12, 2011 Drafting Committee Meeting

With Prefatory Note and Comments

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ON UNIFORM STATE LAWS

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October 19, 2011

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ASSET FREEZING ORDERS

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ASSET FREEZING ORDERS

Prefatory Note

Background

This Act creates a uniform process for the issuance of asset freezing orders which are in personam orders freezing the assets of a defendant and imposing collateral restraint on non-parties such as the defendant's bank in order to preserve assets from dissipation pending judgment. Asset freezing orders have been part of the fabric of civil procedure in England since 1975 and are viewed in other common law countries as valuable tools for use in the 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.

In the United States, the primary remedy against asset dissipation has traditionally been an in rem order prohibiting the transfer of assets. However, prior to 1999, both federal and state courts would issue in personam asset freezing orders, prior to judgment, in appropriate cases to prevent dissipation of assets in order to insure that there would be assets to satisfy a judgment.

In 1999, the United States Supreme Court in a 5-4 opinion concluded that federal courts lacked the power to issue in personam asset freezing orders. The majority opinion in the case, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.* 527 U.S. 308 (1999), written by Justice Scalia, determined that federal courts lacked jurisdiction to issue such orders because they were not part of the common law at the time the federal court system was created. Judge Scalia concluded his opinion by noting that the decision whether to allow an in personam order freezing assets is one that should be made by the legislature and not the courts.

Although the *Grupo Mexicano* decision involved the jurisdiction of federal courts, some state courts concluded, in the wake of that decision, that they lacked the inherent authority to issue asset freezing orders. Another state court concluded that the decision had no effect on it because the decision was based on federal law. The *Grupo Mexicano* decision thus created confusion and a lack of uniformity among states which this act will remedy.

This Act

An asset freezing 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 extremely 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 well-developed 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. As the language of section 4 makes clear, an asset freezing order can be issued only if the moving party establishes that there is a substantial likelihood that the assets of a party will be dissipated and that the moving party will be unable to receive satisfaction of the judgment. In order to prove that a party is dissipating assets, according

to the definition found in Section 2, the moving party must establish that the party against which the order is sought is selling, removing or otherwise dealing with the asset with the asset for the purpose of defeating satisfaction of any judgment that might be entered.

Section 4 also contains an important provision protecting the party against which an asset freezing order is entered by making it clear that the party is entitled to an order allowing the use of assets to meet normal living or business expenses and the cost of defending the claim.

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.

It is important to note that while an asset freezing order is a valuable procedural tool, it is just that – a procedural tool to be used to prevent a party from dissipating assets prior to judgment. The existence of an asset freezing order does not alter any rights or interests which predate the issuance of the order or create any new rights or interests on behalf of the party which has obtained the order. For example, a party which obtains an asset freezing order does not acquire any sort of proprietary interest in the assets enjoined and is not given any preference over other creditors in the event of the insolvency of the party against which the asset freezing order has been issued.

1 **ASSET FREEZING ORDERS**

2
3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Asset Freezing Order

4 Act.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Asset” means anything that may be the subject of ownership, whether real or
7 personal, tangible or intangible, legal or equitable or any interest therein, which is not exempt
8 from execution [under the laws of this state or the state in which the asset is located, as
9 determined by applicable law][pursuant to Section 3(c)].

10 (2) “Asset freezing order” means an in personam order restraining or enjoining a party
11 directly or indirectly from dissipating an asset

12 (3) “Dissipating” means taking any of the actions set out in (A), (B) or (C) with regard to
13 an asset if the purpose of the action is to defeat satisfaction of judgment:

14 (A) selling, removing, alienating, transferring, assigning, encumbering, or
15 similarly dealing with an asset of that party, wherever situated;

16 (B) instructing, requesting, counseling, demanding, or encouraging any other
17 person to take an action described in subparagraph (A); or

18 (C) facilitating, assisting in, aiding, abetting, or participating in any act described
19 in subparagraphs (A) and (B) the effect of which is to do so.

20 (3) “State” means a state of the United States, the District of Columbia, Puerto Rico,
21 United States Virgin Islands or any territory or insular possession subject to the jurisdiction of
22 the United States.

23 (4) “Party” means a person that brings an action or against which an action is brought,
24 whether or not service has been made or notice given.

1 (5) "Person" means an individual, corporation, business trust, estate, partnership, limited
2 liability company, association, joint venture or any other legal or commercial entity.

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

5 (7) "Consumer Debt" means a debt which was incurred primarily for personal, family, or
6 household purposes, whether or not such obligation has been reduced to judgment.

7 (8) "Debtor" means the party that allegedly owes money to another party.

8 **SECTION 3. APPLICABILITY.**

9 (a) This [act] does not apply:

10 (1) in an action against a debtor for a consumer debt;

11 (2) in a [domestic relations] case; or

12 (3) to any order entered in a [Family Law, Domestic Relations, Other (cite
13 statutory provision)] case.

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

16 (c) This [act] does not apply or limit remedies available to any person other than the
17 debtor to the extent that:

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

19 (2) another statute of this state or another state, foreign country, or governmental
20 unit of another state or foreign country expressly governs the creation, perfection, priority, or
21 enforcement of a security interest, judgment lien, or lien on real property, wherever such
22 property is located, or permits the exercise of common law rights of set-off, recoupment or rights
23 of other parties pursuant to contract to the extent they are seeking to enforce rights or remedies

1 that existed prior to [the date of the asset freezing order][commencement of the action in which
2 the asset freezing order is obtained].

3 **Comment**

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

9
10 The [act] also does not apply in domestic relations cases which would include actions for
11 divorce, child custody and child support. A wife in a divorce action, for example, could not use
12 the provisions of this act to attempt to freeze the assets of her husband. Likewise, this act could
13 not be used to enforce an asset freezing order in a divorce action issued by a court outside the
14 United States. The decision to exempt these kinds of cases from this [act] was made by the Scope
15 and Programs Committee.

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

19
20 Section 3(c) reinforces the notion that this [act] is not intended to limit or supersede any
21 currently existing remedies that a secured creditor or lienholder may have. The asset freezing
22 order does not establish any liens, choate or inchoate, in the property which is the subject of the
23 asset freezing order. The purpose of the asset freezing order is the prevention of wrongful
24 voluntary conveyances of any interest in the subject property. Absent fraud or collusion with the
25 party against whom the asset freezing order is issued, it would not prevent other creditors of that
26 party from obtaining involuntary liens against the subject property.

27
28 The issuance of an asset freezing order would not prevent a secured creditor or
29 lienholder from commencing, continuing or completing any available remedies to realize its
30 collateral. It would not, for example, affect a creditor's right to foreclose on its mortgage or other
31 security interest. It would not prevent, inhibit or affect the validity of a subsequent sale of the
32 property which was the subject of the secured creditor's enforcement action. It would also not
33 prevent an unrelated person from initiating a lawsuit against a party which is the subject of an
34 asset freezing order and obtaining a judgment against that party's assets.

35
36 By way of example, it would not prevent involuntary seizures of the debtor's property to
37 the extent that a party wishes to pursue an action on contract, seek an attachment, seek to enforce
38 a judgment, or seek to enforce common law rights of set-off or recoupment, or their contractual
39 equivalent in certain circumstances such as "netting" in financial instruments. However, once the
40 asset freezing order is in place, any person with notice of the order could not cooperate with the
41 debtor to place a new mortgage on an asset, or enter into a new contract containing rights of set-
42 off. If the mortgage or contract were in place prior to [the date of the asset freezing order][the

1 commencement of the action in which the asset freezing order is obtained], then efforts to
2 enforce those rights, as involuntary acts against the debtor are excluded.

3
4 **SECTION 4. ASSET FREEZING ORDER ISSUED WITH NOTICE.**

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

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

9 (2) there is a substantial likelihood that the assets of the party against which the
10 order is sought will be dissipated and a substantial likelihood that the moving party will be
11 unable to receive satisfaction of a judgment in the action because of the dissipation of assets if
12 the order is not granted;

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

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

17 (b) An asset freezing order must be served in compliance with [cite applicable rules or
18 statutes of this state for service appropriate to this type of order] within [] days of the issuance of
19 the order.

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

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

1 The court shall have discretion, based on all the facts and circumstances, to determine if the asset
2 freezing order should be limited to a certain amount of assets, and may issue appropriate
3 accounting requirements to ensure compliance.

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

7 **Comment**

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

13
14 Under Section 4(d), the party against which an asset freezing order is issued is entitled to
15 an order allowing the use of assets to meet normal living expenses and business expenses
16 including the payment of currently existing debts and the costs of defending the claim. That party
17 bears the burden of establishing the amount of those expenses.

18
19 An asset freezing order cannot normally be applied to assets which are owned by a non-
20 party. However, where the assets are owned jointly by a non-party and a party against which an
21 asset freezing order has been entered, the order also applies to the non-party. In that situation, the
22 non-party may apply to the court for an order removing the asset from the scope of the order.

23
24 **SECTION 5. ASSET FREEZING ORDER ISSUED WITHOUT NOTICE.**

25 (a) The court may issue an asset freezing order without notice only if specific facts in an
26 affidavit or verified pleading offered in support of the motion to freeze assets clearly show, by
27 clear and convincing evidence, that the moving party is entitled to the order under Section 4(a).

28 (b) Counsel for the moving party must disclose all material facts in the affidavit or
29 verified pleading presented in support of a motion to have an asset freezing order issued without
30 notice, including any material facts favorable to the non-moving party which the moving party
31 knows or reasonably should know.

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

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

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

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

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

11 **Comment**

12
13 This section provides for the issuance of an asset freezing order without notice. A party
14 seeking an asset freezing order without notice must satisfy the requirements for issuance of the
15 order contained in Section 4(a) and the additional requirements set forth in this section
16

17 Sections 5(a) and (c)-(e) reflect currently existing law for the issuance of a temporary
18 restraining order issued without notice in both state and federal court. Section 5(b) is an
19 extremely important provision drawn from English and Canadian law and reflects the heightened
20 disclosure obligation imposed on a party who seeks an asset freezing order without notice. This
21 section imposes a duty on counsel to make reasonable inquiry to ascertain all material facts
22 relating to the asset freezing issue and to disclose to the court facts favorable to the party against
23 which the order is sought. The English courts define the duty of disclosure as follows:
24

- 25 (a) the party seeking the order must make a full and fair disclosure of all of the
26 material facts;
27 (b) materiality is to be decided by the court, not by the movant or his legal
28 advisers;
29 (c) proper inquiries must be made before making the application and the duty of
30 disclosure applies not only to facts known by the claimant but to those which
31 he would have known if he had made proper inquiries;
32 (d) the extent of the inquiries which are necessary must depend on the nature of
33 the case, the probable effect of the order on the defendant, the degree of
34 legitimate urgency and the time available for making inquiries.
35
36

1 Section 6(b) is a self-executing provision which requires a non-party in a state that has
2 adopted this [act] to comply with the asset freezing order without the need for further action. If
3 the non-party is in a state which has not adopted this [act], the non-party is not required to
4 comply with the order unless and until the party on whose behalf the asset freezing order has
5 been issued has obtained an order recognizing the asset freezing order from the jurisdiction
6 where the non-party is located.
7

8 English law relating to makes clear that an asset freezing order is simply an order which
9 does not confer any proprietary rights on successful applicants. English Civil Procedure texts
10 emphasize the following points:
11

- 12 (a) the freezing injunction was not intended to rewrite the law of insolvency;
- 13 (b) a claimant who obtains a freezing injunction does not acquire a proprietary
14 interest in the assets enjoined and is not given any preference over other
15 creditors in the event of the defendant's insolvency;
- 16 (c) a non-party can apply to have his pre-existing debt discharged by the
17 defendant;
- 18 (d) a freezing injunction does not prevent a party from honoring its contractual
19 obligations to other parties;
- 20 (e) a freezing injunction cannot be applied to property which is owned by a non-
21 party;
- 22 (f) a freezing injunction does affect the interest of a non-party in two ways – (1)
23 where the property is jointly owned by the defendant and a non-party and (2)
24 where the non-party as acquired the property from the defendant in suspicious
25 circumstances. In all situations, the non-party can apply to the court for an
26 order removing the property from the scope of the injunction.
27

28 During the discussion at the 2011 annual meeting, a helpful comment was made from the
29 floor that UCC §4-303 be referenced in the comments to this section. That provision of the UCC
30 would apply to a non-party bank served with an asset freezing order. Under the provisions of
31 UCC § 4-303 a bank is given a reasonable time to act on an asset freezing order which runs from
32 the time the asset freezing order is “received or served.”
33

34 **SECTION 7. SECURITY.**

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

40 (b) A party on whose behalf an asset freezing order is issued shall indemnify a non-party

1 for the reasonable costs of compliance with the order or compensate for any loss caused by the
2 order whether or not the motion for the asset freezing order was properly granted.

3 **Comment**

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

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

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

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

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

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

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

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

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

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

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

(4) the order was issued without notice to the party against which the order was issued and the issuing court did not utilize procedures substantially similar to those provided in Section 5.

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

(6) the order was obtained by fraud;

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

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

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

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

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

Comment

This section concerns the recognition of asset freezing orders issued by courts in other states and countries. Because asset freezing orders are not final judgments, there is a lack of uniformity in the present law concerning their recognition. Section 8(a) relates to the recognition of asset freezing orders issued by courts in other states and 8(b) - (d) relate to the recognition of asset freezing orders issued by courts outside the United . Sections 8(b)-(d) borrow freely from

1 the architecture and language of section 4 of the Uniform Foreign-Country Money Judgments
2 Recognition Act.

3
4 **SECTION 9. ENFORCEMENT OF ASSET FREEZING ORDER.** An asset freezing
5 order issued or recognized by a court of this state is valid and enforceable in the same manner as
6 a judgment.

7 **Comment**

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

11
12 **SECTION 10. APPEAL.** The [insert name of appropriate appellate court] shall have
13 jurisdiction of an appeal from an order granting, continuing, modifying, refusing or dissolving an
14 asset freezing order.

15 **Comment**

16
17 This provision provides for an appeal as of right from a court order relating to an asset
18 freezing order. Because asset freezing orders are really a form of preliminary injunctive relief,
19 the language of this section tracks the language of the federal statute creating appellate
20 jurisdiction over appeals from orders relating to preliminary injunctive relief. Similar language
21 exists in state statutes and rules governing appeals relating to injunctive relief.

22
23 **SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
24 applying and construing this uniform act, consideration must be given to the need to promote
25 uniformity of the law with respect to its subject matter among the states that enact it.

26 **SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
27 **NATIONAL COMMERCE ACT.** This [act] modifies, limits and supersedes the federal
28 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
29 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
30 authorize delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section
31 7003(b).

1 **SECTION 13. SEVERABILITY.** If any provision of this [act] or its application to any
2 person or circumstance is held invalid, the invalidity does not affect other provisions or
3 applications of this [act] which can be given effect without the invalid provision or application,
4 and to this end, the provisions of this [act] are severable.

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

7
8 **SECTION 14. SAVINGS CLAUSE.** This [act] does not prevent the exercise of other
9 remedies not inconsistent with this [act].

10 **SECTION 15. EFFECTIVE DATE.** This [act] takes effect...