# UNIFORM ASSET-PRESERVATION ORDERS ACT* (2012)

*(Amended in 2014)*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

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*WITH PREFATORY NOTE AND COMMENTS*



August 24, 2022

*The conference changed the designation of the Asset-Preservation Orders Act from Uniform to Model as approved by the Executive Committee on July 7, 2022.

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# UNIFORM ASSET-PRESERVATION ORDERS ACT

## Prefatory Note

### ASSET-PRESERVATION ORDERS ARE *IN PERSONAM* ORDERS IN THE NATURE OF AN INJUNCTION PRESERVING ASSETS BY PREVENTING THEIR DISSIPATION UNDER CERTAIN AND LIMITED CONDITIONS. THE VIOLATION OF AN ASSET-PRESERVATION ORDER IS PUNISHABLE BY CONTEMPT

In the United States, the primary remedy to protect assets from dissipation prior to judgment has traditionally been an *in rem* order prohibiting the transfer of assets in the context of pre-judgment attachments. This act, among other things, creates a procedure for the issuance of an asset-preservation order which differs significantly from the currently existing in rem prejudgment attachment process. An asset-preservation order is injunctive relief, applying *in personam,* which preserves assets by preventing their dissipation so that sufficient assets will be available to satisfy an existing or future judgment. Because an asset-preservation order is in the nature of injunctive relief, violations of the order are punishable by contempt.

### THE ACT, WHICH CREATES A RIGOROUS PROCESS FOR THE ISSUANCE, RECOGNITION AND ENFORCEMENT OF ASSET-PRESERVATION ORDERS IS PROCEDURAL ONLY AND DOES NOT CREATE AN INDEPENDENT CLAIM OR CAUSE OF ACTION THAT COULD BE USED BY PERSONS NOT A PARTY TO THE ACTION TO PREVENT ANY USE OF ASSETS

The Uniform Asset-Preservation Orders Act is procedural only. It applies to create a potential remedy only in an underlying action which has already been filed or which is being filed at the time an asset-preservation order is sought. A person who is not a party to the underlying action cannot use this act to attempt to prevent any use of assets.

### THE ACT APPLIES ONLY TO AN ACTION IN WHICH MONETARY DAMAGES ARE SOUGHT; THUS THE ACT WOULD NOT NORMALLY APPLY TO ESTATE, TRUST, OR PROBATE MATTERS

The language of Section 4(a) specifically limits the application of this act to "…[a]n action in which monetary damages are sought…" Thus, this act would not apply to actions, for example, related to estates, trusts and probate, unless those actions are construed as an action against an estate or trust for money damages. The language of section 4 also means that this act does not apply in cases where both money damages and non-monetary equitable relief are sought or where the sole request for relief is equitable.

### AN ASSET-PRESERVATION ORDER DOES NOT CONFER ANY PROPERTY RIGHTS ON SUCCESSFUL APPLICANTS OR ALTER THE LAW RELATING TO SECURITY INTERESTS IN ANY WAY

As previously noted, this act is procedural in nature and simply provides a uniform law which creates a process for the issuance, recognition and enforcement of asset-preservation orders. It does not alter or confer any property rights. It also does not limit or supersede any currently existing remedies that a secured creditor or lienholder may have. The act may affect a

right accruing to a nonparty after the entry of an asset-preservation order if the party has actual or constructive notice of the entry of the order by service or otherwise.

## ASSET-PRESERVATION ORDERS HAVE BEEN UTILIZED BY COURTS IN OTHER COMMON LAW JURISDICTIONS SINCE 1975 TO PROTECT THE RIGHTS OF PARTIES

English courts and courts in other common law jurisdictions like Canada have been issuing orders preserving assets since the 1970's. The orders, first known as *Mareva* injunctions after the name of the case which affirmed the jurisdiction of the English courts to enter them, are now part of the judicial fabric of other common law countries. Those courts view in personam orders preserving assets as valuable tools to be used in appropriate cases, particularly in the modern world of technology, where assets can be transferred with the simple stroke of a computer key. American courts, prior to 1999, also would issue in personam orders preserving assets by preventing their dissipation. As is noted in another section of this note, that power was called into question by the Supreme Court's *Grupo Mexicano* decision, thus making this uniform act necessary.

## THE AUTHORITY TO ISSUE ASSET-PRESERVATION ORDERS IS IMPORTANT EVEN IN STATES WHICH HAVE PREJUDGMENT ATTACHMENT STATUTES

Virtually every state has a prejudgment attachment remedy which authorizes an *in rem* order prohibiting the transfer of assets prior to judgment. In fact, in the United States, that has been the primary remedy against asset dissipation. Prejudgment attachment does not afford the protection to a party that an asset-preservation order does because prejudgment attachment is a limited remedy. It applies only to assets which are within the jurisdiction of the court and which are known to the party seeking prejudgment attachment.

This act creates a significantly different and more effective remedy which provides greater protection for a plaintiff who fears that a defendant in the underlying action will dissipate assets and thus impair the plaintiff's ability to realize on a judgment. Because an asset-preservation order is an *in personam* order, it applies to enjoin a defendant over whom the court has jurisdiction from dissipating any of the assets no matter where they are located and whether or not they are known to the party seeking the order. A party against which an asset-preservation order is entered violates the order if it disposes of assets whether or not they are physically located within the court's jurisdiction and whether or not the party which has obtained the order knows about the assets.

In addition, a party must often demonstrate fraud in order to obtain a prejudgment attachment whereas an asset-preservation order requires a showing that there is a substantial likelihood that the assets will be dissipated.

Take for example, a debtor in Alabama which has substantial bank accounts in Alabama, Colorado and Maine. A creditor, seeking to prevent the debtor from transferring the funds held in Alabama banks, may currently seek relief only under the Alabama prejudgment attachment statute. If the creditor is successful in making the necessary showing, only the Alabama assets are affected. The debtor is free to transfer funds held by banks in Colorado and Maine. In order

to prevent dissipation of those assets, the creditor would have to file prejudgment attachment actions in Colorado and Maine.

If Alabama were to adopt this act, the creditor would simply have to go to an Alabama court and make the proper showing to obtain an asset-preservation order. Once the order was issued, the debtor could not dispose of funds any of his bank accounts, no matter where they were. If it did, it would be in contempt of court for violating the asset-preservation order.

**THIS ACT IS NECESSARY TO CREATE UNIFORMITY IN LIGHT OF THE *GRUPO MEXICANO* DECISION OF THE UNITED STATES SUPREME COURT**

The viability of in personam orders preserving assets was the subject of the opinion by the Supreme Court of the United States in *Grupo Mexicano de Dessarolo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). The *Grupo Mexicano* case is a classic case demonstrating the need for an asset-preservation order procedure. The plaintiffs were investment funds in the United States which had purchased seventy-five million dollars of notes issued by a Mexican holding company that operated toll roads in Mexico. The Mexican holding company suffered serious financial setbacks and began transferring the assets which secured the notes to pay other obligations. The assets were located in Mexico and consequently there was no possible in rem remedy.

The investment funds commenced an action in the United States District Court for the Southern District of New York seeking an order precluding the Mexican holding company from transferring or encumbering the assets. The district court issued an order restraining the Mexican holding company from dissipating the assets which were pledged to satisfy the note. The court found that the investment funds would suffer irreparable injury since the Mexican holding company's financial condition and dissipation of assets would frustrate any judgment recovered. The United States Court of Appeals for the Second Circuit affirmed the district court's issuance of an order and the United States Supreme Court granted certiorari.

In a 5-4 opinion authored by Justice Scalia, the Supreme Court noted that the order which the district court entered preserving assets by preventing their dissipation was a valuable procedural tool but concluded that federal courts lacked the jurisdiction to issue such orders because they were not part of the common law at the time the federal court system was created. Justice Scalia expressed no substantive concern with the order entered by this district court or the overall concept of orders preventing the dissipation of assets but simply found that that the district court lacked the jurisdiction to enter the order. He also remarked that the decision whether federal courts should have the power to issue in personam orders to prevent the dissipation of assets should be left up to the legislature.

Although the *Grupo Mexicano* decision involved the jurisdiction of federal courts, it caused confusion in the state courts over the propriety of issuing in personam orders to preserve assets by preventing their dissipation. Some state supreme courts concluded, in the wake of that decision, that courts in their state lacked the authority to issue those type of orders. At least one other state supreme court concluded the opposite – that courts in their state still had the power to issue such orders because the *Grupo Mexicano* decision involved federal court jurisdiction. *Grupo Mexicano* also placed the United States at odds with other common law countries, which permit so-called *Mareva* or similar type injunctions, because reciprocity of enforcement has become a priority when assets may be transferred instantly with the push of a button.

The Uniform Asset-Preservation Orders Act remedies this lack of uniformity by providing state legislatures with a Uniform Act that authorizes the issuance of asset-preservation orders and provides for the recognition and enforcement of asset-preservation orders issued by sister states and courts outside the United States.

**THE ACT PROVIDES A RIGOROUS PRE-ISSUANCE PROCESS SIMILAR TO THE PROCESS TO BE FOLLOWED FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION BUT TAILORED TO ASSET-PRESERVATION ORDERS**

Section 4 sets out the legal standard which must be met before an asset-preservation order can be issued. The standard mirrors the traditional standards for the issuance of a preliminary injunction but is recast to fit the asset-preservation order context. The party seeking the order must show there is a substantial likelihood both that the party seeking the order will prevail on the merits and that the assets of the party against which the order is sought will be dissipated if the order is not granted such that the moving party would be unable to receive satisfaction of a judgment because of the dissipation. A detailed discussion of the concept of dissipation appears in the comments to Section 4.

**THE PRE-ISSUANCE PROCESS IS EVEN MORE RIGOROUS WHERE THE ORDER IS SOUGHT WITHOUT NOTICE**

An asset-preservation order issued without notice is essentially a temporary restraining order. Thus the language of Section 5, which authorizes the issuance of an asset-preservation order without notice, tracks the language and requirements for the issuance of a temporary restraining order under the Federal Rules of Civil Procedure and is therefore similar to the requirements of the states which have substantially adopted the federal rules.

Section 5(b) contains a requirement which adds additional rigor to the already demanding standard for the issuance of a temporary restraining order. Under that section, a party seeking an asset-preservation order without notice must conduct a reasonable inquiry into the facts relating to the case and the asset-preservation order and must disclose all material facts that weigh against the issuance of the order.

**THE ACT PROVIDES A SERIES OF POST-ISSUANCE PROCEDURES TO PROTECT THE INTERESTS OF THE PARTY AGAINST WHICH THE ASSET-PRESERVATION ORDER IS ISSUED AND TO ENSURE THAT THE ORDER IS NARROWLY TAILORED TO MEET THE NEEDS OF A PARTICULAR CASE**

Although the act requires that rigorous standards be met before an asset-preservation order is entered, the text of the act recognizes that an asset-preservation order may adversely affect the party against which the order is issued. Consequently, it provides significant post-issuance procedures.

For example:

- A party against which an asset-preservation order is entered may apply for relief from the order by posting a bond or other security in the amount of the damages sought or in an amount determined by the court [Section 4(c)].

- On at least 24 hours' notice to the party that obtained the asset-preservation order, a party against which the order is issued may apply for an order permitting it to pay its ordinary living expenses, business expenses and legal representation [Section 4(d)].

- The court may limit an asset-preservation order to a certain amount or type of assets and may order appropriate accounting requirements [Section 4(e)].

- In the case of an asset-preservation order issued without notice, the party against which the order is issued may move to dissolve or modify the order and may apply for relief under Sections 4(c) and (d) [Section 5(d)].

- The court may require security from a party on whose behalf an asset-preservation order is issued to pay for costs and damages sustained by the party against which the order is issued if the order is later determined to have been improvidently granted [Section 7(a)].

The message of these procedural protections is that the scope of each asset-preservation order will depend on the particular facts and circumstances of each case. The task of the court is to tailor the scope of an asset-preservation order narrowly. The amount of assets frozen should be only the amount necessary to carry out the purpose of the act – that sufficient assets be available to satisfy the judgment.

**THE ACT PROVIDES SIGNIFICANT POST-ISSUANCE PROTECTIONS FOR NONPARTIES WHICH MAY BE REQUIRED TO COMPLY WITH THE ORDER**

Under the provisions of Section 6(b), a nonparty served with an asset-preservation order shall promptly take all necessary and appropriate actions to preserve assets by preventing any use of the assets of the party against which the order is issued which would violate the order. However, Section 6 also contains other provisions which protect the nonparty from potential harm related to compliance.

- A nonparty is required to preserve the assets of a party only if the nonparty is served with the order [Section 6(b)].

- A nonparty served with an asset-preservation order may move to dissolve or modify the order [Section 6(e)].
- A party on whose behalf and asset-preservation order is entered shall indemnify a nonparty for the reasonable costs of compliance with the order and compensate for any loss caused by the order [Section 7(b)].

**THE PROVISIONS OF THIS ACT WHICH AUTHORIZE THE ISSUANCE OF AN ASSET-PRESERVATION ORDER EX PARTE SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE**

This act provides for the ex parte issuance of an asset-preservation order. It goes without saying that such a provision must satisfy the due process clause. In the oft-quoted words of the United States Supreme Court, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v.*

*Eldridge,* 424 U.S. 319, 334 (1976) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Thus, the decision whether a statute passes constitutional muster is a fact intensive inquiry which focuses on the particular provisions of that statute.

In order to determine whether provisions of this act which authorize the issuance of an asset-preservation order ex parte are constitutional, it is appropriate to discuss the decision of the United Supreme Court in *Connecticut v. Doehr*, 501 U.S. 1 (1991). That decision discusses the constitutional efficacy of a procedural mechanism similar to an asset-preservation order – the ex parte provisions of a prejudgment attachment statute.

It is important to note, at the outset, what the ex parte provisions of the Connecticut prejudgment statute at issue in *Doehr* were. First, the statute authorized prejudgment attachment on a very minimal showing "[t]hat there is probable cause to sustain the validity of the plaintiff's complaint." Id. at 5. Only a skeletal affidavit needed to be filed with the court related to that issue. Id. at 14. Second, the statute authorized a prejudgment attachment without any showing that the party against which a prejudgment attachment was sought was about to transfer or encumber his real estate or take any other action that would render his real estate unavailable to satisfy the judgment. Id. at 16.

The ex parte provisions of this act have none of the infirmities of the statute at issue in *Doehr.* By contrast this act contains a series of provisions designed to protect against the erroneous issuance of an asset-preservation order. As a threshold matter, before an asset preservation order can be issued ex-parte, the party seeking the order must establish first, that there is a substantial likelihood that it will prevail on the merits of the action [Section 5(a); 4(b)(1)]. In addition, the party must show and the court must find that, if the motion for an asset-preservation order is not granted, "there is a substantial likelihood the assets of the party against which the order is sought will be dissipated so that the moving party will be unable to receive satisfaction of a judgment because of the dissipation" [Section 4(a)(2)]. This provision directly addresses a concern of the court in *Doehr* and provides significant protection against the erroneous issuance of the order.

There is on additional requirement which provides important additional protection against erroneous issue – Section 5(b). This provision is taken from the English and Canadian law relating to asset-preservation orders and is a principal safeguard for parties against which an order is sought ex-parte. This section mandates that a party seeking the issuance of an asset-preservation order ex-parte must conduct a reasonable investigation into the facts and "disclose in the affidavit and verified pleading" used to seek the ex parte order "all material facts which weigh against the issuance of the order". A more detailed discussion of this duty of disclosure appears in the comment to Section 5(b).

There also are significant procedural protections for a party to obtain relief from an overbroad or erroneously granted order. The court has the authority to require security in the form of a personal bond or surety. If the court determines that security is required, "it shall require the party to give security to pay for costs and damages sustained by the party against which the order is issued if it is later determined to have been improvidently granted" [Section 7(a)].

The statute also authorizes the party against which an asset-preservation order has been entered to move to modify or dissolve the order [Section 7(d)], to seek relief by posting a bond [Section 4(c)], and to seek an order authorizing the use of assets to pay for ordinary living or business expenses or for the cost of legal representation. The court also has the power to limit the order to a certain amount or type of assets [Section 4(c)]. Thus, as soon as a party against which an ex parte asset-preservation order has been entered is served, that party has a wide variety of procedural options available to it to seek immediate dissolution or modification of the order or other relief from it.

**THE ACT ALSO PROVIDES FOR RECOGNITION AND ENFORCEMENT OF ASSET-PRESERVATION ORDERS ISSUED BY SISTER STATES AND FOREIGN COUNTRIES**

Because asset-preservation orders are not final judgments, they are not afforded "full faith and credit" recognition. As a result, there has been a lack of uniformity in the approach which courts have taken to the recognition and enforcement of non-final asset-preservation order issued by other courts. This act remedies the lack of uniformity. Section 8 provides the standards for recognition of an asset-preservation order. This Section relies heavily on the process and language of the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA), which has been widely adopted.

## UNIFORM ASSET-PRESERVATION ORDERS ACT

**SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Asset-Preservation Orders Act.

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

(1) "Asset" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, or legal or equitable, or any interest therein, which is not exempt from execution under applicable law.

(2) "Asset-preservation order" means an in personam order preserving an asset by restraining or enjoining a person from dissipating an asset directly or indirectly.

(3) "Consumer debt" means a debt incurred primarily for personal, family, or household purposes. The term includes a debt that has been reduced to judgment.

(4) "Debtor" means a person that allegedly owes money to a party.

(5) "Dissipate" means to take an action with regard to an asset of a debtor to defeat satisfaction of an existing or future judgment, including:

(A) selling, removing, alienating, transferring, assigning, encumbering, or similarly dealing with the asset;

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

(C) facilitating, assisting in, aiding, abetting, or participating in an action described in subparagraph (A) or (B).

(6) "Nonparty" means a person that is not a party and has custody or control of an asset of a party which is subject to an asset-preservation order. The term includes a person that holds a joint ownership interest in an asset with a party against which an asset-preservation order has been entered.

(7) "Party" means a person that brings an action or against which an action is brought, whether or not service has been made on or notice given to the person.

(8) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

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

(10) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

**Comment**

The term "dissipate", which is defined in Section 2(5), is a common term in American jurisprudence. It is a flexible concept designed to be applied on a case by case basis. An extended discussion of the meaning of the term appears in the comments to Section 4.

**SECTION 3. SCOPE.**

(a) This [act] applies to a right accruing to a nonparty after the entry of an asset-preservation order if:

(1) the nonparty has been served with the order pursuant to Section 6(a); or

(2) the party obtaining the order has filed, recorded, or docketed the order in the appropriate jurisdiction and office in which the party would be required under applicable law to file, record, or docket the order to give notice of, establish, or perfect a lien, security interest, mortgage, or comparable interest, and the order as filed, recorded, or docketed, if it were a judicial lien in favor of a party, would give priority to the interest of a party over the interest of the nonparty under applicable law.

(b) This [act] does not apply in an action:

(1) against an individual for a consumer debt; or

(2) that arises under the family or domestic relations law of this state.

(c) This [act] does not apply to or limit a right or remedy available to a party or nonparty to the extent that a law, regulation, or treaty of the United States preempts this [act].

(d) This [act] does not affect a right or remedy including a right or remedy arising from the creation, perfection, priority, or enforcement of a security interest or other interest**s** that existed before an order takes effect.

(e) This [act] does not prevent recognition under principles of comity of an asset-preservation order not within the scope of this [act].

(f) This [act] does not prevent the exercise of other remedies not inconsistent with this [act].

[(g) This [act] does not affect an exemption in this state based on tenancy by the entirety.]

**Comment**

This section is designed to clarify the scope of this act and to make clear that an asset-preservation order does not confer any property rights on successful applicants or alter the law relating to secured interests in any way.

Under the provisions of section 3(a)(1)-(2), the act does apply to nonparty property rights accruing after the nonparty has been served with an asset-preservation order or the order has been recorded, filed or docketed under the circumstances described in Section 3(a)(2). This act, however, imposes no obligation to preserve assets on a nonparty which has such constructive notice of an asset-preservation order but which has not been served with the order.

The act refers generally to the issuance of an asset-preservation order, and is intended to permit recognition and enforcement of such an order whether issued by a court or an arbitral tribunal. It applies in an action for damages when an order is sought, whether in a court or in an arbitration proceeding, that restrains a defendant from dissipating an asset in order to keep that asset available to satisfy a judgment should one be entered**.** Courts have authority to issue orders in aid of arbitration and otherwise enforce such orders, and the authority of a court to enforce an asset-preservation order issued in an arbitration proceeding is implicit in this act.

As an in personam remedy, the asset-preservation order precludes the entity against which it is issued from doing acts that are contrary to the order. However, in order to ensure compliance, the act also provides for notice to nonparties so that they, after they have been served and the duty to comply attaches**,** do not permit the party against which the order is entered to violate the asset-preservation order by releasing an asset to that party or allowing it to use the asset in some way. The act seeks to balance the nonparty's obligations under applicable law with

the obligations imposed by this act. As such, the act applies to nonparties which have been served with an asset-preservation order as well as those which have been put on notice by the use of a public filing system. Service of the order is addressed in Section 3(a)(1), which provides that the nonparty which has been served is bound by knowledge of the order.

Notice through the use of a public filing system is addressed in Section 3(a)(2). That section provides that filing in a public notice system used for the perfection of liens then results in the act being applicable to a nonparty whose interest would be subordinate to that of the party obtaining the order if that party's interest were a judicial lien. A nonparty to whom the act applies under Section 3(a)(2) is not bound by the order, however, unless that party has also been served. This Section is meant to address notice and application; it is not the intention of this Section 3 to otherwise affect the normal rules of priority for interests competing with perfected security interests under part 3 of Article 9, which rules of priority are preserved. See, e.g., Uniform Commercial Code sections 9-317(a) and 9-323. Section 3 would not interfere with a secured party acquiring a security interest in collateral obtained by the enjoined party after the order has been issued where the secured party had a security agreement covering the after-acquired property in place before the secured party was bound by the order. Further, because "dissipate" is defined as requiring a person to **"**take an action", passive inaction would not be subject to the order.

Section 3(b) makes clear that this act does not apply to actions against consumer debtors. Such actions would include actions relating to bankruptcy, collection and foreclosure actions. For example, a party seeking to collect on a credit card debt could not use the provisions of this act to attempt to preserve the assets of the debtor.

The act also does not apply in cases which arise under the family or domestic law of a state. The term family law encompasses proceedings relating to divorce, annulments of marriages, custody and support of children and the granting and enforcement of alimony. A wife in a divorce action, for example, could not use the provisions of this act to attempt to prevent the use of the assets of her husband. Likewise, this act could not be used to enforce an asset-preservation order in a divorce action issued by a foreign court. It was a policy decision of the Uniform Law Commission to exempt actions for consumer debt and family and domestic relations cases from the scope of the act

Sections 3(c)-3(g) reinforce the notion that this act is not intended to limit or supersede any currently existing remedies that a secured creditor or lienholder may have. The asset-preservation order does not establish any liens, choate or inchoate, in the property which is the subject of the asset-preservation order. The purpose of the asset-preservation order is the prevention of wrongful voluntary conveyances of any interest in the subject property. It would not, for example, affect existing law providing that, absent fraud or collusion with the party against whom the asset-preservation order is issued, other creditors of that party could obtain involuntary liens against the subject property.

The effective date of an order under Section 3(c)(2) for a nonparty is the date on which the nonparty would be bound under Section 3(a).

The issuance of an asset-preservation order would not prevent a secured creditor or lienholder from commencing, continuing or completing any available remedies to realize its

collateral that existed prior to the issuance of the asset-preservation order**,** including, as discussed above, enforcing a security interest in after-acquired collateral. It would not, for example, affect a creditor's right to foreclose on its mortgage or other security interest. It would not prevent, inhibit or affect the validity of a subsequent sale of the property which was the subject of the secured creditor's enforcement action. It would also not prevent an unrelated person from initiating a lawsuit against a party which is the subject of an asset-preservation order and obtaining a judgment against that party's assets.

By way of example, an asset-preservation order would not prevent involuntary seizures of the debtor's property to the extent that a party wishes to pursue an action on contract, seek an attachment, seek to enforce a judgment, or seek to enforce common law rights of set-off or recoupment, or their contractual equivalent in certain circumstances such as "netting" in financial instruments. However, once the asset-preservation order is in place, any person with notice of the order could not cooperate with the debtor to place a new mortgage on an asset, or enter into a new contract containing rights of set-off. If the mortgage or contract were in place prior to issuance of the asset-preservation order, then efforts to enforce those rights, as involuntary acts against the debtor, are excluded.

Unless displaced by the particular provisions of this act, the principles of law and equity, including the law relevant to remedies of creditors and the rights of debtors, supplement its provisions.

As noted previously, this act specifically excludes from its scope actions against an individual for consumer debt or that arise under the family or domestic relations law. Even though those actions are specifically excluded, under Section 3(e), a court could still recognize and enforce an asset-preservation order involving consumer or family law matters if it chose to do so under principles of comity.

**SECTION 4. ASSET-PRESERVATION ORDER ISSUED WITH NOTICE.**

(a) In an action in which monetary damages are sought**,** a court may issue an asset-preservation order on motion with notice to the party against which the order is sought and with an expedited opportunity to be heard if the court finds that:

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

(2) if the order is not granted, there is a substantial likelihood the assets of the party against which the order is sought will be dissipated so that the moving party will be unable to receive satisfaction of a judgment because of the dissipation;

(3) any harm the party against which the order is sought may suffer by complying

with the order is clearly outweighed by the risk of harm to the moving party if the order is not issued; and

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

(b) An asset-preservation order issued with notice must be served in compliance with [applicable law of this state for service appropriate to this type of order].

(c) A party against which an asset-preservation order is issued may apply for relief from the order by posting a bond or other security in the amount of the damages sought or in an amount determined by the court.

(d) On at least 24 hours' notice to the party that obtained an asset-preservation order, a party against which the order is issued may apply for an order permitting it to pay its ordinary living expenses, business expenses, and legal representation.

(e) The court may limit an asset-preservation order to a certain amount or type of assets and may order appropriate accounting requirements.

(f) An asset-preservation order remains in effect until it is vacated by the court, or the dispute is resolved by agreement of the parties, operation of law, or satisfaction of a judgment entered against the party against which the order was issued.

**Comment**

Because the issuance of an asset-preservation order is in the nature of injunctive relief, section 4(a) generally adopts the standards for the issuance of a preliminary injunction under currently existing law. Section 4(a)(1), specifically requires that a party seeking an asset-preservation order show that "there is substantial likelihood of success". The committee recognizes that the "substantial likelihood" showing is not the standard in all states. The more stringent standard was intentionally chosen by the committee because of the potentially intrusive nature of asset preservation orders. See e.g. *Envtl. Servs., Inc. v. Carter*, 9 So.3d 1258, 1261 (Fla. 5th DCA 2009)[to demonstrate that a temporary injunction is warranted, a party must plead and establish …(3) a substantial likelihood of success on the merits]. The states which do not require the "substantial likelihood" showing, require a "likelihood of success" showing which is arguably a lesser standard. See e.g. *Arthur J. Gallagher & Co. v. Marchese*, 96 A.2d 3d 791,791-92, 946 N.Y.S.2d 243, 244 (N.Y. 2012)[to obtain a preliminary injunction, a movant must establish, by clear and convincing evidence, (1) a likelihood of success on the merits.] These

standards are to be applied to the underlying law on which the action is brought and not to this act itself. As noted in the preface, this act creates no independent cause of action.

In order to obtain an asset-preservation order, with or without notice, the party seeking the order must show and the court must find that "if the order is not granted, there is a substantial likelihood the assets of the party against which the order is sought will be dissipated so that the moving party will be unable to receive satisfaction of a judgment because of the dissipation."

The term "dissipate" is a common term in American jurisprudence which judges apply on a daily basis. The term dissipate includes the concept of waste or "to use up wastefully". An insolvent corporation, for example, owes a fiduciary duty to its creditors not to "dissipate" assets. *H.C. Schmiedling Produce Co., v. Alfa Quality Produce Co., Inc.,* 597 F. Supp 2d 313, 318 (E.D.N.Y. 2009).

This common sense concept of the meaning of "dissipate" as being disposition of assets outside the normal course of events or the ordinary course of business reflects the view taken by English and Canadian courts in interpreting what "dissipate" means in the context of an asset-preservation order. In the words of a recent decision of the English courts, a party can satisfy the requirement for obtaining an asset-preservation order if it can show that "[t]here is a real risk that, unless restrained by an injunction, the defendant will dissipate or dispose of his assets other than in the normal course of business…" *JSC BTA Bank v. Ablyazov & Ors*, [2009] 2 C.L.C. 967.

A recent decision from the Canadian courts demonstrates a similar approach and emphasizes that the issue of whether assets will be "dissipated" requires an examination of a wide variety of facts and circumstances:

> To determine whether there is a "real risk" of the assets being removed or dissipated it is necessary to look at all of the circumstances, including the nature of the conduct alleged, the type of assets involved and the general circumstances are all to be considered in an application such as this. The "real risk" to be assessed is whether in all of the circumstances, the assets will be dealt with in a manner that will serve to hamper or defeat the plaintiff's attempts to realize on any judgment they might obtain….
>
> The assets in this case are all quite liquid, being in the form of bank accounts and term deposits. If an injunction is not granted, there is a real risk that the defendants will deal with the assets "in a manner clearly distinct from usual or ordinary course of business or living so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law". (citations omitted).

*Sibley & Associates LP v. Ross*, 2011 CarswellOnt 4671 (Ontario Superior Court of Justice, May 16, 2011).

As these cases suggest, the focus of the inquiry about dissipation is on the purpose for the present or future disposition of the assets and whether that disposition is in the ordinary course of "business or living". There is no requirement that the party seeking the order show that the

defendant is dissipating its assets for the specific purpose of defeating an existing or future judgment. Zuckerman on Civil Procedure, Principles of Practice Section 9.156 (Sweet & Maxwell 2006). The concept of dissipation is a flexible one that would encompass actions such as the transfer of assets outside the normal course of business or living, waste of assets, and actions taken with the specific intent or effect of making the assets unavailable to satisfy a judgment. Its meaning is a fact intensive inquiry derived on a case by case basis.

Thus, in order to satisfy the requirement of this act contained in Section 4(a)(2), a party must show and the court must find that, if an asset-preservation order is not granted, there is a substantial likelihood that the party against which the order is sought will dispose of assets outside the normal course of living or business so that the moving party will be unable to receive satisfaction of the judgment.

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

Any asset-preservation order should be narrowly tailored to the facts and circumstances of a particular case and should preserve only the amount of assets necessary to satisfy a judgment. The order should state the maximum amount of assets to which the order applies.

An asset-preservation order cannot normally be applied to assets which are owned by a nonparty. However, where the assets are owned jointly by a nonparty and a party against which an asset-preservation order has been entered, the order also applies to the nonparty. In that situation, the non-party, under Section 6(e) of this act, may apply to the court for an order removing the asset from the scope of the order. Nothing in this act is meant to change existing law with regard to joint ownership.

**SECTION 5. ASSET-PRESERVATION ORDER ISSUED WITHOUT NOTICE.**

(a) The court may issue an asset-preservation order on motion without the notice required by Section 4(a) if the court finds that facts in an affidavit or verified pleading offered in support of the motion establish that the moving party is entitled to the order under Section 4(a).

(b) A party moving for an asset-preservation order under subsection (a) shall:

(1) conduct a reasonable inquiry and disclose in the affidavit or verified pleading all material facts that weigh against the issuance of the order; and

(2) disclose in the affidavit or verified pleading all efforts to give notice or the reasons why notice should not be required.

(c) An asset-preservation order issued without notice expires on a date set by the court,

not later than 14 days after the court issues the order, unless before that time:

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

(2) the nonmoving party consents in a record to an extension.

(d) If an asset-preservation order is issued without notice, the party against which the order is issued may move to dissolve or modify the order after notice to the party that obtained the order and may apply for relief under Section 4(c) and (d). The court shall hear and decide the motion or application on an expedited basis.

**Comment**

This section provides for the issuance of an asset-preservation order without notice. A party seeking an asset-preservation order without notice must satisfy the requirements for issuance of the order contained in Section 4(a) and the additional requirements set forth in this section. The order is not effective until served on the person subject to the order. As with service of an asset-preservation order issued with notice, service of an asset-preservation order issued without notice must comply with the law of the state appropriate to such an order. See Section 4(b).

Section 5 draws heavily from currently existing law relating to a temporary restraining order issued without notice in both state and federal courts. Section 5(b)(1) is an extremely important provision drawn from English and Canadian law and reflects the heightened disclosure obligation imposed on a party who seeks an asset-preservation order without notice. This section imposes a duty on counsel to make reasonable inquiry to ascertain material facts and to disclose to the court all material facts that weigh against the issuance of the order.

By way of example, the English courts define this duty of disclosure as follows:

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

The failure of the party obtaining the order to make the full disclosure required by this section may be a ground for setting aside or modifying the order.

**SECTION 6. OBLIGATION OF NONPARTY SERVED WITH ASSET-PRESERVATION ORDER.**

(a) An asset-preservation order may be served on a nonparty. If the party that obtained the order serves a nonparty with the order, the party shall give notice to all parties in the action of the name and address of the nonparty not later than [one day] after service.

(b) Subject to subsection (e), a nonparty served with an asset-preservation order shall take all necessary and appropriate actions to preserve assets by preventing any use of the assets of the party against which the order is issued which would violate the order until further order of the court. The nonparty shall comply promptly with this subsection, taking into account the manner, time, and place of service and other factors that reasonably affect the nonparty's ability to comply. If the nonparty believes, in good faith, that complying with the asset-preservation order would violate foreign law, create liability under a foreign legal system or violate an order issued by a foreign sovereign or tribunal, the nonparty immediately may move the court that issued the asset-preservation order to dissolve or modify the order. If the court finds that the nonparty acted in good faith, it may not find the nonparty in contempt of court for failing to comply with the order during the pendency of the petition. The court shall hear and decide the motion on an expedited basis.

(c) If an asset-preservation order is vacated or modified, a party obtaining the order shall give notice promptly to a nonparty that was served with the order in the same manner as the nonparty was originally given notice.

(d) Except as otherwise provided for in subsection (b), a nonparty served with an asset-preservation order may not knowingly assist in or permit a violation of the order.

(e) A nonparty served with an asset-preservation order may move to dissolve or modify the order. The court shall hear and decide the motion on an expedited basis.

## Comment

This section provides for service of an asset-preservation order on a nonparty and requires the nonparty so served to act to prevent any use of the assets of the party against which the order issued which would violate the order.

Section 6(a) permits service on a nonparty so that the party obtaining the asset-preservation order can require the nonparty to comply with Section 6(b). The act relies upon current principles of applicable law as to the proper entity for service in particular circumstances. If the party obtaining the asset-preservation order is seeking action by a nonparty under Section 6(b), the orders should be served on the most directly involved entity. For example, if a nonparty, such as a bailee of certificated securities, has possession of securities in which the party subject to the order has an ownership interest, the order should be served on the person in possession of the securities.

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

Section 6(b) requires prompt action by the nonparty to prevent any use of the assets by the party against which the asset-preservation order is issued which would violate the order. That action would include preventing any sale, transfer, alienation, assignment, or encumbrance of the asset or any similar activity. It also cautions that the determination of whether the duty to comply with the order has attached shall take into account the manner, time and place of service and other factors that reasonably affect the nonparty's ability to comply.

Section 6(b) also provides protection for a nonparty who has a good faith belief that complying with an asset-preservation order would violate foreign law. The provision was added following discussions with lawyers for the Federal Reserve Board.

Section 6 (c) provides for the instances where an asset-preservation order is vacated or modified. It directs the party who obtained the vacated or modified order to provide notice of the order in the same manner as notice was originally given. If notice was originally given as described in Section 3(a)(1), it is again to be given in the same manner. If notice was originally given as described in Section 3(a)(2), it is again to be given in the same manner.

Because of the multi-jurisdictional nature of these orders, there are possible instances where notice was given under both Sections 3(a)(1) and 3(a)(2). Upon modification or vacation, notice would again be given under both Sections 3(a)(1) and 3(a)(2).

Under the provisions of Section 6(d), a nonparty served with an asset-preservation order violates the order only if it knowingly assists in or permits a violation of the order. This section instructs a nonparty to honor the asset-preservation order once the duty to comply with the order has attached under Section 6(b) and not to knowingly act to undermine the effect of the order. A nonparty, for example, once the duty to comply has attached would "knowingly assist in or

permit" a violation of the order if it returned property to the party against which the order was entered or , in the case of a bank, honored a check of that party.

Section 6(e) allows a nonparty served with an asset-preservation order to move to dissolve or modify the order on any grounds particular to the nonparty. When the order sought to be dissolved or modified was issued by a court in another state or a court outside the United States and is being recognized and enforced under the provisions of Sections 8 and 10, a motion to dissolve or modify may be filed in the court recognizing and enforcing the order.

For example, assume that a New York court, under Section 8(a), has recognized an asset-preservation order issued by a court in Oregon and a New York bank has been served with the order. The New York bank could move to dissolve or modify the order in the New York court which recognized the order. It would not have to seek relief from the issuing court in Oregon.

**SECTION 7. SECURITY; INDEMNITY.**

(a) The court may require security from a party on whose behalf an asset-preservation order is issued. If the court determines that security is required, it shall require the party to give security to pay for costs and damages sustained by the party against which the order is issued if the order is later determined to have been improvidently granted.

(b) A party on whose behalf an asset-preservation order is issued shall indemnify a nonparty for the reasonable costs of compliance with the order and compensate for any loss caused by the order.

**Comment**

This section authorizes a court to require a party on whose behalf an asset-preservation order has been issued to provide security for a party against which the order has been issued and any nonparty served with the order. The security is for damages sustained as the result of an order later found to have been improvidently granted. Section 7(b) also requires a party on whose behalf an asset-preservation order has been issued to indemnify a nonparty for the reasonable costs of compliance and to compensate the nonparty for loss caused by the order. This requirement exists whether or not the motion for the order was granted properly.

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

**SECTION 8. RECOGNITION OF ASSET-PRESERVATION ORDER ISSUED BY ANOTHER COURT.**

(a) A court of this state shall recognize an asset-preservation order issued by a court in

another state unless:

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

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

(b) Except as otherwise provided in subsection (c) and subject to subsection (d), a court of this state shall recognize an asset-preservation order issued by a court outside the United States.

(c) A court of this state may not recognize an asset-preservation order issued by a court outside the United States if:

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

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

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

(d) A court of this state need not recognize an asset-preservation order issued by a court outside the United States if:

(1) the order was issued without notice to the party against which the order was issued and the issuing court did not use procedures substantially similar to those in Section 5;

(2) the party against which the order was issued 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 the issue;

(3) the order was obtained by fraud that deprived the losing party of an opportunity to oppose the order;

(4) the order or the underlying claim for relief is repugnant to the public policy of

this state or the United States;

(5) the order conflicts with another order;

(6) the proceeding in the issuing court was contrary to an agreement of the parties under which the dispute in question was to be determined otherwise than by proceedings in the court outside the United States;

(7) jurisdiction was based only on personal service and the court outside the United States was a seriously inconvenient forum for the hearing regarding the order;

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

(9) 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.

(e) A party resisting recognition of an asset-preservation order issued by a court outside the United States has the burden of proving that a ground for nonrecognition in subsection (c) or (d) applies.

**Comment**

This section relates to the recognition of asset-preservation orders issued by courts in other states and countries. Because asset-preservation orders are not final judgments and are not otherwise entitled to full faith and credit recognition, there is a lack of uniformity in the present law concerning their recognition. Section 8(a) relates to the recognition of asset-preservation orders issued by courts in other states and 8(b) - (d) relate to the recognition of asset-preservation orders issued by foreign courts. Sections 8(b) - (d) borrow freely from the architecture and language of section 4 of the Uniform Foreign-Country Money Judgments Recognition Act.

Section 8 applies to any in personam order which prevents the use of assets whether denominated as an asset-preservation order or not. The court in the state which is being asked to recognize and enforce the order shall determine whether it is an asset-preservation order to which this section applies.

Where an order is being recognized and enforced under this act, motions by a nonparty to modify or dissolve the order, under Section 6(e), may be filed in the court recognizing and enforcing the order.

**SECTION 9. PERSONAL JURISDICTION.**

(a) An asset-preservation order issued by a court in a foreign country may not be refused recognition for lack of personal jurisdiction if the party against which the order was entered:

(1) was served with process personally in a foreign country in which the issuing court is located;

(2) voluntarily appeared in the proceeding other than for the purpose of protecting property seized or threatened with seizure in the proceeding or contesting the jurisdiction of the court over the defendant;

(3) before the commencement of the proceeding, had agreed to submit to the jurisdiction of the court with respect to the subject matter involved;

(4) was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) had a business office in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of the business done by the party through that office; or

(6) operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.

(b) The list of bases for personal jurisdiction in subsection (a) is not exclusive. A court of this state may recognize a basis for personal jurisdiction other than those listed in subsection (a) as sufficient to support an asset-preservation order issued by a court outside the United States.

**Comment**

This section, like the previous section, draws heavily on the language and concepts of the Uniform Foreign-Country Money Judgments Recognition Act. The language of this section is taken from Section 5 of that Act.

**SECTION 10. ENFORCEMENT OF ASSET-PRESERVATION ORDER.** An asset-preservation order issued or recognized by a court of this state is entitled to full faith and credit in the same manner as a judgment.

**Comment**

Article IV, Section 1 of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Section 3 of the Uniform Foreign-Country Money Judgments Recognition Act provides that "The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." Similarly, the Restatement (Second) Conflict of Laws Section 102, titled "Enforcement of Judgment Ordering or Enjoining Act," provides that "[a] valid judgment that orders the doing of an act other than the payment of money, or that enjoins the doing of an act, may be enforced, or be the subject of remedies, in other states." Non-final orders are therefore not entitled to automatic recognition and enforcement as a matter of current law, but rather, are left to comity. *See, e.g., Padron v. Lopez*, 220 P. 3d 345 (Kan. Sup. Ct. 2009) ("an ex parte temporary injunction is not entitled to full faith and credit because it is a prejudgment, temporary order. Therefore, it is not subject to enforcement under either the Foreign Judgments Act or the Full Faith and Credit Clause of the United States Constitution, Article 4, § 1.")

To resolve this and provide statutory authority for recognition and enforcement of asset-preservation orders issued pursuant to this act among states that have adopted the act, this section provides expressly for the recognition and enforcement of asset-preservation orders in the same manner as a judgment, which requires application of the full faith and credit clause, but recognizes that they are not judgments themselves.

As previously noted, because an asset-preservation order is in the nature of injunctive relief, the remedy for violation of an asset-preservation order is contempt.

**[SECTION 11. APPEAL.** The [insert name of appropriate appellate court] has jurisdiction of an appeal, including an interlocutory appeal, from an order granting, continuing, modifying, refusing, or dissolving an asset-preservation order.]

***Legislative Note:*** *This section may be adopted as a part of the statute or as a separate court rule.*

**SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

**SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**[SECTION 14. SEVERABILITY.** If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end, the provisions of this [act] are severable.]

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

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