

MEMORANDUM

TO: Drafting Committee - Uniform Act on Asset Freezing Orders

FROM: John L. Carroll, Reporter

DATE: November 4, 2010

RE: First Draft of the Uniform Law on Asset Freezing Orders

This memo is intended to assist with the understanding of the first draft of the Uniform Act on Asset Freezing Orders. It reflects the conclusions of the study committee on what should be included in such a law. In reaching those conclusions, the committee studied “Mareva Injunctions” in great detail. “Mareva Injunctions” is the term given to asset freezing orders in England, Canada and the other common law jurisdictions of the world. Mareva injunctions have existed in England since the 1970s and this draft reflects the law of both England and Canada. In addition, the draft relies heavily on the procedures which currently exist under Rule 65 of the Federal Rules of Civil Procedure.

THE STANDARD FOR ISSUANCE

The issuance of an asset freezing order can have a significant effect on the party against whom it is issued and on third parties charged with compliance with the order. Accordingly, the study committee concluded that there should be a rigorous standard which had to be met before an asset freezing order could be issued. Section 2 of this draft contains the standards for issuance. Section 2 borrows heavily from the standard, contained in case law, currently in place for the issuance of preliminary injunctions in federal court under Rule 65 of the Federal Rules of Civil Procedure.

The uniform draft, in Section 2(1), retains the language of the federal preliminary injunction standard that a party seeking an asset freezing order must show a “substantial likelihood” of success on the merits before an asset freezing order can be issued. In England, the showing which must be made is “a good arguable case.” In Canada, the standard is “strong prima facie case on the merits.”

Section 2(2) is a departure from the language of the federal preliminary injunction standard designed to create a specific standard for asset freezing orders. The evil to be addressed by an asset freezing order is the dissipation of assets by a party leaving nothing to satisfy the underlying claim if judgment is ultimately entered. Again, because of the potential harm to a party against whom an asset freezing order is entered and third parties who must comply with it,

it is important that the standard for issuance do more than protect against the “possible” dissipation of assets. Such an order must be entered only when it is plain that there will be no assets left to satisfy a judgment if the order is not entered. Thus, the language of this first draft requires a party to show a “significant risk that the assets of the party against whom the order is sought will dissipate the assets” and further that “the moving party will be unable to receive satisfaction of the underlying claim if the order is not granted.” This language parallels the standard under English and Canadian law.

Sections 2(3) and 2(4) retain the specific language of the federal preliminary injunction standard about balancing the equities.

PROCEDURAL SAFEGUARDS

Most asset freezing orders are issued *ex parte*. The study committee concluded that the *ex parte* nature of the order creates two issues. First, there must be adequate procedural safeguards to protect against the wrongful issuance of an order, and second there must be a process following the issuance of an order which comports with the due process clause of the federal constitution. Section 3 of the Act relates to *ex parte* asset freezing orders. It contains both a special procedural safeguard and a process for reviewing the issuance of an *ex parte* asset freezing order.

Section 3(1) simply states that the standard for the issuance of an asset freezing order is the same whether the order is issued *ex parte* or after a hearing.

Section 3(2) is an extremely important provision which imposes on counsel for the moving party a duty not only to disclose facts favorable to his or her position but also any known facts favorable to the non-moving party. This is a duty imported from both English and Canadian law. This provision is intended to impose a more rigorous duty on counsel than the current language of Rule 65(b)(1) (A) which simply conditions the issuance of a Temporary Restraining Order on the presentation of specific facts which show that “immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition.”

Sections (3) and (4) are taken directly from Rule 65 and are the provisions from that Rule understood to satisfy the due process issue.

The assets of a party against whom an asset freezing order is issued may often be in the custody of a third party. Consequently, it is important that those third parties be served with an asset freezing order if that order is to be effective. Section 3(5) requires the party who has obtained the asset freezing order to provide a list of all known non-parties on whom the order is to be served.

ORDERS FREEZING ASSETS IN OTHER JURISDICTIONS

Most often a party will want to freeze assets in jurisdictions other than the state in which the court issuing the order sits. The party may even want to freeze assets outside the United States. Sections 4 and 5 authorize the issuance of such orders. Those sections also contain important provisions limiting the initial effect of such orders. Under Sections 4(2) and 5(2), a party may not

commence other proceedings involving the party against whom the asset freezing order is issued, including proceedings to enforce the order, without permission of the issuing court. These provisions are designed to give the issuing court control over the effect of the asset freezing order and address any concerns about enforcement flowing from the fact that an asset freezing order may not be viewed as a final order or judgment. The language of these sections is similar to the language contained in asset freezing orders in England where the enforcement will be sought outside of England and Wales.

SECURITY

There are two issues involving security which flow from the issuance of an asset freezing order. The first involves protection against the wrongful issuance of such an order and the second involves the protection of non-parties who must comply with the order. Section 6 is designed to address those issues.

Section 6(1) adopts language directly from Rule 65 which requires a party who obtains a temporary restraining order or preliminary injunction to give security to pay for the costs and damages sustained by a party who has been wrongfully enjoined. The language of Rule 65 has been modified slightly to apply to asset freezing orders.

Section 6(2) is designed to provide protection for third parties, like banks, who may hold the assets of a party against whom an asset freezing order is entered. This provision requires indemnification of the reasonable costs of compliance with an asset freezing order regardless of whether the order was issued appropriately or not. This provision is taken from the English law.

ENFORCEMENT

The enforcement of asset freezing orders issued by state courts is problematic under the current state of the law, because those orders are not final orders or judgments. They are not enforceable in sister states under the Full Faith & Credit Clause but may be enforceable under the doctrine of comity. Likewise, there is no uniform law for the enforcement of asset freezing orders issued by foreign states. The study committee recognized that a uniform law would have to contain special provisions for the enforcement of asset freezing orders. Section 6 contains those special provisions.

Section 7(1) relates to the enforcement of asset freezing orders in sister states. The language is presented in alternative form. The first alternative leaves no discretion in the court of a sister state and requires that court to enforce any asset freezing order issued by a court in another state. The second alternative embraces the doctrine of comity and requires enforcement unless enforcement would violate public policy.

Section 7(2) concerns enforcement of asset freezing orders of courts of foreign states and adopts the same approach as Section 7(1). The first alternative would require the enforcement of an asset freezing order issued by a court in a foreign state unless there were systemic procedural flaws present in the judicial system in which the court issuing the order sits. The language

describing the procedural flaws which would prevent enforcement is taken from the Uniform Foreign Country Judgment Recognition Act. The second alternative version, like the alternative version of the Section 7(1) embraces the doctrine of comity.

I look forward to meeting with you and working on this important project.