

# State of Alabama



## Alabama Law Institute

# Alabama Uniform Asset-Preservation Orders Act

March 2015

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## **ALABAMA UNIFORM ASSET-PRESERVATION ORDERS ACT**

**March 2015**

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## **PREFACE**

The Alabama Law Institute presents to the Bench and Bar of Alabama, for consideration and constructive criticism, the following proposed act.

Under current law, the primary remedy against asset dissipation has traditionally been an “in rem” order prohibiting the transfer of specific assets. Such pre-judgment attachments are based in equity and require particularized showings of fraud.

This bill creates a process for the issuance of asset preservation orders, which are in personam orders which protects assets of a defendant, by preventing their dissipation and imposing collateral restraint on nonparties such as the defendant’s bank, in order to preserve assets from dissipation, pending judgment.

John Carroll served as chair of the Alabama Law Institute Committee which worked on this project and as reporter for the national committee.

Othni J. Lathram  
Director

March 2015



**ALABAMA UNIFORM ASSET-PRESERVATION  
ORDERS ACT**

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**ALABAMA UNIFORM ASSET-PRESERVATION ORDERS**

**ACT**

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

**Alabama Comment**

This Section is identical to Section 1 of the Uniform 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. The term “asset” includes the plural unless the context indicates otherwise.

(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.

#### **Alabama Comment**

Alabama’s draft differs from the Uniform Act by removing the examples provided for the definition of “Dissipate.” The committee found these examples to lead to more confusion than they cured. The deletion was not meant to convey that the specific examples in the Uniform Act were not actions that would lend a court to find the potential for dissipation.

#### **Uniform 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 interests 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.]~~

### **Alabama Comment**

This Section is identical to Section 3 of the Uniform Act.

### **Uniform 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 prior to the issuance of the order 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. either: (1) depositing with the court in which the action is brought a sum of money; or (2) filing with the court a bond executed as surety by a surety insurer licensed to do business in this state, either of which shall be in an amount equal to the amount demanded in the action plus interest thereon at eight percent per year for three years plus \$100.00 to apply on any court costs which may be taxed in such action. Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered in the action for which such order was issued and costs not to exceed \$100.00. Upon making such deposit or filing such~~

~~bond the court shall issue a notice as to the stay of the asset-preservation order and mail a copy thereof by registered or certified mail to the party who sought the asset-preservation order. Within 10 days from the date of the receipt of the said notice, the party who sought the asset-preservation order may by motion, petition the court in which the action is pending for a hearing on the sufficiency of the amount in question or on the qualifications of the surety insurer. In such an event, the ruling of the court on the said motion, shall be a final determination. Upon the expiration of the said 10 days, or in the event a petition has been filed with the court, upon the determination of the court, the asset-preservation order shall be quashed. The court shall be entitled to a fee for making and serving the notice in the sum of \$2.00. Any excess of the security over the aggregate amount of any judgment or decree rendered plus costs actually taxed shall be repaid to the party filing the same or his successor in interest. Any deposit of money shall be considered as paid into court and shall be subject to the provisions of law relative to payments of money into court and the disposition of same.~~

(e b) 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 c) 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 reasonable and ordinary living expenses, business expenses, and legal representation.

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

(~~f e~~) Unless otherwise affected by operation of law, an ~~A~~ 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 the judgment entered against the party against which the order was issued is satisfied.

### **Alabama Comment**

The committee struck subsection (b) believing it to be duplicative and unnecessary.

It is important to view the remedies available under this act as similar to those available under Rule 65 of the Alabama Rules of Civil Procedure. The asset protection provided by this act is available only in actions where monetary relief is sought and does not preclude a party from seeking additional relief that is otherwise available under other law of this state.

Courts when considering the issuance of an order pursuant to this act should be mindful of the power to require a bond or other security pursuant to Section 7.

### **Uniform 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) In an action in which monetary damages are sought, 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~~ 10 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.

### **Alabama Comment**

The imposition of an order pursuant to this act without notice is an extraordinary remedy that should be a rare occurrence.

It is important to view the remedies available under this act as similar to those available under Rule 65 of the Alabama Rules of Civil Procedure.

Courts when considering the issuance of an order pursuant to this act should be mindful of the power to require a bond or other security pursuant to Section 7.

### **Uniform 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, in compliance with the applicable law, 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 who serves a nonparty under subsection (a) ~~obtaining the order~~ shall give notice promptly within 10 days from such order to a the 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.

### **Alabama Comment**

This Section is substantially similar to Section 6 of the Uniform Act. The committee inserted the 10-day requirement for notice in subsection (c) believing that “promptly” was too vague.

### **Uniform 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~~ shall require security from a party on whose behalf an asset-preservation order is issued under section 5. The court may require security from a party on whose behalf an asset-preservation order is issued under section 4. 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.

### **Alabama Comment**

The committee changed the permissive ability to require security to a mandatory requirement.

### **Uniform 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.

#### **Alabama Comment**

This Section is identical to Section 8 of the Uniform Act.

#### **Uniform 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: ORDER ISSUED BY COURT IN FOREIGN COUNTRY.**

(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.

#### **Alabama Comment**

This Section is identical to Section 9 of the Uniform Act.

### **Uniform 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. AUTHORIZATION TO FILE,**

**RECORD OR DOCKET.** Issuance of an asset-protection order grants the party obtaining the order authorization to file, record or docket the order in the appropriate jurisdiction or office. In the event following the filing, recordation or docketing of the asset-protection order in a jurisdiction or office, the order is vacated or modified then the party filing, recording or docketing the order in such jurisdiction or office, shall within ten (10) days from the order being vacated or modified cause the filing, recording or docketing to be amended to reflect the change of the order.

### **Alabama Comment**

This Section was added by the committee to provide proper authorization for the filing of an order in the appropriate office.

### **SECTION 11. 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.

### **Alabama Comment**

This Section is identical to Section 10 of the Uniform Act.

### **Uniform 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 1112. APPEAL.** The Supreme Court of Alabama has jurisdiction of an appeal, ~~including an interlocutory appeal,~~ from an order granting, continuing, modifying, refusing, or dissolving an asset-preservation order.

**Alabama Comment**

This Section is substantially similar to Section 11 of the Uniform Act but reflects the committee's decision to not provide for an interlocutory appeal..

**SECTION 12 13. 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.

**Alabama Comment**

This Section is identical to Section 12 of the Uniform Act.

**SECTION 13 14. 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).

**Alabama Comment**

This Section is identical to Section 13 of the Uniform Act.

**SECTION ~~14~~ 15. 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.

**Alabama Comment**

This Section is identical to Section 14 of the Uniform Act.

**SECTION ~~15~~ 16. EFFECTIVE DATE.** ~~This [act] takes effect...~~

This act shall be effective January 1, 2016.