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**John R. Kouris**

June 5, 2015

Dear Friends:

We want to bring to your attention a matter of great concern to the defense bar.

In 2012, the Uniform Law Commission drafted “model” legislation called The Uniform Asset Freeze Order Act and in 2013 sent it to the states for enactment. After it was defeated, withdrawn, or tabled in the first three states in which it was introduced (North Dakota, Colorado, and DC), the ULC made minor amendments and retitled it “The Uniform Asset Preservation Orders Act .”

It has since been pulled from the legislative calendar in Alabama and a New Jersey legislative commission is considering whether to recommend it to the New Jersey legislature. (The New Jersey Defense Lawyers Association testified against the bill). DRI has worked very closely with the SLDOs in DC, New Jersey, and Alabama to provide research and support. Tellingly, the legislation has now been slowed or stopped in every legislative body in which it has been introduced as we have made legislators more familiar with its provisions.

While we don't doubt the ULC's good intentions, the Uniform Asset Preservation Orders Act would be extremely harmful to the defense bar and our clients.

Consider the following.

### The Act Is Breathtaking in Scope

- The Act would allow a plaintiff to potentially freeze a defendant's assets, long before any judgment is entered against a defendant or any jury's determination of fault is made.
- An asset freeze order can be entered even before any discovery is commenced.
- The Act broadly defines “assets” to include “anything that may be subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.”
- It would even allow assets to be frozen in which an innocent co-owner has an interest.

### **The Act Is Draconian in Nature**

- A party who is subjected to an asset freeze order must apply for a court order permitting the payment of the party's "ordinary living expenses, business expenses, and legal representation."
- To obtain an asset freeze order a court must find that there is a substantial likelihood of the plaintiffs prevailing on the merits of the underlying claim. However, plaintiffs can request, and the courts grant, an asset freeze order without hearing any evidence or even commencing discovery so, on what basis can courts make a "likelihood of prevailing" determination.
- The Act would allow an asset freeze order to be entered without notice to the defendant.

### **The Act Affects Non-Parties and Has Extraterritoriality Provisions**

- The Act authorizes the service of an asset freeze order on a nonparty who has "custody or control" of an asset subject to the order. It provides that once served, a nonparty "shall freeze" the assets of the party "until further order of the court."
- The Act requires a court to recognize an asset freeze order issued by a court in another state and even another country. Section 10 of the Act literally provides that an asset freeze order is entitled to full faith and credit in the same manner as a judgment.

### **Other Concerns**

- No fraudulent intent is required to obtain an asset freeze order. The Act potentially can be applied to anyone with insufficient assets to satisfy a future verdict.
- A party's assets should not be frozen based on a court's best guess as to the potential value of a cause of action. How can a court possibly address the impact of comparative fault or contributory fault principles on the value of a claim before any discovery has occurred?
- The term "ordinary business expenses" is undefined. Many types of critical business transactions needed to keep a company solvent in today's tough economy may be blocked by the Act. The Act will limit a company's ability to sell or transfer its assets in the ordinary course of its business.
- Will a company under a freeze order be allowed to raise capital, enter into transactions or incur expenses that might expand its business? The cost of running a small business could skyrocket if a court must be consulted every time a company seeks to acquire or convey an asset.

- Will the Act preclude a family from buying a new car, putting a new roof on the house, taking a vacation, or paying for a child's college education? The head of a household who is subject of an asset freeze order may need to seek a court approval to pay for these types of expenses.
- In some jurisdictions it can take 4-5 years before a suit goes to verdict. It is unfair to permit a defendant's assets be frozen before the merits of a claim against it is resolved.
- The imposition of an asset freezing order will likely cause more cases to be settled for reasons having nothing to do with the merits of a claim. Defendants will be pressured to settle a claim just to get out from under a freeze order and avoid financial ruin.

DRI will not intervene directly in individual states unless requested to do so by the state's SLDOs. We see our primary role as 1) informing you of the nature of the model legislation, 2) alerting you to the potential for its introduction into your state legislatures so that you can be ready to mobilize against it, and 3) providing any assistance that you may request.

We do have a favor to ask. Since our ability to monitor the entire country from afar is limited, we request your assistance in monitoring your state legislature for the possible addition of the act to the legislative calendar.

We have found this to be a highly successful approach thus far. Working together, we can prevent this legislation, extremely detrimental to defendants, from being institutionalized in any of our judicial jurisdictions.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Kouris", with a large, stylized flourish extending to the right.

John R. Kouris  
Executive Director

cc: John Parker Sweeney  
Toyja Kelley  
Sky Woodward  
Jill Rice  
Gardner Duvall  
Tim Kolly