

**To: Commission**  
**From: Steven Brizek**  
**Re: Uniform Asset-Freezing Orders Act**  
**Date: March 11, 2013**

## **MEMORANDUM**

### **Introduction**

The Uniform Law Commission (ULC), in July, 2012, approved and recommended for enactment in all the States The Uniform Asset-Freezing Orders Act (UAFOA). This Memorandum is respectfully submitted to the Commission to facilitate its evaluation of that proposed statute.

#### **I**

### **Purpose of the UAFOA**

The UAFOA is designed to create a uniform process for the issuance of asset freezing orders, which are *in personam* orders that freeze the assets of a defendant by the imposition of injunctive restraints upon the asset owner and collateral restraints upon non-parties, such as a defendant's bank, in order to preserve assets from dissipation, pending judgment.

What is new about the UAFOA is that, heretofore, in the United States the primary remedy available to a litigant to preserve assets from dissipation, pending judgment, has been an *in rem* order directed to the attachment of restraints upon specific assets, not upon the asset owner or others, per se, which assets are subject to the control of the court, so as to prohibit their unauthorized transfer for the purpose of avoiding satisfaction of a judgment.

The UAFOA, therefore, provides an additional "layer" of protection by focusing on those who have power over assets to be preserved for satisfaction of judgments by subjecting them to *in personam* injunctive restraints upon the exercise of that power by way of orders which, if disobeyed, will subject them to punishment for contempt.

A primary example of why that additional "layer" of protection might be necessary in a particular case is when the assets sought to be preserved for judgment are in a foreign jurisdiction and, hence, beyond the reach of an *in rem* order for their preservation.

#### **II**

### **Current issues with regard to *in personam* asset freezing orders**

The traditionally available pre-judgment, *in rem* attachments are based in equity and require particularized showings of fraud. Some courts in this country have issued *in personam* asset freezing orders where those orders were necessary to prevent a defendant from dissipating assets where it appeared that no assets would be left to satisfy a potential judgment, even if fraud did not underlie the claim.

Research is required to determine the current state of the law in New Jersey with regard to the practice and procedures relevant to the issuance of *in rem* attachments and *in personam* asset freezing orders.

An injunction prior to judgment was issued to prevent the transfer or dissipation of assets beyond the jurisdiction of the court by an English court in 1975, by way of what has come to be referred to as a “*Mareva* injunction”. *Mareva Compania Naviera S.A. v. Int’l Bulk Carriers S.A.*, 2 Lloyd’s Rep.509 (1975). Such *in personam*, “global” freezing orders are primarily recognized in various common law jurisdictions and have been codified in the United Kingdom in the Supreme Court Act 1981, Chapter 54, which states that the high court may by order (whether interlocutory or final) grant an injunction when just and convenient, including an injunction “restraining a party to any proceedings from removing from the jurisdiction...assets located within that jurisdiction” regardless of where the party itself is.

The *Mareva* injunction is a temporary injunction not meant to deprive the debtor of property, but to insure a collection pot for the plaintiff. The ability to obtain this relief in the United States, both as a matter of Federal and State law, is limited.

The viability of asset freezing orders was called into question by the decision of the United States Supreme Court in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). In that case, the trial court issued an *in personam* asset freezing order restraining a Mexican company from dissipating assets which were pledged to satisfy notes held by American investors. The appellate court affirmed the order but the Supreme Court found that Federal courts lacked the jurisdiction to issue asset freezing orders because they were not part of the common law at the time the Federal court system was created. The court further noted that the decision whether to provide Federal courts the power to issue asset-freezing orders was to be made by the legislature.

The current state of the law in New Jersey on this subject seems not to have developed beyond the view expressed in the published Chancery Division opinion in *Delaware River and Bay Authority v. York Hunter Const., Inc.*, 344 N. J. Super 361 (Ch. 2001). That view, generally speaking, is that while the New Jersey Legislature, in the limited circumstances set forth in *N.J.S. 2A:26-1 et seq.*, has effectively allowed for pre-judgment restraint against the dissipation of assets by way of the pre-judgment attachment of assets, absent further Legislative expansion of the relief obtainable pursuant to that statute, or absent some specific equitable basis for doing so, an injunction may not issue to prevent a defendant or third parties from disposing of assets of the defendant within the court’s jurisdiction merely to preserve them to satisfy a future money judgment.

The court in *York Hunter* granted an injunction against the dissipation of funds where a basis for equitable jurisdiction could be found; noting that damages “sustained by the inability of the available remedy (when provided) to give relief is not the type of damage which our courts can address. Equity should and does intervene when it can prevent the injury which would otherwise give rise to an action for money; it cannot and should not intervene to insure that the money will be available.” 344 N.J. Super. at 368.

An important issue then becomes, in the absence of a law such as the UAFOA, what would a New Jersey court do if asked to recognize and enforce a *Mareva* injunction? Would it do so under principles of comity? Would it refuse to do so on a basis of public policy, *i.e.*, if such a freezing order to ensure a pool of funds could not be enforced *ab initio* in New Jersey, should New Jersey enforce a foreign order to the same effect?

Research is also required as to whether the enactment of the UAFOA in its present form or in any form might be at odds with the holding in *Winberry v. Salisbury*, 5 N.J. 240, 255 (1950) insofar as it may be construed as an unlawful infringement upon the rule-making power of the Supreme Court.

To date, the UAFOA has been introduced before the legislatures of North Dakota and Colorado. The American Bar Association's House of Delegates, at its Midyear Meeting in Dallas, Texas, February 6-12, 2013, gave its approval to the UAFOA as drafted by the ULC.

The ULC points out that:

(1) Although the *Grupo Mexicano* decision involved the jurisdiction of the Federal courts, it caused some confusion in the State court system over the propriety of asset freezing orders;

(2) Some State supreme courts concluded, in the wake of that decision, that courts in their State lacked the authority to issue asset freezing orders, while at least one State supreme court concluded the opposite;

(3) The UAFOA is designed to remedy this current lack of uniformity on the question of whether courts have the power to issue and recognize asset freezing orders by providing States with a uniform act that authorizes the issuance of asset freezing orders and provides for the recognition and enforcement of asset freezing orders by other States and courts outside the United States; and

(4) As an asset freezing order is, by its very nature, an extraordinary remedy with potentially significant impact on the debtor whose assets are frozen and on third-parties holding those assets, and, thus, it is extremely important that there be rigorous standards which must be met before such an order can be issued, the UAFOA provides appropriate procedural safeguards to both debtors and non-parties.

### **III**

#### **Structure and highlights of the UAFOA**

The UAFOA, in Sections 4, 5 and 7, provides a process for the issuance of an asset freezing order with notice.

Under the provisions of the UAFOA, a party can obtain an asset freezing order only if it establishes that there is substantial likelihood that the assets of a party against which the order is

sought will be dissipated so that the party seeking the asset freezing order will be unable to receive satisfaction of the judgment (Section 4).

The UAFOA also allows for the issuance of an asset freezing order without notice (Section 5). The party seeking the order must conduct a reasonable inquiry and disclose all material facts that weigh against the issuance of the order.

The UAFOA authorizes a court to require security to protect a party against the wrongful issuance of an asset freezing order (Section 7). It also requires a party on whose behalf an asset freezing order has been entered to indemnify a non-party for the reasonable costs of the compliance and to compensate the non-party for any loss caused by the order. This requirement exists whether or not the motion for the order was properly granted.

Since asset freezing orders also impact non-parties, their obligations are set out in the UAFOA (Section 6). Non-parties served with an asset freezing order shall promptly freeze the assets held on behalf of the party against whom the order is issued. A court's assessment of the promptness of a non-party's response to an asset freezing order must take into account the manner and time of service as well as other factors that reasonably affect a non-party's ability to comply.

Lastly, the UAFOA also contains a mechanism for recognition and enforcement of asset-freezing orders issued by other States and from foreign courts (Sections 8 and 9). The UAFOA provides protection for a litigant that has obtained an asset-freezing order from another State court or foreign court. Presently, there are differing approaches to the recognition of these types of asset freezing orders. Some courts recognize asset freezing orders issued by other courts under the doctrine of comity. Some courts refuse to recognize asset freezing orders issued by other courts because they are not final orders. The UAFOA eliminates that uncertainty by providing a mechanism for recognition and enforcement. The process for recognition and enforcement draws heavily from the widely adopted Uniform Foreign-Country Money Judgments Recognition Act.

The ULC suggests that the UAFOA:

- (1) Provides a uniform process for the issuance of the orders, including a court finding of substantial likelihood of success on the merits of the underlying case;
- (2) Provides procedural protections for the parties against whom such an order is issued;
- (3) Specifies the obligations of and protections for non-parties who might be affected by the order;
- (4) Specifies that it does not apply in actions against an individual for consumer debt or in family law or domestic relations cases;
- (5) Provides that an asset freezing order may be enforced against a third-party holder of the defendant's assets;

(6) Remedies lack of uniformity in the recognition and enforcement of asset freezing orders issued by courts of other States and courts outside the United States;

(7) By codifying the rules on recognition and enforcement of asset freezing orders, it satisfies reciprocity concerns of foreign courts and makes it more likely that asset freezing orders entered by a court in a State in our country would be recognized in other countries; and

(8) Allows for an asset freezing order issued or recognized by a court in a State which has adopted the UAFOA to be entitled to full faith and credit in the same manner as a judgment.

#### **IV Conclusion**

Staff recommends that the Commission undertake to consider the merits of, need for and provisions of the UAFOA as proposed by the ULC and authorize further research and analysis with view to its possible recommendation for adoption by the State of New Jersey.