NEW JERSEY LAW REVISION COMMISSION

Final Report
Relating to
Uniform Asset-Preservation Orders Act

February 6, 2017

The work of the New Jersey Law Revision Commission is only a recommendation until enacted. Please consult the New Jersey statutes in order to determine the law of the State.

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Executive Summary

This Report discusses the Uniform Asset-Preservation Orders Act (UAPOA) promulgated by the ULC for enactment in all states. The UAPOA is designed to create a uniform process that ensures assets are available to satisfy an existing or future judgment through injunctive relief.

The Commission duly considered the ULC's comments to the UAPOA and the comments provided by the member of the ULC Drafting Committee, along with the comments provided by the AOC and the defense bar. It was of concern to the Commission that the UAPOA is an Act for which uniformity among the states is a significant concern, and yet no other state has enacted the Act in any form in the years since the ULC first released it as the Uniform Asset-Freezing Orders Act in 2012. After considering the potential conflicts with the *Winberry* holding, and the totality of the concerns presented by both the AOC and the defense bar, the Commission recommends that the UAPOA not be enacted in New Jersey at this time.

The Commission will continue to monitor and give further consideration to the UAPOA as future developments arise.

Background

The Commission first considered the Uniform Asset-Freezing Orders Act (UAFOA), which was promulgated by the ULC in 2012, authorizing courts to issue an asset-freezing order, ensuring that assets are available to satisfy an existing or future judgment. Later, the Act was amended by the Uniform Law Commission (ULC) and renamed the Uniform Asset-Preservation Orders Act (UAPOA or the Act) to more accurately reflect the scope of the remedy and to prevent confusion.

The UAPOA replaces the term "freezing" with the term "preservation" in the title and throughout the body of the Act. Other changes revise the introduction to clarify the purpose and the objectives of the Act, and highlight that the UAPOA applies only in actions where monetary damages are sought and would not ordinarily apply to consumer debt, family law, probate, trust, or estate matters. To date, the UAPOA has not been enacted or introduced in any jurisdiction.

Staff contacted the Administrative Office of the Courts (AOC) to obtain comment on whether the UAPOA should be enacted in New Jersey. In November of 2014, the Civil Practice Division (CPD) reviewed the Act and recommended against adoption of the UAPOA in New Jersey.[1] The CPD stated that the harms sought to be remedied by the UAPOA are already

[1] Email from Alyson Jones, Legislative Liaison, Administrative Office of the Courts (2014) (on file with the NJLRC).

addressed by existing statutes which permit prejudgment attachment of assets in certain circumstances under the Uniform Fraudulent Transfer Act.[2] The CPD also observed that the UAPOA raises significant concerns, including Constitutional issues regarding ex parte attachment of assets and informational privacy, the increased costs of doing business in New Jersey, and the disproportionate impact the Act may have on small businesses, if their limited assets are frozen pending a judgment.

In January of 2015, Mr. Steven Richman, Esq., of Duane Morris, LLP, ABA Advisor to the ULC Drafting Committee, provided background information concerning the purpose and objectives of the Act. Mr. Stephen Foley, Esq., a repr**e**sentative from the New Jersey Defense Association, identified areas where the UAPOA raises concerns for members of the defense bar, similar to the issues provided in formal comments from the Voice of the Defense Bar and the New Jersey Defense Association (the defense bar). They noted that although the UAPOA permits courts to exempt "ordinary business expenses" from the assets preserved for judgment, the Act, by failing to define the term "ordinary business expenses," does not provide adequate notice of the protections provided to businesses under this exemption. The defense bar noted that other key terms are listed in Section 4 of the UAPOA, are note defined including "ordinary living expense" and "legal representation." The reach of the Act to nonparties located outside of New Jersey was another area of concern presented by the defense bar, particularly in circumstances where the nonresident seeks to challenge the asset-preservation order before the issuing court.

The Commission acknowledged that a threshold analysis under *Winberry v. Salisbury* must first be considered to determine whether the UAPOA conforms to the New Jersey Supreme Court holding that the Legislature must not interfere with the rule-making power of the judiciary to govern court administration, practice and procedure. As currently drafted, the UAPOA provides an injunctive remedy to ensure assets are available to satisfy an existing or future judgment, creating procedures which may be challenged as touching upon the "judicial domain" and interfering with "judicial prerogatives."

INTRODUCTION

A. Uniform Act

[2]N.J. STAT. ANN §§ 2A:26-1 to -16; *see generally* N.J. STAT. ANN §§ 25:2-20, et seq. and N.J. STAT. ANN §§ 2A:26-1 et seq; *see* UNIF. VOIDABLE TRANSACTION ACT (May 2014)(proposing to amend and rename the Uniform Fraudulent Transfers Act clarifying the purpose of the statutes to govern transactions that are not only conducted with fraudulent intent, but those which are voidable due to other circumstances, *available at* http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014_AUVTA_Final%20Act_2016mar8.pdf.; *see also* AB 3742 N.J. Leg. 217 Session (2016)(based in part on the NJLRC Final Report Concerning Voidable Transaction (recommending adoption of the UVTA in New Jersey), *available at* http://www.njleg.state.nj.us/2016/Bills/A4000/3742_I1.pdf.

The UAPOA is designed to create a uniform process for the issuance of asset-preservation orders - *i*n personam orders which impose a preliminary injunction on the asset owner and collateral restraints upon non-parties, such as the defendant's banking institution.[3] The UAPOA is procedural in nature and only applies when the underlying action involves monetary damages.[4] The UAPOA also address the circumstances where the assets are in a foreign jurisdiction and beyond the reach of an *in rem* order for their preservation.[5]

Steven M. Richman, the American Bar Association Advisor to the ULC Drafting Committee, explained when he presented to the NJLRC that when as the end of litigation nears, there often is not a pool of funds or assets remaining to satisfy a judgment, "because while the matter was pending, the defendant dissipated its assets[, t]his is not necessarily a fraudulent situation, but one in which a debtor indulges and spends money so that the creditor cannot realize on its just debt."[6] He added that the UAPOA covers situations where the asset-dissipation is not prima facie fraudulent which is covered by existing statutes. Instead, the scope of the UAPOA provides a more expansive remedy than is currently provided in the jurisdictions of many American state courts.

Before the UAPOA, the primary remedy available to a litigant to preserve assets from dissipation pending judgment was an *in rem* order.[7] The order was directed to the attachment of restraints upon the defendant's property, not upon the defendant or third parties.[8] As a consequence, the itemized assets were subject to the control of the court, prohibiting their unauthorized transfer.[9] These prejudgment attachment orders generally required a showing that the defendant attempted to fraudulently conceal or transfer the assets to another jurisdiction, outside of the reach of the court. [10]

Under the UAPOA, an asset-preservation order may be sought at the time the underlying action is filed and it remains available while the action is pending.[11] It does not generally apply to consumer debt, family law, probate, trust, or estate matters.[12] The Act creates a remedy by which an asset-preservation order may be obtained without establishing the intent to hinder, delay, or defraud the plaintiff.[13] A party may obtain an asset-preservation order, after

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[3] UNIF. ASSET-PRESERVATION ORDERS ACT, Act Summary (May 2014), *available at* http://www.uniformlaws.org/shared/docs/asset_freezing_orders/UAPOA_Final%20Act_2014.pdf.
[4] *Id.*
[5] *See id.*
[6] *The Uniform Asset Freezing Order Act of 2013: Hearing on Bill 20-218 Before the Committee on the Judiciary and Public Safety*, 20 DC L.B. 3 (D.C. 2013) (statement of Steven M. Richman, ABA Advisor to Unif. L. Comm'n).
[7] N.J. STAT. ANN §§2A:26-1, et seq. (West 2016).
[8] *Id.*
[9] *Id.*
[10] *See* UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra* note 3.
[11] *See id; see also Del. River & Bay Auth. v. York Hunter Constr., Inc*., 344 N.J. Super. 361, 364-65 (Sup. Ct. Ch. Div. 2001).
[12] *Id.*
[13] *See id.*

establishing 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-preservation order will be unable to receive satisfaction of the judgment.[14]

The UAPOA authorizes: (1) that the party against which an asset-preservation order has been entered, move to modify or dissolve the order - Section 7(d); (2) that the party seeking relief must post a bond - Section 4(c); and (3) issuance of an order to release assets to pay for ordinary living or business expenses or for the cost of legal representation.

In addition, the UAPOA provides that the:

> court also has the power to limit the order to a certain amount or type of assets. 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.[15]

B. Case Law

1. Federal

The ULC promulgated the Uniform Act, in part, responding to the Supreme Court decision, in *Grupo Mexicano de Dessarolo v. Alliance Bond Fund, Inc.*, that federal courts lacked the jurisdiction to issue *in personam* preliminary injunctions to prevent a party from dissipating its assets pending adjudication of a claim for monetary damages, because the asset-freezing orders were not a part of the common law when the time the federal court system was created. The Court added that Congress, however, had the authority to grant the federal courts power to issue asset-freezing orders.[16] In *Grupo*, the Second Circuit upheld the decision of the district court to issue an *in personam* asset-freezing order restraining a company based in Mexico from dissipating assets, which were pledged to satisfy notes held by American investors. [17]

The Supreme Court identified factors that may be considered when drafting an asset-preservation provision, including the following:

> simplicity and uniformity of procedure; preservation of the court's ability to render a judgment that will prove enforceable; prevention of inequitable conduct on the part of defendants; avoiding disparities between defendants that have assets within the jurisdiction (which would be subject to pre-judgment attachment 'at law') and those that do not; avoiding the necessity for

[14] *See id.*
[15] *See* UNIF. ASSET-PRESERVATION ORDERS ACT, Act Summary (May 2014), *available at* http://www.uniformlaws.org/shared/docs/asset_freezing_orders/UAPOA_Final%20Act_2014.pdf.
[16] *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999).
[17] *Id.* at 332; *see also Grupo Mexicano*, 527 U.S. at 333 (dictum) (suggesting that the proper forum for resolution of the issue was with the Congress).

> plaintiffs to locate a forum in which the defendant has substantial assets; and, in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions.[18]

Following the decision in *Grupo*, there was a split among the circuits whether the decision was limited only to the federal courts or whether the power to issue asset-freezing orders was granted to the state legislatures.[19] The ULC sought to remedy the lack of uniformity by providing state legislatures with an uniform act which seeks to authorize the issuance of asset-preservation orders.[20]

The ULC created the UAPOA to address another result from the *Grupo* decision which places the United States at odds with various common law jurisdictions that recognize in personam "global" freezing orders, often referred to as "Mareva injunctions."[21] Recognizing the significance of international reciprocity when enforcing asset-preservation orders, the ULC designed the UAPOA to provide for the recognition of asset-preservation orders by sister states and courts outside of the United States.[22]

2. *New Jersey*

New Jersey follows the rule established in *Delaware River & Bay Authority v. York Hunter Construction*, that to satisfy a future judgment, a pre-judgment order should not be issued to preserve assets from dissipation. In *York*, the Delaware River Bay & Authority (the Authority), a governmental entity, gave York Hunter Construction Company (York) funds to complete a major construction project, but imposed a trust on the funds, requiring York to pay all of the subcontractors first before using the funds.[23] York, instead, used the funds to satisfy outstanding debts to relieve the company's mounting financial difficulties.[24] Once the Authority became aware of this, the Authority sued York for conversion and breach of contract.[25] In light of the circumstances, the Authority also sought an order to freeze York's assets, pending judgment.[26]

The court characterized the matter as "the substantive equivalent of an action seeking to

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[18] *Id.* at 330 (citing Brief for United States as *Amicus Curiae* at 16); see also Frederick S. Wait, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 73, at 110–111 (1884)(asserting that "[a] rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants); *see also York*, 344 N.J. Super. at 353.
[19] *York*, 344 N.J. Super. at 365.
[20] *See* UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra note* 1.
[21] *See id. Mareva Compania Naviera S.A. v. Int'l Bulk Carriers S.A.*, 2 Lloyd's Rep.509 (1975) (stating that 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 ").
[22] *See* UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra note* 1.
[23] *York*, 344 N.J. Super. at 363.
[24] *Id.*
[25] *Id.* at 364.
[26] *Id.*

compel the defendant to re-fund a trust improperly depleted," an action "routinely committed to the equity courts."[27] The court stated that a threshold showing must be met before determining whether to issue an injunction.[28]

"[A] plaintiff must be threatened with substantial, immediate, and irreparable harm and demonstrate that there is a reasonable probability of eventual success on the merits in accordance with well settled principles of law".[29] The plaintiff "must [also] show that the harm to the plaintiff if the injunction does not issue is more severe than the harm to the defendant if the injunction is granted."[30] The court added that, "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages."[31]

By contrast, when a similar issue was heard by the Third Circuit, the Court held that the inability to satisfy a monetary judgment might constitute irreparable harm when determining whether to issue a preliminary injunction.[32] State courts are split on this issue, Florida and New York, for example, both look simply at whether a money judgment can be obtained.[33] The inquiry does not involve whether the judgment is collectible because the view is predicated on the premise that the "mere fact that a defendant has insufficient assets to satisfy a judgment does not 'harm' the plaintiff during the pendency of the litigation."[34]

With *York*, New Jersey adopted an "intermediate position"[35] applied by the Delaware courts which requires "an independent jurisdictional basis, apart from the insolvency, for equity to intervene."[36] Applying this position in *York*, as long as the company held the funds in trust, the funds were not technically York's assets, but rather the Authority's assets.[37] In sum, the court found it appropriate to restrain the defendant only from dissipating those assets "which would be available to refund the trust", but declined to impose a preliminary injunction to freeze the assets that were still held in trust.[38]

In *York*, the court observed that a pre-judgment order preserving assets from dissipation

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[27] *York*, 344 N.J. Super. at 370.
[28] *Id.*
[29] *Id.* at 364 (citing *Crowe v. DeGioia*, 90 N.J. 126 (1982)).
[30] *Id.*
[31] *Crowe*, 90 N.J. at 132-33.
[32] *Geraldi v. Pelullo*, 16 F.3d 1363, 1373 (3d. Cir. 1994) (quoting *Hoxworth v. Blinder, Robingson & Co*., 903 F.2d. 186, 205-06 (3d Cir. 1990)).
[33] *York*, 344 N.J. Super. at 365 (citing *Mary Dee's, Inc. v. Tartamella*, 492 So.2d 815, 816 (Fla. Dist. Ct. App. 1986); St. Lawrence Co. v. Alkow Realty, 453 So.2d 514 (Fla. Dist. Ct. App. 1984); *Ashland Oil, Inc. v. Gleave*, 540 F.Supp. 81, 86 (W.D.N.Y. 1982)).
[34] *Id.* at 366 (quoting Robert J.C. Deane, *Varying the Plaintiff's Burden: An Efficient Approach to Interlocutory Injunctions to Preserve Future Money Judgments*, 49 U. Toronto L.J. 1, 23–4 (1999).
[35] *Id.* at 367; *see also Consol. Lint, LLC v. Waller*, BER-C-293-05, 2005 WL 2483375 at *5-7 (N.J. Super. Ct. Ch. Div. Oct. 3, 2005) (explaining and adopting the reasoning of *York*); (*Russo v. Estate of Rieger*, BER-C-243-06, 2006 WL 2347881 at *6-7 (N.J. Super. Ct. Ch. Div. Aug. 14, 2006) (same treatment of *York* as *Waller*)
[36] *E.I. Du Pont de Nemours & Co. v. HEM Research, Inc.*, 576 A.2d 635, 641 (Del. Ch. 1989) ("Insolvency is not a circumstance that independently confers jurisdiction upon a court of equity. Rather, insolvency establishes the defendant's inability to respond to a judgment, and, therefore, negates the adequacy of the legal remedy.").
[37] *Id.* at 369.
[38] *Id.* at 370.

is the "functionally equivalent to a pre-judgment attachment of those assets," and absent further legislative expansion, an injunction to preserve assets may not be issued merely to preserve them to satisfy a future money judgment.[39]

ASSET-PRESERVATION ORDERS

A. New Jersey Practice and Procedure for Asset-Preservation

Asset-preservation orders are addressed in New Jersey under N.J.S. 2A:26-1 to -16, which is considered "a remedial law for the protection of resident and nonresident creditors and claimants" that must be liberally construed.[40] The court in *York* cautioned that a pre-judgment attachment must be regarded "as extraordinary remedy"[41] which "may only be issued where there is a probability of success on the merits and the enumerated statutory criteria are satisfied."[42] Consequently, "both the statute and the court rules proscribing the procedure for seeking pre-judgment attachment must be strictly construed."[43]

N.J.S. 2A:26-2 provides several grounds upon which the court may properly issue an attachment order against a defendant's property: (1) where plaintiff has a claim, of an equitable nature, as to which a money judgment is demanded against the defendant, and the defendant absconds or is a nonresident and a summons cannot be served upon him in this state; or (2) where the defendant is a corporation created by the laws of another state, but authorized to do business in this state and such other state authorizes attachments against New Jersey corporations authorized to do business in that state.[44]

An attachment order has been denied where:

> [t]he motion record is devoid of any evidence that defendant is about to remove her property from the jurisdiction; that she possesses property or choses in action which she fraudulently concealed; that she has or is about to assign, remove, or dispose of any property with intent to defraud her creditors; or that she fraudulently contracted the debt. In short, there is no basis whatsoever for the issuance of an order for arrest and, thus, no grounds for imposition of a pre-judgment attachment of assets under N.J.S.A. 2A:26–2(a) exist.[45]

When seeking a writ of attachment, a plaintiff must "state in his affidavit sufficient facts

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[39] *York*, 344 N.J. Super. at 368.
[40] N.J STAT. ANN. § 2A:26-1 (describing the remedial nature of the statutory section).; *see also Tanner Assoc., Inc. v. Ciraldo*, 33 N.J. 51, 53 (1960), *quoted in In re Estate of Balgar*, 399 N.J. Super. 426, 439 (Law Div. 2007).
[41] *Id.* at 368-69*; Russell v. Fred G. Pohl Co.*, 7 N.J. 32, 39 (1951), *quoted in Wolfson v. Bonello*, 270 N.J. Super. 274, 289 (App. Div. 1994).
[42] *Estate of Balgar*, 399 N.J. Super. at 439.
[43] *Id.* (quoting *Tanner Associates, Inc. v. Ciraldo*, 33 N.J. 51, 53 (1960)).
[44] *See id;* .N.J STAT. ANN §2A:26-2.
[45] *In re estate of Balgar*, 399 N.J. Super. at 440.

to establish a prima facie cause of action against the defendant in attachment, and to include therein the other statutory requirements for the issuance of the writ."[46] In doing so, the "plaintiff is entitled to all inferences fairly deducible from his affidavit, and all conflicts will be resolved in his favor."[47]

Courts may issue attachment orders to freeze the assets of an account holder if "there exists a reasonable suspicion that the account holder has committed or is about to commit the crime of terrorism . . . or the crime of soliciting or providing material support or resources for terrorism."[48] The asset freeze may be ordered if found necessary "to ensure eventual restitution to victims of the alleged offense . . . so that the funds or assets may not be withdrawn or disposed of until further order of the court."[49] "Within ten days after a court issues an attachment order under this act, the Attorney General must send a copy of the order to the account holder's last known address or to the account holder's attorney, if known."[50] Unless extended for good cause, this type of asset freeze "expires 24 months after the date of the court's initial attachment order."[51]

Additionally, an asset freezing order may be issued to collect alimony and child support.[52] "Service of the writ shall freeze the asset for the amount of the judgment, but no turnover of funds shall be made or required to be made until ordered by the court."[53]

The New Jersey Rules of Court feature more detailed procedures regarding attachment and sequestration.[54] A writ of attachment may be issued only "where the defendant is subject to the exercise of jurisdiction by the state consistent with due process of law.[55] A defendant must have at least three days' notice before a motion requesting an attachment order may be heard, but must "file and serve any opposing affidavits or cross-motions at least one day prior to the hearing."[56] Such a motion may be granted only if the court finds that "(1) there is a probability that final judgment will be rendered in favor of the plaintiff; (2) there are statutory grounds for issuance of the writ; and (3) there is real or personal property of the defendant at a specific location within this state which is subject to attachment."[57]

A writ of attachment may be ordered without notice to the defendant "only if the defendant is about to abscond or if the court finds from specific facts shown by affidavit or

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[46] *Tanner Associates*, 33 N.J. at 64.
[47] *Id.*
[48] N.J STAT. ANN. 2C:66-3(a) (West 2016).
[49] N.J STAT. ANN. 2C:66-3(c) (West 2016).
[50] N.J STAT. ANN. 2C:66-8 (West 2016).
[51] N.J STAT. ANN. 2C:66-7 (West 2016).
[52] N.J. STAT. ANN. 5:7-5(f) (West 2016).
[53] *Id.*
[54] *See* N.J. CT. R. 4:60-1 to -19.
[55] N.J. CT. R 4:60-5(a).
[56] *Id.*
[57] *Id.*

verified complaint that the giving of such notice is likely to defeat the execution of the writ."[58] "Before or after issuance of the writ, the court may, in its discretion, order the plaintiff to post a bond with sufficient sureties and in an amount sufficient to indemnify defendant for all damages resulting from the attachment and for taxed costs, if the writ is vacated, or if the action is dismissed, or if judgment therein is given for defendant."[59]

Once the order has been entered, a writ is issued to the sheriff of each county "in which the property to be attached is located or found."[60] The plaintiff must serve the defendant with notice of the attachment within one week after the sheriff returns with the attached property.[61] A defendant whose property has been attached may file a motion to vacate the writ of attachment, but such a motion does not constitute a general appearance.[62] The plaintiff bears the burden of proof, which may be presented by affidavits, depositions, or oral testimony, and "all questions of fact and law shall be determined by the court without a jury."[63]

A defendant may secure the discharge of attached property and recover possession by filing a bond of an amount and "with such sureties as the court by order directs and approves, after notice to the plaintiff."[64] "The court may order sequestration of defendant's real and personal estate" as needed to satisfy a judgment or order obtained against the defendant.[65]

B. Other Common-law Jurisdictions – Mareva injunctions

Beginning in 1975, Great Britain authorized courts to issue Mareva injunctions, *in personam* preliminary injunctions issued to prevent a party from dissipating its assets pending adjudication of a claim for monetary damages, so they may be preserved to satisfy an existing or future judgment. [66] Subsequently, other common law countries adopted Mareva injunctions, including Canada, Australia, New Zealand, and Singapore. In each jurisdiction, the moving party must show that a real risk of dissipation exists. Following the procedures established in Great Britain, the moving party may seek a "World-Wide Mareva" injunction, in cases where the claimant demonstrates that the opposing party does not have assets in the home country, but instead maintains assets abroad. The claimant must provide property and company searches, or other evidence indicating that assets are being diverted.

Asset is defined under English law as something "which can be seized by the clamant, if

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[58] N.J. CT. R. 4:60-5(b).
[59] N.J. CT. R.. 4:60-5(c).
[60] N.J. CT. R. 4:60-6.
[61] R. 4:60-9(a), *see also* R. 4:60-9(b) (regarding contents of notice).
[62] N.J. CT. R. 4:60-11(a) (West 2016).
[63] N.J. CT. R. 4:60-11(b).
[64] N.J. CT. R. 4:60-13.
[65] N.J. CT. R. 4:60-19.
[66] William Tetley, Q.C , *Arrest, Attachment, and related Maritime Law Procedures*, 73 Tul. L. Rev. 1895, 1951 (1999).

and when [sic] [the claimant] becomes a judgment creditor, and which can be sensibly treated as having some value to [sic] [the claimant]." [67] Generally in England, an ex parte hearing is held in chambers, and if granted, the injunction takes effect immediately, but the order must be served on the defendant and third parties identified by the order. The injunction may be combined with an action in rem or with other "ancillary orders." Under English law, third-parties who fail to comply, generally banks, are exposed to the risk of fines, the sequester of assets, and possible imprisonment of employees. The English law allows for "Angel Bell" variations of the Mareva injunction to allow a defendant "seeking in good faith to make payments which [sic] the defendant considers" should be made "in the ordinary course of business." [68]

In Singapore, for example, the moving party may present prima facie evidence of fraud and dishonesty to infer that the risk exists.[69] In England, the moving party must submit an affidavit providing the relevant facts and demonstrating a "good and arguable" case for the application. In Canada, however, the Mareva injunction must be sought by motion, and the moving party must demonstrate a "strong prima facie" case, in order to satisfy the standard of proof. An ex parte interim injunction is available in Canada, but may be issued for a period not to exceed fourteen days, if the judge finds, in an urgent case, that notice would defeat the purposes of the motion or is not possible.[70]

C. Issues and concerns

a. *Winberry* Analysis

A threshold issue when considering whether to recommend the UAPOA for enactment in New Jersey is whether the Act conflicts with the rule-making power of the New Jersey Courts, as established in *Winberry v. Salisbury*.[71] The analysis involves determining whether the asset-preservation orders fall with the domain of the courts, which are charged to "make rules governing the administration and practice and procedures" of the courts. The Court observed that the Legislature governs the "law of pleading and practice," while the judiciary governs "substantive law, which defines our rights and duties."[72]

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[67] *Iraqi Ministry of Defence v Arcepey Shipping Co SA,* [1981] Q.B. 65, the term "Angel Bell" as commonly used in English jurisprudence was derived from this decision.
[68] *Iraqi Ministry of Defence v Arcepey Shipping Co SA,* [1981] Q.B. 65, the term "Angel Bell" as commonly used in English jurisprudence was derived from this decision.
[69] Colin Ng & Partners, *What Must You Show to Obtain a World Wide Mareva Injunction in Singapore Courts? (2005), available at* http://www.cnplaw.com/en/files/articles/2005/liti/liti_marapr2005_caseupdate_1.pdf.
[70] Tetley, 73 Tul. L. Rev. 1895,1953.
[71] *Winberry v. Salisbury*, 5 N.J. 240 (1950); *see also*, *Ferriera v. Rancocas Orthopedic Associates*, 178 N.J. 144, 163 (Zazzali, J., concurring in part and dissenting in part) (quoting *In re Salaries for Prob. Officers*, 58 N.J. 422, 425 (1971)).
[72] *Winberry* at 5 N.J. at 247-48.

Under the separation of powers analysis, the court looks to determine "whether the judiciary has fully exercised its power with respect to the matter at issue, then, "[i]n the absence of complete judicial action, . . .whether the statute serves a legitimate legislative goal, and 'concomittantly, does not interfere with judicial prerogatives or only indirectly or incidentally touches upon the judicial domain.' "[73]

Arguably, creating a mechanism to ensure that assets are available to satisfy a judgment may serve a legitimate interest, particularly if dissipation of assets prior to a final judgment is found to be rampant in matters decided by New Jersey Courts. However, the injunctive relief provided under the Act may be challenged as a procedural mechanism which interferes with "judicial prerogatives" and "touches upon the judicial domain."

b. Nonparties/Nonresident

Opponents of the UAPOA also state that the Act creates an in rem corollary by expressly allowing orders to be served on nonparties. Critics of the Act find that this provision adversely effects: (1) financial institutions, particularly banks, which hold the assets of a party against which a claim has been filed, and (2) persons or entities who share joint ownership of an asset with a party against whom a claim has been filed.

Proponents of the UAPOA observe that financial institutions are routinely exposed to asset-preservation orders from courts in foreign jurisdictions and their compliance to these orders demonstrates their ability to respond if similar requirements were adopted in New Jersey.

The defense bar, when presenting to the Commission, expressed concern with the realistic possibility of a nonresident to challenge an asset-preservation order before the court where the order was issued.

c. Vague terms

Under the UAPOA, the moving party must demonstrate by a "preponderance of the evidence a substantial likelihood of success on the merits of the underlying claim," and "a substantial likelihood that the moving party will be unable to obtain satisfaction of a judgment, and a balancing of harms." The defense bar, in written comments provided to the Commission, states that the "substantial likelihood standard is vague and undefined," adding that a party's assets may be "tied up before any discovery on the merits of a claim commences and be subject to the control of a court for years before a trial occurs.

[73] *Ferriera* 178 N.J. at 163 (Zazzali, J., concurring in part and dissenting in part) (quoting *In re Salaries for Prob. Officer*s, 58 N.J. at 425).

The defense bar also noted that the UAPOA allows courts to exempt "ordinary business expenses" from the asset-preservation order, but fails to define this key term. The comments to the UAPOA indicate that such expense include "the payment of currently existing debts and costs-* of defending the claim," but provides no further explanation.[74] The defense bar observes that in order to implement this provision, courts may be required to monitor the flow of a party's assets throughout the litigation, which may generate additional motions and litigation expenses.[75] The defense bar also identified other key terms listed in Section 4 of the UAPOA which were not defined, specifically "ordinary living expense", and "legal representation."[76]

The defense bar stated that freezing the assets of a small business "with limited borrowing power" may disrupt their payroll or prevent payment to a key supplier and derail a revenue-generating project.[77] Recognizing that an asset-freeze could cause irreversible damage to business operations, the defense bar observed that some businesses "may be forced to sacrifice legitimate defenses" and stipulate to "higher damages simply to survive the suit."[78]

CONCLUSION

The Commission duly considered the ULC's comments to the UAPOA and the comments provided by the member of the ULC Drafting Committee, along with the comments provided by the AOC and the defense bar. It was of concern to the Commission that the UAPOA is an Act for which uniformity among the states is a significant concern, and yet no other state has enacted the Act in any form in the years since the ULC first released it as the Uniform Asset-Freezing Orders Act in 2012. Without any other state in the United States enacting the UAPOA, the Commission considered the use of *Mareva* injunctions in other countries and observed that the objectives of the ULC may be able to be met through the use of mechanisms other than the UAPOA. After considering the potential conflicts with the *Winberry* holding, and the totality of the concerns presented by both the AOC and the defense bar, the Commission recommends that the UAPOA not be enacted in New Jersey at this time.

The Commission will continue to monitor and give further consideration to the Act as future developments arise.

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[74] *Id.*
[75] *Id.*
[76] Minutes, NJLRC Meeting (January 15, 2015), *available at* http://www.lawrev.state.nj.us/minutes/minutes%202015/MIN011515.pdf.
[77] Letter from Mike Ogborn, President, Colorado Trial Lawyers Association, to Claire Levy, Representative of House District 13, Colorado House of Representatives (2013) (on file with the NJLRC).
[78] *Id.*