

**To: New Jersey Law Revision Commission**  
**From: Jayne Johnson**  
**Re: Uniform Asset-Preservation Orders Act**  
**Date: January 9, 2017**

## **EXECUTIVE SUMMARY**

This Memorandum discusses the Uniform Asset-Preservation Orders Act (UAPOA) and seeks to provide the background information requested by the Commission. Staff seeks guidance on how to best proceed with the project or whether to hold the project for further review.

## **BACKGROUND**

In 2013, the Commission first considered the Uniform Asset-Freezing Orders Act, which was promulgated by the Uniform Law Commission (ULC) in 2012. The Act authorized courts to issue an asset-freezing order, which prevents the dissipation of assets and preserves them to satisfy an existing or future judgment. In 2014, the Act was amended by the ULC and renamed the Uniform Asset-Preservation Orders Act (UAPOA or the Act). The ULC sought to re-classify the orders to more accurately reflect the scope of the remedy and to prevent confusion.

The UAPOA replaced the term “freezing” with the term “preservation” in the title and throughout the body of the Act. Other changes included revising the introduction to clarify the purpose and the objectives of the Act by emphasizing 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.

During the course of Staff’s outreach, members of the defense bar and the UAPOA Drafting Committee provided formal comments and expressed a willingness to discuss the UAPOA at a NJLRC meeting. In January 2015, Mr. Steven Richman, Esq., of Duane Morris, LLP, an ABA Advisor to the ULC Drafting Committee presented the objectives of the uniform act before the Commission and Mr. Stephen Foley, Esq., representing the New Jersey Defense Association, identified areas where the UAPOA raises concerns for members of the defense bar.

Staff also contacted the Administrative Office of the Courts (AOC) to obtain comment on the viability of the UAPOA in New Jersey. The Civil Practice Division (CPD) of the AOC reviewed the Act and recommended against adoption of the UAPOA in New Jersey. The CPD noted that the UAPOA raises significant concerns, including the increased costs of doing business in New Jersey, a disproportionate impact on small businesses, and constitutional issues regarding the *ex parte* attachment of assets and informational privacy.

The CPD further stated that the harms sought to be remedied by the UAPOA are fundamentally addressed by existing statutes. The CPD added that the work of the NJLRC, recommending updates to the Uniform Fraudulent Transfer Act, N.J.S. 25:2-20 et seq. and N.J.S. 2A:26-1 et seq., (which permits prejudgment attachment of assets in certain circumstances, based on the Uniform Voidable Transactions Act) will further extend the remedies available under New Jersey law.

## INTRODUCTION

### A. Uniform Act

The UAPOA is designed to create a uniform process for the issuance of asset-preservation orders - *in personam* orders which impose a preliminary injunction on the asset owner and collateral restraints upon non-parties, such as the defendant's banking institution.<sup>1</sup> The UAPOA is procedural in nature and only applies when the underlying action involves monetary damages.<sup>2</sup> The UAPOA also addresses the circumstances where the assets are in a foreign jurisdiction and beyond the reach of an *in rem* order for their preservation.<sup>3</sup> The Act does not generally apply to consumer debt, family law, probate, trust, or estate matters.<sup>4</sup>

Steven M. Richman, the American Bar Association Advisor to the ULC Drafting Committee, explained that as the end of litigation nears, often the pool of funds or assets to satisfy a judgment dissipates while the matter is pending. He added that often the circumstances do not constitute prima facie fraud, instead, the "debtor indulges and spends money so that the creditor cannot realize on its just debt." Mr. Richman suggested that the UAPOA is designed to cover situations like these by providing a more expansive remedy, similar to what is available in common-law countries but is currently unavailable in American state courts.

Under existing statutes, the primary remedy available to a litigant seeking to preserve assets from dissipation pending judgment is an *in rem* order.<sup>5</sup> The order is directed to the attachment of restraints upon the defendant's property, not upon the defendant or third parties.<sup>6</sup> As a consequence, the itemized assets are subject to the control of the court, prohibiting their unauthorized transfer.<sup>7</sup> These prejudgment attachment orders generally require a showing that the defendant attempted to fraudulently conceal or transfer the assets to another jurisdiction,

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<sup>1</sup> UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, (May 2014), *available at* [http://www.uniformlaws.org/shared/docs/asset\\_freezing\\_orders/UAPOA\\_Final%20Act\\_2014.pdf](http://www.uniformlaws.org/shared/docs/asset_freezing_orders/UAPOA_Final%20Act_2014.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.*

<sup>5</sup> N.J. STAT. ANN. §§2A:26-1, et seq. (West 2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

outside of the reach of the court.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> A party may obtain an asset-preservation order, after 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.<sup>11</sup>

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) the 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.<sup>12</sup>

## **B. Case Law**

### **1. Federal**

The ULC promulgated the Act, in part, as a response to the Supreme Court decision, in *Grupo Mexicano de Dessarolo v. Alliance Bond Fund, Inc.*, in which the Court held that the federal courts lacked the jurisdiction to issue *in personam* preliminary injunctions, which prevent a party from dissipating its assets pending adjudication of a claim for monetary damages.

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.<sup>13</sup> The Supreme Court reversed the decision, ruling that the asset-freezing orders were not a part of the common law when the federal court system was created and, as a consequence, the federal courts lacked the jurisdiction

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<sup>8</sup> See UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra* note 1.

<sup>9</sup> 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).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> 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](http://www.uniformlaws.org/shared/docs/asset_freezing_orders/UAPOA_Final%20Act_2014.pdf).

<sup>13</sup> *Id.* at 332; see also *Grupo Mexicano*, 527 U.S. at 333.

to issue the orders.<sup>14</sup>

The Supreme Court observed, however, that Congress had the authority to grant the federal courts power to issue asset-freezing orders.<sup>15</sup> The Supreme Court identified the following factors which should be considered when drafting an asset-preservation provision:

- (1) simplicity and uniformity of procedure;
- (2) preservation of the court's ability to render a judgment that will prove enforceable;
- (3) prevention of inequitable conduct on the part of defendants;
- (4) 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;
- (5) avoiding the necessity for plaintiffs to locate a forum in which the defendant has substantial assets; and
- (6) in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions.<sup>16</sup>

Following the decision in *Grupo*, there was a split among the circuits regarding 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.<sup>17</sup> The ULC sought to remedy the lack of uniformity by providing state legislatures with a uniform act which seeks to authorize the issuance of asset-preservation orders.<sup>18</sup>

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."<sup>19</sup> 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.<sup>20</sup>

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<sup>14</sup> *Grupo Mexicano*, 527 U.S. at 333 (dictum) (suggesting that the proper forum for resolution of the issue was with the Congress).

<sup>15</sup> *Id.*

<sup>16</sup> *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.

<sup>17</sup> *York*, 344 N.J. Super. at 365.

<sup>18</sup> See UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra* note 1.

<sup>19</sup> 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").

<sup>20</sup> See UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra* note 1.

## 2. State Law – New Jersey Case Law

New Jersey presently follows the rule established in *Delaware River & Bay Authority v. York Hunter Construction (York)*, that to satisfy a future judgment, a pre-judgment order should not be issued to preserve assets from dissipation.<sup>21</sup> 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.<sup>22</sup> York, instead, used the funds to satisfy outstanding debts to relieve the company's mounting financial difficulties.<sup>23</sup> Once the Authority became aware of this, the Authority sued York for conversion and breach of contract.<sup>24</sup> In light of the circumstances, the Authority also sought an order to freeze York's assets, pending judgment.<sup>25</sup>

The court characterized the matter as “the substantive equivalent of an action seeking to compel the defendant to re-fund a trust improperly depleted,” an action “routinely committed to the equity courts.”<sup>26</sup> The court stated that a threshold showing must be met before determining whether to issue an injunction.<sup>27</sup>

“[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”.<sup>28</sup> 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.”<sup>29</sup> The court added that, “[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages.”<sup>30</sup>

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.<sup>31</sup> State courts are split on this issue. Florida and New York, for example, both look simply at whether a money judgment can be obtained.<sup>32</sup> 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

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<sup>21</sup> *Delaware River & Bay Authority v. York Hunter Construction*, 344 N. J. Super. 361 (Ch. Div. 2001).

<sup>22</sup> *York*, 344 N.J. Super. at 363.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 364.

<sup>25</sup> *Id.*

<sup>26</sup> *York*, 344 N.J. Super. at 370.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 364 (citing *Crowe v. DeGioia*, 90 N.J. 126 (1982)).

<sup>29</sup> *Id.*

<sup>30</sup> *Crowe*, 90 N.J. at 132-33.

<sup>31</sup> *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)).

<sup>32</sup> *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)).

not ‘harm’ the plaintiff during the pendency of the litigation.”<sup>33</sup>

With *York*, New Jersey adopted an “intermediate position”<sup>34</sup> applied by the Delaware courts which requires “an independent jurisdictional basis, apart from the insolvency, for equity to intervene.”<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

In *York*, the court observed that a pre-judgment order preserving assets from dissipation 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.<sup>38</sup>

## 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.<sup>39</sup> The court in *York* cautioned that a pre-judgment attachment must be regarded “as extraordinary remedy”<sup>40</sup> which “may only be issued where there is a probability of success on the merits and the enumerated statutory criteria are satisfied.”<sup>41</sup> Consequently, “both the statute and the court rules proscribing the procedure for seeking pre-judgment attachment must be strictly construed.”<sup>42</sup>

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

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<sup>33</sup> *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)).

<sup>34</sup> *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*))

<sup>35</sup> *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.”).

<sup>36</sup> *Id.* at 369.

<sup>37</sup> *Id.* at 370.

<sup>38</sup> *York*, 344 N.J. Super. at 368.

<sup>39</sup> N.J.S.A. 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).

<sup>40</sup> *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).

<sup>41</sup> *Estate of Balgar*, 399 N.J. Super. at 439.

<sup>42</sup> *Id.* (quoting *Tanner Associates, Inc. v. Ciraldo*, 33 N.J. 51, 53 (1960)).

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.<sup>43</sup>

An attachment order may be denied if:

[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.<sup>44</sup>

When seeking a writ of attachment, a plaintiff must “state in his affidavit sufficient facts 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.”<sup>45</sup> In doing so, the “plaintiff is entitled to all inferences fairly deducible from his affidavit, and all conflicts will be resolved in his favor.”<sup>46</sup>

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.”<sup>47</sup> 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.”<sup>48</sup> “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.”<sup>49</sup> Unless extended for good cause, this type of asset freeze “expires 24 months after the date of the court’s initial attachment order.”<sup>50</sup>

Additionally, an asset freezing order may be issued to collect alimony and child support.<sup>51</sup> “Service of the writ shall freeze the asset for the amount of the judgment, but no

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<sup>43</sup> N.J.S.A. 2A:26-2; *see id.*

<sup>44</sup> *In re estate of Balgar*, 399 N.J. Super. at 440.

<sup>45</sup> *Tanner Associates*, 33 N.J. at 64.

<sup>46</sup> *Id.*

<sup>47</sup> N.J. STAT. ANN. 2C:66-3(a) (West 2016).

<sup>48</sup> N.J. STAT. ANN. 2C:66-3(c) (West 2016).

<sup>49</sup> N.J. STAT. ANN. 2C:66-8 (West 2016).

<sup>50</sup> N.J. STAT. ANN. 2C:66-7 (West 2016).

<sup>51</sup> N.J. STAT. ANN. 5:7-5(f) (West 2016).

turnover of funds shall be made or required to be made until ordered by the court.”<sup>52</sup>

The New Jersey Rules of Court feature more detailed procedures regarding attachment and sequestration.<sup>53</sup> 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.”<sup>54</sup> 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.”<sup>55</sup> 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.”<sup>56</sup>

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 verified complaint that the giving of such notice is likely to defeat the execution of the writ.”<sup>57</sup> “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.”<sup>58</sup>

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.”<sup>59</sup> The plaintiff must serve the defendant with notice of the attachment within one week after the sheriff returns with the attached property.<sup>60</sup> 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.<sup>61</sup> 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.”<sup>62</sup>

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.”<sup>63</sup> “The court may order sequestration of defendant’s real and personal estate” as needed to satisfy a judgment or order obtained against the defendant.<sup>64</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *See* N.J. Ct. R. 4:60-1 to -19.

<sup>54</sup> R. 4:60-5(a).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> R. 4:60-5(b).

<sup>58</sup> R. 4:60-5(c).

<sup>59</sup> R. 4:60-6.

<sup>60</sup> R. 4:60-9(a), *see also* R. 4:60-9(b) (regarding contents of notice).

<sup>61</sup> R. 4:60-11(a).

<sup>62</sup> R. 4:60-11(b).

<sup>63</sup> R. 4:60-13.

<sup>64</sup> R. 4:60-19.

## B. Issues for consideration

### 1. *Winberry* Conflicts

A threshold issue when considering the viability of the UAPOA in New Jersey is whether a pre-judgment asset-preservation order violates *Winberry v. Salisbury*.<sup>65</sup> The analysis involves determining whether the orders encompass “substantive law, which defines our rights and duties,” or whether the orders fall within the domain of the legislature, involving procedure and the “law of pleading and practice.”<sup>66</sup> 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.’ ”<sup>67</sup>

The UAPOA seeks to extend judicial power rather than contract it.<sup>68</sup> Courts are able to exercise discretion to deny requests if the court determines the facts do not warrant an *in personam*, asset-preservation order.<sup>69</sup> The UAPOA does not interfere with judicial prerogatives and seeks to advance procedural protections to prevent a defendant from dissipating its assets to defeat satisfaction of an existing or future judgment.<sup>70</sup> The UAPOA appears as though it could withstand a *Winberry* challenge because it is a procedural mechanism that arguably achieves a legitimate legislative goal and does not interfere with judicial prerogatives.

### 2. Impact on the Judiciary

The court in *York* did not identify *Winberry* conflicts with the enactment of an asset-freezing provision, but the court did warn that any expansion of judicial power by the legislature would be a “quagmire[,] . . . there should be some good reason and some theoretical underpinning before resources are committed.”<sup>71</sup> The court added that this expansion may “have the effect of converting any money damage action against a defendant of questionable financial integrity into a chancery action requiring an investigation into the defendant’s actual financial condition.”<sup>72</sup>

If the Commission seeks to proceed with this project, Staff will conduct outreach to explore possible modifications to harmonize the uniform provisions with existing New Jersey law. Staff will also research the following concerns raised by commenters: (1) the scope and

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<sup>65</sup> *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)).

<sup>66</sup> *Winberry* at 5 N.J. at 247-48.

<sup>67</sup> *Ferriera* 178 N.J. at 163 (Zazzali, J., concurring in part and dissenting in part) (quoting *In re Salaries for Prob. Officers*, 58 N.J. at 425).

<sup>68</sup> See UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra* note 1.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 368-69.

<sup>72</sup> *Id.*

breadth of the Act, particularly the Act's application to all defendants without requiring a threshold showing or other means to narrow the reach of the Act; (2) the feasibility of a nonresident challenging an asset-preservation order before the court where the order was issued; (3) the vagueness of the terms listed in Section 4, specifically "ordinary business expense", "ordinary living expense", and "legal representation;" (4) the expense of obtaining a bond under Section 4; (5) the disproportionate impact the Act may have on small, poorly capitalized businesses; (6) the focus of the Act on the sufficiency of the defendant's assets to satisfy a judgment, which may unfairly burden the defendant; and (7) the increase in the cost and expense of litigation in New Jersey that the Act may generate, which may, in turn, drive up the cost of doing business in New Jersey.

### 3. Nonparties

Opponents of the UAPOA state that the Act creates an *in rem* corollary by expressly allowing orders to be served on nonparties.<sup>73</sup> Critics of the Act find that this provision adversely affects: (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 which a claim has been filed. Proponents of the UAPOA observe that financial institutions are already exposed to asset-preservation orders from courts in foreign jurisdictions, which demonstrates how routine compliance may become.

### 4. Ordinary business expense

Stephen Foley, Esq., when presenting to the Commission, expressed the concerns of the defense bar concerning the feasibility of a nonresident challenging an asset-preservation order before the court, where the order was issued. He also stated that the vagueness of the terms listed in Section 4, specifically "ordinary business expense", "ordinary living expense", and "legal representation" caused great concern to his colleagues.<sup>74</sup> Trial attorneys provided written comments to a state legislator who proposed a bill introducing the UAPOA, which was later withdrawn, stated that "[f]reezing the assets of . . . [a] small[] company[y] with limited borrowing power could prevent payroll from being paid, or allowing the company to pay a supplier that is key to allowing that business to complete a project and earn revenue."<sup>75</sup> The further explained that recognizing an asset-freeze order could cause irreversible damage to operations; some businesses may be forced to sacrifice legitimate defenses and to stipulate higher damages simply to survive the suit.<sup>76</sup>

The critics of the UAOPA add that the Act empowers a court to exempt "ordinary business expenses" from the asset-preservation order. This key term is not defined. The

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<sup>73</sup> Minutes, NJLRC Meeting, p. 1-2 (January 15, 2015), available at <http://www.lawrev.state.nj.us/minutes/minutes%202015/MIN011515.pdf>.

<sup>74</sup> *Id.*

<sup>75</sup> 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 author).

<sup>76</sup> *Id.*

comments to the UAPOA indicate that such expenses include “the payment of currently existing debts and costs of defending the claim,” but provides no further explanation.<sup>77</sup> Opponents of the Act fear that the vague language of the provision may force courts to micromanage the flow of a party’s assets throughout the litigation with frequent and expensive motions.<sup>78</sup>

### C. *Mareva* Injunctions – Common-law Countries

Asset-freezing orders were issued in common-law countries as early as 1975, beginning in the United Kingdom, where courts issued *Mareva* injunctions. Like the asset-preservation orders defined in the UAPOA, *Mareva* injunctions are *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.

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.<sup>79</sup> The claimant must provide property and company searches, or other evidence indicating that assets are being diverted.<sup>80</sup> In Singapore, for example, the moving party may present prima facie evidence of fraud and dishonesty to infer that the risk exists.<sup>81</sup> Following the procedures established in the United Kingdom, 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.<sup>82</sup>

In the England, the following procedures govern *Mareva* injunctions:<sup>83</sup>

- a. *Mareva* injunctions may be issued:
  - i. Before the start of the trial – generally issued after the writ,<sup>84</sup>
  - ii. After the start of the trial
- b. Defendant may seek a *Mareva* injunction in support of a counterclaim
- c. “Good, arguable case” standard – party must submit an affidavit demonstrating a “good and arguable case” for the application, along with a draft order
- d. Moving party must demonstrate that the opposing party has assets in England,
- e. Worldwide Injunction – may be requested if assets are outside of England
- f. Asset - defined as something “which can be seized by the clamant, if and when [ ] [the claimant] becomes judgment creditor, and which can be sensibly

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> William Tetley, Q.C , *Arrest, Attachment, and related Maritime Law Procedures*, 73 Tul. L. Rev. 1895, 1951 (1999).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> The Rules & Practice Directions - Civil Procedure Rules issued by the Ministry of Justice

<sup>83</sup> Tetley, 73 Tul. L. Rev. 1895,1953.

<sup>84</sup> *Id.* (common use of *Mareva* injunctions in maritime law, if issued before the writ is taken out, the requesting party must request issuance “forthwith” or “as soon as possible”).

treated as having some value to [sic] [the claimant].”

- i. Does not include the “right to borrow”
- ii. Generally free to borrow money following the issuance of the order
- g. Cross-undertakings in damages – indemnifies the defendant for losses resulting to the defendant if the claim is unsuccessful, and compensates third parties for losses the order may cause them, and any expenses incurred while complying with the order
- h. Ex parte hearing – generally held in chambers, if granted, the injunction takes effect immediately, but the order must be served on the defendant and third parties implicated by the order. The injunction may be combined with an action *in rem* or with other “ancillary orders.”
- i. Third-party failure to comply - exposes banks, in particular, to the risk of fines, sequestrating of assets, and possible imprisonment of employees.
- j. “Angel Bell” variations – issued by courts to allow a defendant “seeking in good faith to make payments which he considers should made in the ordinary course of business.”<sup>85</sup>

## 1. Canada

As early as 1979, Canada followed the precedent set in the United Kingdom and began authorizing courts to issue *Mareva* injunctions. Canada requires a party to demonstrate a “strong prima facie” case to obtain a *Mareva* injunction, a higher standard than its English counterpart. The Supreme Court of Canada cautioned that the English standards would be adapted and not merely transplanted in the Canadian judicial system. Canada requires the following:

- a. Motion – the injunction is granted by motion, the moving party:
  - a. may be required to provide security if the application is unsuccessful
  - b. must “undertake to abide by any order concerning damages caused by the granting or extension of the injunction”
  - c. must demonstrate that the opposing party has assets in Canada,
  - d. World-wide Injunction – may be requested if assets are outside of Canada
- b. Ex parte interim injunction – may be issued for a period not to exceed fourteen days, if the judge finds that in an urgent case, notice would defeat the purposes of the motion, or is not possible.<sup>86</sup>

## 2. Singapore

To obtain a *Mareva* Injunction, in Singapore, the moving party must demonstrate: (1) a good and arguable case; (2) the opposing party maintains assets in Singapore; or (3)

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<sup>85</sup> *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.

<sup>86</sup> Tetley, 73 Tul. L. Rev. 1895,1953.

requests a world-wide injunction to preserve assets outside Singapore. The moving party must demonstrate that assets are being dissipated, and may present prima facie evidence of fraud and dishonesty to infer that the risk exists.<sup>87</sup>

## CONCLUSION

The use of *in personam* asset-preservation orders in common-law countries illustrates how this procedural mechanism may ensure that assets are not dissipated before a judgment is satisfied. However, a fundamental feature of the UAOPA is the uniform approach to issuing these orders. Without adoption by any other United States state or jurisdiction, it is difficult to assess the potential impacts of adopting it in New Jersey. Modifying the Act to address the concerns raised by the AOC, including: the increased costs of doing business; the disproportionate impact on small businesses; and possible constitutional issues regarding the *ex parte* attachment of assets and informational privacy, will need to be addressed.

Staff seeks guidance from the Commission regarding whether to proceed with additional research or to hold the project at this time.

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<sup>87</sup> 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](http://www.cnplaw.com/en/files/articles/2005/liti/liti_marapr2005_caseupdate_1.pdf).