To: New Jersey Law Revision Commission
From: Jayne Johnson and Alexander S. Firsichbaum
Re: Uniform Asset-Preservation Order Act
Date: October 6, 2014

MEMORANDUM

This Memorandum provides information concerning the amended Uniform Asset-Preservation Orders Act, and additional information requested by the Commission. If the Commission seeks to proceed with this project, Staff will conduct outreach to various stakeholders to prepare a Draft Tentative Report, modifying the UAPOA as directed by the Commission to address the issues and concerns raised in the research and comments received.

SUMMARY

At the March 2013 Commission Meeting, the Uniform Asset-Freezing Orders Act (UAFOA), which creates a pre-judgment, *in personam* order to freeze the assets of a defendant, was first presented by Staff for Commission consideration. Since that time, the Act was amended by the Uniform Law Commission (ULC) and renamed the Uniform Asset-Preservation Orders Act (UAPOA).[1] The ULC published the amended the Act in May 2014; the primary substantive change replaces the term "freezing" with the term "preservation" in the title and throughout the body of the Act.[2] Other changes incorporate the 2013 revisions to the Prefatory Notes made by National Conference of Commissioners on Uniform State Law (NCCUSL), which outlines the historical context that lead the ULC to identify a need for uniformity in this area of the law.[3] The amended Act also incorporated revisions to the Official Comments, emphasizing the protections offered to a party served with an asset-preservation order. [4]

In 2014, the UAPOA was introduced in the District of Columbia. The UAFOA was not enacted in any jurisdiction, but was introduced in North Dakota and Colorado. The American Bar Association approved the UAFOA in February 2013.

BACKGROUND

A. Uniform Act

The UAPOA is designed to create a uniform process for the issuance of asset-preservation orders, which are *in personam* orders that preserve assets from dissipation by imposing a preliminary injunction on the asset owner and collateral restraints upon non-parties,

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[1] *See* 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.
[2] *Id.*
[3] *See id.*
[4] *See id.*

such as the defendant's banking institution.[5]

The UAPOA is designed to respond to the technological advances that allow a defendant to dispose of assets that would satisfy a judgment with the click of a mouse or the push of a button.[6] 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.[7]

The UAPOA is procedural in nature and only applies when the underlying action involves monetary damages.[8] It does not generally apply to consumer debt, family law, probate, trust, or estate matters.[9] The asset-preservation order may be sought at the time underlying action is filed and it remains available while the action is pending.[10]

Before the UAPOA, the primary remedy available to a litigant to preserve assets from dissipation, pending judgment, was an *in rem* order.[11] The order was directed to the attachment of restraints upon the defendant's property, not upon the defendant or third parties.[12] As a consequence, the itemized assets were subject to the control of the court, prohibiting their unauthorized transfer.[13] 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. [14]

The UAPOA creates a new remedy by which an asset-preservation order may be obtained without establishing the intent to hinder, delay, or defraud the plaintiff.[15] Under the provisions of the UAPOA, a party may obtain an asset-preservation order, 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-preservation order will be unable to receive satisfaction of the judgment.[16]

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

> 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

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[5] *Id.*
[6] *Id.*
[7] *See id.*
[8] *Id.*
[9] *Id.*
[10] *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).
[11] N.J. STAT. ANN §2A:26-1, et seq. (West 2013).
[12] *Id.*
[13] *Id.*
[14] *See* UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra* note 1.
[15] *See id.*
[16] *See id.*

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.[17]

B. Case Law

a. Federal

The United States Supreme Court decision in *Grupo Mexicano de Dessarolo v. Alliance Bond Fund, Inc*. prompted the ULC to consider a uniform asset-freezing provision.[18] 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.[19] 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.[20] The Court further stated that the legislature must make the determination about whether to provide federal courts with the power to issue asset-freezing orders. [21]

The Supreme Court mentioned factors that may be considered when drafting an asset-preservation provision:

> 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 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.[22]

Likewise, following the decision in *Grupo*, many jurisdictions concluded that states also lacked the authority to issue asset-freezing orders; while other states determined that the decision was limited only to the federal courts and the power to issue asset-freezing orders remained at

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[17] *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.
[18] *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999).
[19] *Id.*
[20] *Id*.
[21] *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 Legislature).
[22] *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.

the state level.[23] The ULC sought to remedy the lack of uniformity by providing state legislatures with a Uniform Act that authorizes the issuance of asset-preservation orders.[24]

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".[25] 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.[26]

b. State Law – New Jersey Case Law

When this project was first presented to the NJLRC, the Commission authorized further research to determine the current state of New Jersey law. New Jersey follows the rule established in *Delaware River & Bay Authority v. York Hunter Construction*, where the court held 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 (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.[27] York, instead, used the funds to satisfy outstanding debts to relieve the company's mounting financial difficulties. Once the Authority became aware of this, the Authority sued York for conversion and breach of contract.[28] In light of the circumstances, the Authority also sought an order to freeze York's assets, pending judgment.[29]

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."[30] The court stated that a threshold showing must be met before determining whether to issue an injunction.

"[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".[31] The plaintiff "must [also] show that the harm to the

[23] *York*, 344 N.J. Super. at 365.
[24] *See* UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra note* 1.
[25] *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 ").
[26] *See* UNIF. ASSET-PRESERVATION ORDERS ACT, Prefatory Note, *supra note* 1.
[27] *York*, 344 N.J. Super. at 363.
[28] *Id.* at 364.
[29] *Id.*
[30] *York*, 344 N.J. Super. at 370.
[31] *Id.* at 364 (citing *Crowe v. DeGioia*, 90 N.J. 126 (1982)).

plaintiff if the injunction does not issue is more severe than the harm to the defendant if the injunction is granted."[32] The court added that, "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages."[33]

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.[34] State courts are split on this issue, Florida and New York, for example, both look simply at whether a money judgment can be obtained. [35] 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."[36]

With *York*, New Jersey adopted an "intermediate position"[37] applied by the Delaware courts which requires "an independent jurisdictional basis, apart from the insolvency, for equity to intervene."[38] 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.[39] 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.[40]

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.[41]

C. 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

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[32] *Id.*
[33] *Crowe*, 90 N.J. at 132-33.
[34] *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)).
[35]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)).
[36] *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).
[37] *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*)
[38] *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.").
[39] *Id.* at 369.
[40] *Id.* at 370.
[41] *York*, 344 N.J. Super. at 368.

claimants" that must be liberally construed. [42] The court in *York* cautioned that a pre-judgment attachment must be regarded "as extraordinary remedy"[43] which "may only be issued where there is a probability of success on the merits and the enumerated statutory criteria are satisfied."[44] Consequently, "both the statute and the court rules proscribing the procedure for seeking pre-judgment attachment must be strictly construed."[45]

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.[46] 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.[47]

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."[48] In doing so, the "plaintiff is entitled to all inferences fairly deducible from his affidavit, and all conflicts will be resolved in his favor."[49]

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

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[42] N.J. STAT. ANN. §2A:26-1 (West 2013)(describing the remedial nature of the 2A:26-1 to -16).; *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).

[43] *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).

[44] *Estate of Balgar*, 399 N.J. Super. at 439.

[45] *Id.* (quoting *Tanner Associates, Inc. v. Ciraldo*, 33 N.J. 51, 53 (1960)).

[46] N.J. STAT. ANN. §2A:26-2; *see id.*

[47] *See* N.J.S. 2A:26-2.

[48] *Estate of Balgar*, 399 N.J. Super. at 440.

[49] *Tanner Associates,* 33 N.J. at 64.

terrorism."[50] 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."[51] "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."[52] Unless extended for good cause, this type of asset freeze "expires 24 months after the date of the court's initial attachment order."[53]

Additionally, an asset freezing order may be issued to collect alimony and child support.[54] "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.[55]

The New Jersey Rules of Court feature more detailed procedures regarding attachment and sequestration.[56] 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.[57] 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."[58] 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."[59]

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."[60] "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."[61]

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…."[62] The plaintiff must serve the defendant with

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[50] N.J. STAT. ANN. §2C:66-3(a).
[51] N.J. STAT. ANN. §2C:66-3(c).
[52] N.J. STAT. ANN. §2C:66-8.
[53] N.J. STAT. ANN. §. 2C:66-7.
[54] N.J. STAT. ANN. §. 5:7-5(f).
[55] *Id.*
[56] *See* N.J. CT. R. §. 4:60-1 to -19.
[57] R. 4:60-5(a).
[58] *Id.*
[59] *Id.*
[60] R. 4:60-5(b).
[61] R. 4:60-5(c).
[62] R. 4:60-6.

notice of the attachment within one week after the sheriff returns with the attached property.[63] 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.[64] 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."[65]

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."[66] "The court may order sequestration of defendant's real and personal estate" as needed to satisfy a judgment or order obtained against the defendant.[67]

D. Issues and Concerns

a. *Winberry* Analysis

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*.[68] The analysis involves determining whether the orders must be considered by the courts because they 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."[69] 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, we then have inquired into 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.'" [70]

In New Jersey, judicial action concerning asset-preservation order is not complete, in fact, the UAPOA seeks to extend judicial power rather than contract it. Courts are able to exercise discretion to deny requests if the court determines the facts do not warrant an *in personam*, asset-preservation orders. 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.[71] The UAPOA appears as though it would

[63] R. 4:60-9(a), *see also* R. 4:60-9(b) (regarding contents of notice).
[64] R. 4:60-11(a).
[65] R. 4:60-11(b).
[66] R. 4:60-13.
[67] R. 4:60-19.
[68] *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)).
[69] *Winberry* at 247-48.
[70] *Ferriera* at 163 (Zazzali, J., concurring in part and dissenting in part) (quoting *In re Salaries for Prob. Officer*s, 58 N.J. 422, 425 (1971)).
[71] *Id.* (quoting *Salaries for Prob. Officers*, 58 N.J. at 391).

withstand a *Winberry* challenge because it is a procedural mechanism that arguably achieves a legitimate legislative goal and does not interfere with judicial prerogatives.

b. 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."[72] 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."[73]

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 practice. Staff will also research the following concerns raised by commenters: (1) the scope and breadth of the Act, arguably it is too overreaching, applying to all defendants without requiring a threshold showing or other means to narrow the application of the Act; (2) the Act is likely to have a disproportionate impact on small, poorly capitalized businesses, particularly those businesses that are impacted by the restriction which prevents placing a mortgage on the assets of a defendant subject to an asset-preservation order; (3) the focus of the Act on the sufficiency of the defendant's assets to satisfy judgment; (4) the expense of obtaining a bond under Section 4; (5) the vague terms listed in Section 4, without providing an adequate definition, specifically "ordinary business expense" , "ordinary living expense", and "legal representation"; (6) the feasibility of a nonresident challenging an asset-preservation order before the New Jersey courts; and (7) the increase in the cost and expense of litigation in New Jersey which will drive up the cost of doing business in New Jersey.

CONCLUSION

If the Commission seeks to proceed with this project, Staff will conduct outreach to various stakeholders to prepare a Draft Tentative Report, modifying the UAPOA as directed by the Commission to address the issues and concerns raised in the research and comments received to date.

[72] *Id.* at 368-69.
[73] *Id.*