

MINUTES OF COMMISSION MEETING

January 15, 2015

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr. and Commissioner Andrew Bunn. Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner Ronald K. Chen and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner John Oberdiek.

Also in attendance were: Jim Appleton, President of the New Jersey Coalition of Automotive Retailers, Alida Kass, Esq., representing the N.J. Civil Justice Institute, Steven Richman, Esq., representing the ABA International Law Section, and Stephen Foley, Esq., representing the New Jersey Defense Association.

Minutes

The vote on the Minutes of the January meeting was carried to the February meeting and Staff was asked to reprint the Minutes and redistribute them on the February filing day.

Uniform Asset-Preservation Orders Act

Jayne Johnson presented a Memorandum discussing the Uniform Asset-Preservation Orders Act (UAPOA). Ms. Johnson explained that the issues addressed by the UAPOA were originally considered by the Commission at the March 2013 meeting in discussions of the UAPOA's predecessor, the Uniform Asset-Freezing Orders Act. Ms. Johnson stated that the Commission held the UAPOA project at the October 2014 meeting to allow further discussion with members of the bar who provided comment at the initial stages of the project. Present to discuss the uniform act today were Mr. Steven Richman, Esq., ABA International Law Committee and ABA Advisor to the ULC Drafting Committee, and Mr. Stephen Foley, Esq., representing the New Jersey Defense Association.

Ms. Johnson noted that the UAPOA was renamed to more accurately reflect the nature of these asset-preserving actions. Similar to the Uniform Asset-Freezing Orders Act, the UAPOA would provide *in personam* injunctive relief provided that a petitioner can prove that the case has a substantial likelihood of success and that the defendant's assets may dissipate before the issuance of a final judgment. She further explained that the UAPOA offers protection to defendants by permitting them to post a surety bond and/or obtain court approval to pay ordinary, business or legal expenses.

Ms. Johnson mentioned that, based upon feedback from interested stakeholders, concerns regarding the UAPOA include: (1) the potential increased use of a now selectively used tool; (2) the possibility of circumventing the discovery process; (3) the potential harm to small businesses; and (4) the fact that these situations are already adequately addressed by N.J.S. 2A:26-2 attachment orders.

Chairman Gagliardi questioned whether the UAPOA has been enacted in any U.S. jurisdictions. Ms. Johnson responded that it has not been enacted in any State, but has been introduced in the District of Columbia.

Ms. Johnson introduced Mr. Stephen Foley, Esq., presenting commentary on behalf of the New Jersey Defense Association. Mr. Foley detailed his background as a civil litigator for the past 30 years, both defending civil litigation and representing insurance carriers. He noted that he was contacted by Staff because of an article the association published when the Commission was considering the Uniform Asset-Freezing Orders Act.

Mr. Foley advised the Commission that his clients strongly oppose the enactment of the UAPOA in New Jersey. In particular, he maintained that the UAPOA would complicate litigation, add an unwarranted level of judicial involvement and afford plaintiffs rights not ordinarily available until judgment. Based upon his practice experience, Mr. Foley discussed cases in which the plaintiff's ability to utilize the remedies provided by the UAPOA would have presented a problematic and potentially unfair result. Mr. Foley also discussed that the UAPOA defines an asset as anything subject to ownership or an interest therein. He questioned whether an asset (such as a house) damaged while defendant is subject to an asset-preservation order would be prevented from being repaired or whether plaintiff would potentially have an interest in the insurance proceeds.

Mr. Foley suggested that it appears that the UAPOA's presumption is for asset preservation and the entry of these orders. The defendant would have the burden of proof to convince the court to dissolve the order. While the UAPOA permits defendant to post a bond or request expenses, it does not provide a definition for living, business, or legal expenses, which could be burdensome for a defendant.

Mr. Foley stated that in reviewing the UAPOA's comments, it appears that existing remedies for pre-judgment attachment are equitable and usually involve fraud on defendant's part. Yet, in the UAPOA's comments, it does not appear that the Act requires a fraudulent purpose in dissipation. "Dissipate" is defined as taking an action to defeat satisfaction. Mr. Foley asserted that he would read that as applying to acts which have intent to dissipate. He stated that this inconsistency seems like a drafting disconnect and suggested that existing remedies already adequately address fraudulent dissipation and that, in his day-to-day practice, this type of dissipation has not been an issue. As a result, he expressed the concern that the UAPOA may create more problems than it solves.

Commissioner Bunn, however, indicated that he does see this type of dissipation in his practice, noting that in certain circumstances it might be necessary for a court to stop a defendant from spending money and freeze a defendant's assets. He acknowledged that there were drafting issues with the UAPOA, but asked whether Mr. Foley could think of ways in which to modify the language to prevent wrongful conveyances, and to allow a wronged plaintiff a judicial remedy, without giving rise to the potential harms that were of concern to Mr. Foley. Mr. Foley said that he was concerned about the issue of whether something is a "wrongful" dissipation, suggesting that the UAPOA seems to mainly ensure that assets exist in the event of a judgment. He also expressed concern with the issue of liquidated and unliquidated damages and how you

determine which creditor takes priority. Commissioner Bunn asked whether constructive trusts should be available and Mr. Foley replied that he would want a clearer standard for the imposition of a constructive trust. He asserted that the “substantial likelihood of success” standard is vague enough to be interpreted by judges differently and will be adjudicated on the basis of competing affidavits.

Ms. Johnson then introduced Mr. Steven M. Richman, Esq., from the ABA International Law Committee and an ABA Advisor to the ULC Drafting Committee. Mr. Richman explained that he was involved with the drafting of the UAPOA for years and summarized the history of the Act, explaining that the ULC commenced this project after the United States Supreme Court ruling in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, which held that federal courts do not have jurisdiction to issue an injunction preventing the dissipation of assets. In that case, the defendant’s assets were being spent in a manner that was not wrongful, and Mr. Richman noted that federal courts are split as to whether lack of assets to satisfy a judgment constitutes an irreparable harm. He stated that the ULC sought to provide jurisdiction for courts to issue pre-judgment injunctions in appropriate circumstances.

Mr. Richman explained that the British concept of an *in personam* remedy was instructive. British courts, through what has become termed a “*Mareva* injunction,” have the authority to enjoin asset transfers globally and hold individuals in contempt for failure to comply. The common law jurisdictions of England, Australia, Canada and perhaps New Zealand, permit courts to address the issue of money dissipating prior to final adjudication. The UAPOA provides a mechanism for cross-border recognition of the freezing order because money can move rapidly between jurisdictions.

Mr. Richman noted that an attachment order can only be issued against property in New Jersey. He mentioned that the ULC has discussed some of the issues raised by Mr. Foley at length and that drafting issues can be addressed at the state level. He also stated that the UAPOA is not a consumer bill; rather, it is intended to operate between businesses. Addressing Mr. Foley’s concern that the UAPOA’s effects are not limited to wrongdoers, Mr. Richman maintained that ultimately judges serve as gatekeepers, as they do with other injunctive remedies. New Jersey courts considered this issue in *Delaware River & Bay Authority v. York Hunter Construction* but without statutory codification, court interpretations may vary from case to case. Mr. Richman further explained that businesses can already be shut down through attachment actions and that a business’ ability to raise capital can already be thwarted by a receivership petition, a potentially more draconian remedy.

Chairman Gagliardi noted that before discussing proposed modifications to the UAPOA, the Commission must first decide whether it wishes to consider the UAPOA at this time.

Commissioner Bunn stated that it is an interesting topic, though he was unsure whether or not it is appropriate at this time. He recognized that there are problems unresolved by current law and could see the need for some type of legislation, but added that before making a decision, he would like to know more about the *Mareva* injunctions used in Britain, including the circumstances under which they are granted or denied. Commissioner Bertone agreed, stating that she also saw the need for something in this area and would like to receive more information.

Commissioner Bell stated that, while he had no strong feelings either way and would be interested in hearing additional information, it may ultimately be appropriate to defer to the AOC's preference against enactment of the UAPOA.

Chairman Gagliardi noted the AOC's recommendation against enactment and asked what other individuals or organizations have been contacted for input. Ms. Johnson responded that the Business Law Section of the New Jersey State Bar Association is currently considering the UAPOA and Mr. Richman added that the New Jersey State Bar Association is sending it out for additional comment.

Chairman Gagliardi said the Staff should obtain input from these other interested entities as to whether to undertake this project and, if so, whether it would be appropriate to modify the UAPOA to address some of the issues identified at this meeting. In the interim, he requested that Staff perform additional research in response to Commissioner Bunn's request. He asked whether this met with the Commission's approval and all responded affirmatively.

Chairman Gagliardi thanked the commenters for their presentations and assured them that they will be notified when the UAPOA is scheduled for further discussion.

Driver's License – Penalties, N.J.S. 39:3-10

Laura Tharney briefly explained that the Draft Tentative Report provided to the Commission proposed revisions to N.J.S. 39:3-10 consistent with the determination of the Court in *State v. Carreon*, that, upon conviction for driving without a license, drivers who have never been licensed in this or any other state may be fined or imprisoned, but not both. Ms. Tharney said that the revisions to the statute included some structural modifications to the paragraph in question in an effort to enhance the clarity of the statute.

The Tentative Report was released on motion of Commissioner Bunn, seconded by Commissioner Bell, and unanimously approved by the Commission.

Franchise Practices Act

Laura Tharney indicated that, initially, the focus of the project was on the case law addressing the presumptive invalidity of the existing statutory provisions pertaining to forum-selection clauses, indications that the presumption of invalidity was not limited to such clauses in franchise agreements pertaining only to motor vehicle franchises, and the case law finding unconstitutional restrictions on the use of arbitration in franchise agreements. She added that, during the course of Staff's research in this area, other language was identified that could benefit from revision – specifically, the potentially confusing \$35,000 gross sales threshold found in N.J.S. 56:10-4 and discussed by the Court in *Tynan v. General Motors Corporation*. Ms. Tharney explained that, if it was acceptable to the Commission, Staff could incorporate the draft language found in the Gross Sales Threshold Memorandum into the Tentative Report in the interest of obtaining comment on that issue as well.

Alex Firsichbaum addressed a question posed by the Commission at the last meeting regarding the definition of “franchise,” saying that, based on further research, Staff did not recommend a change to the current language of the statute. Also, regarding the gross sales requirement, the project included language already used by the courts.

Jim Appleton, President of the New Jersey Coalition of Automotive Retailers, objected to proposed revisions regarding motor vehicle franchises and referred to a letter he said had been recently sent to the Commission. Alida Kass, Esq., of the N.J. Civil Justice Institute, disagreed that the New Jersey Supreme Court had made a broad determination regarding trial by jury in actions involving franchises and also objected to the deletion of all references to “motor vehicle franchises” from the statutory language, saying that it would cause problems.

Commissioner Bunn moved to release the Tentative Report containing both the initially proposed revisions and those pertaining to the gross sales threshold and the motion was seconded by Commissioner Bell and passed unanimously. Chairman Gagliardi thanked the commenters for their preliminary feedback and explained that the Tentative Report was being released in order to attract additional comments.

Collateral Consequences of Conviction / Rehabilitated Convicted Offenders Act

Mark Leszczyszak brought to the Commission’s attention certain key issues regarding the Rehabilitated Convicted Offenders Act (RCOA), explaining that Staff had prepared a Draft Tentative Report in the hope of obtaining comment on the various issues. Areas of concern include the bifurcated nature of the act, which was enacted in 1968 and later amended in 2007. Although it contains only a modest number of sections, the RCOA includes two definitions sections, and Staff recommends consolidation of those sections.

Another area of concern is the determination of when an agency or other entity is exempt from the provisions of the Act. Current statutory language exempts law enforcement agencies from the provisions of the Act without distinguishing between law enforcement activities and licensing functions of those agencies. There remains a question as to whether the characterization as a law enforcement agency exempts that entire organization from the RCOA or whether a more nuanced treatment might be appropriate. Proposed section 2A:168B-3, subsection e., which concerns the act’s application, attempts to distinguish law enforcement activities from licensing functions of agencies pursuant to the court’s reasoning in the *Schmidt* case. Staff proposed revising the definition of “public employment” so as to specify which positions are excluded from its meaning, referencing the broad and inclusive definition of “law enforcement officer,” provided in N.J.S. 43:15A-97.

Mr. Leszczyszak also discussed the inconsistency between the fact that the RCOA is designed to remove the stigma of a conviction but has been interpreted as not removing from consideration the conduct underlying conviction. Another area in which Staff is seeking comment is the proposed removal from the statute of section 2A:168A-4, regarding addiction and drug use, since that section appears to focus on conduct that is not criminal and, as a result, may be inconsistent with the current purposes of the Act.

Chairman Gagliardi asked whether, to this time, Staff had worked with anyone outside the Commission, to which Mr. Leszczyszak replied in the negative, explaining that Staff had focused initially on establishing the scope of the project and preparing a document for potential circulation. Chairman Gagliardi suggested that, because of the potential sensitivity of the subject matter and the anticipated impact of some of the proposed changes on law enforcement agencies, the Commission would prefer that some preliminary comment be obtained from stakeholders before releasing a Tentative Report.

Commissioner Bunn asked whether Staff's goal was to define "criminal conviction." Mr. Cannel responded that the proposed definition of "criminal conviction" expands the scope of the existing statute since it includes references to municipal court convictions. Ms. Tharney explained that this was one of the areas in which Staff was seeking comment to determine if such an expansion of the definition was appropriate and that Staff will seek preliminary comment pursuant to the direction of the Commission.

Uniform Protection of Genetic Information in Employment Act

Vito Petitti explained that in May 2014 the Commission released the Tentative Report proposing revisions of New Jersey's Genetic Privacy Act (GPA) to bring it in line with the full range of protections offered by the Uniform Protection of Genetic Information in Employment Act (UPGIEA). The Commission later directed Staff to consider whether the revisions should include reorganizing the statute for clarity.

Mr. Petitti explained that he consulted with the New Jersey Office of Legislative Services, Legislative Counsel (OLS) about reorganizing the statute and was advised to preserve the existing statutory scheme because the first ten sections of the GPA are listed in sequential order and, apart from the amendments to the Law Against Discrimination, the remaining sections address insurance mandates in corresponding provisions of New Jersey statutory law. The OLS confirmed that the existing structure of the GPA is consistent with other provisions involving insurance mandates.

The Commission authorized broader distribution of the Tentative Report, maintaining the existing organization of the GPA.

Uniform Foreign-Country Money Judgments Recognition Act

Mr. Petitti informed the Commission that the Uniform Law Commission promulgated the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) in 2005 as an update to the 1962 Uniform Foreign Country Money Judgment Recognition Act adopted by the New Jersey Legislature in 1997. He explained that, to this time, the New Jersey Legislature has neither considered nor enacted the UFCMJRA but that 20 other U.S. jurisdictions have done so.

Mr. Petitti discussed two relevant New Jersey cases since the release of the UFCMJRA, noting that neither appeared to be conflict with the act. He requested the Commission's guidance as to whether to enact the UFCMJRA in its entirety, or to simply revise existing New Jersey law

by modifying a few of the provisions. Mr. Petitti indicated that Staff's recommendation would be to revise the existing law to incorporate the additional more specific provisions of the UFCMJRA. Adding certain provisions of the UFCMJRA to existing statutes could make New Jersey's law more clear and distinct. In particular, the UFCMJRA contains a statute of limitations and a burden of proof provision that could be beneficial in New Jersey. Mr. Petitti also indicated that, in preparing a Draft Tentative Report, staff would further research the 2005 Hague Convention on Choice of Court Agreements treaty that has been signed, but not ratified, by the United States to determine the effect it could have on the enforcement of judgments. Mr. Petitti further explained that the UFCMJRA adds a process for the enforcement of these judgments whereas New Jersey law presently does not. Commissioner Bell stated that such a process could have *Winberry* implications. Mr. Petitti agreed and stated that the guidance of court rules would be included in any statutory proposal.

Commissioner Bunn asked whether Staff was proposing to take some of the UFCMJRA's concepts and incorporate them into New Jersey law. Laura Tharney replied affirmatively. Commissioner Bell inquired whether New Jersey law is different than the 1962 Uniform Act. Mr. Petitti responded that New Jersey's existing law is similar to the 1962 Uniform Act but somewhat different than the UFCMJRA. Commissioner Bell asked whether it would be more appropriate to recommend adoption of the UFCMJRA in its entirety, rather than modifying existing New Jersey law. Mr. Petitti stated that was also a useful approach. Ms. Tharney explained that Staff considered whether limited modifications to existing law might be more palatable than proposing an entirely new act. Commissioner Bell wondered whether the UFCMJRA contains some areas that are beneficial but others that are less so. Mr. Petitti replied that Staff would not update areas where the UFCMJRA and New Jersey law are substantially similar.

Commissioner Bunn stated that a uniform approach might be best given the possibility that a foreign judgment may be collectable in multiple states. Uniformity would allow a company with a judgment to more expeditiously and affordably enforce the judgment across the U.S. He concluded that a uniform act would be preferable unless it does violence to New Jersey's existing case law in the area. Chairman Gagliardi agreed with Commissioner Bunn's comments and further suggested that the UFCMJRA's enactment in 20 states indicates some merit in uniformity so it is probably better to recommend adoption of the UFCMJRA than patching existing N.J. law. Commissioner Bertone agreed with Commissioner Bunn's comments and thought his hypothetical was an excellent example of the benefits of uniformity.

The Commission requested that Staff move forward with a recommendation that the 2005 Uniform Act be enacted in New Jersey in its entirety in the interest of uniformity and consistency among the states.

Series Limited Liability Company Statutes

In response to an inquiry regarding Series Limited Liability Companies at the last Commission meeting, Alexander Firsichbaum conducted research and prepared a Memorandum addressing Series LLCs for the Commission.

He briefly explained the origins and the history of the Series LLC, explaining that the concept began with a Delaware statute and, in more recent years, was adopted in approximately a dozen other states in various forms, with an increase in enactments in more recent years as the business form seemed to become more developed and more familiar.

Mr. Firsichbaum explained that the Uniform Law Commission is working in this area of the law, with the Series of Unincorporated Business Entities Act having had its first reading in the 2014 Annual Meeting in July. He suggested that it may be beneficial to monitor the work of the ULC and enactments in other states for further developments and potential revision of the New Jersey statutes.

Annual Report 2014

Laura Tharney explained that all requested modifications to the draft Annual Report for 2014 received before the time of the meeting had been made, and asked if the Commissioners had any other requests for changes. None were presented and the Commission voted unanimously to release the Annual Report for 2014, submit it to the Legislature pursuant to the Commission's statutory mandate, and distribute it.

Miscellaneous

Ms. Tharney provided a brief legislative update, noting the addition of the Uniform Interstate Depositions and Discovery Act to the Commission's "enacted" list.

The Commission briefly considered and informally approved the meeting dates proposed for 2015.

The Commission meeting was adjourned on the motion of Commissioner Bunn, seconded by Commissioner Bell.