

## THE UNIFORM ASSET-PRESERVATION ORDERS ACT: QUIETING THE ALARMS WITH LESSONS FROM ABROAD

*Alexander Firsichbaum\**

### INTRODUCTION

One of the best feelings for a plaintiff's trial attorney might be the award of a large money judgment, not only for the fee, but for the feeling that the hard work has paid off and the client has received just compensation. The celebratory mood will quickly turn sour, however, upon learning that the defendant has quietly dissipated all of its assets beyond the court's territorial jurisdiction in anticipation of an adverse money judgment. While the attorney might be able to seek relief under a fraudulent transfer statute, this often may not bring all the money back. A prudent attorney might have sought a pre-judgment attachment order to keep known assets where they are, but an adversary with assets already located in a different state or country will be hard to beat in the world of online banking. Even the Supreme Court has acknowledged that "increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before . . . ."<sup>1</sup>

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\* Litigation Associate with Orloff, Lowenbach, Stifelman & Siegel. The author is a 2016 graduate of Rutgers Law School and a former Executive Editor of the *Rutgers University Law Review*. The author would like to thank his wife, Megan, for patiently listening to his thoughts on civil procedure, and his friends at the New Jersey Law Revision Commission for their invaluable support and guidance.

1. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 338–39 (1999) (Ginsberg, J., concurring in part and dissenting in part) (citing Lynn Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 32–38 (1996)). One commentator has observed that "the movement of money has evolved from the physical transfer of notes in satchels to transfer by electronic transmission, economic, governmental, and legal groups interested in the proceeds of those transfers have sought to adapt to keep pace . . . [with] the problems created by the explosion of liquidity." James R. Theuer, *Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead?*, 25 N.C. J. INT'L L. & COM. REG. 419, 420 (2000).

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In 2012, the Uniform Law Commission sought to provide a solution by creating the Uniform Asset-Freezing Orders Act (“UAFOA”), which was revised and renamed two years later as the Uniform Asset-Preservation Orders Act (“UAPOA”).<sup>2</sup> The UAPOA’s prefatory note succinctly explains that “[a]n asset-preservation order is injunctive relief, applying *in personam*, which preserves assets by preventing their dissipation so that sufficient assets will be available to satisfy an existing or future judgment. Because an asset-preservation order is in the nature of injunctive relief, violations of the order are punishable by contempt.”<sup>3</sup> In other words, a civil defendant would be enjoined from disposing assets regardless of the location of those assets or whether their existence is known.

In Part I, I will provide a brief background of the UAPOA. In Part II, I will focus on the three categories of expenses the UAPOA provides for funds that may be released from an asset-preservation order. As much of the debate regarding the UAPOA has focused on the practical feasibility of providing for these necessary limitations, I will examine cases from England, Canada, and New Zealand for guidance on how these exemption categories have been interpreted and applied.

### I. A BRIEF BACKGROUND OF THE UAPOA

Steven Richman, a major advocate of the UAPOA, explained that when a party finds at the end of litigation that “there is no pool of funds or assets left because while the matter was pending, the defendant dissipated its assets. This 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.”<sup>4</sup> Because the UAPOA covers situations where the dissipation is not *prima facie* fraudulent, its scope provides a more expansive remedy than is currently provided by many jurisdictions.<sup>5</sup> In 2013, the American Bar Association endorsed the Act as an

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2. See UNIF. ASSET-PRES. ORDERS ACT (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2014); UNIF. ASSET-FREEZING ORDERS ACT (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2012).

3. UNIF. ASSET-PRES. ORDERS ACT, Prefatory Note (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2014).

4. *The Uniform Asset Freezing Order Act of 2013: Hearing on B. 20-218 Before the Comm. on the Judiciary & Pub. Safety*, 20 D.C. L.B. 3 (D.C. 2013) (statement of Steven M. Richman, American Bar Association Advisor to the Uniform Law Commission).

5. See UNIF. ASSET-PRES. ORDERS ACT § 4 (NAT’L CONFERENCE OF COMM’RS OF UNIF.

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“appropriate” mechanism for States to address this problem.<sup>6</sup>

As of the time of this writing, neither the UAFOA nor the UAPOA has yet been enacted in any state, but at least one version has been formally introduced in the legislatures of Washington, DC,<sup>7</sup> Colorado,<sup>8</sup> Alabama,<sup>9</sup> and North Dakota.<sup>10</sup> The New Jersey Law Revision Commission has also been working on a draft bill.<sup>11</sup>

The UAPOA was largely inspired by the United States Supreme Court decision in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, which considered whether federal courts may issue *in personam* preliminary injunctions that prevent a party from dissipating its assets before final adjudication of a claim for only monetary damages.<sup>12</sup> The Court noted that supporting factors included:

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.<sup>13</sup>

While the Court held that the judiciary did not yet have constitu-

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STATE LAWS 2014).

6. ABA Proposed Res. 102A, at 5 (Feb. 11, 2013), [https://www.americanbar.org/content/dam/aba/publishing/abanews/13606000532013\\_hod\\_midyear\\_meeting\\_102a.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/abanews/13606000532013_hod_midyear_meeting_102a.authcheckdam.pdf).

7. Leg. B. 20-0218, 20th Council (D.C. 2013).

8. H.B. 13-1213, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

9. S.B. 196, 2015 Leg., Reg. Sess. (Ala. 2015).

10. S.B. 2123, 63d Leg. Assemb. (N.D. 2013).

11. See New Jersey Law Revision Commission, Final Report Relating to Uniform Asset-Preservation Orders Act (Feb. 6, 2017), <http://www.lawrev.state.nj.us/UAFOA/uapoaDFR020617.pdf>.

12. 527 U.S. 308, 310 (1999).

13. *Id.* at 330 (citing Brief for United States as Amicus Curiae Supporting Respondents, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (No. 98-231)).

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tional authority to issue such orders,<sup>14</sup> it noted that the legislature could provide that authority if it so desired.<sup>15</sup> The UAPOA is thus an answer to this invitation by the Uniform Law Commission.

The debate regarding the desirability of the UAPOA is already highly informed because the remedy provided by the Act has been in regular use around the world since the famous English case, *Mareva Compania Naviera SA v. International Bulk Carriers SA*, was decided in 1975.<sup>16</sup> The injunction authorized in that case has been highly influential on the UAPOA, the provisions of which clearly draw on *Mareva's* progeny.<sup>17</sup> Subsequently known as the “*Mareva* injunction,” this remedy is now widely applied in other common law countries, including Canada,<sup>18</sup> Australia,<sup>19</sup> and New Zealand,<sup>20</sup> and this Commentary will apply the experiences of these jurisdictions to understand the implications of the UAPOA’s provisions.

### II. THE EXCEPTION FOR ORDINARY EXPENSES

While Section 4(d) of the UAPOA empowers a court to issue an order permitting a party subject to an asset-preservation order to pay its “ordinary living expenses, business expenses, and legal representation,” these critical terms are not defined, which might result in courts being forced to micromanage a party’s assets throughout litigation.<sup>21</sup> Interpretation of these exceptions need not be confined to theoretical speculation, however, as they were inherited from the foreign jurisdictions already utilizing this tool. Recognizing that plaintiffs in pending litiga-

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14. *Id.* at 332–33 (quoting 1 COMMENTARIES ON EQUITY JURIS. § 19, at 21).

15. *Id.* at 333.

16. [1975] 2 Lloyd’s Rep. 509 (Eng.).

17. UNIF. ASSET-PRES. ORDERS ACT prefatory note 2–3 (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2014).

18. *See Chitel v. Rothbart*, [1982], 141 D.L.R. 3d 268, para. 63 (Can. Ont. C.A.) (“The *Mareva* injunction is here and here to stay and properly so[.]”).

19. *See Jackson v Sterling Indus. Ltd.* (1987) 162 CLR 612, 623 (Austl.) (“As a general proposition, it should now be accepted in this country that ‘a *Mareva* injunction can be granted[.]’” (emphasis added) (internal citation omitted)).

20. *See Chesterfield Preschools Ltd. v. Comm’r of Inland Revenue* HC Christchurch CIV 2004-409-001596, 13 September 2005 at [21] (N.Z.) (“*Mareva* orders are orders in personam, arising out of the equitable jurisdiction inherent in the High Court [of New Zealand].”).

21. UNIF. ASSET-FREEZING ORDERS ACT § 4(d) (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2012).

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tion should not be accorded the same rights as secured creditors, English courts have consistently upheld the principle that a defendant should be “allowed by the court to employ such assets for the purpose of his business or, where appropriate, to pay living expenses or legal fees.”<sup>22</sup>

Discovery of the defendant’s assets is typically made as part of the application for the order so that the court can determine the amount of assets that need to be released for these purposes. Predictably, the amount of assets to be exempted from such an order can be a source of great contention.<sup>23</sup> If an asset-preservation order captures too much of a party’s assets, that party may be under significant pressure to settle merely to get out from the injunction’s tight grip. A Canadian court aptly observed that a plaintiff could “tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial.”<sup>24</sup> Consequently, the *Mareva* injunction has been famously labeled by English courts as a “draconian remedy” and a “‘nuclear’ weapon[]” of the law.<sup>25</sup>

For direction on how such exceptions might be applied in states considering enacting the UAPOA, it is useful to examine how jurisdictions that have experience with the *Mareva* injunction have walked the line for each of the three categories of expenses.

### A. Living Expenses

The UAPOA provides that an asset-preservation order can be modified to enable a party to pay “ordinary living expenses,”<sup>26</sup> yet fails to indicate how such expenses are to be determined. One commentator appropriately questioned whether an individual would be permitted to pay for “a new roof on a house, a new car to get to work, a summer vacation for the family, [or] a trip to see grandparents over a holiday . . .”<sup>27</sup>

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22. *Atlas Mar. Co. S.A. v. Avalon Mar. Ltd.* [1991] 4 All ER 769 (Eng.).

23. *See, e.g., Aetna Fin. Serv. Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, paras. 2–4 (Can.).

24. *Id.* at para. 43.

25. *Bank Mellat v. Nikpour*, [1985] F.S.R. 87, 92 (Donaldson L.J.) (Eng.).

26. UNIF. ASSET-PRES. ORDERS ACT § 4(d) (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2014).

27. Letter from Steven N. Puiszis, Treasurer-Secretary, DRI – The Voice of the De-

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In *PCW (Underwriting Agencies) Ltd. v. Dixon*,<sup>28</sup> an English court took a stab at the problem. The defendant was the chairman of a very successful underwriting company and “known to be wealthy.”<sup>29</sup> Despite requesting £1,000 per week to support his family, the court ordered that only £100 per week be released from a *Mareva* injunction for living expenses.<sup>30</sup> The plaintiff argued that the defendant’s money had been improperly acquired, and he had no right to use other people’s money to pay his own bills.<sup>31</sup> On appeal, the court reversed and released the higher amount, finding the original order “wholly unrealistic if [the defendant] was to maintain his standard of living” given his high income.<sup>32</sup> The court further added that it would be improper for a defendant to be “compelled to reduce his standard of living, to give up his flat or to take his children away from school, in order to secure what is as yet only a claim by the plaintiff.”<sup>33</sup> Admirably fulfilling his role as a gatekeeper, Justice Lloyd found the original, unreasonably small exemption for living expenses to be coercive, explaining that “until the matter is tried[, the plaintiff] is not entitled to exercise undue pressure on the defendant” and that “if the figure £100 a week was maintained it could only result in the defendant’s capitulation.”<sup>34</sup>

To calculate living expenses for a party’s dependents, New Zealand draws on preexisting standards. In *Solicitor-General v. Panzer*,<sup>35</sup> for example, the court simply referred to New Zealand’s Child Support Act for guidance on the appropriate calculation.<sup>36</sup> American courts have plenty of experience with determining a child’s necessary living expenses through similar child support laws, and they could simply apply a similar analysis.

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fense Bar, to Jayne J. Johnson, Counsel, N.J. L. Rev. Comm’n., 5 (Sept. 10, 2014) (on file with author) [hereinafter Puiszis Letter].

28. *PCW (Underwriting Agencies) Ltd. v. Dixon*, [1983] BCLC 105 (Lloyd J.) (Eng.).

29. *Id.*

30. *Id.*

31. *See id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. [2001] 1 NZLR 224 (HC) (N.Z.). Although this was a criminal case where assets derived from the proceeds of illicit drug sales were restrained pursuant to the Proceeds of Crime Act 1991 § 42(2) (N.Z.), the order was conditioned upon the defendant having access to funds for “reasonable living expenses.” *Id.* at [9].

36. *See id.* at [34].

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One major cause for concern against the UAPOA is the potentially devastating effect that it may have on businesses.<sup>37</sup> In the late nineteenth century, legal scholar Frederick Wait considered a similar proposition and opined:

A rule of procedure which allowed any prowling creditor, before his claim was definitely and finally established by formal judgment, and without reference to the character of his demand, to file a bill to discover equitable assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, it is asserted would, manifestly, be susceptible of the grossest abuse. A more powerful weapon of oppression of a debtor, could not be placed at the disposal of unscrupulous litigants.<sup>38</sup>

Opponents have suggested that application to “smaller companies 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>39</sup> To avoid irreversible damage to operations, businesses could be forced to sacrifice legitimate defenses and stipulate higher damages simply to survive the suit.<sup>40</sup> The lack of definition has led opponents to be concerned about whether a business restrained by such an order will “be permitted to mortgage or sell an asset to raise needed capital, hire new employees, incur debt to purchase new equipment, and expand or move into new markets[.]”<sup>41</sup>

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37. *But see* Letter from James C. McKay, Jr., Senior Assistant Att’y Gen. for the District of Columbia, to the Honorable Tommy Wells, Chairperson, Committee on the Judiciary and Pub. Safety for the Council of the District of Columbia 3 (July 22, 2013), [http://www.americanbar.org/content/dam/aba/events/international\\_law/2014/11/2014-aba-north-america-regional-forum/PreJudgmentAssetFreezing.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/international_law/2014/11/2014-aba-north-america-regional-forum/PreJudgmentAssetFreezing.authcheckdam.pdf) (highlighting the advantage to businesses of strengthening their ability to collect on a judgment).

38. FREDERICK S. WAIT, A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS’ BILLS 140–41 (3d ed. 1897).

39. Letter from Mike Ogborn, President, Colo. Trial Lawyers Ass’n, to Claire Levy, Representative of House Dist. 13, Colo. House of Representatives (2013) (on file with author).

40. *Id.*

41. Puiszis Letter, *supra* note 27, at 5.

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The Official Comments to the UAPOA indicate that such expenses include “the payment of currently existing debts and the costs of defending the claim[.]” but provide no further explanation.<sup>42</sup> With more experience with the issue, English courts have developed a balancing test whereupon the injunction must not be “an instrument of oppression which would bring about the cessation of ordinary trading[.]” while considering “whether the variation of the injunction would involve a real risk that a judgment or award in [the plaintiff’s] favour would remain unsatisfied.”<sup>43</sup>

*Iraqi Ministry of Defence v. Arcepey Shipping Co.* (“The Angel Bell”) was the seminal English case providing that a party subjected to a *Ma-reva* injunction may not be restricted from making payments in the “ordinary course of business.”<sup>44</sup> In that case, the defendant, who was subjected to an asset-freezing order, had taken out a mortgage on the only asset which could have been used to satisfy a potential judgment, a ship named “the Angel Bell.”<sup>45</sup> The court noted:

[T]he plaintiff’s claim may fail, or the damages which he claims may prove to be inflated. . . . It does not make commercial sense that a party claiming unliquidated damages should, without himself proceeding to judgment, prevent the defendant from using his assets to satisfy his debts as they fall due and so put him in the position of having to allow his creditors to proceed to judgment with consequent loss of credit and of commercial standing.<sup>46</sup>

Subsequently, English judges have routinely applied *Angel Bell* variations to court orders which would allow a defendant “seeking in good faith to make payments which he considers he should make in the ordinary course of business.”<sup>47</sup>

Regardless of how carefully an asset-preservation order is drafted,

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42. UNIF. ASSET-PRES. ORDERS ACT § 4 cmt. at 15 (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 2014).

43. *Atlas Mar. Co. S.A. v. Avalon Mar. Ltd.* [1990] 4 All E.R. 769 at 776 (Eng.).

44. *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.* [1981] 1 QB 65 at 65, 73 (Eng.).

45. *Id.* at 67–68.

46. *Id.* at 72.

47. *See id.* at 73.

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such a restraint will undoubtedly have some impact on the operations of any business. Her Majesty's High Court of Justice in England developed a refreshingly simple approach in *Barclay-Johnson v. Yuill*.<sup>48</sup> Recognizing that the level of impact such an order may have on the particular business operations of a litigant is *per se* highly fact-sensitive. A party contesting the order may have these consequences taken into consideration as to whether the injunction ought to be granted: "If . . . there is merely an isolated asset here, the harm to the defendant may be small. On the other hand, if he is trading here and the injunction would 'freeze' his bank account, the injury may be grave."<sup>49</sup>

While the business community is reasonably concerned about the potentially devastating impact of the UAPOA, this same protection against the unjustified use of asset-preservation orders is already built into the current statutory language. A judge is positioned as a gatekeeper whose role is to ensure that a tool intended to guarantee litigation produces fair results does not create an unfair process; the court may not issue the order unless "any harm the party against which the order is sought may suffer by complying with the order is clearly outweighed by the risk of harm to the moving party if the order is not issued."<sup>50</sup> Application of England's *Yuill* test to the UAPOA standard should help to avoid unjustified hindrances to ordinary transactions.<sup>51</sup> These orders ought not to be used in a way which would paralyze parties from continuing ordinary transactions.<sup>52</sup>

### C. Legal Representation

The exemption for legal expenses was readily supplied by courts overseas first developing the *Mareva* injunction. In *Southern Cross*

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48. [1980] 1 W.L.R. 1259 (Eng.).

49. *Id.* at 1266.

50. UNIF. ASSET-PRES. ORDERS ACT § 4(a)(3) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

51. See also Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 344 n.378 (1992) (featuring several cases in which special attention was paid to the issues of operating a business which is under an asset-freezing order).

52. *Atlas Mar. Co. S.A. v. Avalon Mar. Ltd.*, [1990] 4 All E.R. 769, 775 ("The injunction must not be used so as to amount to an instrument of oppression which would bring about the cessation of ordinary trading."); see also *Derby & Co. Ltd. v Weldon*, [1989] 1 All E.R. 1002, 1006–07.

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*Commodities Pty Ltd. (In Liquidation) v. Keith Desmond Martin*, England's High Court refused to unfreeze assets needed to satisfy ongoing legal costs, despite having released assets to meet ordinary living and business expenses.<sup>53</sup> The financial situation was such that the defendants had only enough funds to pay their solicitors up to the day of the appeal, meaning that had the appeal been denied, the solicitors would have immediately ceased work.<sup>54</sup> The Court of Appeal reversed and allowed the defendants to access assets necessary for their defense, basing its reasoning on one of the most fundamental objectives of the *Mareva* injunction: "that nothing should be done that would prevent justice being done between the parties."<sup>55</sup> Insofar as a plaintiff should be empowered to prevent a defendant from becoming judgment-proof by sending assets beyond the court's jurisdiction, a defendant should be allowed to defend against serious allegations by the plaintiff.<sup>56</sup>

English courts do not invariably grant motions to vary a *Mareva* injunction for legal costs, however. In *Fortress Value Recovery Fund I LLC v. Blue Skye Opportunities Fund LP*, a group of more than twenty defendants, including a financial holding company, its subsidiaries, and its individual shareholders, allegedly reorganized an investment fund at the expense of the claimants and was subsequently subjected to a *Mareva* injunction during the resulting litigation.<sup>57</sup> The individuals proposed to cause the holding company to declare a dividend that could be used by them and the corporate defendants to pay for their joint defense, a transaction that would require a modification of the injunction.<sup>58</sup> The defendants asserted that the holding company should be permitted to pay for these legal costs,<sup>59</sup> even though doing so would entirely deplete the holding company's assets.<sup>60</sup> The court noted that previous cases found it appropriate to consider, "if the variation is refused, [whether] the defendant will in practice have recourse to other funds in order to fund his defence even though he may not have a legal right to

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53. *S. Cross Commodities Pty Ltd. (In Liquidation) v. Martin* [1986] EWCA (Civ) 5219, (Eng.).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund L.P.* [2014] EWHC (Comm) 551 [2], [4] (Eng.).

58. *Id.* at [11].

59. *Id.* at [17]–[18].

60. *Id.* at [19].

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those funds.”<sup>61</sup> Applying this test, the court found that the individuals and subsidiaries shared a common interest with the holding company in defending the claim, and would be willing and able to finance the joint defense themselves if their backs were up against a wall.<sup>62</sup> Although the corporate defendants would not have sufficient unrestrained assets to defend themselves with a dividend from the holding company, a variation of the injunction to release funds was unnecessary because the rational self-interest of the individual defendants would prevent it from lacking representation due to a lack of funding.<sup>63</sup>

Combining the holdings of *Southern Cross* and *Fortress Value*, a guiding principle emerges that, if a party subject to an asset-preservation order is unable to secure funding from other sources, and the party controls assets that it would be able to use to pay for legal representation but for the order, the order must be modified to release funds necessary to the party subject to the order, to pay for legal representation.

The costs of legal representation, much like the cost of ordinary business expenses, can vary significantly from case to case, leading opponents of the measure to attack the practicality of this vital element. Following the standard applied by English courts,<sup>64</sup> the UAPOA places the burden of establishing such expenses on the party subject to the order.<sup>65</sup> Uneasy about this imposition, the Colorado Bar Association was concerned that a defendant would need “to disclose any retainer, the attorney’s hourly rate and what is being charged for expenses” to a judge for review on whether the charges were reasonable.<sup>66</sup> Another commentator questioned whether a party subject to the order would be required to obtain court approval before filing suit as a plaintiff or defending itself in unrelated litigation.<sup>67</sup>

Despite these alarmist concerns, the American judicial system has

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61. *Id.* at [28].

62. *See id.* at [29], [34].

63. *See id.* at [34].

64. *See id.* at [23], [38] (placing the burden of persuasion of the defendants to show that they would not be properly represented unless additional assets were released from the freezing order).

65. UNIF. ASSET-PRES. ORDERS ACT § 4 cmt. at 15 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2014); *see also* Puiszis Letter, *supra* note 27, at 4.

66. Memorandum from the Colo. Bar Ass’n to Claire Levy, Representative of House Dist. 13, Colo. House of Representatives 1 (2013) (on file with author).

67. Puiszis Letter, *supra* note 27, at 5.

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had sufficient experience in determining the reasonableness of attorney fees in a variety of contexts.<sup>68</sup> For example, a court might be tasked with determining the reasonableness of attorney fees in litigation over civil rights<sup>69</sup> or warranties on consumer products.<sup>70</sup>

Canadian courts have already dealt with the issue of modifying the terms of a *Mareva* injunction to allow for these expenses. In *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, the court explained that a defendant should be permitted “to maintain his normal standard of living,” which clarifies that the financial situation of the particular party must be considered, and the party should be permitted “to meet legitimate debt payments accruing in the normal course,”<sup>71</sup> a more lenient standard than that provided in the UAPOA comments.

To evaluate a motion for the release of additional funds, *Canadian Imperial* established a test based on English law that first considers whether the only assets available to the defendant are those restrained by the injunction.<sup>72</sup> If so, the court then examines whether the assets sought to be released can be traced to a source other than the plaintiff, distinguishing between *proprietary* injunctions and *Mareva* injunctions.<sup>73</sup> Proprietary injunctions are “granted to preserve an asset in the possession of a defendant, which the plaintiff says belongs to the plaintiff, or is subject to a trust in favour of the plaintiff.”<sup>74</sup> These typically apply in “cases of alleged theft, conversion or fraud where the defendant, by some wrongdoing, comes into the possession of the plaintiff’s property.”<sup>75</sup> “A *Mareva* injunction,” by contrast, “does not require the plaintiff to show any ownership interest in the property subject to the injunction and does not require the plaintiff to establish a case of fraud or theft.”<sup>76</sup> Any assets not subject to the proprietary claim that have

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68. See HENRY COHEN, CONG. RES. SERV., 94-970, AWARDS OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 48–54 (2008), <https://fas.org/sgp/crs/misc/94-970.pdf>.

69. See 42 U.S.C. § 1988(b) (2012).

70. See 15 U.S.C. § 2310(d)(2) (2012).

71. *Can. Imperial Bank of Commerce v. Credit Valley Inst. of Bus. & Tech.*, 2003 CarswellOnt 35, para. 18 (Can. Ont. Sup. Ct. J.) (WL).

72. *Id.* at para. 25.

73. *Id.*

74. *Id.* at para. 15.

75. *Id.*

76. *Id.* at para. 16.

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been caught by the *Mareva* net may be released to pay “reasonable living expenses, [business] debts and legal costs.”<sup>77</sup>

If a defendant has exhausted its unrestrained assets and non-proprietary assets, but still requires funds for legitimate living expenses and legal representation,<sup>78</sup> then that defendant may seek to use the assets subject to the proprietary claim.<sup>79</sup> At this point, the court must engage in a balancing test, weighing the plaintiff’s interest in preventing an adversary from spending its money against the defendant’s interest in being financially capable of presenting a defense.<sup>80</sup>

This test has already proven workable. In *Bot Construction (Ontario) Ltd. v. Dumoulin*,<sup>81</sup> defendants subjected to a *Mareva* injunction liquidated their retirement savings and borrowed \$60,000 from family members to fund the litigation, but their assets were nearly depleted before the discovery was complete.<sup>82</sup> The court rejected a suggestion by the plaintiffs that the court release just enough funds to complete discovery by noting that “the defendant [would be] required to bear the delay and incur the additional costs of returning to court at each stage of the litigation. The risk is that the defendant may fold its cards without ever presenting its defence, simply because it cannot afford to do so.”<sup>83</sup> After weighing the *Canadian Imperial* factors, the court allowed the defendants to sell certain valuable assets and transfer the proceeds to a trust account, but the funds could only be disbursed in accordance with a litigation budget tied to the subsequent phases of the case.<sup>84</sup>

## CONCLUSION

While the terms “ordinary living expenses, business expenses, and legal representation”<sup>85</sup> may be workable in light of their vagueness, a state legislator may be well advised to add more detail to the statutory

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77. *Id.* at para. 26.

78. The court notably does not include debts or business expenses in this stage of the analysis. *Id.* at paras. 16, 25.

79. *Id.* at para. 25.

80. *Id.*

81. 2008 CarswellOnt 2670 (Can. Ont. Sup. Ct. J.) (WL).

82. *Id.* at para. 17.

83. *Id.* at para. 36.

84. *Id.* at para. 39.

85. UNIF. ASSET-PRES. ORDERS ACT § 4(d) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2014).

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language. Such an effect would give more direction to the courts on how they ought to interpret the statute, but would also serve to quell some of the opposition's concern. The Code of Federal Regulations has featured similar language, and those provisions have been successfully and carefully elucidated with examples and elaboration.<sup>86</sup> If potential adopters of the UAPOA are apprehensive about modifying the actual statutory language, then interpretative commentary with citation to Canadian or English jurisprudence as guidance may be a more palatable alternative route until domestic case law matures.

Undoubtedly, the UAPOA would have a profound impact on litigation in any state that enacted it. We can reasonably expect that plaintiffs will use this "extraordinary remedy"<sup>87</sup> to collect judgments not only against dishonest defendants purposefully dissipating assets with intent to defraud, but also against wasteful defendants with a "use it or lose it" mentality. Particularly important in light of increasing globalization, plaintiffs could less often find themselves engaged in international litigation trying to collect on judgments because they could prevent those assets from disappearing.

These highlighted advantages clearly run one-sided. The disadvantage for defendants, however, has not gone unnoticed by the Uniform Law Commission, and safeguards have been built in to prevent overcorrection. The UAPOA would not be used to necessarily freeze all assets owned by a defendant until the end of a case; a defendant must have access to funds sufficient to pay for "ordinary living expenses, business expenses, and legal representation."<sup>88</sup> A party subject to the order should be permitted to maintain the same standard of living, operate a business as usual, and be appropriately represented by counsel through every stage of the litigation.

While courts may need time to develop standards and tests for finding the appropriate balance, the first states to enact the UAPOA would not be pioneers in unmapped territory; courts in England, Canada, and New Zealand have had plenty of experience imposing asset-

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86. *See, e.g.*, 20 C.F.R. § 404.508(a) (2016) (providing a list of living expenses for the Social Security Administration); 26 C.F.R. § 1.162-1(a) (2016) (providing a list of business expenses for the Department of Treasury).

87. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999) (Ginsberg, J., dissenting).

88. UNIF. ASSET-PRES. ORDERS ACT § 4(d) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

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preservation orders, from which the American courts could learn. Armed with this extensive jurisprudence and legal scholarship on the issues surrounding asset-preservation orders, states should be encouraged to take the first step and welcome the UAPOA.