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Judgment Secured: **Now What?**

'Koehler' provides greater New York state access to banks for collection.

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THE CONTINUING global financial crisis and related litigation will implicate, if it has not already done so, the collectibility of judgments obtained. In this context a recent decision of the New York Court of Appeals, answering a question certified by the U.S. Court of Appeals for the Second Circuit, bears close examination.

On June 4, 2009, the New York Court of Appeals issued a decision in favor of a plaintiff who, for over 16 years, has been attempting to collect on a default judgment that he obtained against his former business partner in 1993. The decision, *Koehler v. Bank of Bermuda Limited* (*Koehler*), 2009 NY Slip Op 04297, No. 82, 2009 N.Y. LEXIS 1751 (June 4, 2009), is already being hailed as a landmark for judgment creditors. It is now the law in this state that New York courts are empowered to order any bank over which they have personal jurisdiction to turn over, to a judgment creditor, a judgment debtor's property or assets held at the bank, regardless of whether the court has personal jurisdiction over the judgment debtor or the judgment creditor.

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The impact of the *Koehler* decision has yet to be seen, but warnings from the banking community and the *Koehler* dissent suggest that it will be significant and lead to numerous controversies. Judgment creditors all over the world are likely to consider filing Article 52 proceedings in New York to obtain the turnover of a judgment debtor's assets located anywhere in the world—even if that debtor has no New York ties—if the debtor's assets are held by a bank over which a New York court has jurisdiction.

Similarly, judgment debtors and their counsel must now contemplate that assets deposited in a bank anywhere in the world are potentially subject to turnover to a judgment creditor by order of a New York court if that bank is found to be doing business in New York, whether directly or through a branch or affiliate.

The 'Koehler' Saga Begins

The *Koehler* case began in June 1993, when Lee Koehler, a citizen of Pennsylvania, obtained a default judgment against his former business partner in the U.S. District Court for the District of Maryland.

Apparently aware that Bank of Bermuda Limited was in possession of his former partner's stock certificates in a Bermuda corporation which served as collateral for a loan made to him by the bank, Koehler registered his Maryland judgment in the Southern District of New York and commenced a turnover proceeding against Bank of Bermuda pursuant to Article 52 of the New York Civil Practice Laws and Rules. CPLR 5225(b) allows a judgment creditor to commence a special proceeding "against a person in possession or custody of money or other personal property in which the judgment debtor has an interest…"[1] in order to obtain an order "to deliver the property in which the judgment debtor has an interest, or to convert it to money for payment of the debt."[2]

In October 1993, the Southern District ordered Bank of Bermuda to deliver the stock certificates to Koehler or pay him the debt owed to him by his former partner. The bank, however, contested the district court's jurisdiction. Over the next 10 years, the parties litigated this jurisdictional issue until, in 2003, Bank of Bermuda consented to the court's jurisdiction. However, Bank of Bermuda later revealed that it had transferred the stock certificates that Koehler was seeking and thus was no longer in possession of any property of the judgment debtor.

As a result of the bank's transfer of the stock certificates, Koehler petitioned for a writ of execution and sought to amend his complaint seeking to add claims of negligence, fraudulent conveyance, fraudulent concealment and negligent misrepresentation against Bank of Bermuda. In 2005, the district court denied Koehler's petition and motion to amend his complaint, concluding that "it had no in rem jurisdiction over [judgment debtor's] share certificates, which underlies Koehler's remaining claims against BBL."[3]

Eventually, Koehler's appeal of the orders vacating the 1993 turnover order reached the U.S. Court of Appeals for the Second Circuit. The Circuit recognized that New York state's highest court, the Court of Appeals, had not addressed the specific issue at hand.

Specifically, the Second Circuit stated:

> It seems clear that a court sitting in New York, that has personal jurisdiction over a judgment debtor, may order the judgment debtor himself to deliver property into New York. It is less clear that courts have the authority to order a person or entity other than the judgment debtor to deliver assets into New York, when that person or entity is located in a foreign jurisdiction.[4]

As a result, the Second Circuit certified to the Court of Appeals the question "whether a court in New York may, pursuant to N.Y. C.P.L.R. 5225(b) or N.Y. C.P.L.R. 5227, order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to N.Y. C.P.L.R. Article 52, when those stock certificates are located outside New York."[5]

The Court of Appeals' Ruling

The New York Court of Appeals answered the Second Circuit's certified question in the affirmative, and held that a court sitting in New York may order a bank over which it has personal jurisdiction to turn over property owned by a judgment debtor to a judgment creditor, whether or not that property is located in New York and whether or not the court has jurisdiction over the judgment debtor. [6]

The Court of Appeals approached the certified question by exploring the differences between the pre-judgment attachment mechanism of Article 62 of the CPLR and CPLR Article 52, which was at issue and governs the enforcement of money judgments. The Court noted that "post-judgment enforcement requires only jurisdiction over persons,"[7] in contrast to pre-judgment attachments which typically "operate[] only against property, not any person."[8]

The Court of Appeals also noted that Article 52 "contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country,"[9] and that a recent amendment to CPLR 5224 provides for the production of materials pursuant to a subpoena "whether the materials sought are…within or without the state."[10]

Finally, the Court of Appeals cited to New York case law that has expressly held that judgment debtors can be ordered to turn over out-of-state assets,[11] and a recent Appellate Division case endorsing the proposition that "New York courts have the power to command a garnishee present in the state to bring out-of-state assets under the garnishee's control into the state."[12]

Based on the absence of any express territorial limitation in Article 52 and because a court can compel a person or entity within its jurisdiction to turn over out-of-state assets in its possession or control, the Court of Appeals concluded that "the Legislature intended CPLR article 52 to have extraterritorial reach,"[13] and therefore that "a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee."[14]

The banks, represented by the Clearing House Association LLC, the nation's oldest banking association, argued that the Court should not interpret Article 52 so as to conflict with the separate entity rule, which requires courts to view each branch of a bank as a separate entity that is "in no way concerned with the accounts maintained by depositors in other branches or at a home office."[15] However, the *Koehler* Court did not address that argument, likely because in prior opinions, the district court determined that "the separate entity rule has no role to play in this case, since the rule involves circumstances where a party attempts to obtain the assets of an entity's foreign or auxiliary branch through service of its main branch. Here, the foreign branch itself was properly served."[16]

In any event, under *Koehler*, the separate entity rule appears to be irrelevant where a creditor serves process on a foreign bank and can argue that the bank is "present" in New York for jurisdictional purposes.

The Dissent Warns of Ramifications

The dissent in *Koehler*, authored by Judge Robert Smith and joined by two other Justices, warned of the significant potential implications of the majority decision.

First, the dissent stated that *Koehler* has opened the door to forum-shopping judgment creditors as long as "the bank has a New York branch—either one that is not separately incorporated, or a subsidiary with which the parent's relationship is close enough to subject the parent to New York jurisdiction."[17]

The **impact** of this New York Court of Appeals decision has yet to be seen, but **warnings** from the banking community as well as the **dissent** suggest that it will be **significant** and lead to numerous controversies.

Second, the dissent expressed concern that the opinion will create conflicting decisions by courts in different jurisdictions. Third, the dissent recognized that the decision could impose "significant administrative burdens" on banks.

Finally, the dissent questioned the constitutionality of the majority's decision, stating "[t]he majority's broad view of New York's garnishment remedy may cause it to exceed the limits placed on New York's jurisdiction by the Due Process Clause of the Federal Constitution" and the standard of *International Shoe*.[18]

Conclusion

The ramifications of the *Koehler* decision on judgment collection, New York courts, and the business of banking in New York are potentially staggering, as expressed in the amicus curiae brief filed by The Clearing House Association:

> The banking business is undeniably critical to New York and its economy, and foreign banks represent a substantial element of the New York banking business. Were this Court to hold any bank with a New York presence may be ordered to garnish the tangible property of its foreign customers—anywhere in the world—those customers would undoubtedly reconsider whether to continue to deal with institutions that have a New York presence. And, in turn, this customer reaction would force those financial institutions to reconsider whether to retain their New York branches. Such decisions would inevitably adversely affect the State's economy and tarnish New York's reputation as a global financial center.
>
> Requiring a foreign bank to deliver tangible assets into the state to satisfy a judgment against a jurisdictionally absent debtor would not only be wrong on the law, but would set a precedent that could profoundly affect the business of financial institutions and the role of New York as a leading financial center.[19]

While the impact of the *Koehler* decision has yet to be seen, the decision is undoubtedly cause for concern for banks and judgment debtors around the globe because *Koehler* presents an opportunity for judgment creditors to collect on debts that may previously have been considered impractical or impossible to reach. Judgment debtors are vulnerable to these Article 52 proceedings if their assets are deposited in any bank found to be present in New York whether through a subsidiary, agent or affiliate.

As a result, and because of the presence of international banks in New York and the fact that *Koehler* applies whether or not a judgment debtor has any New York presence, there is a real possibility that judgment creditors will increasingly select New York as their forum of choice to commence turn-over proceedings against New York banks that hold assets for out-of-state and overseas customers.

1. CPLR §5225(b).
2. *Koehler*, No. 82, 2009 N.Y. LEXIS 1751, at *5 (2009).
3. *Koehler v. Bank of Bermuda, Ltd.*, No. M18-302 (CSH), 2005 U.S. Dist. LEXIS 3760, at *21 (S.D.N.Y. March 9, 2005).
4. *Koehler v. Bank of Bermuda*, 544 F.3d 78, 85-86 (2d Cir. 2008) (internal citations omitted).
5. Id., 544 F.3d at 80.
6. *Koehler*, 2009 N.Y. LEXIS 1751, at *1.
7. Id. at *4.
8. Id. at *6.
9. Id. at *8.
10. CPLR 5224 (a-1).
11. *Koehler*, 2009 N.Y. LEXIS 1751, at *9.
12. Id. at *10, (citing *Morgenthau v. Avion Resources, Ltd.*, 49 A.D.3d 50, 54 (1st Dept. 2007), modified on other grounds, 49 A.D.3d 383 (2008)).
13. *Koehler*, 2009 N.Y. LEXIS 1751, at *9.
14. Id. at *12-13.
15. *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (N.Y. Cty. Sup. Ct. 1950).
16. *Koehler v. Bank of Bermuda, Ltd.*, 2005 U.S. Dist. LEXIS 3760, at *35.
17. *Koehler*, 2009 N.Y. LEXIS 1751, at *14.
18. Id. at *19-20.
19. Brief of The Clearing House Association L.L.C. as amicus curiae in support of respondent at 1-3, *Koehler*, No. 82, 2009 N.Y. LEXIS 1751 (2009), available at http://www.theclearinghouse.org/reference/amicus_curiae/index.php.

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