Shipping Corporation of India Ltd. v. Jaldhi Overseas PTE Ltd.: The Second Circuit Cuts Down on Salt

By Lizabeth L. Burrell**

** *Any views expressed in this article are solely those of the author and should not be attributed to the author's firm or its clients.*

In a decision that took the worldwide shipping community by surprise, the United States Court of Appeals for the Second Circuit has abruptly terminated the ability of maritime plaintiffs to attach electronic funds transfers (EFTs).[1] The court's about-face in *Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.* was remarkable not only because the court had expressly reconfirmed the attachment of EFTs only a year ago,[2] but also because the court used an extremely unusual procedure, known colloquially as a "mini-*en banc*,"[3] to overturn *Winter Storm*, the case in which the Circuit first endorsed such attachments.[4]

I. The *Winter Storm* Maelstrom

Policy, not law, was the driving force behind *Jaldhi*. From the moment the attachment of EFTs was permitted, the procedure has been controversial. Such attachments made it much easier to capture security for maritime claims in New York than elsewhere because the international clearing house system requires nearly all international payments using U.S. dollars to pass through New York.[5] Once funds had been detained by a Rule B attachment, plaintiffs were not only assured that favorable judgments or arbitration awards would be satisfied but also that defendants would be much more amenable to early settlements to regain access to their money and avoid further disruption to their commercial dealings.

The attachment of EFTs had effects outside the litigation in which it was ordered. In *amicus curiae* briefs filed in Rule B cases, the Federal Reserve Bank of New York and the New York Clearing House Association banks said that *Winter Storm* subjected them to considerable administrative burdens and encouraged parties to international commercial transactions to turn away from the dollar as the currency of payment and substitute currencies that did not need to pass through New York.[6]

As more and more claimants became aware of the ability to catch EFTs, the United States District Court for the Southern District of New York was confronted with an ever-increasing caseload. Faced with swelling dockets, many judges in the district became hostile to such attachments and sought ways to curtail their effectiveness and thus their popularity.[7] For example,

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1 *Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58 (2d Cir. 2009). Attachments in maritime cases are governed by Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. Rule B(1) provides "If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process."

2 *See Consub Delaware LLC v. Schahin Engenharia Limitada,* 543 F.3d 104 (2d Cir. 2008), *overruled by Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58 (2d Cir. 2009).

3 *See Jaldhi*, 585 F.3d at 67 n.9 ("We refer to this process as a 'mini-*en banc*.' *See United States v. Parkes*, 497 F.3d 220, 230 n.7 (2d Cir. 2007); *see also* Jon O. Newman, *The Second Circuit Review—1987-1988 Term: Forward: In Banc Practice in the Second Circuit, 1984-1988*, 55 Brook. L. Rev. 355, 367-68 (1989) (noting that judges will occasionally circulate particularly important panel opinions before filing)").

4 *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), *overruled by Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58 (2d Cir. 2009).

5 A Rule B attachment can only reach assets that are in the district at the time the garnishee is served with the order of attachment. *See Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262 (2d Cir. 1985). EFTs can fly through the banking system, however, making it unlikely in the extreme that the garnishee would be served during the seconds that EFTs are at least notionally within New York. Accordingly, a practice grew up of deeming service to be continuous for certain periods of time so that any transfers that passed through the district during that time period would be detained.

6 *See*, *e.g.*, *Jaldhi*, 585 F.3d at 62-63; *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 435-36 (2d Cir. 2006).

7 *See* cases discussed in *Jaldhi*, 585 F.3d at 62-64. On January 7, 2009, at a status conference on an attachment case, Judge Loretta A. Preska, now the district Chief Judge, advised counsel that the Southern District judges were discussing development of a uniform attachment order and invited the admiralty bar to contact then Chief Judge Kimba M. Wood to participate in the process. Because the issue related to local practice, the bar acted through the Admiralty

one Southern District judge made it impossible as a practical matter to reach EFTs by denying the plaintiff's request for continuous service.[8]

Notwithstanding this unrest, as late as the fall of 2008, the Second Circuit confirmed its adherence to *Winter Storm*:

> Even if there existed some question as to the viability of *Winter Storm*, it is well established in this Circuit that "one panel of this Court cannot overrule a prior decision of another panel, unless there has been an intervening Supreme Court decision that casts doubt on [this Court's] controlling precedent," or unless an en banc panel of this Court overrules the prior decision. There has been no intervening Supreme Court case, and no decision by an en banc panel overruling *Winter Storm*. Moreover, there is no justification for departing from the principle of *stare decisis* here where [defendant] has not shown that *Winter Storm* is unworkable, and where admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the *Winter Storm* rule.[9]

Other panels did not, however, give *Winter Storm* the same endorsement. In a footnote that was both a prophesy and a roadmap, the Second Circuit commented in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*:

> The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on [*United States v.*] *Daccarett*, [6 F.3d 37,] 55 [(2d Cir.1993)], to hold that EFTs are property of the beneficiary or sender of an EFT. Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of *whose* assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y.U.C.C. Law §§ 4-A-502 to 504. Under state law, the EFT could not be attached because EFTs are property of neither the sender nor the beneficiary while present in an intermediary bank. *Id.* §§ 4-A-502 cmt. 4, 4-A-504 cmt. 1.[10]

Although the *Aqua Stoli* court upheld the attachment, this footnote signaled the court's ambivalence and ultimately provided the legal blueprint for *Jaldhi's* overruling of *Winter Storm*[11] as well as the Second Circuit's immediate follow-up, *Proshipline, Inc. v. Aspen Infrastructures, Ltd.*,[12] which for the first time allowed the vacatur of a Rule B attachment on equitable grounds.[13]

II. *Jaldhi* Presented a Narrow Issue Not Directly Controlled by *Winter Storm*

Jaldhi involved the collapse of a crane on plaintiff's vessel while it was time-chartered to defendant, resulting in claims by plaintiff for unpaid charter hire and counterclaims by defendant for indemnification for liabilities arising from the collapse.[14] The district court's Rule B order at the commencement of the case eventually resulted in the attachment of EFTs totaling $4,873,404.90, but the vast majority of the funds were from EFTs in which the defendant was the beneficiary

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Committee of the Association of the Bar of the City of New York. On January 13, Judge Wood responded to the Committee's January 12 letter by asking the Committee to contact Judge Shira A. Scheindlin, Chair of the Southern District's Judicial Improvement Committee (JIC). Through a Subcommittee of the Admiralty Committee and with the participation of representatives of banking interests as well as the City Bar Committees on Banking Law and on Commercial Law and Uniform State Law, bench and bar met and exchanged ideas and drafts. During that process, there were a series of decisions imposing ever-increasing restrictions on the operation of Rule B. *See*, *e.g.*, *Cala Rosa Marine Co. v. Sucres et Deneres Group*, 613 F. Supp. 2d 426 (S.D.N.Y. 2009) (issued February 4, 2009; Scheindlin, J.); *Marco Polo Shipping Co. Pte v. Supakit Prods. Co.*, No. 08 Civ. 10940, 2009 U.S. Dist LEXIS 19057 (March 4, 2009). After a brief hiatus following the submission of comments by the Admiralty Subcommittee, on April 3, the Committee received a letter from JIC Chair Judge Scheindlin advising that the Board of Judges of the district had approved a model Rule B order drafted by the JIC and expressed "our hope, if not expectation, that maritime lawyers will immediately start submitting this proposed order." The proposed order would have circumscribed the breadth of *Winter Storm*, by imposing conditions on service, but a discussion of the order is beyond the scope of this article and in any event has been largely mooted by *Jaldhi*.

8 *Cala Rosa*, 613 F. Supp. 2d 426; *see* n.5, *supra*; *see also Jaldhi*, 585 F.3d at 62-64.

9 *Consub*, 543 F.3d at 109 (citations and note omitted).

10 *Aqua Stoli*, 460 F.3d at 445 n.6.

11 *See* nn.35-47 and accompanying discussion, *infra*.

12 585 F.3d 105 (2d Cir. 2009).

13 *See* nn.53-61 and accompanying discussion, *infra*.

14 *Jaldhi*, 585 F.3d at 64-65.

($4,590,678.60),[15] not the originator, as had been the case in *Winter Storm* and *Consub*.[16]

Neither party questioned whether or not EFTs originated by the defendant were subject to attachment, having evidently accepted that the *Consub* gloss[17] on the continued viability of *Winter Storm* compelled both the district court and Second Circuit panels to allow attachment of such transfers and therefore made a challenge pointless. Instead, the defendant moved to vacate the attachment ***only*** of EFTs of which it was the beneficiary,[18] an issue on which there was no express ruling at the appellate level. Judge Rakoff granted the motion[19] and, because of the importance and controversial nature of the question, certified his decision for interlocutory appeal under 28 U.S.C. § 1292(b).[20] The court's memorandum entered on the docket stated that "the court hereby grants Jaldhi's motion to vacate that portion of the funds attached by SCI that consists of EFTs still en route to Jaldhi."[21]

In such procedural circumstances, one would have expected an appellate decision confined to the single and circumscribed issue of whether or not it is permissible to attach EFTs of which the defendant is the beneficiary.[22] That was not, however, what the Second Circuit had in mind.

III. The Second Circuit Chewed More than the Parties Bit Off

Several features of *Jaldhi* indicate that the Second Circuit had been on the lookout for a case that would allow the court to put the genie firmly back in the bottle and that *Jaldhi* was simply the first case to present such an opportunity. Unfortunately, the court's eagerness to make a broad ruling revising its Rule B jurisprudence resulted in procedural unfairness to the parties and defects in legal reasoning that could have serious negative effects on the development of maritime law in this important circuit, even if the result was otherwise supportable.

A. Lack of Procedural Fairness

The procedural unfairness arose from the court: (1) deciding issues that were not raised or briefed by the parties; (2) accepting and founding its decision on factual allegations by *amici* and commentators that were neither supported by a record nor subject to challenge by the parties; and (3) procuring what is in effect an *en banc* reversal of a case dealing with a significant and complex point of law that neither party had a chance to brief.

1. *The court decided legal issues that the parties had not been given an opportunity to brief.*

Given the narrow scope of the defendant's motion, the constricted holding of the district court, and the consequently limited nature of the certified question, only a very fine point was presented to the Second Circuit for decision. Neither plaintiff nor defendant sought to disturb the attachment of EFTs ***originated*** by

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[15] *See id.* at 65.

[16] *See id.* at 67; *Winter Storm*, 310 F.3d at 266; *Consub*, 543 F.3d at 108.

[17] *See* n.9 & accompanying text, *supra*.

[18] *See Shipping Corp. of India, Ltd. v. Jaldhi Overseas PTE Ltd*., No. 08 Civ. 4328, 2008 U.S. Dist. LEXIS 49209, at *1 (S.D.N.Y. June 27, 2008), *vacated and remanded*, 585 F.3d 58 (2d Cir. 2009). The defendant also contended that all of the attachments should be vacated solely on equitable grounds but did not argue that it was impermissible to attach EFTs originated by the defendant or otherwise challenge *Winter Storm*. *See* Mem. of Law in Supp. of Def.'s Mot. to Vacate/Modify Maritime Attachment & for Counter-Security, dated May 22, 2008, Point I at 3-5, Docket No. 08 Civ. 4328 (JSR) (S.D.N.Y.). The defendant's request for equitable relief was apparently abandoned—in any event, it is not mentioned in the defendant's reply brief, *see generally* Reply Mem. of Law in Supp. of Def.'s Mot. to Vacate or Modify Maritime Attachment & for Counter-Security, dated June 6, 2008, Docket No. 08 Civ. 4328 (JSR) (S.D.N.Y.)—and the district court did not rule on anything other than the EFTs of which the defendant was the beneficiary. 2008 U.S. Dist. LEXIS 49209 ("defendant Jaldhi Overseas PTE Ltd. ('Jaldhi') moves . . . to vacate those portions of the attachment of property by plaintiff . . . that consist of those electronic funds transfers . . . from third parties of which Jaldhi was the intended beneficiary but not yet the recipient").

[19] *Jaldhi*, 2008 U.S. Dist. LEXIS 49209; *see Jaldhi*, 585 F.3d at 65-66.

[20] *Jaldhi*, 585 F.3d at 66. The district court also concluded that the plaintiff was entitled to sovereign immunity from the defendant's demand for countersecurity, but the Second Circuit did not see it necessary to rule on that issue because the basis for such an attachment would likely be mooted by the court's ruling on the attachment of EFTs. *Id.* at *71-72.

[21] *See* Docket Entry 17, No. 08 Civ. 4328 (JSR) (S.D.N.Y. June 27, 2008).

[22] *See*, *e.g.*, *Jaldhi*, 585 F.3d at 61 ("Specifically, this appeal raises the issue of whether EFTs of which defendants are the ***beneficiary*** are attachable property") (emphasis added); *id.* at 64 ("On appeal, the parties raise the following issues: (1) whether EFTs of which a defendant is the ***beneficiary*** are attachable property of that defendant . . . ; and (2) whether SCI is entitled to immunity under the FSIA from pre-judgment attachment") (emphasis added); *id.* at 66-67 ("the question presented squarely in this appeal--whether an EFT is defendant's property when defendant is the ***beneficiary*** of that EFT") (emphasis added).

the defendant;[23] instead, the *Jaldhi* plaintiff-appellant sought solely to reinstate the attachment of EFTs of which the defendant was the beneficiary.[24] If the court intended to go beyond the questions presented by the motion and ruling below, the parties should have been notified and been given an opportunity to brief those legal issues.

2. *The court based its decision on unsupported factual allegations by nonparties.*

The court's stated reasons for overruling *Winter Storm* were that "*Winter Storm's* reasons [are] unpersuasive and its consequences untenable."[25] An opinion's reasoning is always subject to legitimate debate, and, to be sure, *Winter Storm's* consequences for the judges of the Southern District were apparent. Nevertheless, the court's conclusions that there were untenable consequences for New York banks, New York's status as a commercial center, and the dollar as the currency of choice for international transactions—all of which are matters of fact—relied solely on commentators[26] and nonparties that provided no evidence supporting their assertions.[27] In fact, the court adopted, by quotation, an assertion of an *amicus* that *Winter Storm* "disrupt[ed] th[e] balance [of the banking system] and threaten[ed] the efficiency of funds transfer systems, perhaps including Fedwire" and, again without proof, accepted a commentator's assertion that *Winter Storm* "discourage[d] dollar-denominated transactions and damage[d] New York's standing as an international financial center."[28]

Ironically, in a passage quoted by the Second Circuit, a district court judge took care to note that the volume of attachments had "*allegedly* introduced significant uncertainty into the international funds transfer process,"[29] but the *Jaldhi* court made no such qualification in going on immediately to state

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[23] In fact, counsel for the defendant reportedly was seeking on appeal only to avoid the extension of *Winter Storm* to transfers in which the defendant was the beneficiary. *See* Mark Hamblett, *2nd Circuit Abandons 2002 Ruling That Boosted Attachments*, Law.com: International News (Oct. 20, 2009), http://www.law.com/jsp/law/international/lawArticleIntl.jsp?id=1202434750316.

[24] *See* Notice of Appeal, dated July 10, 2007, Docket No. 08 Civ. 4328 (JSR) (S.D.N.Y.) ("Plaintiff . . . hereby appeals . . . from the Opinion and Order . . . dated June 27, 2008 . . . and any judgment entered thereon granting Defendant's motion to vacate . . . those electronic fund transfers . . . ***directed by third parties to defendant***") (emphasis added).

[25] *Jaldhi*, 585 F.3d at 68.

[26] *See*, *e.g.*, *id.* at 61-62:

> Various commentators and courts have suggested that *Winter Storm* directly led to strains on federal courts and international banks operating within our Circuit. *See, e.g.*, Permanent Editorial Bd. for the Uniform Commercial Code, PEB Commentary No. 16: Sections 4A-502(d) and 4A-503, at 5 n.4 (July 1, 2009) . . . ("[T]he Winter Storm approach is proving to be practically unworkable."). And some have even suggested that *Winter Storm* has threatened the usefulness of the dollar in international transactions. *See generally id.* ("[T]his explosion of writs creates an additional threat to the U.S. dollar as the world's primary reserve currency and New York's standing as a center of international banking and finance."); *see also* Lawrence W. Newman & David Zaslowsky, *Is There Finally a Backlash Against Rule B Attachments*?, 241 N.Y.L.J. 3 (2009) ("[W]hen lawyers are advising their clients that the best way to avoid Rule B attachments is to conduct maritime and perhaps other transactions in a currency other than U.S. dollars, there are emerging risks of a significant reduction in the use of the dollar as the dominant currency of international commerce.").

(Emphasis added). The Permanent Editorial Board is a state-law-oriented group whose work—the UCC—had been rejected by *Winter Storm*. There has been no documentation adduced, either in *Jaldhi* or elsewhere, at least to the author's knowledge, indicating that New York's standing as a financial center or the use of the dollar has been diminished as a result of *Winter Storm*. Of course, the advice lawyers give to their clients is confidential, so there is no way of telling if, and if so, how many attorneys have counseled their clients to avoid transacting business using the dollar. It appears, however, that instead of urging clients to adopt different currencies, most attorneys with clients anxious to avoid Rule B attachments have generally advised those clients to register to do business in New York, a method expressly approved by the Second Circuit. *See*, *e.g.*, *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 133 (2d Cir. 2009); *Centauri Shipping Ltd. v. Western Bulk Carriers KS*, 323 Fed. Appx. 36, 2009 U.S. App. LEXIS 8464 (2d Cir. April 20, 2009), petition for *certiorari* filed August 28, 2009, response requested by the Court Oct. 21, 2009 (Supreme Court Docket No. 09-264). That course of action does not prejudice New York or the dollar.

[27] *See*, *e.g.*, *Jaldhi*, 585 F.3d at 62 ("The unforeseen consequences of *Winter Storm* have been significant. ***According to amicus curiae*** The Clearing House Association L.L.C. . . . from October 1, 2008 to January 31, 2009 alone 'maritime plaintiffs filed 962 lawsuits seeking to attach a total of $ 1.35 billion. These lawsuits constituted 33% of all lawsuits filed in the Southern District, and the resulting maritime writs only add to the burden of 800 to 900 writs already served daily on the District's banks.' ***Amicus Br.*** 3-4.") (emphasis added).

[28] *Id.*

[29] *Cala Rosa*, 613 F. Supp. 2d at 431-32 n.7 (quoted in *Jaldhi*, 585 F.3d at 62) (emphasis added).

positively and without condition that "[o]ur holding in *Winter Storm* not only introduced uncertainty into the international funds transfer process, but also undermined the efficiency of New York's international funds transfer business."[30]

In view of the *Consub* Court's opposite conclusion that it "ha[d] not [been] shown that *Winter Storm* is unworkable,"[31] the *Jaldhi* Court's factual premises about the effect of *Winter Storm* merited at least some examination; but even if it were true that *Winter Storm* produced the negative effects relied on by the court, the parties should have been afforded an opportunity to contest those factual assumptions.

If policy considerations about the perceived effects on banks were to play so strong a role, the parties should also have been permitted to raise countervailing policy issues. A *Fairplay* editorial on "what [*Jaldhi*] means to shipping" predicted that because of the loss of security, "costs will rise" because of "tougher terms, including higher deposits and stricter guarantees."[32] The article also notes that parties trying to collect debts from vessel owners will turn to arresting and attaching ships, "a far costlier and more complex legal process than attaching wire transfers" that is "more disruptive to trade operations overall."[33]

3. *The court took the extraordinary step of* sua sponte en banc *treatment without allowing the parties to brief the case being overruled.*

Acknowledging that one panel was without power to overrule another panel's decision, the *Jaldhi* panel initiated the very rare procedure of a "mini-*en banc*" review to overturn a prior decision of the court even though neither party had asked for *Winter Storm* to be overruled or sought *en banc* review.[34] Without notice that the court would consider attachments arising from EFTs originated by the defendant, the parties could not have anticipated and therefore would not have briefed the question of *Winter Storm's* merit or viability. The lack of opportunity to address the question that was put to all active judges—thus making the decision impregnable in this circuit—was unfair to both the parties and the judges who did not have the benefit of arguments the parties might have brought to bear.

The court's decision to solicit the participation of all active judges in the Circuit to overrule its own precedent indicates the strength of the court's motivation to change the course of its Rule B jurisprudence. If the issue was viewed as having such importance, it was especially important to allow the parties their say.

B. The Decision Is Flawed by Its Reliance on State Law

Apart from the disjunction between the matters the parties thought they were briefing and the issues addressed by the court, the *Jaldhi* decision is unsatisfactory in its treatment of maritime law. The court followed the two-step *Aqua Stoli* roadmap, first holding that *Winter Storm* was wrong to rely on *Daccarett*, a criminal forfeiture case, to conclude that EFTs were attachable assets under Rule B[35] and then applying state law,[36] which is the objectionable element in the court's analysis, to determine if a defendant could have an attachable interest in such transfers.

Daccarett involved an effort to impede the Cali cartel's use of the international banking system to support its drug trafficking by intercepting the EFTs the cartel used to move money among its accounts in the United States, Europe, and Central and South America.[37] The court was called upon to decide whether or not an EFT was a *res* that could be seized pursuant to a forfeiture statute, 21 U.S.C. § 881, which provided that funds traceable to an illegal activity were subject to government seizure.[38] In holding that EFTs were attachable, the court rejected the defendants' arguments that EFTs were not property while in the hands of intermediary banks:

> Claimants argue that EFTs are not seizable properties for purposes of the civil forfeiture statutes because they are merely electronic communications. They claim that an EFT is

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30 *Jaldhi*, 585 F.3d at 62 (citations and internal quotation marks omitted).

31 *Consub*, 543 F.3d at 109 (citations and note omitted).

32 *Bad Judgment? A US appellate court decision to disallow wire transfer attachments in Rule B case could lead to higher costs and less enforceable shipping contracts*, 367 FAIRPLAY 6554 at 1-2 (22 Oct. 2009).

33 *Id.* at 2.

34 "We readily acknowledge that a panel of our Court is 'bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court,' . . . and thus that it would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent. In this case, however, we have circulated this opinion to all active members of this Court prior to filing and have received no objection." *Jaldhi*, 585 F.3d at 67 (citations and note omitted).

35 *Compare Jaldhi*, 585 F.3d at 69-70 *with Aqua Stoli*, 460 F.3d at 445 n.6.

36 *Compare Jaldhi*, 585 F.3d at 70-71 *with Aqua Stoli*, 460 F.3d at 445 n.6.

37 *Daccarett*, 6 F.3d at 43.

38 *Id.* at 54-55.

> not a direct transfer of funds, but rather a series of contractual obligations to pay. Furthermore, they define an EFT as "an intangible property, which not only cannot be stopped once transmitted, but the Intermediary Bank upon accepting it cannot alter from the instructions contained therein." Finally, they claim that only after a transmission is complete and the communication is accepted and received by the beneficiary does it become a seizable *res*.
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> The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. . . .
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> Therefore, an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes.[39]

The *Jaldhi* Court differed with the *Winter Storm* Court on the effect of *Daccarett* because the *Jaldhi* Court discerned an important distinction between Rule B and the forfeiture statutes construed in *Daccarett*: While the forfeiture statutes provide that any property traceable to illegal activities can be attached, without regard to the ownership of the property, Rule B imposes the additional requirement that the property must belong to the defendant.[40]

The *Jaldhi* Court focused on the question of the defendant's ownership not only because of Rule B's specific reference to the *defendant's* personal property but also because a successful attachment provides the only foundation for the court's right to exercise jurisdiction over the defendant:

> As a remedy *quasi in rem*, the validity of a Rule B attachment depends entirely on the determination that the *res* at issue is the property of the defendant at the moment the *res* is attached. Because a requirement of Rule B attachments is that the defendant is not "found within the district," the *res* is the only means by which a court can obtain jurisdiction over the defendant. If the *res* is not the property of the defendant, then the court lacks jurisdiction. In contrast, civil forfeiture is a remedy *in rem*. *In rem* jurisdiction is based on the well-established theory that the thing is itself treated as the offender and made the defendant by name or description. Thus, for *in rem* remedies such as forfeitures, ownership of the *res* is irrelevant, as the court has personal jurisdiction regardless of who owns the *res* at issue. Although not considered by the *Winter Storm* panel, this distinction provides, in our view, a principled basis for allowing EFTs to be subject to forfeiture but not attachment.[41]

The court therefore concluded that *Daccarett* "does not answer the more salient question of *whose* assets [EFTs] are while in transit,"[42] and, although the *Winter Storm* Court answered that question as a matter of federal law, the *Jaldhi* Court decided, instead, that state law controlled the issue of whether or not EFTs in the hands of an intermediary bank are "defendant's tangible or intangible personal property" subject to Rule B attachments.[43] Once the state-law path had been chosen, there was no question about where it would lead: Under New York state law, funds for EFTs are attachable when in the hands of the originating or beneficiary banks, but not when in the possession of an intermediary bank.[44]

Although the *Winter Storm* Court reached a different conclusion, *Jaldhi's* legal reasoning about the effect of

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39 *Id.* (citations omitted).

40 *Jaldhi*, 585 F.3d at 69 ("For maritime attachments under Rule B, however, the question of ownership is critical. As a remedy *quasi in rem*, the validity of a Rule B attachment depends entirely on the determination that the *res* at issue is the property of the defendant at the moment the *res* is attached."); *see also* Fed. R. Civ. P. Supp. R. B(1)(a).

41 *Jaldhi*, 585 F.3d at 69 (citations and note omitted).

42 *Id.* (quoting *Aqua Stoli*, 460 F.3d at 445 n.6) (internal quotation marks omitted); *see also* Fed. R. Civ. P. Supp. R. B(1)(a).

43 *See Jaldhi*, 585 F.3d at 70.

44 *Id.* (internal quotation marks omitted).

Daccarett is certainly respectable. In deciding whether or not a defendant has an attachable interest in EFTs, however, the court erred in its reasoning, if not in its result, by looking to state law.

The state law approach had been expressly rejected in *Winter Storm* which held:

> Admiralty Rule B preempts U.C.C. § 4-A-503.
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> That principle of preemption applies to state statutes enacted for the protection of banks, as this Circuit held in *Aurora [Maritime Co. v. Abdullah Mohamed Fahem & Co.]*, 85 F.3d 44 [(2d Cir.1996)], a decision which is dispositive of this aspect of the instant case. . . . The opinion in *Aurora* notes that "[m]aritime attachment is by any test a characteristic feature of the general maritime law," it being "self-evident that the maritime attachment is not merely well established in admiralty, but that it is a unique, characteristic feature of that branch of our law."[45]

Even if the *Jaldhi* outcome is expedient and justifiable,[46] the court could have barred the attachment of EFTs in the hands of intermediary banks as a matter of federal maritime law interpreting a federal admiralty rule of procedure. Instead, the Second Circuit deviated from its constitutional role as an admiralty court when it chose to make the interpretation and application of a federal admiralty rule dependent on state law subject to local variation.[47]

As stated in the *amicus* brief of The Maritime Law Association of the United States filed in *Consub*:

> In addition to being unnecessary, it would be improper to allow state law to control or even to influence the meaning of terms used in an admiralty procedural rule because the Constitution commands that maritime matters be governed by federal law. U.S. CONST. art. III, § 1, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 3.
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> [T]he Framers intended "to place the entire subject [of maritime law]—its substantive as well as its procedural features—under national control." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).
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> While these principles were developed many years ago, recent decisions of the Supreme Court demonstrate that their strength remains undiminished to this day . . . . *Norfolk Southern v. Kirby*, 543 U.S. 14, 125 S. Ct. 385, 395-96 (2004)[48]. . . .
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> * * *
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> Even if all fifty states adopted identical versions of UCC Article 4A (which has not happened), application of state law would still disrupt the necessary uniformity in the availability of maritime attachments. *See generally* Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 442, 452-53, 456-57, 459-60, nn. 72, 134, 139 & 142 (1994) (discussing the deliberate choice made to enact a fifty-state statute rather than a federal statute so that, if desired, states could depart from the standard); *see also* Michael F. Sturley, *Uniformity in the Law Governing the*

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[45] *Winter Storm*, 330 F.3d at 279 (expressly holding that state UCC was preempted) (citations and internal quotation marks omitted); *id.* at 275-78 (analyzing the status of federal admiralty law concerning Rule B).

[46] For example, an argument supporting the *Jaldhi* outcome could be founded on the established need for the property to be in the hands of the garnishee at the time the order of attachment is served. *See Reibor*, 759 F.2d 262. Because of the speed with which EFTs pass through the banking system, it is highly unlikely that process could be served during the moment that the EFT was in the hands of the intermediary New York bank, thus achieving the same result as *Jaldhi*, but without intruding state law into the interpretation of a maritime rule. *Cf. Cala Rosa*, 613 F. Supp. 2d 426.

[47] Notably, while *Reibor* examined state law to reach its conclusion, that court did so only in order to fashion a uniform federal rule where existing federal maritime law provided little guidance. *See Reibor*, 759 F.2d at 266. It is one thing to look at bodies of law, state, foreign, and international, in formulating a single federal rule to govern in all maritime cases and quite another simply to relinquish an issue to the vagaries of state law.

[48] *See Kirby*, 543 U.S. 14, 125 S. Ct. at 395-96 ("Article III's grant of admiralty jurisdiction must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.") (citations and internal quotation marks omitted).

> *Carriage of Goods by Sea*, 26 J. MAR. L. & COMM. 553, 567 (1995) (discussing how apparent uniformity–adoption of the same text–quickly degenerates into inconsistency) . . . .[49]

The responsibility of the federal courts to make admiralty law where none exists was recently the subject of considerable discussion by the Supreme Court in a case concerning the *Exxon Valdez*,[50] in which the Court expressly confirmed that it was "exercis[ing] federal maritime common law authority" to "regulate . . . a [maritime] common law remedy for which *responsibility lies with this Court as a source of judge-made law in the absence of statute*."[51] In explaining its decision to forge a new rule, the Court noted:

> The character of maritime law as a mixture of statutes and judicial standards, an amalgam of traditional common-law rules, modifications of those rules, and newly created rules accounts for the large part we have taken in working out the governing maritime tort principles. . . . And for the very reason that our exercise of maritime jurisdiction has reached to creating new causes of action on more than one occasion, it follows that we have a free hand in dealing with an issue that is entirely a remedial matter. . . . *[T]he Judiciary has traditionally taken the lead in* ***formulating*** *flexible and fair remedies in the law maritime*, and Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law . . . . [W]e may not slough off our responsibilities for common law remedies because Congress has not made a first move . . . . *Where there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard*, subject of course to congressional revision.[52]

The development of the technology enabling electronic transfers created a need for a rule about whether or not such transfers were subject to attachment under Rule B, leaving the courts to fashion "a judicially derived standard." If, contrary to the views of the *Winter Storm* Court, there was no existing federal guidance about whether or not "defendant's tangible or intangible personal property" should include EFTs in the hands of intermediary banks, the *Jaldhi* Court could have and should have gone on—as it was authorized and indeed required to do—to create a uniform interpretation of what property was subject to attachment under Rule B to be used in every case in which the reach of this federal admiralty rule is at issue. If the court had acted as an interpreter or maker of admiralty law, either conclusion—that such attachments are or are not permissible—would have been an appropriate exercise of the court's constitutional power. The only flawed alternative was to cede the issue to the control of state law.

IV. Will Rule B Become a Dead Letter?

Less than a week after *Jaldhi*, the Second Circuit issued its opinion in *Proshipline, Inc. v. Aspen Infrastructures, Ltd.*[53] In that case, the court upheld an equitable vacatur[54] of a Rule B attachment in New York on the ground that the party that attached the funds and the party that owned the funds were both present in Texas, even though all the conditions for an attachment stated in Rule B were fulfilled.

Until *Proshipline*, the considerable body of Second Circuit Rule B case law held unambiguously that, except where the defendant was present in an immediately adjacent district, as with the Southern and Eastern Districts of New York, the only requirement for sustaining a Rule B attachment was compliance with the Rule's literal terms.[55] In *dictum* in *Aqua*

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[49] Brief of Amicus Curiae The Maritime Law Ass'n of the U.S. in Supp. of Application of Fed. Mar. Law, dated October 5, 2007, at 8-9, 12-13, filed in Consub Delaware LLC v. Schahin Engenharia Limitada, Docket Number 07-0833-cv (2d Cir.) (citations and parenthesis omitted).

[50] *Exxon Shipping Co. v. Baker*, 554 U.S. __ (2008) ("*Exxon Valdez*"); s*ee also Kirby*, 543 U.S. 14, 23 (2004) ("Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts. . . . Because the grant of admiralty jurisdiction and the power to make admiralty law are mutually dependent, the two are often intertwined in our cases. . . . [I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision").

[51] *Exxon Valdez*, slip op. at 28, 29, 34 ("we are acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy") (emphasis added).

[52] *Id.*, slip op. at 35-36 n.21 (emphasis added; internal quotation marks omitted).

[53] 585 F.3d 105 (2d Cir. 2009).

[54] *Proshipline*, 585 F.3d at 112 n.3 ("We note that we are dealing here with equitable vacatur rather than vacatur for failure to comply with Rule B.").

[55] *See Aqua Stoli*, 460 F.3d at 439, 440-41, 442, 444 ("we have not answered the question of whether a maritime attachment, admittedly valid under Rule B, may be vacated and, if so, what showing is required"), ("no district court countenanced the degree of discretion in vacating maritime attachments that [defendant] now advances"), ("in none of [the Circuit's earlier jurisprudence on attachments] was the determinative question anything other than whether the

Stoli, however, the court posed the possibility of adding equitable grounds as a possible basis for vacatur:

> While . . . the exact scope of a district court's vacatur power is not before us, . . . a district court may vacate the attachment if the defendant shows at the Rule E hearing that 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise.[56]

Although the *Proshipline* court may have been influenced by the proliferation of lawsuits between the parties, the defendant's amenability to jurisdiction in Texas had nothing to do with whether or not the plaintiff might ultimately be able to satisfy any judgment in its favor, particularly because a Texas attachment was vacated on the basis of the defendant's presence there (at least at the moment).[57] In addition, the defendant is an Indian manufacturing corporation that ships its products to other countries on time-chartered vessels, and the dispute arose from an agreement for logistics services that provides for the arbitration of disputes in Singapore under English law.[58] Nothing about these circumstances suggests that this case was a localized, Texas-based dispute or that the defendant should be immune from the operation of Rule B.

The *Proshipline* Court acknowledged that the "traditional policy underlying maritime attachment, which is to permit the attachments of assets wherever they can be found and not to require the plaintiff to scour the globe to find a proper forum for suit or property of the defendant sufficient to satisfy a judgment, has been implemented by a relatively broad maritime attachment rule, under which the attachment is quite easily obtained."[59] Nevertheless, the court applied what can only be described as a *forum-non-conveniens* analysis in determining if an attachment could be maintained:[60]

> Equitable vacatur of writs of attachment, in contrast to vacatur for failure to comply with Rule B, turns not on the owner of the attached funds' relationship with the jurisdiction of attachment, but on both parties' relationship with another jurisdiction. For equitable vacatur to be granted on this basis, "the plaintiff [must be able to] obtain *in personam* jurisdiction over the defendant in [a] district where the plaintiff is located."[61]

It is ironic that the *Jaldhi* Court appears to have been reacting, at least in part, to the geographic diversity of the parties and the source of their disputes[62] while the *Proshipline* panel based its vacatur on a perceived geographic homogeneity. In common, however, is the conclusion that the federal courts in New York should narrow their portals, if not shut their doors, to Rule B attachments.

Jaldhi and *Proshipline* also have a common heritage in that *Aqua Stoli* articulated their respective legal foundations—in *Jaldhi*, in first distinguishing *Daccarett* on the basis that ownership of the property was not required for attachment under the forfeiture statutes and then adopting state UCC law,[63] and, in *Proshipline*, in allowing vacatur on equitable grounds despite compliance with the terms of the Rule[64]—even though the *Aqua Stoli* court was not called upon to decide and did not decide these questions. Rarely have the *dicta* in a single case been so oracular.

It will take some time to work out the implications of the Second Circuit's most recent Rule B decisions, but the process has started. The Second Circuit has just ruled in *Hawknet, Ltd. v. Overseas Shipping Agencies*—its first post-*Jaldhi* appeal involving a Rule B EFT attachment—that *Jaldhi* applies retroactively because it is a jurisdictional ruling:

> In *Firestone Tire & Rubber Co. v. Risjord*, the Supreme Court concluded that "by definition, a jurisdictional ruling may never be made prospective only." 449 U.S. 368, 379 (1981). Our holding in *[Jaldhi]* directly affects how the district court may obtain

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defendant could be 'found' within the district-in other words, whether the textual requirements of the attachment rule were met").

56 *Id.* at 445 (notes omitted).

57 *See Proshipline* , 585 F.3d at 116.

58 *Id.* at 108.

59 *Id.* at 111 (quoting *Aqua Stoli*, 460 F.3d at 443) (citations and internal quotation marks omitted).

60 *Proshipline*, 585 F.3d at 116-17.

61 *Id.* at 117 (citing and quoting *Aqua Stoli*, 460 F.3d at 445).

62 *See Jaldhi*, 585 F.3d at 60 ("This case is based on a dispute between a company incorporated in India and a company incorporated in Singapore over an accident that occurred in India while one company was shipping products to China; the dispute was to be arbitrated in England.").

63 *Compare Jaldhi*, 585 F.3d at 69-71 *with Aqua Stoli*, 460 F.3d at 445 n.6.

64 *Compare Proshipline* , 585 F.3d at 116-17 *with Aqua Stoli*, 460 F.3d at 445.

> personal jurisdiction over defendants, and thus it is properly considered a "jurisdictional ruling." We conclude, therefore, that our holding in *[Jaldhi]* applies retroactively.[65]

Although skeptical about the outcome, the court allowed the plaintiff an opportunity to show that there was an alternative basis for jurisdiction over the defendant that would allow the action to be maintained. That is but one small example of the huge effort that will be required on the part of the bar, the judiciary, and the clerks to sort out the cases affected and take appropriate action. It will also be interesting to see if parties who might have reached assets other than EFTs but did not do so because sufficient funds had been attached from EFTs will be able to renew their attempts to find security and a jurisdictional base in attachments of other property.

Already, maritime firms are trying to determine if conflicts of interest will obligate them to withdraw from cases in which they seek to confirm attachments if they also represent clients seeking vacatur, and *vice versa*. And, of course, firms that had centered their structure and staffing on a *Winter Storm* Rule B practice are facing the same uncertainties as firms that had focused on the subprime market.

V. A Light at the End of the Tunnel

Nevertheless, in keeping with the adage that when one door closes, another opens, a recent decision by the New York Court of Appeals—*Koehler v. Bank of Bermuda Limited*[66]—may make New York a mecca for the enforcement of judgments, admiralty or otherwise.

Koehler decided a certified question submitted by the Second Circuit: "whether a court sitting in New York may 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 CPLR article 52, when those stock certificates are located outside New York."[67]

Koehler, a judgment creditor, had filed a petition against the Bank of Bermuda (BBL) in the federal district court in Manhattan, seeking "payment or delivery of property of [the] judgment debtor"—specifically certain stock certificates—which the judgment creditor believed were being held by the bank in Bermuda.[68] The petition was served on Bank of Bermuda (New York) Limited, which was alleged to be a New York subsidiary and agent of BBL.[69] The court entered a turnover order requiring BBL to deliver the stock certificates or funds sufficient to pay the judgment.[70] After a ten-year battle, BBL consented to personal jurisdiction but revealed that it no longer possessed the stock certificates, having released them despite the turnover order when the obligation they secured was satisfied.[71] The district court then dismissed the petition, on the grounds, *inter alia*, that it had no *in rem* jurisdiction over the shares because they were not within the State of New York.[72] On Koehler's appeal to the Second Circuit, that court found New York law to be unclear on the question of whether or not a court sitting in New York had authority under CPLR § 5225 ("Payment or delivery of property of a judgment debtor") to order a garnishee to turn over assets not located within New York. The Second Circuit therefore referred the question to New York State's highest court.

As with *Jaldhi*, the decision turned on the court's categorization of the kind of jurisdiction being exercised. Contending that the turnover order improperly attempted to exercise *in rem* jurisdiction over assets outside the state, the garnishee bank alleged that it could not be compelled to bring stock certificates (or their monetary equivalent) from Bermuda to New York because *in rem* jurisdiction can extend only to property within the state's territorial boundaries.[73] The court held, however, that the garnishee had failed to distinguish between the different kinds of jurisdiction being exercised in pre- and post-judgment proceedings:[74] Courts issuing pre-judgment attachments, like those under Rule B or Article 62 of New York's Civil Practice Law and Rules, are exercising *in rem* jurisdiction over the assets themselves and *quasi in rem* jurisdiction over the debtor, thus making it necessary for the assets to be within the court's territorial bounds; but, in contrast, in post-judgment proceedings, *in personam* jurisdiction is being exercised over the defendant:

> Article 52 postjudgment enforcement involves a proceeding against a person—its purpose is to demand that a person convert

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65 *Hawknet, Ltd. v. Overseas Shipping Agencies*, Docket No. 09-2128-cv, slip op. at 6 (2d Cir. Nov. 13, 2009) (footnote omitted).

66 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009).

67 12 N.Y.3d at 536. The same interests that filed *amicus* briefs in *Jaldhi* also filed in *Koehler*. *See id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* at 536-37.

72 *Id.* at 537.

73 *Id.* at 538-39.

74 *Id.* at 537-39.

> property to money for payment to a creditor—whereas article 62 attachment operates solely on property, keeping it out of a debtor's hands for a time.[75]

The court reasoned that New York law permitted the exercise of jurisdiction over a judgment debtor or garnishee to compel the turn-over of assets in their possession;[76] New York statutory law provided for orders requiring a "defendant" to turn over out-of-state property;[77] New York law provided for a special proceeding against the garnishee directly, meaning that the garnishee was a defendant;[78] and once such jurisdiction was obtained, "the principle that a New York court may issue a judgment ordering the turnover of out-of-state assets is not limited to judgment debtors, but applies equally to garnishees."[79] Thus,

> [b]earing in mind the fundamental differences between enforcement and attachment . . . discussed above, we hold 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.[80]

The potential sweep of this decision is vast, and if *Koehler* is the light at the end of the tunnel, it may, for some, be the light of day and, for others, an on-coming train. Marine creditors who will find it much harder to find assets to attach at the commencement of a case may have considerably greater leverage if they succeed in obtaining a judgment. Banks in New York may be relieved of intercepting EFTs but now may have to monitor not only their own activities but also those of their head offices and branches abroad to ensure that property or funds subject to turnover orders do not go astray to avoid subjecting themselves to contempt sanctions.[81]

Jaldhi profoundly altered the seascape, but it affects only EFTs. For example, on November 13, 2009, a federal district court sitting in Texas ordered the attachment of a vessel, more traditional maritime property, as the property of the defendants.[82] Accordingly, contrary to the erroneous announcements by some non-U.S. lawyers who have urged litigants to turn to restraints and injunctions available under their domestic procedures, Rule B is not dead: All property with a less transient presence in New York remains subject to maritime attachment. While admiralty claimants have lost a valuable tool, it remains to be seen if *Jaldhi* will provide banks and the courts with the relief they sought in the long run because of the as-yet unknown effects of *Koehler*. Thus, although New York may no longer be as popular a jurisdiction for pre-judgment attachments in maritime cases, it may well become the place of choice for enforcing the rights of both maritime and non-maritime judgment creditors. Only time will tell if *Koehler* will produce the same effects perceived to have resulted from *Winter Storm*.

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Lizabeth L. Burrell, Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, NY

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75 *Id.*. at 538-39.

76 *Id.*. at 539-40.

77 *Id.*. at 539-40.

78 *Id.*. at 540-41.

79 *Id.*. at 541; *see id.* at 539 (noting that "CPLR 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" and that the Legislature had recently amended a post-judgment statute to facilitate disclosure of materials that would assist in collecting judgments even if those materials are not in New York).

80 *Id.* at 541.

81 *Id.* at 537. The Clearing House also filed an *amicus* brief in *Koehler*. *See id.* at 535. It is curious that the Second Circuit and New York State Court of Appeals reacted so differently.

82 LeBlanc and LaFrance, Inc., *et al.* v. M/V PONTODAMON, *in rem*; Sungleam Maritime Ltd.; & Ocean Freighters Ltd., *in personam*, Docket No. 09-cv-00962 (item 5, Writ of Maritime Attachment) (E.D. Tex., Beaumont Div., Nov. 13, 2009).