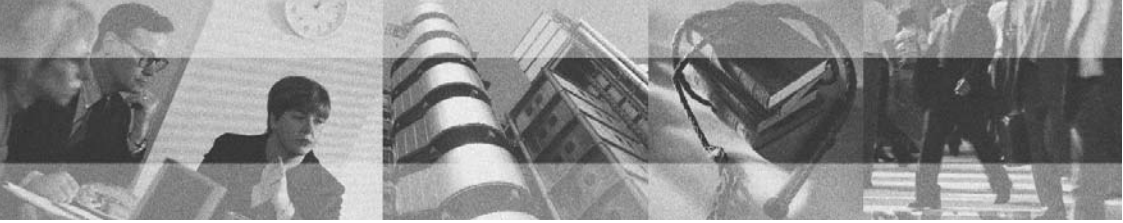

RULE B ATTACHMENT DETACHED: THE RISE AND FALL OF *WINTER STORM*

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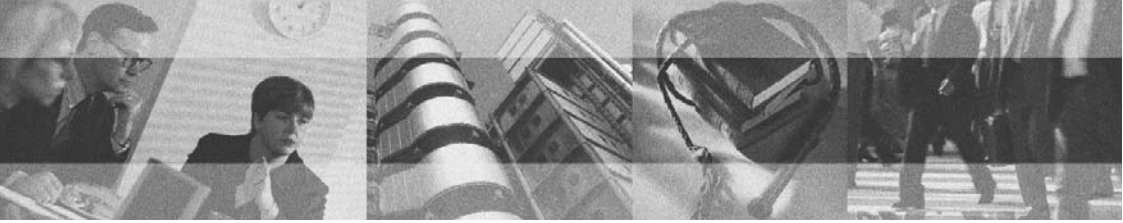
As recently as this year, decisions rendered by the United States District Court for the Southern District of New York and the Second Circuit Court of Appeals made it possible for plaintiffs in maritime actions to attach funds, including insurance premiums destined for defendant insurers, that were merely electronically passing through New York banks on their way to foreign lands. Thanks to Rule B of the Supplemental Admiralty Rules for Certain Admiralty and Maritime Claims of the United States Federal Rules of Civil Procedure ("Rule B") and its case law progeny, plaintiffs seeking to obtain jurisdiction over property, for the purpose of securing judgment security, could do so by attaching a defendant's assets as they passed through New York banks in the form of an Electronic Funds Transfer ("EFT").

Rule B originally was intended to facilitate the seizure of ships or cargo within a district court's jurisdiction on the basis that such ships and cargo were inherently transient and could set sail at any moment. The prerequisites for attachment of a defendant's assets pursuant to Rule B are the existence of a maritime claim and the defendant's lack of presence in the district in which attachment is sought. Thus, attachment of assets, pursuant to Rule B, is not permitted in non-maritime claims. Nor is it available for the assets of defendants who are "found within the district". (The definition of "found within the district" has very recently been expanded to include those entities registered with the New York Secretary of State pursuant to the New York Business Corporation Law § 1304 and who designated an agent for service of process within the district. See *STX Panocean (UK) Ltd v Glory Wealth Shipping PTE Ltd*, 560 F.3d 127 (2d Cir. 2009).

The case that essentially began the debate as to the attachment of EFTs, in addition to the ships and cargo that were more traditionally attached, was *Winter Storm Shipping Ltd v Thai Petrochemical Indus Public Co Ltd*, 310 F.3d 263 (2d Cir. 2002). There, the Court of Appeals vacated a judgment of the Southern District that had vacated a maritime attachment of funds of the defendant Thai Petrochemical. The funds in question had originated with Thai Petrochemical and were destined for accounts of third parties with whom Thai Petrochemical had independent business relations. The Court of Appeals held that "EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)," implicitly acknowledging that the funds at the intermediary bank were the property of Thai Petrochemical (*Winter Storm*, 310 F.3d at 278).

In a case involving a slightly different factual scenario, a split within the Southern District began to manifest itself when Judge Denise Cote, in *Noble Shipping v Euro-Maritime Chartering Ltd*, No. 03 Civ. 6039, 2003 U.S. Dist. LEXIS 23008 (S.D.N.Y. Dec. 24, 2003), held that funds passing through a New York bank *from* an unrelated third party *to* the defendant were attachable as property of the defendant. Thus, after the holdings in *Winter Storm* and



Noble Shipping, funds flowing through New York banks both to and from defendants were viewed by most judges of the Southern District as attachable. But not all judges of the Southern District agreed.

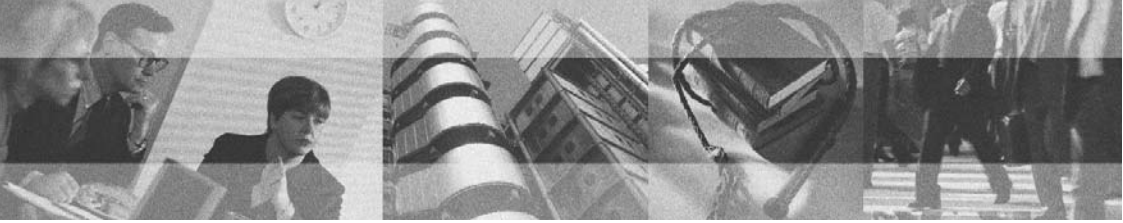
In *Seamar Shipping Corp v Kremikovtzi Trade Ltd*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006), Honorable Jed Rakoff held that funds originating with a third party and directed *to* a defendant beneficiary were not the property of the defendant while in transit and therefore could not be attached pursuant to Rule B. The Court acknowledged the holding in *Winter Storm* and a subsequent holding in *Aqua Stoli Shipping Ltd v Gardner Smith Pty Ltd*, 460 F.3d 434, 436 (2d Cir. 2006), which noted, *in dicta*, "EFTs to or from a party are attachable by a court as they pass through banks located in that court's jurisdiction". Nevertheless, Judge Rakoff held that EFTs to a defendant were not attachable. He reasoned that *Aqua Stoli* questioned *Winter Storm* and that it would therefore be illogical to read *Aqua Stoli* as expanding the original holding in *Winter Storm*. See also *Shipping Corp of India Ltd v Jaldhi Overseas Pte Ltd*, No. 08 Civ. 4328, 2008 U.S. Dist. LEXIS 49209 (S.D.N.Y. June 27, 2008).

In contrast to the holdings in *Seamar Shipping* and *Shipping Corp of India*, Judge William Pauley in *Compania Sudamericana De Vapores S.A. v Sinochem Tianjin Co*, No. 06 Civ. 13765, 2007 U.S. Dist. LEXIS 24737 (S.D.N.Y. Apr. 4, 2007), focusing on the holdings in *Aqua Stoli* and *Winter Storm*, held that EFTs *to and from* a defendant were attachable, and refused to limit attachment to those funds sent by a defendant.

In the midst of this chaos, a situation in which a defendant insurer found its policyholders' wired premium payments attached at a New York bank was not far-fetched. Whether such an attachment would have been upheld in the Southern District depended on the judge presiding over the case. If challenged before Judge Rakoff, as indicated by the holdings in *Seamar Shipping* and *Shipping Corp of India*, it is likely that the attachment would have been invalidated on the basis that the defendant insurer would have had no property interest in the subject funds. Most other judges faced with the same question would have answered in the affirmative.

Furthermore, had it been an insurance company that had its property attached, and that property was an incoming premium, a question may have arisen as to whether the policies for which the premiums were paid would be effective. Most insurance policies contain provisions allowing an insurer to cancel coverage in the event an insured does not pay its premium. See e.g. *Gannon v N.Y. Mut. Underwriters*, 55 N.Y.2d 641 (1981) (dismissing plaintiff insured's action under policy where premium was not paid and insurer had cancelled policy prior to fire occurrence). In fact, had this occurred, it was possible that an insurer would not know for some time whether an insured's premium payment had been attached (attachment proceedings are *ex parte* and so it is possible for an attachment to become effective long before an insurer is made aware of the attachment) or simply unpaid.

Although this state of affairs in the Southern District of New York and the Second Circuit Court of Appeals appeared to be laying the groundwork for continued confusion and consternation, the Second Circuit recently addressed the issue again and put all questions to rest. In a "mini-en banc" opinion, the Court of Appeals, in *Shipping Corp of India Ltd v Jaldhi*



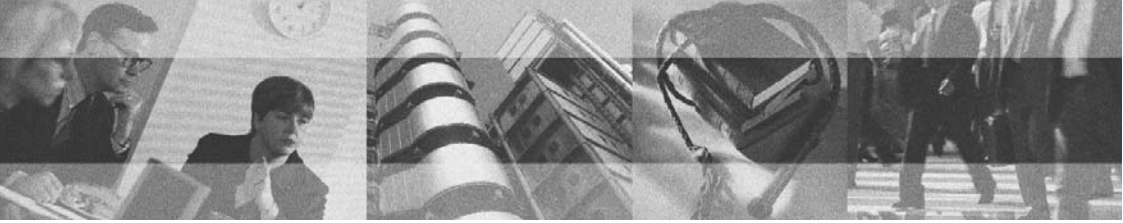
Overseas Pte Ltd, Nos. 08-3477-cv(L), 08-3758-cv(XAP), 2009 U.S. App. LEXIS 22747 (2d Cir. Oct 16, 2009), held that EFTs being processed by an intermediary bank are not "property" subject to attachment under Rule B, thereby overruling the holding in *Winter Storm*.

Notably, the Court looked to New York State law, despite the fact that Rule B is governed by federal maritime law, to hold that EFTs are not "property". In this manner, the Court avoided application of the holding in *United States v Daccarett*, 6 F.3d 37 (2d Cir. 1993), the case upon which the Second Circuit relied to decide *Winter Storm*. Instead, the Court applied provisions of the Uniform Commercial Code adopted by New York to reach the conclusion that "these provisions of New York law establish that EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Id.* at *35.

In overruling *Winter Storm* and abrogating the decisions relying on it, the Court did not shy away from acknowledging policy considerations, especially the impact that cumbersome EFT attachments had by creating an environment in which transactions would be better conducted in currencies other than US dollars in an effort to avoid such attachments. *Shipping Corp of India*, 2009 U.S. App. LEXIS 22747, at *10 (*"Undermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center."*) The Court also made reference to numerous holdings, commentaries, and *amicus curiae* briefs by various banking institutions addressing the threat to the international funds transfer business in New York.

Further expanding the scope of the holding in *Shipping Corp of India*, the Second Circuit more recently held that application of the holding applies retroactively and in cases in which a party did not raise an argument against attachment prior to the time at which *Shipping Corp of India* was decided. In *Hawknet Ltd v Overseas Shipping Agencies*, No. 09-2128-cv, 2009 U.S. Dist. LEXIS 24970 (2d Cir. Nov. 13, 2009), on appeal from an order entered on May 6, 2009 by the United States District Court for the Southern District of New York vacating an order of maritime attachment pursuant to Rule B, the District Court had originally ordered attachment of funds of certain defendants, but later vacated the attachment as to one of the defendants on the basis that there was insufficient evidence that the defendant was a proper party to the case. The District Court then stayed the action pending appeal of the issue of whether the party was a proper party. While the Second Circuit was reviewing the appeal, the Court issued its holding in *Shipping Corp of India*. The defendant, in a letter brief to the Court, argued that the appeal was moot inasmuch as the holding in *Shipping Corp of India* decided the issue. In opposition, the plaintiff argued that the decision in *Shipping Corp of India* did not apply retroactively.

While noting the general presumption against the retroactive application of statutes and regulations (citing *Landgraf v USI Film Prods*, 511 U.S. 244 (1994) & *Islander E Pipeline Co, LLC v Conn. Dep't of Envtl. Prot.*, 482 F.3d 79 (2d Cir. 2006)), the Court concluded that no such presumption applied to the case before the Court. It did so on the basis that jurisdictional rulings can never be made prospective only (citing *Firestone Tire & Rubber v Risjord*, 449 U.S. 368 (1981)), and that "the holding in *Shipping Corp of India* directly affects



how the district court may obtain personal jurisdiction over defendants" (*Hawknet*, 2009 U.S. App. LEXIS, at *8). Thus, as a jurisdictional ruling, the ruling in *Shipping Corp of India* can be applied retroactively.

Additionally, the Court held that, by not asserting an argument against Rule B attachment prior to the holding in *Shipping Corp of India*, the defendant had not waived its right to assert such an argument: *"Although it is true as a general matter that an appellate court will not consider arguments unless they were raised before the district court, a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made"* (*Hawknet*, 2009 U.S. App. LEXIS, at *9-10 (citations omitted)). The Court cited to *Winter Storm* as the controlling precedent that prevented defendants from making an argument against Rule B attachment prior to the holding in *Shipping Corp of India*.

Notably, on October 30 2009, plaintiff-appellant Shipping Corp of India was granted a 30-day extension of time to file a petition for rehearing. It seems clear, however, that even if such a petition is granted, the Second Circuit is not likely to change its position on this matter. Furthermore, on March 22 2010, the United States Supreme Court denied a writ of *certiorari* submitted by Shipping Corp of India. It looks as though maritime attachment of EFTs pursuant to Rule B is a thing of the past – at least for now.