

Enforcing Foreign Judgments in the U.S.: New Opportunities in New York

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It has been said that "banking is not really about lending money at all, but about getting paid back." Peter Schiff, *The Little Book of Bull Moves in Bear Markets*, p.xxxv (2008). In the same sense, successful litigation depends not so much on winning a judgment, but on collecting it. Often the court that enters a monetary judgment is powerless to compel the defendant to satisfy it—for example, when the defendant has no attachable assets in the jurisdiction. In those situations, it becomes necessary for the judgment creditor to initiate a second phase of litigation in a jurisdiction where it may collect.

When the judgment is issued by a state or federal court within the United States, the U.S. Constitution's full-faith-and-credit clause protects judgment creditors by requiring all U.S. courts to honor and enforce each other's judgments. U.S. Const. Art. IV, § 1. 28 U.S.C. § 1963 prescribes the means to register any U.S. federal court's money judgment in any other judicial district, and provides that "[a] judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."

Domesticating foreign judgments in the United States is a trickier business, because "no federal law governs the enforcement of foreign-country judgments, and indeed... even in federal courts, state law rather than federal law applies to this subject." Andreas F. Lowenfeld & Linda J. Silberman, *United*

States of America, Enforcement of Foreign Judgments Worldwide, 123 (2d ed. 1994). In 1895, the U.S. Supreme Court established the principle that foreign judgments should "be given full credit and effect" in U.S. courts so long as "the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proof, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record"—unless "principles of international law" or "the comity of our own country" dictates otherwise. *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895).

One principle of comity that sometimes dictates otherwise, as it did in *Hilton*, is where the courts of the foreign jurisdiction would not give reciprocal treatment to a judgment entered in the United States. See Brian Richard Paige, Comment, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 Seattle Univ. L. Rev. 591, 593 (2003) (noting that "at least seven states (Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina, and Texas)...continue to insist that reciprocity be established"). But, in general, "[a] valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned." Restatement (Second) of Conflict of Laws § 98. Most states in the United States have enacted some form of Uniform Foreign Money-Judgments Recognition Act, which makes a "foreign judgment...enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit," subject to a few exceptions to guard against "case[s] of serious injustice." Unif. Foreign Money-Judgments Recog. Act, § 3, § 4 cmt. (1962).

The laws regarding the recognition of foreign judgments in the United States are not the only consideration in selecting a jurisdiction in which to seek enforcement of a judgment. The main

consideration, of course, is finding a jurisdiction in which the judgment debtor's assets can be attached. A judgment creditor can seek to enforce the judgment in any jurisdiction where the judgment debtor's assets are located, since the courts of a state may properly exercise their jurisdiction over any property within that state. *See Shaffer v. Heitner*, 433 U.S. 186, 210 (1977). Until recently, however, it was unclear what recourse a judgment creditor might have in the United States against a judgment debtor with assets offshore.

On June 4, 2009, the New York Court of Appeals, the state's highest court, issued a decision which one commentator observed has "the potential of making New York a mecca for judgment creditors pursuing assets of their judgment debtors." In *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), the court held that New York law permits federal and state courts to order banks subject to personal jurisdiction in New York to turn over assets owned by customers who have outstanding judgments against them, regardless of whether those assets are located in New York or even within the United States. Thus, the presence in New York of a third party holding a judgment debtor's assets can provide the hook to attach those assets even if they are outside the United States and not subject to the *in rem* jurisdiction of any court in the United States.

Koehler arose from a dispute between two former business partners in a Caribbean resort, Lee Koehler and A. David Dodwell. The Bank of Bermuda had acted as a lender to the partners and held their shares in the resort as collateral. In 1993, Koehler obtained a \$2 million judgment against Dodwell in the U.S. District Court for the District of Maryland. Koehler then commenced an action in the U.S. District Court for the Southern District of New York seeking an order requiring the Bank of Bermuda to turn over the shares it held for Dodwell even though those shares were held by the bank offshore, relying on a provision of New York law permitting judgment creditors to bring proceedings against third parties holding judgment debtors' assets and empowering courts to issue a "delivery order" requiring the third party to deliver the property or convert it to monetary form to satisfy the judgment. *See* N.Y. CPLR 5225(b).

The federal district court dismissed the petition, citing the "well established principle that a New York

court cannot attach property not within its jurisdiction." *Koehler v. Bank of Bermuda Ltd.*, 2005 U.S. Dist. LEXIS 3760, *33 (S.D.N.Y. Mar. 9, 2005). The court rejected the argument that "nothing more than a valid money judgment is necessary," holding that "the law...requires that the property sought to be levied against exist within the jurisdiction." On appeal, however, the Second Circuit held that it was unsettled whether New York law required *in rem* jurisdiction over the property or whether *in personam* jurisdiction in New York over the party holding the property was sufficient to sustain a garnishment under Section 5225(b) of the New York Civil Practice Laws and Rules ("CPLR"). *See Koehler v. Bank of Bermuda Ltd.*, 544 F.3d 78, 80 (2d Cir. 2008). The Second Circuit certified that question to the New York Court of Appeals.

New York's status as a global financial center rendered the question certified in *Koehler* one of significant consequence to financial institutions. Nearly any institution maintaining a branch or office in New York is subject to personal jurisdiction there. *Koehler* thus exposed such institutions to the possibility that any property they held for their customers anywhere in the world could be subject to garnishment in a New York court.

The Clearing House Association, a trade association affiliated with Bank of America, Citibank, JPMorgan Chase, and numerous other lending institutions, filed an *amicus curiae* brief siding with the Bank of Bermuda. In that brief, Clearing House submitted that "[r]equiring 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." Specifically, Clearing House argued that the rule would subject banks to "the substantial burden of searching for, restraining, collecting and delivering remote property into the State," and that "[i]nstitutions would face significant financial and legal exposure, particularly when asked to choose between obeying court orders here in New York and adhering to applicable law in foreign jurisdictions." Clearing House also raised the specter that foreign customers of banks maintaining New York branches "would undoubtedly reconsider whether to continue to deal with [those]

institutions," "inevitably adversely affect[ing] the State's economy and tarnish[ing] New York's reputation as a global financial center." Finally Clearing House argued that making New York such a hospitable forum for judgment creditors would burden the state's courts with numerous foreign disputes lacking any connection to the state.

In deciding the certified question presented by the Second Circuit, the New York Court of Appeals held that under New York law, "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." 12. N.Y.3d at 541. The Court of Appeals did not grapple with the practical implications raised by the Clearing House. Rather, the Court based its opinion on the fact that a CPLR 5225 turnover action proceeds "against the garnishee, rather than by a device operating on the property alone," and is thus distinct from alternative devices such as prejudgment attachment requiring *in rem* jurisdiction over the property. *Id.* at 538. While a court may not exercise *in rem* jurisdiction unless "the *res* [is] within the jurisdiction of the court issuing the process," a "court[] can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction" even if the property is outside of it. *Id.* at 538-39.

A dissenting opinion protested that "[s]uch a broad garnishment remedy is unsupported by any precedent in New York or, apparently, in any other jurisdiction." *Id.* at 542 (Smith, J., dissenting). The dissent pointed out that the precedents the majority had relied upon entailed exercises of *in personam* jurisdiction over judgment debtors, not third parties which may have legitimate interests "independent of the judgment debtor" for keeping property outside the jurisdiction. *Id.* at 543. By extending the reach of those cases to third parties, the dissent submitted, "the majority's holding opens a forum-shopping opportunity for any judgment creditor trying to reach an asset of any judgment debtor held by a bank (or other garnishee) anywhere in the world." *Id.* at 542. That forum-shopping opportunity applies to New York uniquely inasmuch as no other state had interpreted any of its own garnishment statutes as broadly as the New York Court of Appeals did in *Koehler*.

The New York Court of Appeals has the final say on questions of New York law, so *Koehler* will remain the law unless the U.S. Supreme Court indulges an appeal on federal constitutional grounds or otherwise has occasion to address the issue. The dissenting opinion sketched out one theory on which such an appeal might proceed. The dissent expressed concern that "[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." *Id.* at 544. The due-process standard requires "all assertions of state-court jurisdiction" to be evaluated according to "traditional notions of fair play and substantial justice." *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The U.S. Supreme Court had already held that "the traditional *in rem* approach of such proceedings—permitting judgments to be enforced against property whenever it may be located—is constitutionally acceptable," but no court has yet held that "the novel *in personam* approach to judgment enforcement" represented by *Koehler* satisfies due-process requirements. *Id.*

If the approach remains "novel" and is not later overturned on constitutional grounds, judgment creditors have a potent new tool in their arsenal when it comes time to collect on foreign or domestic judgments. And whatever effect it might have on New York's standing as a leading financial center, it seems likely to cement New York's status as the leading litigation forum for judgment creditors hoping to collect.

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