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The End Of Winter Storm: The Second Circuit Decides That “Beneficiary” Wire Transfers Are Not Attachable Property Under Rule B And That It Is “Probable” That “Originator” Wire Transfers Are Likewise Not Attachable¹

The Second Circuit’s decision today, October 16, 2009, in *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte. Ltd.* overruled the Court’s 2002 *Winter Storm Shipping v. TPL* decision on the attachability of electronic fund transfers (“EFTs”) “with the consent of all the judges of the Court in active service.” The Court ruled that *Winter Storm* was “erroneously decided and therefore should no longer be binding precedent in our Circuit.”

The issue on appeal was specifically the attachability of EFTs being sent to a Rule B defendant (*i.e.* “beneficiary” EFTs)—which the District Court had ruled were not attachable property. That question had been left open by the Second Circuit’s decision in *Consub Delaware LLC v. Schabin Engenheria Limitada* (2008), which had upheld the attachability of “originator” EFTs. The Court stated, in a footnote, that in “overturning *Winter Storm*, we also abrogate any decision insofar as it has relied on *Winter Storm*, specifically [*Consub Delaware*]”—a reversal of views by the entire court from a decision from just the prior year.

Background

The Court preceded its analysis with a review of “critical commentary” of the *Winter Storm* decision including that “some even suggested that *Winter Storm* has threatened the usefulness of the dollar in international transactions.” Moreover, note was made of the Clearing House Banks’

amicus arguments (also made and ignored in *Winter Storm* and *Consub Delaware*) of the burden placed on its member banks by the volume of attachments. Indeed, the Court went back to an *amicus* brief submitted by the Federal Reserve Bank of New York seven years earlier in *Winter Storm*, which had not been re-filed in this case, in respect of “[u]ndetermining the efficiency and certainty of fund transfers in New York” and to its “standing as an international financial center.”

The Court next discussed how the effectiveness of Rule B had been “cabined” or limited by its decision this year in *STX Panocean* upholding “registration” as a basis for defeating Rule B and other lower court restrictions. Reference was made to a lower court decision rejecting “continuous service,” which, if upheld, “would arguably limit the reach of *Winter Storm*.” These limitations, including one judge’s requirement of proof of an EFT being made “beyond a hunch,” “[t]aken together ... may have limited the practical usefulness of our holding in *Winter Storm* to plaintiffs and thus the practical effects of overturning that decision.” This justification, if it may be so termed, was made “to allay any concerns that the decision in this case is wholly unanticipated, surprising, or disruptive to ongoing financial practices.”

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Legal Reasoning

Beneficiary EFTs

The Court first noted that its decision complied with the requirements for en banc reversal and that there were two reasons for doing so. First, *Winter Storm* had erroneously relied on a prior decision upholding seizure of EFTs in a criminal case, which were used by a Colombian cartel to transfer funds, under a penal statute and that “the effects of *Winter Storm* on the federal courts and international banks in New York are too significant to let this error go uncorrected.”

The Court reviewed *Winter Storm*’s rationale and decided that its “reasons [are] unpersuasive and its consequences untenable” and its reliance on a criminal case “misplaced.” Accordingly, under Rule B “the question of ownership [of the Rule B property] is critical” because if the “*res* is not the property of the defendant, then the court lacks jurisdiction.”

Although *Winter Storm* had relied upon Rule B’s broad language defining property as “tangible or intangible” the Panel was not persuaded by the “text of Rule B” that EFTs are a defendant’s property.

Further, in the absence of “federal maritime law to guide our decision” New York State law should be considered—which “does not permit attachment of EFTs that are in possession of an intermediary bank.” An “authoritative comment,” to the New York Uniform Commercial Code “states that a beneficiary has no property interest in an EFT”—a comment cited to the Court by amicus briefs in *Winter Storm* and *Consul Delaware*. Again, “[t]aken together,” 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” and “cannot be subject to attachment under Rule B.”

Originator EFTs

The Court sent back the question, not raised on appeal, as to whether “there are grounds for not vacating the remaining [originator EFT] portions of the attachment order” (emphasis added). The prior analysis of New York law and refusal to rule on a cross-appeal issue as “likely moot” because “it is probable that the District Court will vacate the ... attachment order in its entirety” provide some indicator as to how that court will rule.

Conclusion

The dire warnings as to Rule B’s “damage [to] New York’s standing as an international financial center,” made in 2002 and before the events of 2008, which were entirely unrelated, clearly were influential. Contrary to the Court’s suggestion, this decision is “unanticipated, [and] surprising.” Numerous pending appeals before the Second Circuit, as well as hundreds of Rule B cases pending in New York, will be significantly impacted. No doubt an equal number of pending arbitrations and litigations proceeding around the world, many of which are proceeding solely on the basis that security has been obtained for an eventual award or judgment under a Rule B attachment of EFTs, will also be effected.

The reality of the Court’s remark that “we must not overstate the practical effect of our holding in this case” because of recent limitations on the remedy remains to be seen.

It should be added that Rule B remains a viable and cost effective remedy where a defendant has property, (other than an EFT, such as charter hire or a bank account or bunkers) in the United States and cannot be “found” in the District in which attachment is sought.

Please contact us for further information as how best to proceed at www.blankrome.com. ■

For Additional Information

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