

New York's High Court Beckons Foreign Judgment Creditors to New York—but Does Koehler Loosen Cornerstone of New York's Economy?

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In June 2009, the New York Court of Appeals reached a decision that has the potential to create monumental change in legal and business practices in New York, especially as it relates to the financial industry. In *Koehler v. Bank of Bermuda Ltd.*,¹ on a certified question from the United States Court of Appeals for the Second Circuit, New York's highest court answered in the affirmative the narrow question of "[w]hether, under New York law, a turnover proceeding can reach property outside of New York?" The Court's simple answer to this seemingly narrow and technical legal question, promises to have very broad implications as it potentially places money and property located outside New York — indeed, anywhere in the world — easily within the grasp of judgment creditors, despite their, or judgment debtors', lack of any contacts with New York.

In fact, the Court in *Koehler* has gone so far as to permit actions to enforce a foreign judgment, brought by a foreign creditor, against a foreign debtor, to recover assets located outside of the United States. In plain and practical terms, this means that judgment creditors worldwide can now come to New York to enforce judgments, because a bank having even a mere token presence in New York can now be forced by New York's courts to turnover a judgment debtor's (i.e., one of the bank's clients') assets located anywhere in the world, even if the debtor-client has no connection at all to New York. It is hard to overstate how broad and far-reaching the implications of *Koehler* can be for financial institutions located in New York and those who do business with them.

Background

This issue of first impression arose when a Pennsylvania citizen, ("C"), sued his former business partner, ("D"), a resident of Bermuda, in federal court in Maryland. C obtained a default judgment in excess of two million dollars and promptly commenced his campaign to seek satisfaction of the judgment. D owned stock in a Bermudian corporation and the certificates that represented D's shares were in the possession of a Bermudian bank ("B"), to whom D had pledged the shares as collateral for a loan. In a strategic maneuver to gain access to these foreign assets, C, the judgment creditor, utilized New York's enforcement statute, CPLR 5225, to force B, the garnishee, to turn over D's stock certificates (or their monetary equivalent). C argued that under § 5225, the court was authorized to issue an order requiring someone who is in possession or custody of money or other personal property in which a judgment debtor has an interest, to turn over the property or pay the money to the judgment creditor. C contended, therefore, that despite the fact that B was a Bermudian bank, a New York court could issue a turnover order of D's assets located outside New York because B maintained a New York branch.

C's first stop in his quest to enforce the judgment was the United States District Court for the Southern District of New York, a jurisdiction with no relationship to either the judgment creditor or the underlying case, and nothing but the most attenuated of connections to the judgment debtor. The District Court dismissed C's

petition on several grounds, including on the ground that it had no *in rem* jurisdiction over D's property since the property in question (D's stock certificates held by B in Bermuda) was not in New York. C appealed to the Second Circuit, who sought the guidance of the New York Court of Appeals as to the scope of § 5225.

The Koehler Decision

The New York Court of Appeals agreed with C and concluded that B's New York connection was sufficient to consider B "present" in New York and therefore to treat B as a garnishee under Article 52.² Accordingly, the Court held that under CPLR 5225(b), a New York court could order B to bring the stock certificates from outside the United States and into New York and deliver them to C (or to a New York sheriff for sale with the proceeds to go to C). The Court of Appeals emphasized that the "key to the reach of the turnover order is personal jurisdiction" over the garnishee, B.³ In other words, because B was subject to personal jurisdiction in New York, it could be forced to turnover D's foreign assets to satisfy a judgment against D.

This is in contrast to *in rem* jurisdiction, which is necessary in pre-judgment attachment scenarios and which requires that the property subject to attachment actually be located in New York. In a post-judgment enforcement action, a court with the requisite jurisdiction over the necessary parties has already rendered a judgment, and in enforcing this judgment, the court just requires personal jurisdiction over either the judgment debtor or a garnishee, according to *Koehler*. This distinction greatly broadens the reach of New York courts, affording judgment creditors worldwide easy access to assets located far beyond New York's borders. So long as a person/entity (e.g., a bank) subject to personal jurisdiction in New York is holding the assets of a judgment debtor, that person/entity can be forced by a New York court to turnover the assets of the judgment debtor even if the assets are located outside the United States, and even if the judgment debtor itself is not subject to jurisdiction in New York.

"Far-Reaching" and Constitutional Implications

The dissent in *Koehler* warns of the far-reaching implications of this decision. For example, the dissent notes that the majority's opinion will undoubtedly encourage judgment creditors to forum shop, could potentially conflict with laws and judicial decisions of other jurisdictions, and will likely impose "significant administrative burdens" on New York's banking institutions, not to mention its courts. All of this in cases that need not have any connection whatsoever to New York and which New York's courts could have no real interest in adjudicating.

In addition, the dissent also raised constitutional concerns questioning whether the fact that the garnishee is amenable to personal jurisdiction in New York "is enough contact under *International Shoe* to justify the enforcement of a non-New York judgment by a non-New York creditor against a non-New York debtor, to recover an asset that is located in Bermuda."⁴ The Second Circuit has already applied the New York Court of Appeals' answer to its certified question and vacated and remanded the *Koehler* matter to the District Court for further proceedings.⁵ In reviewing the Court of Appeals' answer, the Second Circuit makes no mention of the constitutional concerns raised by the *Koehler* dissent.⁶ However, it is possible that this decision

may still be subject to further appellate review by the Second Circuit or by the United States Supreme Court. Indeed, given that foreign litigants will use § 5225 to enforce foreign judgments to retrieve foreign assets, a constitutional challenge to the scope of § 5225 appears to be inevitable.

Conclusion

The result of the *Koehler* decision is that a garnishee who is subject to personal jurisdiction in New York and who holds assets of another located outside of the state (even outside of the country), can be ordered to bring the assets into New York to satisfy a judgment rendered against the owner of the assets. The practical effect of this is that large garnishees with a New York presence will likely become a target of choice for judgment creditors worldwide, looking to have New York courts satisfy their judgments. In New York, the large garnishees of choice can be found in the banking industry, where New York bank affiliates form the bridge that *Koehler* envisions, which allows foreign assets to be delivered into New York and into the waiting hands of judgment creditors.

In addition to the concerns raised by the *Koehler* dissent, this decision raises the concern that banking customers will be wary of dealing with entities that have a New York presence, which in turn may cause financial institutions to reconsider their own presence in New York. Since the banking industry is a cornerstone of New York's economy, such an exodus is exponentially more troubling. However, unless *Koehler* is later reversed on constitutional grounds or the New York legislature limits the reach of the state's enforcement statute, these concerns are here to stay.

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¹ 12 N.Y.3d 533 (2009).

² A garnishee is simply defined as any person who owes a debt to or holds property of a judgment debtor. CPLR 105 (i).

³ *Koehler*, 12 N.Y.3d at 540.

⁴ *Id.* at 545.

⁵ *Koehler v. Bank of Bermuda Ltd.*, 577 F.3d 497 (2d Cir. 2009).

⁶ *Id.*