CARLTON FIELDS

Daimler Mostly Resolves New York's 'Separate Entity' Dispute

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When the New York State Court of Appeals rendered its *Koehler* decision,1 commentators believed that the court had revolutionized the law of money judgment collection: Any bank with a branch in New York State could be sued as a garnishee and ordered to restrain, and deliver to the New York court, a judgment debtor's assets located at any of the bank's branches anywhere in the world.2 Events have not turned out as anticipated. After five years, and dozens of garnishment actions against international banks, the lower federal and state courts disagree on the meaning of *Koehler*. Faced with conflicting applications of New York state law, and unclear as to the correct rule, the U.S. Court of Appeals for the Second Circuit, in *Motorola Credit v. Standard Chartered Bank*, has certified again to the New York Court of Appeals the issue of the extraterritorial reach of the New York State garnishment statute.3 The essence of the certified question is whether the New York state courts still recognize their judicially created "separate entity" rule - that "the mere fact that a bank may have a branch within New York is insufficient to render accounts outside of New York" subject to restraint "merely by serving a New York branch."4 New York courts had created the separate entity rule as a policy exception to the more overarching principle of general in personam jurisdiction.5 A bank has a branch in New York: Therefore, the entire bank is "present" in New York, and subject to being sued in New York for any claim, whether or not related to its activities in the forum state. The separate entity rule was created, in part, to ameliorate the effect of general jurisdiction as it applied to out-of-state banks with branches in New York. The dispute underlying the Motorola question is whether, in *Koehler*, the New York Court of Appeals had intended to abrogate the judicially created "separate entity" rule. This dispute has largely been overcome by events. On Jan. 14, 2014, the U.S. Supreme Court rendered a decision in *Daimler AG v. Bauman*6 that, as a matter of federal constitutional law, severely limits general jurisdiction. The court held that the premise of the extraterritorial garnishment cases - a foreign international bank is "present" in New York because it has a branch there, and therefore may be sued in New York for activity having no relation to New York - violates the Due Process Clause of the federal Constitution.

Koehler Case in Federal Court

In *Koehler*, a judgment creditor commenced a garnishment proceeding against the New York subsidiary of a foreign bank that, at its foreign branch, held property of the judgment debtor.7 The court declined the judgment creditor's request that the bank be ordered to deliver the foreign

property to the federal district court in New York State. On appeal, the Second Circuit certified the extraterritorial question to the New York Court of Appeals: "May a court sitting in New York 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?"8 ***Koehler* Decision in 2009**

The Clearing House Association, LLC, - "the nation's oldest bank association" - submitted an amicus curiae brief to explain the dangers of an affirmative answer to the certified question.9 The Clearing House did not contest general jurisdiction - that a foreign corporation doing business in New York may be sued in New York for conduct unrelated to its New York business. Rather, the Clearing House urged the Court of Appeals to continue the historic exemption against certain lawsuits arising from a bank's out-of-state activities: "It has long been the law of New York that a judgment debtor's bank account cannot be garnished in New York when the branch that holds the deposit is located elsewhere."10 Among the policy reasons underlying New York's creation of the rule was comity - the avoidance of "unnecessary conflicts with the laws of other jurisdictions."11 The Clearing House arguments did not convince the Court of Appeals: It answered "yes" to the certified question. Territorial reach was determined by personal jurisdiction: "the key to the reach of the turnover order is personal jurisdiction over a particular defendant."12 Where a court has personal jurisdiction over a judgment debtor, "A New York court has the authority to issue a turnover order pertaining to extraterritorial property. "13 The New York State Court of Appeals saw no reason to have a different rule for a judgment debtor and a garnishee bank such as that in *Koehler*, where the court had personal jurisdiction over the bank.14 The court did not address the policy reasons for treating banks with a branch in New York differently from any other garnishee. **Lower Courts Apply *Koehler***

In the five years since *Koehler*, New York federal and state courts have grappled with restraining notices seeking the seizure of assets held in foreign banks. Regarding jurisdiction, the courts are in agreement: By having a New York branch, the international bank is "present" in New York and subject to the general jurisdiction of the New York court, allowing the bank to be sued for activity not arising from the bank's New York business. The courts differed, however, on the application of general jurisdiction. Several courts interpreted *Koehler* to have abrogated the separate entity rule: In their view, a judicially created prohibition on suing a bank to restrain and deliver assets held abroad no longer exists.15 Other courts, after acknowledging general jurisdiction over the foreign bank (because of the branch in New York), applied the separate entity rule to limit the jurisdiction, specifically, to prohibit the garnishment of a bank's off-shore customer accounts.16 ***Motorola* Certification**

Has the separate entity rule been abrogated or not? In January 2014, on the appeal of two of these garnishment cases, the Second Circuit certified the abrogation question. It asked the New York Court of Appeals "whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank."17 ***Daimler AG v. Bauman***

The *Motorola* certification has been overcome by events, specifically, the Supreme Court's decision in *Daimler*. The plaintiffs in *Daimler* were the victims of Argentina's security forces. It was alleged

that the Argentina subsidiary of *Daimler AG*, a German public stock company headquartered in Stuttgart, had assisted the security forces in violating the plaintiffs' rights in Argentina. The lawsuit against the German corporation was filed in California, where, through an American subsidiary, the German company engaged in extensive business maintaining multiple offices that accounted for 2.4 percent (several billion dollars) of its worldwide sales. The issue before the court was whether a foreign company could be sued in California when the conduct underlying the lawsuit had occurred "entirely abroad."18 The basis of plaintiffs' assertion of jurisdiction was classic general jurisdiction - that the foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."19 The court rejected the application of general jurisdiction on the facts pleaded in *Daimler*. Relying on its recent "pathmarking"20 decision in *Goodyear v. Dunlop Tires Operations v. Brown*,21 the court opined that a court may assert general jurisdiction over a foreign corporation only where that corporation's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state."22 However, "only a limited set of affiliations" qualify to make a corporation "at home in the forum state,"23 with those limited affiliations being the corporation's "place of incorporation and principal place of business."24 In other words, unless it is where it is headquartered or incorporated, a foreign corporation may not be sued in a state when the acts giving rise to the lawsuit arose elsewhere. The *Daimler* plaintiffs argued that the court not restrict general jurisdiction so severely, but allow it wherever the corporation "engages in a substantial, continuous, and systematic course of business," as, frankly, many had thought to be the law.25 The court's rejection of this definition of general jurisdiction was unequivocal: "[Plaintiffs'] formulation, we hold, is unacceptably grasping."26 **Answering the Question**

For most international banks, *Daimler* answers the question certified in *Motorola*. For a bank doing business internationally, and headquartered and incorporated outside of New York - which describes almost every defendant in the extraterritorial garnishment cases - *Daimler* answers the *Motorola* question. New York courts do not have general jurisdiction over such a bank regarding conduct occurring abroad and having nothing to do with New York. Clearly, the conduct underlying the proposed restraint in *Motorola*, and similar cases, occurred abroad: The customer (the judgment debtor in *Motorola*) opened an account in the United Arab Emirates (or China, or Brazil, or wherever the extraterritorial restraint is sought). For the bank headquartered and incorporated outside of New York, the territorial restrictions of what in New York had been called the separate entity rule are, per *Daimler*, required by the Due Process Clause. To allow the ownership of accounts created and maintained abroad to be determined in New York lawsuits would be, as the *Daimler* court concluded, "exorbitant exercises of all-purpose jurisdiction" that unfairly subject a foreign corporation "to suit on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact" in the forum state.27 That such a bank has a branch in New York does not confer jurisdiction regarding foreign accounts. As to these banks, the certified question should be answered "yes." For the bank doing business internationally, but headquartered or incorporated in New York,28 the consequences of *Daimler* are different. Under the holding of *Daimler*, such banks are "at home" in

New York and thus subject to New York general jurisdiction, allowing them to be sued in New York for conduct occurring and having its impact abroad. However, even general jurisdiction is limited by comity. As the *Daimler* court noted, "Other nations do not share the uninhibited approach to personal jurisdiction advanced by the [lower court] in this case."29 Indeed, the court admonished the lower court for paying "little heed to the risks to international comity its expansive view of general jurisdiction posed."30 As to the banks doing business internationally but "at home" in New York, an argument may be made that comity alone prohibits extraterritorial garnishment. Unless the separate entity rule is reconfirmed, New York may be a more attractive location for banks doing business internationally if the bank is headquartered and incorporated abroad rather than in New York. *Daimler's* limitation on general jurisdiction protects the bank headquartered and incorporated abroad from the costs and liabilities of a New York court ordering the extraterritorial restraint of a bank customer's property. However, unless comity prohibits extraterritorial garnishment, New York's "at home" banks can offer no such protection to their customers. This is a serious competitive disadvantage. A customer who chooses to have a banking relationship outside the United States (or outside New York State) with a bank "at home" in New York may have his out-of-state or out-of-country accounts restrained and delivered to a New York court in a New York garnishment proceeding. No such risk exists if the customer opens his foreign account with a bank not "at home" in New York even though the bank has a branch in the state. Leveling the playing field between the New York "at home" bank and its out-of-state competitors (domestic and foreign) is a policy reason for the New York Court of Appeals to reaffirm the separate entity rule by answering "yes" to the *Motorola* certified question. ***Brian Rosner*** *and* ***Natalie A. Napierala*** *are shareholders in the New York office of Carlton Fields, both concentrating in securities and commercial litigation, and white-collar. Rosner is the author of "Swindle: How a Man Named John Grambling Jr. Cheated Banks out of Millions" (Business One, Irwin, 1990).* ***Endnotes:*** *1. Koehler v. Bank of Bermuda, 12 N.Y.3d 533, 911 N.E.2d 825 (2009). 2. See, e.g., David D. Siegel, 'Koehler': Creating Mecca for Creditors or Anti-Mecca for Garnishees? N.Y.L.J., July 28, 2009. 3. Tire Eng'g & Distrib., L.L.C. v. Bank of China Ltd. and Motorola Credit Corp. v. Standard Chartered, 740 F3d 108, 110 (2d Cir. 2014). Based on two appeals, the Second Circuit had certified two "separate entity" questions to the New York State Court of Appeals, a separate question arising from each appeal. Subsequent to the New York Court of Appeals' acceptance of the certified questions, the parties to the Tire Engineering appeal stipulated to its dismissal. The Second Circuit has withdrawn the certified question based on that appeal and re-confirmed the question relating to the Motorola appeal. See Tire Eng'g & Distrib., L.L.C. v. Bank of China Ltd. and Motorola Credit Corp. v. Standard Chartered _F3d_(2d Cir. Feb. 24, 2014). 4. Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v. Advanced Empl. Concepts, 269 A.D.2d 101, 703 N.Y.S.2d 3 (1st Dept. 2000). 5. See United States v. First Nat'l City Bank, 321 F.2d 14, 19-20 (2d Cir. 1963), rev'd, 379 U.S. 378 (1965) ("A review of the New York cases indicates a consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank...'the different branches were as separate and distinct from one another as from any other bank'" (citations omitted)); see generally Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915*

*(1917) (general jurisdiction) and Chrzanowska v. Corn Exch. Bank, 225 N.Y. 728, 122 N.E. 877 (1919), aff'd 173 A.D. 285 (1st Dept. 1916) (separate entity). 6. Daimler AG v. Bauman, 571 U.S.__, 134 S.Ct. 746 (Jan. 14, 2014). 7. Koehler, 544 F.3d 78 at 80. 8. Id. at 88. 9. Brief of the Clearing House Association L.L.C. as Amicus Curiae Supporting Respondent, Koehler v. The Bank of Bermuda Ltd., No. 2009-0082, 2009 WL 1615261, at *5 (March 17, 2009). 10. Id. at *2. 11. Id. at *27. To abandon the rule, the Clearing House advised, would "threaten international comity" and result in the disruption of international banking, and conflict between the courts of separate nations as each court fought over the disposition of the same asset. Id. at *28-31. 12. Koehler, 12 N.Y.3d at 540. 13. Id. 14. Id. at 539-541. 15. See, e.g, JW Oilfield Equipment, LLC v. Commerzbank AG, 764 F.Supp.2d 587, 595-96 (S.D.N.Y. 2011) and Eitzen Bulk A/S vs. Bank of India, 827 F.Supp.2d 234, 238-41 (S.D.N.Y. 2011). 16. The courts continuing to apply the separate entity rule reasoned that "the Court of Appeals in Koehler did not even mention the separate entity rule, thereby strongly indicating that it had not intended to overrule that doctrine." Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 WL 1844061, at *3 (N.Y. Sup. May 12, 2011); see also Parbulk II AS v. Heritage Maritime, SA, 935 N.Y.S.2d 829, 832 (Sup. Ct. New York Co. 2011); Global Tech., Inc. v. Royal Bank of Canada, No. 15015/2011, 34 Misc.3d 1209(A), 2012 WL 89823, at *15 (Sup. Ct. New York Co. Jan. 11, 2012) and Shaheen Sports Inc. v. Asia Ins. Co. Ltd., No. 98-CV-5951 LAP, 11-CV-920 LAP, 2012 WL 919664, at *5 (S.D.N.Y. March 14, 2012). 17. Motorola, 740 F.3d at 110. 18. Daimler, 134 S.Ct. at 750-53. 19. Id. at 754 (citations omitted). 20. Id. at 760 and note 16. 21. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S.__, 131 S.Ct. 2846 (2011), (injured abroad by a foreign corporation's defective product, manufactured abroad, the North Carolina plaintiffs sued in their home state, asserting that North Carolina courts had general jurisdiction over the foreign corporation because of its activity in North Carolina, specifically, that some of its products had been sold in North Carolina. The court rejected the argument. It held that a "connection so limited between the forum and the foreign corporation" does not establish the "'continuous and systematic'" affiliation that would render the foreign corporation "at home in the forum State" so that it could be sued for "claims unrelated to the foreign corporation's contacts with the State." 22. Daimler at 754. 23. Id. at 760. 24. Id. 25. Id. at 760-61 (citation omitted). Certainly, Justice Sotomayor thought so. Substantial, continuous, and systematic business as the basis for general jurisdiction is what has "been taught to generations of first-year law students" as the very definition of what due process allows. Id. at 770 (Sotomayor, J., concurring). 26. Id. at 761. 27. Id. at 761-62. 28. For example, of the 14 current members of the Clearing House, three (The Bank of New York Mellon, Citibank and JPMorgan Chase) are headquartered in New York and incorporated in Delaware. 29. Daimler, at 763. 30. Id.*

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