

New Model Order of Maritime Attachment May Reduce Burden on Banks

The use of maritime attachment orders to restrain electronic funds transfers may be significantly curtailed by the recent endorsement by judges in the Southern District of New York of a new model maritime attachment order.

The Second Circuit's 2002 *Winter Storm* decision, allowing admiralty and maritime Rule B¹ attachments to reach electronic funds transfers (EFTs) as they pass through intermediary banks, has resulted in a significant burden on New York banks and on the federal courts sitting in New York City. On April 3, 2009, the Board of Judges of the United States District Court for the Southern District of New York met to discuss the use of a model Rule B order drafted by the Judicial Improvements Committee which, if used, appears to make maritime attachments much less burdensome on New York banks (and significantly less effective as a remedy for plaintiffs). Most of the judges expressed approval of the Model Order. The Model Order has been communicated to the City Bar Committee on Admiralty along with a letter encouraging maritime lawyers to "immediately start submitting this proposed order."

Background - *Winter Storm* and Maritime Attachments

Although interference with an EFT as it passes through an intermediary bank is contrary to New York law under Article 4-A of the U.C.C., maritime attachments arise under federal law. The *Winter Storm* decision applied the Supremacy Clause of the U.S. Constitution and created federal common law superseding the U.C.C. to allow such attachments to reach EFTs. Two subsequent panels of the Second Circuit have, successively, questioned and reaffirmed *Winter Storm*. *Aqua Stoli Shipping* (2006) described *Winter Storm* as "open to question"; *Consub Del. LLC* (2008) said that *Winter Storm* was "correctly decided."

While the *Winter Storm* judges may have been indifferent to the resulting burden on the banks, the courts have become concerned about the burden that maritime attachments are placing on the courts themselves. The Model Order was proposed after, and should be read against the background of, the February 4, 2009 opinion and order of Judge Scheindlin (who chaired the committee that wrote the new Model Order), in *Cala Rosa Marine v. Sucres et Deneres Group* (09 Civ. 425).

Judge Scheindlin's *Cala Rosa* Decision

In her *Cala Rosa* decision, Judge Scheindlin summarized the current law as follows:

1. Rule B attachments follow New York law in that they do not reach assets not present at the garnishee at the time the restraining order or attachment is served.
2. The first rule cannot be circumvented by serving a TRO purporting to restrain property coming into the hands of the garnishee after service.

3. If, however, the garnishee voluntarily treats the attachment as having continuous effect and restrains transfers accordingly, "the overwhelming authority provides that no vacatur will follow"; that is, the transfers will be treated as subject to the attachment.

After summarizing the law and acknowledging that, absent continuous service of the attachments, it would be virtually impossible to attach EFTs, Judge Scheindlin held, in substance, that that was the law and that she was not going to condone the burden placed on banks by continuous service to catch EFTs. She granted the attachment requested in the *Cala Rosa* case, denied a request for continuous service, and required service to be made by the U.S. Marshal rather than by private process servers retained by the plaintiff, *de facto* eliminating continuous service. Judge Scheindlin's decision was influenced by the fact that the dispute before her had no U.S. connection; the litigation would be an arbitration in London (which does not permit pre-judgment attachment); and the case had been pending for a time and would continue to pend, creating the prospect of continuous re-service over many months.

The principles Judge Scheindlin announced in *Cala Rosa* appear to be embodied in the new Model Order. The Model Order was approved by most of the judges at the meeting, and has been disseminated to the bar with the "hope, if not expectation, that maritime lawyers will immediately start submitting this proposed order."

The New Model Order - Summary of Key Provisions

The following elements of the [new Model Order](#) may make maritime attachments less attractive to plaintiffs (page citations in the Model Order):

- The Court has the option to limit "initial service" of the Order to service by the U.S. Marshal. Thus far, the Model Order follows *Cala Rosa*, and would likely eliminate continuous service of the Order. However, the Model Order goes on to say that "supplemental service" if "required," shall be made "personally," and does not offer the option of restricting "supplemental," as opposed to "initial," service to the U.S. Marshal. What is meant by "supplemental service" and whether it is the same as continuous service is not addressed in the Model Order.² (p. 3)
- The garnishee now has the right to charge a reasonable processing fee. There is no indication of what would be reasonable. Presumably, the fee would have to have some relation to actual cost, which might include a fair allocation of overhead. (p. 3)
- The garnishee has the option to refuse to deem service effective as to EFTs passing through after service. (p. 3)
- The Order expires 60 or 90 days from issuance if no property has been restrained, subject to one 60-day extension for "good cause" and subsequent extensions for "extraordinary circumstances." This seems to contemplate subsequent services of the Order, in light of Judge Scheindlin's reaffirmation in *Cala Rosa* of the rule that the Order does not take effect at all if no property is restrained by the initial service. Nevertheless, it confines the period for such successive services, if any. (pp. 4-5)
- The Order expires 45 days from issuance unless plaintiff has commenced "adversarial proceedings," including arbitration, against defendant. (p. 5)

Detailed Discussion of Model Order Features

1. **Required Finding.** The Model Order requires a finding that the defendant regularly sends funds to others that are routed through New York banks. The plaintiff will have to provide some evidence to support this finding.
2. **Voluntary Continuous Effect.** While the Model Order departs from New York's U.C.C. Article 4-A in permitting service on intermediary banks processing electronic funds transfers, it otherwise follows New York attachment law in that it reaches only property "belonging to or being held for Defendant by any garnishee... *at the time of service.*" The italicized words raise the question of whether the model order should be given continuing effect, as would a New York state court attachment order, in a situation where property is successfully attached at the time of service. This is an issue the courts will have to resolve, but which may leave banks in doubt as to whether to recognize continuing service if the attachment is successful when served.

This severe limitation of the attachment, however, is not mandatory; a later paragraph permits a garnishee to "consent to deem service to be effective and continuous for any period of time not to exceed 60 days from the date of this order." Consent to continuous service may be manifested by the garnishee's "rules, policies or other instructions regarding service." It will be important for banks to set internal policies on whether they will voluntarily permit continuous service and for how long (not to exceed 60 days from the date of order), including whether they will recognize continuous service where property has been successfully attached. To take full advantage of a limited attachment order, banks should not consent unnecessarily to continuous service. However, the second paragraph of the Model Order appears to sanction a bank decision to consent to continuous service.

3. **EFTs Affected.** The court has the option to have the Model Order cover EFTs either "originated by" the defendant (the situation in the Second Circuit's *Winter Storm* decision) or "originated by, payable to, or otherwise for the benefit of" the defendant. Garnishee banks will be compelled to pay attention to whether they are filtering only for transfers originated by the defendant or also for transfers originated for the benefit of the defendant. Ultimately, the courts will have to address whether a transfer attached at an intermediate bank is property of the beneficiary or of the originator (where federal law applies - under the New York U.C.C. it is not the property of either).³
4. **Filtering EFTs.** Since the garnishee bank cannot possibly check for EFTs at the moment of service of the Model Order, and EFTs usually pass through an intermediary bank instantaneously, it is impossible for an attachment to capture an EFT unless it is given "continuous effect" by the garnishee, by putting up an EFT filter. Thus, banks that do not desire to give any voluntary continuous effect to the order will not put up a filter. On the other hand, if a bank does decide voluntarily to put up a filter, it will have to decide how long to keep the filter up. If the bank's options are unclear under the particular Order entered, the bank may restrain transfers initially, to be safe, and seek guidance from the Court.
5. **Garnishee Answer.** The garnishee must advise the plaintiff as soon as practicable after it determines that it has any property subject to the attachment order. It must state the amount of funds, the exact name of the originator and beneficiary as reflected in the wire transfer information, and any information available about the purpose of the transfer. This requirement can be satisfied by furnishing plaintiff the payment order of the EFT.

6. Escrow of EFTs. The order contemplates that plaintiff, defendant and the garnishee will negotiate placing attached funds into escrow, obtaining substitute security, or having the funds deposited into the court registry. The plaintiff must notify the court within 30 days of the attachment whether any of this has been arranged. If so arranged, then the case is to be dismissed without prejudice. Upon dismissal, the attachment order should no longer be effective (although the garnishee is not required to receive notice of the dismissal; it will have to monitor the docket if desired).

On the theory that the attachment order lapses upon dismissal of the action, any garnishee with property that has been attached will want to turn over the funds as soon as practicable to expedite its dismissal. This is because, under New York law, if a levy does attach, the levy continues to have effect as to subsequently received property and the garnishee will have to continue to restrain transfers until the order lapses.

7. Personal Service; Service by U.S. Marshal. As noted above, the Model Order gives the court the option of limiting "initial" service to the U.S. Marshal or permitting service by plaintiff's agents. In either case, initial service must be personal and cannot be done by fax (later service may be by fax or email if the garnishee consents). If the order served on the bank permits service by plaintiff, then there is a higher risk that the bank will be repeatedly served on a daily (or more frequent basis). This raises the question of whether a bank may tailor its policy concerning voluntarily continuous service depending on who is authorized by the Order to serve. The Model Order gives no guidance as to whether such tailoring is permissible.

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¹ Of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

² The phrase "supplemental process" appears in Admiralty Rule C(3), referring to process in addition to an arrest warrant for a vessel, but that does not appear to shed any light on this issue.

³ In the recent decision in *Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, S.D.N.Y., 03 Civ. 08554 (April 17, 2009, Judge Pogue of the U.S. Court of International Trade sitting by designation), Judge Pogue used the contention of plaintiff that both the originator and beneficiary had property in EFTs to hold that that contention made EFTs joint property within the meaning of the Federal Debt Collection Procedures Act (which applies to collection of debts owed the government), which in turn meant that state law applied to the garnishment under a clause in that statute. Judge Pogue then held that state law under U.C.C. Article 4-A barred attachment of EFTs at intermediary banks. Judge Pogue did not, however, reconcile his premise that the EFT was joint property of the beneficiary and originator with his conclusion to apply state law, which provides that EFTs at intermediary banks are not property of either the beneficiary or the originator. Official Comment 4 to U.C.C. §4-A-502.

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