

SECOND CIRCUIT OVERTURNS ITS PRIOR DECISION IN *WINTER STORM*

*Electronic Fund Transfers Are No Longer Property
Subject to Maritime Attachment Under Rule B*

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On October 16, 2009, the U.S. Court of Appeals for the Second Circuit in a case entitled "*The Shipping Corporation of India v. Jaldhi Overseas Pte Ltd.*" filed under Case No. 08-3477-cv, held that electronic fund transfers ("EFTs") being processed by an intermediary bank are not property subject to attachment under Rule B, and with the consent of all active judges of the Second Circuit, overruled *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2nd Cir. 2002) and all of its progeny.

In order to understand the import of this decision, a little background is necessary. An EFT is nothing other than an instruction to transfer funds from one account to another. If the originating bank and beneficiary bank are within the same consortium, the transfer can be made directly to one another. If the banks are not within the same consortium—as is usually the case in international transactions—then an intermediary bank must be used. In the case of U.S. dollars, virtually all intermediary banks, if not all, are located in Manhattan. Even though the EFT transaction technically lasts for only a moment, the funds nevertheless travel through Manhattan since that is where the intermediary banks are located.

The *Winter Storm* decision was significant in that it held that EFTs were "property" for the purposes of a maritime attachment pursuant to Rule B of the Supplemental Rules of Admiralty or Maritime Claims and Asset Forfeiture Actions

(which are part of the Federal Rules of Civil Procedure). If a plaintiff could lodge a colorable maritime claim against a particular defendant, and that defendant was not located within the district, then that plaintiff had the right to restrain the "property" up to the amount sued for, which belonged to the defendant.

It is beyond the scope of this Alert to explain all of the ins and outs of these EFTs, but suffice it to say that EFTs between a defendant and other third parties totally unrelated to the dispute between plaintiff and defendant were subject to maritime attachment under *Winter Storm* and its progeny.

In overruling *Winter Storm*, the Second Circuit took notice of the effect its prior decision was having on financial transactions in general. According to the Second Circuit, from October 1, 2008 thru January 31, 2009, maritime plaintiffs filed 962 lawsuits seeking to attach as much as \$1.35 billion. These lawsuits were said to comprise as much as 33% of all lawsuits filed in the Southern District of New York.

The Second Circuit also took notice of the fact that maritime lawyers were counseling their clients to conduct business in a currency other than dollars in order to avoid the possibility of maritime attachment. The Second Circuit reasoned that *Winter Storm* created uncertainty for New York's international funds' business as well as New York's standing as a center of international finance and business.

To some extent, this decision is not surprising in that many judges in the Southern District and Second Circuit had expressed their strong displeasure with the onslaught of Rule B attachment filings during court conferences and informally at bar association events.

We will continue to keep you apprised of all significant maritime developments.

For any questions, comments or suggestions regarding this or any future Maritime Alert, please contact:

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