

The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte Ltd. United States Court of Appeals for the Second Circuit 585 F.3d 58 (Decided October 16, 2009)

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**ELECTRONIC FUND TRANSFERS ARE NOT ATTACHABLE PROPERTY
UNDER RULE B.**

The Second Circuit overruled its decision in *Winter Storm* and held that Electronic Fund Transfers, whether originating from the defendant or benefiting the defendant, are not attachable property under Rule B.

The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte Ltd.
United States Court of Appeals for the Second Circuit
585 F.3d 58
(Decided October 16, 2009)

In an action before Judge Jed S. Rakoff in the United States District Court for the Southern District of New York, plaintiff, The Shipping Corporation of India, Ltd. (“SCI”), was granted an order for a process of maritime attachment and garnishment pursuant to Rule B of the Supplemental Rules for Admiralty or Maritime Claims against defendant, Jaldhi Overseas Pte Ltd. (“Jaldhi”). Following a Rule E hearing, Judge Rakoff vacated portions of this maritime attachment and denied Jaldhi’s motion for counter-security because SCI, as an alleged instrument of the government of India, was immune from pre-judgment attachment under the Foreign Sovereign Immunity Act (“FSIA”).³¹

Both parties appealed to the United States Court of Appeals for the Second Circuit. The issues presented on appeal were: (1) whether EFTs of which a defendant is the beneficiary are attachable property, and (2) whether SCI is entitled to immunity under the FSIA. Judge Rakoff certified the first issue for appeal because Judges in the Southern District had expressed differing opinions about its resolution.³²

The Second Circuit, with consent of all its active judges (though not *en banc*), held that electronic fund transfers (“EFTs”) being processed by intermediary banks are not “property” subject to attachment under Rule B. In doing so, the court expressly overruled *Winter Storm Shipping, Ltd. v. TPI*, and its progeny.³³

The Second Circuit conducted its review *de novo*. According to the court, a plain reading of the text of Rule B shows that an EFT must be the defendant’s tangible or intangible property in order for it to be attached. *Winter Storm*, as aforementioned, held that EFTs were attachable property under Rule B. The *SCI* court concluded that *Winter Storm* erroneously relied on *United States v. Daccarett*.³⁴ *Daccarett*, according to the court, did not decide whether an originator or beneficiary of an EFT had a property interest in the EFT; rather, it held only that funds traceable to illegal activity were subject to forfeiture under the applicable statute in that specific case. This rationale did not satisfy the crucial question under Rule B of ownership of, and property rights to, EFTs.

Nor did the court find that any historical rationale justified the extension of federal maritime common law to current practices under Rule B. Although EFTs, like ships, are transitory in nature, the current practice under Rule B differed from the historical practice of arresting ships because plaintiffs were currently seeking writs of attachment against EFTs before they entered the district (and often based on mere speculation that they would, in fact, pass through the district).

³¹ 28 U.S.C. §§ 1602-1611

³² See *Seamar Shipping Corp. v. Kremikovitz Trade Ltd.*, 461 F.Supp.2d 222 (S.D.N.Y. 2006).

³³ 310 F.3d 263, 278 (2d Cir. 1992) (holding that EFTs are attachable property under Rule B); See also *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006); *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008).

³⁴ 6 F.3d 37 (2d Cir. 1993).

Since federal courts look to state law when there is no federal maritime law to guide their decisions, the Second Circuit looked to New York state law. “New York State does not permit attachment of EFTs that are in possession of an intermediary bank.”³⁵ Under New York State law, EFTs, as they pass through intermediary banks, are neither the property of the originator or the beneficiary.

As an aside, the court noted that the *Winter Storm* decision elicited a lot of criticism. The court cited commentary from the Permanent Editorial Board for the Uniform Commercial Code which stated that *Winter Storm* strained federal courts and international banks within the Second Circuit. In a three month period near the end of 2008, Rule B lawsuits constituted 33% of all lawsuits filed in the Southern District. International banks located in New York were processing hundreds of writs of attachment each day. Likewise, the court cited commentary from the Federal Reserve Bank of New York. The court wrote: “undermining the efficiency and certainty of funds transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York’s standing as an international financial center.”³⁶

In fact, the Second Circuit’s decision to overrule *Winter Storm* was not entirely unexpected. In *Aqua Stoli*, the same court wrote that “the correctness of our decision in *Winter Storm* seems open to question.”³⁷ Additionally, many decisions by courts within the Second Circuit limited the effect of *Winter Storm*.³⁸

Since the first issue certified for appeal was answered in the negative, the court declined to address the second issue regarding SCI’s FSIA immunity.

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³⁵ *SCI* at 70.; N.Y. U.C.C. § 4-A-503.

³⁶ *SCI* at 62.

³⁷ *Aqua Stoli* at 445.

³⁸ See *STX Pan Ocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127 (2d Cir. 2009) (holding that a defendant is “found” within the district for the purposes of Rule B if it registers with the New York Secretary of State); *Cala Rosa Marine Co. Ltd. v. Sucre et Deneres Group*, 613 F.Supp.2d 426 (S.D.N.Y. 2009) (denying a request for “continuous service” of an attachment on banks); *Marco Polo Shipping Co. Pte v. Supakit Prods. Co.*, 2009 WL 562254, 2009 A.M.C. 639 (S.D.N.Y. 2009) (requiring a “plausible” showing that defendant’s funds were actually passing through the district).