The continuing global financial crisis and related litigation will implicate, if it has not already done so, the collectibility of judgments obtained. In this context a recent decision of the New York court of Appeals, answering a question certified by the U.S. Court of Appeals for the Second Circuit, bears close examination.

On June 4, 2009, the New York court of Appeals issued a decision in favor of a plaintiff who, for over 16 years, has been attempting to collect on a default judgment that he obtained against his former business partner in 1993. The decision, *Koehler v. Bank of Bermuda Limited* (*Koehler*), 2009 NY slip op 04297, No. 82, 2009 N.Y. LEXIS 1751 (June 4, 2009), is already being hailed as a landmark for judgment creditors. It is now the law in this state that New York courts are empowered to order any bank over which they have personal jurisdiction to turn over, to a judgment creditor, a judgment debtor's property or assets held at the bank, regardless of whether the court has personal jurisdiction over the judgment debtor or the judgment creditor.

The impact of the *Koehler* decision has yet to be seen, but warnings from the banking community and the *Koehler* dissent suggest that it will be significant and lead to numerous controversies. Judgment creditors all over the world are likely to consider filing Article 52 proceedings in New York to obtain the turnover of a judgment debtor's assets located anywhere in the world—even if that debtor has no New York ties—if the debtor's assets are held by a bank over which a New York court has jurisdiction.

Similarly, judgment debtors and their counsel must now contemplate that assets deposited in a bank anywhere in the world are potentially subject to turnover to a judgment creditor by order of a New York court if that bank is found to be doing business in New York, whether directly or through a branch or affiliate.

The *Koehler* Saga Begins

The *Koehler* case began in June 1993, when Lee Koehler, a citizen of Pennsylvania, obtained a default judgment against his former business partner in the U.S. District Court for the District of Maryland. Apparently aware that Bank of Bermuda Limited was in possession of his former partner's stock certificates in a Bermuda corporation which served as collateral for a loan made to him by the bank, Koehler registered his Maryland judgment in the Southern District of New York and commenced a turnover proceeding against Bank of Bermuda pursuant to Article 52 of the New York Civil Practice Laws and Rules. CPLR 5225(b) allows a judgment creditor to commence a special proceeding "against a person in possession or custody of money or other personal property in which the judgment debtor has an interest…" in order to obtain an order "to deliver the property in which the judgment debtor has an interest, or to convert it to money for payment of the debt."

In October 1993, the Southern District ordered Bank of Bermuda to deliver the stock certificates to Koehler or pay him the debt owed to him by his former partner. The bank, however, contested the district court's jurisdiction. Over the next 10 years, the parties litigated this jurisdictional issue until, in 2003, Bank of Bermuda consented to the court's jurisdiction. However, Bank of Bermuda later revealed that it had transferred the stock certificates that Koehler was seeking and thus was no longer in possession of any property of the judgment debtor.

As a result of the bank's transfer of the stock certificates, Koehler petitioned for a writ of execution and sought to amend his complaint seeking to add claims of negligence, fraudulent conveyance, fraudulent concealment and negligent misrepresentation against Bank of Bermuda. In 2005, the district court denied Koehler's petition and motion to amend his complaint, concluding that "it had no in rem jurisdiction over [judgment debtor's] share certificates, which underlies Koehler's remaining claims against BBL."

Eventually, Koehler's appeal of the orders vacating the 1993 turnover order reached the U.S. Court of Appeals for the Second Circuit. The Circuit recognized that New York state's highest court, the Court of Appeals, had not addressed the specific issue at hand.
Specifically, the Second Circuit stated:
It seems clear that a court sitting in New York, that
has personal jurisdiction over a judgment debtor,
may order the judgment debtor himself to deliver
property into New York. It is less clear that courts
have the authority to order a person or entity other
than the judgment debtor to deliver assets into
New York, when that person or entity is located in
a foreign jurisdiction.

As a result, the Second Circuit certified to the
Court of Appeals the question "whether a court in
New York may, pursuant to N.Y. C.P.L.R. 5225(b) or
N.Y. C.P.L.R. 5227, 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 N.Y. C.P.L.R. Article
52, when those stock certificates are located outside
New York."

The Court of Appeals’ Ruling
The New York Court of Appeals answered the
Second Circuit’s certified question in the affirmative,
and held that a court sitting in New York may order a
bank over which it has personal jurisdiction to turn over
property owned by a judgment debtor to a judgment
creditor, whether or not that property is located in New
York and whether or not the court has jurisdiction over
the judgment debtor.

The Court of Appeals approached the certified
question by exploring the differences between the
pre-judgment attachment mechanism of Article 62
of the CPLR and CPLR Article 52, which was at issue
and governs the enforcement of money judgments.
The Court noted that “post-judgment enforcement
requires only jurisdiction over persons,” in contrast to
pre-judgment attachments which typically “operate[]
only against property, not any person.”

The Court of Appeals also noted that Article 52
“contains no express territorial limitation barring the
entry of a turnover order that requires a garnishee to
transfer money or property into New York from another
state or country,” and that a recent amendment to
CPLR 5224 provides for the production of materials
pursuant to a subpoena “whether the materials sought
are...within or without the state.”

Finally, the Court of Appeals cited to New York case
law that has expressly held that judgment debtors can
be ordered to turn over out-of-state assets, and a recent
Appellate Division case endorsing the proposition that
"New York courts have the power to command a
garnishee present in the state to bring out-of-state assets
under the garnishee’s control into the state."

Based on the absence of any express territorial
limitation in Article 52 and because a court can compel
a person or entity within its jurisdiction to turn over
out-of-state assets in its possession or control, the Court
of Appeals concluded that “the Legislature intended
CPLR article 52 to have extraterritorial reach,” and
therefore that “a New York court with personal
jurisdiction over a defendant may order him to turn
over out-of-state property regardless of whether the
defendant is a judgment debtor or a garnishee.

The banks, represented by the Clearing House
Association LLC, the nation’s oldest banking
association, argued that the Court should not interpret
Article 52 so as to conflict with the separate entity
rule, which requires courts to view each branch of a
bank as a separate entity that is “in no way concerned
with the accounts maintained by depositors in other
branches or at a home office.” However, the Koehler
Court did not address that argument, likely because in
prior opinions, the district court determined that “the
separate entity rule has no role to play in this case, since
the rule involves circumstances where a party attempts
to obtain the assets of an entity’s foreign or auxiliary
branch through service of its main branch. Here, the
foreign branch itself was properly served.”

In any event, under Koehler, the separate entity
rule appears to be irrelevant where a creditor serves
process on a foreign bank and can argue that the bank
is “present” in New York for jurisdictional purposes.

The Dissent Warns of Ramifications
The dissent in Koehler, authored by Judge Robert
Smith and joined by two other Justices, warned of
the significant potential implications of the majority
decision.

First, the dissent stated that Koehler has opened the
door to forum-shopping judgment creditors as long as
“the bank has a New York branch—either one that is
not separately incorporated, or a subsidiary with which
the parent’s relationship is close enough to subject the
parent to New York jurisdiction.”

The impact of this New York Court of
Appeals decision has yet to be seen, but warnings from the
banking community as well as the dissent suggest that it will be
significant and lead to numerous controversies.

Second, the dissent expressed concern that the
opinion will create conflicting decisions by courts in
different jurisdictions. Third, the dissent recognized that
the decision could impose “significant administrative
burdens” on banks.

Finally, the dissent questioned the constitutionality
of the majority’s decision, stating “[t]he majority’s broad
view of New York’s garnishment remedy may cause it to
exceed the limits placed on New York’s jurisdiction
by the Due Process Clause of the Federal Constitution”
and the standard of International Shoe.

Conclusion
The ramifications of the Koehler decision on
judgment collection, New York courts, and the business
of banking in New York are potentially staggering,
anywhere in the world—those customers would
undoubtedly reconsider whether to continue to deal
with institutions that have a New York presence.
And, in turn, this customer reaction would force
those financial institutions to reconsider whether to
retain their New York branches. Such decisions would
inevitably adversely affect the State’s economy and tarnish New York’s reputation as a

global financial center.

Requiring a foreign bank to deliver tangible assets
into the state to satisfy a judgment against a
jurisdictionally absent debtor would not only be
wrong on the law, but would set a precedent that
could profoundly affect the business of financial
institutions and the role of New York as a leading
financial center.

While the impact of the Koehler decision has yet to
be seen, the decision is undoubtedly cause for concern
for banks and judgment debtors around the globe
because Koehler presents an opportunity for judgment
creditors to collect on debts that may previously have
been considered impractical or impossible to reach.

Judgment debtors are vulnerable to these Article 52
proceedings if their assets are deposited in any bank
found to be present in New York whether through a
subsidiary, agent or affiliate.

As a result, and because of the presence of
international banks in New York and the fact that
Koehler applies whether or not a judgment debtor has
any New York presence, there is a real possibility
that judgment creditors will increasingly select New
York as their forum of choice to commence turn-over
proceedings against New York banks that hold assets
outside-of state and overseas customers.

5. Id., 544 F.3d at 80.
7. Id. at *4.
8. Id. at *6.
9. Id. at *8.
10. CPLR 5224 (a-1).
12. Id. at *13, citing Mengenhuis v. Anton Resources, Ltd., 49
at *35.
18. Id. at *19-20.
19. Brief of The Clearing House Association LLC as amicus curiae in
support of respondent at 1-3, Koehler, No. 82, 2009 N.Y. LEXIS 1751,

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