The Calm After the *Storm*? UCC Article 4A, *Jaldhi*, and the Future of Rule B Attachment in the Second Circuit

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Introduction

At the heart of almost every major transaction in the commercial world is one party's obligation to send a payment to another party. The wholesale wire transfer system allows such parties to transfer extremely large sums of money across borders in an inexpensive and virtually insulated fashion.[1] Because of their central role in business transactions, wholesale wire transfers, a type of electronic funds transfer ("EFT"), represent the dominant payment system in the United States.[2] Using specialized software, banks provide wire transfer services to business and financial institutions in order to allow these entities to transfer such large sums of money at the speed of business.[3] In short, the wire transfer system is vital to the U.S. and world economies.

Considering the importance of the wire transfer system, the Uniform Commercial Code ("UCC") drafting committee created Article 4A in 1989 to establish a uniform and comprehensive source of law for funds transfers, and "better promote the use of funds transfers than would the existing patchwork rules developed by case law."[4] Today, every state in the United

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[1] *See* RONALD J. MANN, PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS: CASES, MATERIALS, AND PROBLEMS 224 (4th ed. 2008).

[2] *Id.* (measured by dollar volume).

[3] *See* U.C.C. § 4A Prefatory Note, ¶ Description of transaction covered by Article 4A., ¶ Characteristics of a fund transfer. (1990).

[4] Hyung J. Ahn, Note, *Article 4A of the Uniform Commercial Code: Dangers of Departing from a Rule of Exclusivity*, 85 VA. L. REV. 183, 188–89 (1999).

States has enacted Article 4A as law.[5] One important feature of Article 4A is that it was drafted to prevent litigants with claims against parties to funds transfers from capturing, impeding, or otherwise pulling funds back out of the wire transfer system, especially funds "held" by intermediary banks, a term discussed at length *infra*.[6] Yet, in *Winter Storm*, the United States Court of Appeals for the Second Circuit (the "Second Circuit") allowed litigants to use Rule B of the Federal Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") to "capture" funds passing through New York City intermediary banks.[7] The court held that a sender's EFT that passes through a New York bank is legally vulnerable to a valid maritime attachment order.[8] Relying in part on Rule B, the court found that federal law preempted Article 4A.[9]

Several years of turmoil in the banking and legal communities followed this decision. Courts in the Southern District of New York ("SDNY") were inundated with Rule B claims.[10] New York City banks faced the logistical and financial nightmare of complying with a flood of daily attachment orders.[11] The ruling, if left unchecked, even might have threatened to undermine the U.S. dollar as the world's reserve currency.[12]

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[5] PERMANENT EDITORIAL BOARD FOR THE UNIF. COMMERCIAL CODE, PEB COMMENTARY NO. 16 SECTIONS 4A-502(d) and 4A-503 3 (2009) [hereinafter PEB].

[6] *See* U.C.C. § 4A-503 cmt. (1990); MANN, *supra* note 1, at 272.

[7] *See* Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263 (2d Cir. 2002), *overruled by* Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58 (2d Cir. 2009).

[8] *See id.* at 278.

[9] *See* Consub Del. LLC v. Schahin Engenharia Limitada, 543 F.3d 104, 109 (2d Cir. 2008) (citing Winter Storm Shipping Ltd. v. TPI, 310 F.3d 263 (2d Cir. 2002)), *abrogated by* Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58 (2d Cir. 2009); *see also* Aqua Stoli Shipping Ltd. v. Gardner Smith PTY Ltd., 460 F.3d 434, 438 (2d Cir. 2006).

[10] *See* PEB, *supra* note 5, at 5 n.4.

[11] *See* Brief for Amicus Curiae The Clearing House Ass'n LLC in Support of Defendant-Appellant at 10–11, Consub Del. LLC v. Schahin Engenharia Limitada, 543 F.3d 104 (2d Cir. 2008) (No. 07-0833-cv) [hereinafter Brief for Amicus Curiae The Clearing House Ass'n LLC].

[12] *See* Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 62 (2d Cir. 2009), *cert. denied,* 130 S. Ct. 1896 (2010).

Then, in late 2009, despite affirming the rule of *Winter Storm* several times previously,[13] the Second Circuit overruled *Winter Storm* in its unprecedented decision in *Shipping Corp. of India v. Jaldhi*.[14]

With *Jaldhi*, the Second Circuit moved its funds-transfer jurisprudence in the right direction. The opinion, however, failed to put a number of key issues to rest, which should be addressed by the Second Circuit in a subsequent decision in order to prevent the damage caused by *Winter Storm* from recurring.

This paper proceeds in three parts to analyze the *Winter Storm* ruling, the number of problems it created in its wake, and the *Jaldhi* opinion and its shortcomings. Part I provides background information regarding maritime attachment and discusses the mechanics of wire transfer transactions under Article 4A. Part II explores the *Winter Storm* rule, including the weakness in its legal reasoning and the profoundly negative consequences it had for the commercial world. Part III evaluates the *Jaldhi* decision and explores its weaknesses with respect to preventing the resurrection of *Winter Storm*-like reasoning.

I. Background Information

In order to understand the tumult created by *Winter Storm*, it is first necessary to examine maritime attachment under Rule B as well as the operation of Article 4A with respect to funds transfers.

A. Maritime Attachment Under Rule B

Under the Rules Enabling Act, 28 U.S.C. § 2073, the Supreme Court in 1966 established the Supplemental Rules for Certain Admiralty and Maritime Claims, "a reformed and comprehensive codification of admiralty rules to govern the practice of the federal courts."[15] Rule B, a jurisdictional rule included in the Supplemental Rules, governs the process by which a litigant may attach another party's assets in order to allow a district court to assert personal jurisdiction over the defendant whose property is attached. The rule provides in relevant part:

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[13] *See Consub Del.*, 543 F.3d 104; *Aqua Stoli*, 460 F.3d 434.

[14] *See Jaldhi,* 585 F.3d 58.

[15] *Aqua Stoli*, 460 F.3d at 438.

> If a defendant is not found within the district . . . a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process. . . . . The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment.[16]

Rule B requires a plaintiff to establish four conditions before obtaining an attachment order from a court: (1) the plaintiff has a valid prima facie admiralty claim against the defendant, (2) the defendant cannot be found within the district, (3) the defendant's property may be found within the district, and (4) there is no statutory or maritime law bar to the attachment.[17] The jurisdiction conferred by a maritime attachment is characterized as *quasi in rem*—jurisdiction over a person but based on that person's interest in property that is located within the court's territory.[18]

The ease with which a plaintiff can obtain an attachment under Rule B process makes it an extremely strong tool for maritime plaintiffs.[19] In one sense, the maritime rules provide some procedural protection for defendants. Rule E(4)(f), for example, allows a defendant subject to an order of attachment under Rule B to appear before the district court to contest the attachment once its property has been restrained.[20] Yet, a plaintiff can obtain an attachment order from a district court *ex parte* and "without proving any of the merits of the underlying claim," which gives defendants little chance to prevent the attachment of their property before it is executed.[21] The historical rationales of maritime attachment help explain

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[16] *Id.* (quoting FED. R. CIV. P. SUPP. B(1)).

[17] *See id.* at 445.

[18] *Winter Storm*, 310 F.3d at 268.

[19] *See* Ian Taylor, Note, *Maritime Madness: Rule B, Electronic Funds Transfers, Maritime Contracts, and the Explosion of Admiralty Litigation in the Southern District of New York*, 34 TUL. MAR. L.J. 211, 220 (2009).

[20] *See Aqua Stoli*, 460 F.3d at 438.

[21] *See* Taylor, *supra* note 19, at 220.

the strong nature of this asset-attachment litigation tool. In *Aqua Stoli*, the Second Circuit wrote:

> Maritime attachments arose because it is frequently, but not always, more difficult to find property of parties to a maritime dispute than of parties to a traditional civil action. Maritime parties are peripatetic, and their assets are often transitory . . . . Thus, the traditional policy underlying maritime attachment has been to permit the attachments of assets wherever they can be found and not to require the plaintiff to scour the globe to find a proper forum for suit or property of the defendant sufficient to satisfy a judgment.[22]

The court has reiterated that maritime attachment serves two purposes: assuring the satisfaction of a successful suit and ensuring that elusive defendants appear in court.[23]

B. Mechanics of Wire Transfer Transactions Under Article 4A

1. Key Terms

Article 4A governs wire transfers, or EFTs whereby a party seeking to make a payment instructs his bank to push funds from his account into the account of his obligee.[24] It is important at the outset to identify several key terms in Article 4A. A "payment order" means "an instruction of a sender to a receiving bank . . . to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary."[25] A "funds transfer," on the other hand, constitutes a *series* of payment orders, "beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order."[26] Furthermore, each entity that receives a payment order in a funds transfer is a "receiving bank" and

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[22] *Aqua Stoli*, 460 F.3d at 443.

[23] *See Winter Storm*, 310 F.3d at 268; Taylor, *supra* note 19, at 220.

[24] *See* U.C.C. § 4A Prefatory Note, ¶ Description of transaction covered by Article 4A. (1990).

[25] U.C.C. § 4A-103(a)(1) (1990).

[26] *Id.* § 4A-104(a).

each entity that sends a payment order in a funds transfer is a "sender."[27] "Originator" means the "sender of the first payment order in a funds transfer."[28] "Originator's bank" most usually means the "receiving bank to which the payment order of the originator is issued."[29] The "beneficiary's bank" is the "bank identified in a payment order . . . to make payment to the beneficiary" (in which an account of a beneficiary is to be credited).[30] Finally, the "intermediary bank" means a "receiving bank other than the originator's bank or the beneficiary's bank," which carries the payment order from the former to the latter.[31]

2. Concrete Illustration of Terms and Players in Action

Some simple illustrations are appropriate to identify the other key players and terms involved in a series of payment orders culminating in a funds transfer.[32] Suppose Mr. A transacts business with Mr. B and needs to pay Mr. B a large sum of money. Mr. A will begin the funds transfer by instructing his bank to debit his account and credit Mr. B's account.[33] Mr. A's instruction to his bank is a "payment order," Mr. A is the "originator" of the payment order, Mr. A's bank is the "originator's bank," and Mr. B is the beneficiary of the payment order.[34] Mr. A also is the "sender" because he instructed his bank to send the payment order. If Mr. A and Mr. B use the same bank, then Mr. A's bank is simultaneously the "originator's bank" and the "beneficiary's bank," such that the bank can carry out Mr. A's

[27] *See id.* § 4A-103(a)(1), (4)-(5); § 4A-103(a)(4) (noting that only banks, and not people, can receive payment orders).

[28] *Id.* § 4A-104(c).

[29] *Id.* § 4A-104(d).

[30] *Id.* § 4A-103(a)(3).

[31] *Id.* § 4A-104(b).

[32] The following illustrations are based on the three lengthier hypothetical situations, Case No. 1, Case No. 2, and Case No. 3, presented in the Official Comment to U.C.C. Article 4A-104. *See* U.C.C. § 4A-104 cmt. 1 (1990).

[33] *See id.* § 4A-104 cmt. 1, Case No. 1.

[34] *See id.* § 4A-103(a)(1); § 4A-104(c); § 4A-104(d); § 4A-103(a)(2).

payment order by debiting and crediting the appropriate accounts without issuing another payment order.[35]

Due to a globalized economy, odds are high that Mr. A and Mr. B will use different banks.[36] If this is the case, Mr. A will send a payment order to his bank. His bank will then have two options. Under one option, Mr. A's bank will issue a subsequent and independent payment order directly to Mr. B's bank.[37] Mr. B's bank will then debit Mr. A's bank's account and credit Mr. B's account. In this case, Mr. B's bank is the "beneficiary's bank."[38] Thus, there are two different payment orders in this option: one from Mr. A to Mr. A's bank, and one from Mr. A's bank to Mr. B's bank.

Under a second option, Mr. A's bank will issue a subsequent and independent payment order to a third-party bank with whom it has a correspondent banking relationship.[39] The third-party bank will debit Mr. A's bank's account and credit its own account. Then, the third-party bank will issue a subsequent and independent payment order to Mr. B's bank. Mr. B's bank will debit the third-party bank's account and credit Mr. B's bank account, thereby completing the funds transfer. In this case, the third-party bank is an "intermediary bank."[40] Thus, there are three different payment orders in the second option: one from Mr. A to his bank, one from Mr. A's bank to the intermediary bank, and one from the intermediary bank to Mr. B's bank.[41]

[35] *See id.* § 4A-104(d); § 4A-103(a)(3). Assuming Mr. A's bank and Mr. B's bank are the same entity, Mr. A's bank would also be a "receiving bank" because it is the bank to which Mr. A's instruction is ultimately addressed. *See id.* § 4A-103(a)(4).

[36] *See id.* § 4A-104 cmt. 1, Case No. 2.

[37] *Id.*

[38] *See id.* § 4A-103(a)(3).

[39] *See id.* § 4A-104 cmt. 1, Case No. 3.

[40] *See id.* § 4A-104(b). In some cases, a funds transfer might be routed through several different intermediary banks. *See* U.C.C. § 4A Prefatory Note, ¶ Description of transaction covered by Article 4A. (1990).

[41] *Id.* § 4A-104 cmt. 1, Case No. 3.

In both options, each entity that sent a payment order was a "sender" and each bank that received a payment order was a "receiving bank."[42] Furthermore, the series of payment orders in either option, together, constitutes one funds transfer.[43] Thus, the original payment order from Mr. A to his bank is carried out by a series of payment orders by each bank in the transmission chain to the next bank in the chain until Mr. B's bank receives a payment order to make the credit to Mr. B's account.[44]

3. Acceptance and Execution of Payment Orders

The rights and obligations of an intermediary bank arise as the result of "acceptance" and "execution" of a payment order by the intermediary bank. Acceptance by an intermediary bank is governed by section 4A-209(a), which states in pertinent part: "Subject to subsection (d), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order."[45] Execution by an intermediary bank is governed by section 4A-301(a), which states in pertinent part: "A payment order is 'executed' by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank."[46]

Reading sections 4A-209(a) and 4A-301(a) together reveals that an intermediary bank has discretion in determining whether to continue the transmission chain of an originator's payment order. An intermediary bank can reject, if it chooses, a payment order pursuant to section 4A-210(a).[47] If a bank properly rejects a payment order, it incurs no liability to the originator or to the beneficiary. The authoritative comment to section 4A-210 explains that "there are many reasons why a bank doesn't execute an order," including "equipment failure, credit limitations on the receiving bank, or some other factor which makes proper execution of the order

[42] *See id.* § 4A-104 cmt. 1, Case No. 2 & Case No. 3.

[43] *Id.* § 4A-104 cmt. 1, Case No. 3.

[44] *See id.* § 4A-104 cmt. 1, Case No. 3; U.C.C. § Prefatory Note, ¶ Description of transaction covered by Article 4A. (1990).

[45] U.C.C. § 4A-209(a) (1990).

[46] *Id.* § 4A-301(a).

[47] *See id.* § 4A-210(a); *see also* § 4A-209 cmt. 8 (stating that acceptance is in the control of an intermediary bank and occurs only if the intermediary bank executes the payment order).

infeasible."[48] Furthermore, the authoritative comments to section 4A-209 make clear that a receiving bank has no duty to accept a payment order.[49]

If, however, the intermediary bank chooses to execute a payment order by issuing a subsequent payment order, it will be deemed to have "accepted" the payment order it received from the previous sender and will incur obligations and liabilities imposed by Article 4A.[50] One such obligation is that if the receiving bank to which the intermediary bank sent a payment order accepts the order, the intermediary bank becomes obligated to pay the receiving bank the amount of the intermediary's order.[51] This obligation may be excused, though, pursuant to Article 4A's "money back guarantee," which states that "[t]he obligation of [the] sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order."[52]

Properly understood, a funds transfer is essentially a series of independent contractual obligations between banks to carry out the instructions of the originator. The originator pays the beneficiary by causing the beneficiary's bank to become indebted to the beneficiary in the amount of the payment.[53] The debt arises when the beneficiary's bank accepts the payment order that the originator's bank, or an intermediary bank, issued to the beneficiary's bank to execute the originator's order.[54] The drafters of Article 4A specified that "[a]lthough Article 4A follows convention in using the term 'funds transfer' to identify" a payment from the originator to the beneficiary, "no money or property right" of the originator is actually transferred to the beneficiary.[55]

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[48] *Id.* § 4A-210 cmt. 1.

[49] *See id.* § 4A-209 cmt. 1.

[50] *See, e.g.*, *id.* § 4A-302; § 4A-303; § 4A-305; § 4A-402.

[51] *See id.* § 4A-402(c); § 4A-402 cmt. 2.

[52] *Id.* § 4A-402(c); § 4A-402 cmt. 2.

[53] *See* U.C.C. § 4A Prefatory Note, ¶ Description of transaction covered by Article 4A., ¶ Concept of acceptance and effect of acceptance by the beneficiary's bank. (1990).

[54] *See id.*

[55] *See id.* ¶ Concept of acceptance and effect of acceptance by the beneficiary's bank.

II. The Road to *Jaldhi*

Since the Second Circuit relied upon *United States v. Daccarett* to support its holding in *Winter Storm*, Part II begins with a brief exposition of *Daccarett* as a starting point for the discussion of case law and developments leading up to *Jaldhi*. Part II then presents the statement of the case for *Winter Storm* and discusses its shortcomings as a matter of law. Finally, it addresses the collateral damage that *Winter Storm* inflicted on legal and commercial entities.

A. *Daccarett* – Key Case for *Winter Storm* Decision

Daccarett was a criminal case arising out of an international effort to impede the drug-trafficking and money-laundering activities of the Cali Cartel, a Colombian drug cartel headed by Jose Santacruz-Londono.[56] The Cartel used EFTs to move its drug proceeds around the world for ultimate disposition into Colombian bank accounts.[57] In an attempt to stop the flow of illicit money back to drug suppliers, Congress enacted several statutes aimed at inhibiting drug-trafficking and money-laundering activities. At issue in the case was one such statute, 18 U.S.C. § 981, which allows the U.S. Government to institute civil forfeiture proceedings against any *property* involved in the drug offense without first obtaining a conviction.[58] The U.S. Government, relying on § 981, seized approximately $12 million by intercepting and attaching dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with the Cartel's banks in Panama and Colombia.[59]

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[56] United States v. Daccarett, 6 F.3d 37, 43 (2d Cir. 1993) (noting that the Colombian conglomerate was alleged to have imported approximately 3,000 kgs of cocaine per month into the United States).

[57] *Id.*

[58] *See id.* (emphasis added).

[59] *Id.* at 44 ("[T]rough both oral orders and a series of eight arrest warrants *in rem*, government agents instructed the intermediary banks in New York to attach 'all funds' on deposit in the names of various individuals and entities connected with Santacruz-Londono and 'all related entities and individuals', and to inform the agents about all transfers that were destined for a third-party beneficiary in Colombia. The intermediary banks complied with the agents' directions; they initially froze the seized funds and later transferred them to the clerk of the court who now holds them pending the outcome of this appeal.").

The Court faced the issue of whether EFTs held by intermediary banks were subject to civil forfeiture under § 981.[60] In ultimately what became a significant basis for the court's subsequent decision in *Winter Storm*, the Second Circuit laid out its conception of EFTs as they move through the chain of transmission between banks. The court wrote that

> [t]he claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.[61]

The court held that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes."[62] It explained that civil forfeiture perpetuates "the legal fiction that 'property used in violation of [the] law was itself the wrongdoer that must be held to account for the harms'" it has caused.[63] Thus, a precedent had been set by the court that—at least in civil forfeiture cases—an EFT is attachable *property*.

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[60] *Id.* at 43.

[61] *Id.* at 54.

[62] *Id.* at 55.

[63] *Id.* at 45–46.

B. *Winter Storm* Rule

Almost a decade later, the Second Circuit revisited its holding in *Daccarett* in *Winter Storm Shipping v. TPI*.[64] The case arose after Winter Storm Shipping, a Maltese corporation, chartered its vessel to TPI, a Thai corporation.[65] Winter Storm claimed that TPI breached the terms of the charter and brought a maritime claim in the SDNY so it could invoke the court's admiralty jurisdiction under 28 U.S.C. § 1333.[66] It further alleged that TPI could not be "found within" the SDNY under Rule B and sought an order of attachment to be sent to "Chase Manhattan Bank and/or Bank of New York" as potential garnishees[67]—institutions that are "indebted to . . . another whose property has been subjected to garnishment."[68] The district court issued the order of attachment *ex parte* and the specified banks were served with process. At the time of service, Bank of New York ("BNY") held no funds of TPI, but it placed a stop order on any funds relating to TPI that might pass through its New York City branch.[69]

While the proceedings took place in New York City, "TPI entered into an unrelated commercial transaction with Oppsal Shipping Co., Ltd."[70] The terms of the contract called for TPI to pay Oppsal in U.S. dollars. To satisfy this provision, TPI instructed its bank, Bank of Ayudhya ("BA"), to send a wire transfer through BNY as an intermediary bank to Oppsal's bank, the Royal Bank of Scotland ("RBS").[71] On July 2, 2001, BNY received from BA a payment order in the amount of $1,085,071.41. Rather than accepting and executing BA's entire payment order, BNY issued a payment order to RBS in the amount of $723,449.83. Pursuant to the earlier service of attachment procured by Winter Storm in the SDNY, BNY put the

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[64] *See Winter Storm*, 310 F.3d at 276–77.

[65] *Id.* at 265.

[66] *Id.*

[67] *Id.* at 266.

[68] BLACK'S LAW DICTIONARY 702 (8th ed. 2004).

[69] *Winter Storm*, 310 F.3d at 266.

[70] *Id.* at 267.

[71] *Id.* at 266.

balance of the payment order, $361,621.58, into a suspense account because it represented the total amount of Winter Storm's claims against TPI.[72]

TPI subsequently challenged the validity of the attachment order in the SDNY. Judge Scheindlin held that an EFT intercepted at an intermediary bank is not "property" that can be attached under Admiralty Rule B.[73] Thus, the issue of whether EFTs are attachable property under Rule B was "teed-up" for the Second Circuit.

That court wasted no time in reversing Judge Scheindlin and held that EFT funds in the hands of an intermediary bank may be attached pursuant to Rule B.[74] Notably, the *Winter Storm* rule became the source of anxiety and chaos which engulfed the SDNY until the recent *Jaldhi* decision.

The court began by dismissing any notion that Rule B violated a garnishee's due process rights. Though TPI argued that it had no contacts with the district, had no expectation that its funds would be routed momentarily through a New York City bank, and otherwise had no reason to believe it would be hailed into a court in New York, the Court found that the procedural safe guards in Rule B and Rule E, discussed *supra*, were adequate to protect a garnishee's rights.[75]

The court next turned to the issue of whether TPI's funds in the hands of BNY during the funds transfer constituted "property" of TPI for the purposes of Rule B. Judge Haight, sitting by designation, noted that federal law generally governs questions as to the validity of Rule B attachments and "state law may be borrowed if there is no federal admiralty law" on point.[76] Despite broaching the topic of state law, the court relied exclusively on federal sources to "fashion a rule . . . that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)."[77]

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[72] *Id.* at 266–67.

[73] *Id.* at 267.

[74] *Id.* at 278.

[75] *Id.* at 273.

[76] *See Winter Storm,* 310 F.3d at 275–76.

[77] *See id.* at 278.

In particular, the court relied on the three main sources of federal support for the *Winter Storm* rule. First, it noted "that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B."[78] Second, perceiving a close relationship between a bank account and an EFT sent from a bank account, it interpreted the language of Rule B extremely broadly. Referring to the text of the rule, it explained that "[i]t is difficult to imagine words more broadly inclusive than tangible or intangible" and found that an EFT in the hands of an intermediary bank falls within the rule's ambit as property of the defendant.[79] Third, it found "significant guidance" in *Daccarett*.[80] Noting the *Daccarett* rule that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes," it wrote that "[t]here is no principled basis for applying a different analysis or arriving at a different conclusion in the instant case."[81]

Having found that the rule it fashioned derived from federal law, the court found state law was preempted to the extent that it would hold that an EFT in the hands of an intermediary bank is not seizable property under Rule B.[82] After briefly acknowledging Article 4A, the court found that the equitable interests of maritime plaintiffs in having access to Rule B attachment presented no occasion to reject the federal rule in favor of Article 4A's prescriptions.[83]

C. Problems with the Rule of *Winter Storm*

Almost immediately, courts, banks, commentators, and the legal community generally took issue with *Winter Storm*. This section explores different weaknesses of the Second Circuit's reasoning in *Winter Storm* and then addresses negative repercussions of the *Winter Storm* rule.

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[78] *Id.* at 276–77.

[79] *See id.* at 276.

[80] *Id.*

[81] *Id.* at 278.

[82] *See id.* at 278–79.

[83] *See Winter Storm,* 310 F.3d at 279–80.

1. *Winter Storm's* Misplaced Reliance on *Daccarett*

One of the biggest problems with *Winter Storm* is that the Second Circuit incorrectly based its holding on a civil forfeiture *in rem* remedy, which was not relevant to deciding whether an EFT in the hands of an intermediary bank is attachable property under Rule B. The Permanent Editorial Board for the Uniform Commercial Code (the "PEB") suggested that the Second Circuit's reliance on *Daccarett* for the rule of *Winter Storm* was misplaced.[84] The key, according to the PEB, is distinguishing between civil forfeiture and a remedy *quasi in rem*. Specifically, as a remedy *quasi in rem*, the validity of a Rule B attachment depends entirely on the determination that the *res* at issue is property of the judgment-debtor at the moment it is attached.[85] "Forfeiture, on the other hand, is a remedy *in rem*, based . . . on the legal fiction that 'property used in violation of law [is] itself the wrongdoer that must be held to account for the harms it [has] caused.'"[86] The *Winter Storm* court failed to note that *Daccarett*, a forfeiture action under the federal drug laws, did not address whether the obligations created by an EFT are property of either the originator or the beneficiary of a funds transfer. That issue, although determinative in *Winter Storm*, was irrelevant under the forfeiture statutes because the funds subject to attachment were the property of the government under the legal fiction noted *supra*.[87]

While the Second Circuit thought this distinction was immaterial, the difference between civil forfeiture and a remedy *quasi in rem* makes all of the difference in determining whether EFTs are attachable property while they are briefly held by intermediary banks. One element of a plaintiff's prima facie case for Rule B attachment is that it must prove the funds it seeks to attach are the "property" of the defendant. Since *Daccarett* did not have cause to address whether an originator or beneficiary of an EFT has a

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[84] PEB, *supra* note 5, at 4–5 n.3.

[85] *Id.* at 5 n.3 (citing J. Lauritzen A/S v. Dashwood Shipping, Ltd., 65 F.3d 139, 141 (9th Cir. 1995) (characterizing Rule B attachment as *quasi in rem* jurisdiction "because jurisdiction is derived solely from the attachment of the property of the defendant.")).

[86] *Id.* (explaining that there is a critical distinction between actions proceeding under Supplemental Rule C—now Rule G—and those brought under Rule B; it is not a "distinction without a difference," as *Winter Storm* found).

[87] *See Consub Del.*, 543 F.3d 104; Brief for Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 4; *see also* Daccarett, 6 F.3d at 45–46.

property interest in such EFT, that case cannot form a basis for holding that Second Circuit precedent requires a court to find that funds held by an intermediary bank in the chain of a wire transfer transmission are property of the originator or beneficiary. After all, the fact that the government can seize proceeds at any bank as long as there is some "traceable connection to an illegal transaction in controlled substances" sheds little light on whether an EFT is property under maritime law.[88] The Federal Reserve Bank of New York agreed that "by extending the definition of property used in *Daccarett*, a criminal case involving the proceeds of unlawful narcotics trafficking, to the commercial realm of maritime attachments, the *Winter Storm* court created a crack in the legal infrastructure underlying the U.S. payments system."[89]

Once *Daccarett* is removed as an independent source of federal support, *Winter Storm's* holding that Article 4A is preempted by federal law becomes untenable. Rule B confers jurisdiction on a district court by allowing a litigant to attach a party's property such that the property becomes the basis for the court's assertion of personal jurisdiction over that party. Properly understood, Rule B is a jurisdictional statute that does not define what "property" is.[90] Despite the broad language used in Rule B, which the *Winter Storm* court found significant, the rule does not offer guidance on whether an EFT passing through an intermediary bank is property of an originator or beneficiary. Since there was no federal rule on point, the Second Circuit should have looked to state law, specifically New York's Article 4A, to define the term "property."[91]

A closer inspection, however, reveals that there is no divergence between federal and state law treatment of EFTs passing through intermediary banks. First, federal law has explicitly incorporated Article 4A to define rights and obligations of parties to a funds transfer through the

[88] Brief for Amicus Curiae Federal Reserve Bank of New York in Support of Defendant-Appellant at 8–9, Consub Del. LLC v. Schahin Engenharia Limitada, 543 F.3d 104 (2d Cir. 2008) (No. 07-0833-cv) (quoting Winter Storm Shipping, Ltd. v. TPI, 198 F. Supp. 2d 385, 388–89 (S.D.N.Y. 2002), *vacated*, 310 F.3d 263, 280 (2d Cir. 2002)) [hereinafter Brief for Amicus Curiae Federal Reserve Bank of New York].

[89] *See id.* at 17.

[90] *See* PEB, *supra* note 5, at 3.

[91] *See Aqua Stoli*, 460 F.3d at 445 n. 6.

adoption of Regulation J, 12 C.F.R. 210.25–210.32 ("Reg J").[92] Reg J incorporates Article 4A to cover all funds transfers conducted on the "Fedwire" funds transfer system. In keeping with the Federal Reserve Banks' role as payments system operators, the Federal Reserve Banks own and operate the Fedwire system, which is the "dominant system for transfers between U.S. banks."[93] The Federal Reserve Banks both originate funds transfers and act as receiving banks—either an intermediary bank or the beneficiary's bank—for each of the transfers that is sent over the Fedwire system.[94] Statutory interpretation dictates that the definition of property vis-à-vis Rule B attachment actions regarding EFTs sent via the Fedwire system is governed by state law pursuant to § 210.25(b).[95]

What about EFTs that are not sent via the Fedwire system, specifically EFTs sent across international borders? The Clearing House Interbank Payments System ("CHIPS") network, owned and operated by the New York Clearing House Association, handles 95% of the international transfers made in dollars, transferring an average of $750 billion per day.[96] These funds are transferred through participating banks located in New York because all of the banks belonging to the CHIPS network must maintain a regulated presence in New York. As a result, NewYork is considered the national and international center for wholesale wire transfers.[97] Reg J does not on its face incorporate Article 4A to govern CHIPS transfers because the regulation only refers to governing collections by Federal Reserve Banks and Fedwire funds transfers.[98] Yet, courts should look to Reg J for guidance for the sake of uniformity and efficiency of international commercial business interests. It surely does not make sense

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92 *See* Regions Bank v. Provident Bank, Inc., 345 F.3d 1267, 1274 (11th Cir. 2003); 12 C.F.R. § 210.25(b) (2010); Brief for Amicus Curiae Federal Reserve Bank of New York, *supra* note 88, at 4 (noting that for transfers processed over Fedwire, the Federal Reserve has adopted Article 4A as federal law in its Regulation J).

93 MANN, *supra* note 1, at 237.

94 *Id.* at 3.

95 *See* Thomas C. Baxter & Raj Bhala, *The Interrelationship of Article 4A with Other Law*, 45 BUS. LAW. 1485 (1990).

96 Banque Worms v. BankAmerica Int'l, 570 N.E.2d 189, 194 & n.2 (N.Y. 1991).

97 *Id.*

98 *See* 12 C.F.R. §§ 210.1, 210.25(a), (b) (2010).

that federal courts are required to apply New York law to Fedwire transactions via Reg J but are free to fashion a wholly different rule to govern CHIPS transactions, especially because international business transactions can rely on both systems.

Indeed, the policy behind Article 4A and Reg J dictates that the Second Circuit should look to Article 4A, a body of law enacted in every state and by the federal government for Fedwire transactions, to govern CHIPS transactions during the time they pass through the United States. A goal of the Federal Reserve in adopting Article 4A, as federal law through Reg J, was to encourage uniformity and certainty in the law applicable to all funds transfers.[99] The Clearing House Association LLC asserted that federal courts should give deference to Article 4A because it is consistent both with federal law and the laws in all fifty-two jurisdictions that have adopted the UCC.[100] This is especially persuasive because the dominant interest in drafting Article 4A was uniformity due to the "inherently interjurisdictional nature of funds transactions."[101] In fact, the New York Court of Appeals, the highest authority on the application of New York law, has long held that "national uniformity in the treatment of electronic funds transfers [(EFTs)] is an important goal, as are speed, efficiency, certainty, and finality."[102] Domestic banks should enjoy certainty of knowing that the integrity of their intermediary payment order obligations will not vary depending upon the domestic or international character of the individual funds transfer.

Considering the inapplicability of *Daccarett* and the goals of uniformity and certainty in funds transfer transactions, there was no basis for the *Winter Storm* court to find that federal maritime law in the form of Rule B preempted Article 4A in determining the property rights and obligations of the defendant-originator in that case. Since Rule B offers no guidance on whether an EFT passing through an intermediary bank is property of an originator or beneficiary, Rule B is not such a superseding law.[103]

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[99] Brief for Amicus Curiae Federal Reserve Bank of New York, *supra* note 88, at 14–15.

[100] Brief for Amicus Curiae The Clearing House Ass'n, *supra* note 11, at 17.

[101] Ahn, *supra* note 4, at 188–89.

[102] *See Banque Worms*, 570 N.E.2d at 195.

[103] PEB, *supra* note 3, at 3, 5.

2. The *Winter Storm* Court Fashioned a Rule Wholly at Odds with Article 4A's Treatment of Funds in Intermediary Banks

Had the *Winter Storm* court relied upon New York's Article 4A laws, it certainly would have arrived at a different result. In fact, the court fashioned a rule that was wholly at odds with Article 4A's recognition that funds held temporarily by an intermediary bank during a funds transfer are not property of either the originator or the beneficiary.[104]

To obtain attachment under Rule B, the party seeking attachment must show that the property to be attached is in fact owned by the party against whom attachment is sought. Yet, Article 4A explicitly and directly commands that an intermediary bank holds no property of either the originator or the beneficiary.[105] The PEB succinctly explained the underpinnings of Article 4A's stance on the status of funds in intermediary banks involved in an EFT:

> [U]nder the Article 4A structure, the issuance and acceptance of payment orders create rights and obligations only as between the sender of the payment order and its receiving bank (e.g., between originator and originator's bank as to the originator's payment order), between the originator's bank and an intermediary bank as to the originator's bank's payment order, between the intermediary bank and the beneficiary bank as to the intermediary bank's payment order, and finally as between the beneficiary bank that has accepted a payment order and the beneficiary. Accepted and executed payment orders thus create contractual obligations that result in a series of credits and debits to bank accounts. They do not involve a transfer of property of the originator to the beneficiary. A receiving bank owes its contractual obligation to its sender to execute the payment order and the sender owes its contractual obligation to pay the amount of the payment order to its receiving bank. The intermediary

[104] *See Jaldhi*, 585 F.3d at 71; U.C.C. § 4A-502 cmt. 4 (1990) (showing that funds held temporarily during a funds transfer are not property of the originator or the beneficiary); Brief for Amicus Curiae Federal Reserve Bank of New York, *supra* note 88, at 2 (showing that the U.C.C., as adopted by the federal and state governments, governs Fedwire transactions).

[105] *See Jaldhi*, 585 F.3d at 71; U.C.C. § 4A Prefatory Note, ¶ Concept of acceptance and effect of acceptance by the beneficiary's bank. (1990); PEB, *supra* note 5, at 3.

> bank has no contractual obligation to the originator or to the beneficiary, and neither the originator nor the beneficiary has any contractual obligation to or rights flowing from the intermediary bank. Thus, credits in an intermediary bank are credits in favor of the originator's bank, *and are not property of either the originator or the beneficiary*.[106]

The PEB's reasoning is grounded in the distinction between payment orders and funds transfers with regard to the issue of privity of contract. While a funds transfer is the cumulative process of sending a series of payment orders, parties to a funds transfer are only in privity with their immediate transferor and their immediate transferee.[107] An intermediary bank, while in privity with an originator's bank and a beneficiary's bank, has no direct connection either to an originator or a beneficiary.[108] Because of this fact, the PEB explains that neither the originator nor the beneficiary has an interest in the funds held by an intermediary bank because they do not have contractual rights to compel the bank to continue the transfer or cause the bank to pay them directly.[109]

To better understand this concept, I revisit the illustration in Part I. In the illustration, Mr. A seeks to send an EFT to Mr. B in order to satisfy a business debt he owes to Mr. B. Mr. A begins the funds transfer by issuing a payment order to his bank, the originator's bank. As soon as the originator's bank accepts Mr. A's payment order by executing a subsequent payment order to an intermediary bank, Mr. A owes the originator's bank an obligation to pay the amount of the payment order.[110] As soon as the intermediary bank accepts the originator's bank's payment order by executing a payment order to Mr. B's bank, the beneficiary's bank, the originator's bank owes the intermediary bank an obligation to pay the amount of the payment order.[111] Finally, as soon as the beneficiary's bank accepts the intermediary bank's payment order pursuant to 4A-209(b), the

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[106] PEB, *supra* note 5, at 2 (emphasis added).

[107] *See id.* at 1–2.

[108] *See id.* at 2.

[109] *See id.* at 2–3.

[110] *See* U.C.C. § 4A-402(c) (1990).

[111] *See id.*

intermediary owes the beneficiary's bank an obligation to pay the amount of the payment order.[112]

A funds transfer, or the accumulation of payment orders allowing Mr. A to pay Mr. B, is essentially a "series of payment orders that create contractual obligations *only* as to the sender and receiver of each payment order"—contractual obligations which are not the property of either the originator or the beneficiary.[113] The Second Circuit recognized this principle in *Grain Traders*, where the Court precluded an originator of a funds transfer from suing an intermediary bank.[114] Because the originator is in contractual privity only with the originator's bank,[115] the originator has no claim or property right as against an intermediary bank.

The logical implication of Article 4A precluding originators and beneficiaries from claiming a property right to funds held by intermediary banks is that neither the creditor of an originator nor a beneficiary properly may issue creditor process seeking to attach EFTs held by an intermediary bank because such bank does not hold property of either the originator or the beneficiary.[116] Thus, a payment order held by an intermediary bank cannot be thought of as "property" of either the originator or the beneficiary.

The Federal Reserve Bank of New York explained that the policy behind the rule that the originator is in contractual privity only with the originator's bank and, thus, has no has no claim or property right against an intermediary bank, is fundamental to commercial law.[117] It stated that "[c]ommercial parties should not be expected to look beyond pre-existing contractual relationships that anticipate and allocate risk. It is this concept, contractual privity, that provides the necessary certainty to the payments

[112] *See id.* § 4A-209 cmt. 4; § 4A-404(a).

[113] PEB, *supra* note 5, at 1 (emphasis added).

[114] *Id.* at 4 n.3 (citing Grain Traders, Inc. v. Citibank, N.A., 160 F.3d 97 (2d Cir. 1998)).

[115] *See id*. at 2.

[116] *See* PEB, *supra* note 5, at 3; Brief for Amicus Curiae Federal Reserve Bank of New York, *supra* note 88, at 13–14.

[117] *See* Brief for Amicus Curiae Federal Reserve Bank of New York, *supra* note 88, at 15–16.

system."[118] Indeed, Article 4A explicitly recognizes that the creditor's right to attach the originator's funds hinges on the existence of privity between the two parties. Section 4A-502 governs creditor process served on a receiving bank.[119] Comment four to this section states that a creditor may want to reach funds involved in a funds transfer, including serving process on an intermediary bank.[120] Subsection (d) is intended to guide creditors and courts "as to the proper method of reaching the funds involved in a funds transfer." Pursuant to this subsection, "a creditor of the originator can levy on the account of the originator . . . before the funds transfer is initiated, but . . . cannot reach any other funds because no property of the

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[118] *Id.* at 15.

[119] That provision reads:

> (a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account. (b) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order. (c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply: (1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account; (2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal; (3) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process. (d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

U.C.C. § 4A-502 (1990).

[120] *Id.* § 4A-502 cmt. 4.

originator is being transferred."[121] A creditor of the beneficiary can serve process only on the beneficiary's bank to reach the obligation of the beneficiary's bank to pay the beneficiary, *but only after* the beneficiary's bank has accepted the transfer—before this point the beneficiary has no property interest in the funds.[122] Section 4A-503 solidifies the principle that intermediary banks are insulated entities under Article 4A as it serves as a prohibition on injunctions and restraining orders with respect to funds transfers. This section states:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may *not* otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.[123]

The authoritative comment to this section explains that section 4A-503's prohibitions are designed to prevent the interruption of a funds transfer after it has been set in motion.[124] Most importantly, the drafters explained that a creditor can enjoin an originator's bank from initiating a payment order and a beneficiary's bank from paying the beneficiary, but "[n]o other injunction is permitted. *In particular, intermediary banks are protected* . . . ."[125]

In addition to Article 4A's explicit prohibitions on interrupting the transmission chain of a funds transfer, the drafters crafted other provisions to insulate the wire transfer system from interruption. For example, comment four to section 4A-211, which governs the rejection of a payment order, states that it is not appropriate to allow the beneficiary's bank to

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[121] *See id.*

[122] *See id.*; Brief for Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 6–7 n.5.

[123] U.C.C. § 4A-503 (1990) (emphasis added).

[124] *Id.* § 4A-503 cmt. (noting that this section is related to § 4A-502(d) and U.C.C. § 4A-502 cmt.4).

[125] *Id.* § 4A-503 cmt. (emphasis added).

cancel or amend a payment order except in "unusual circumstances."[126] In addition, section 4A-211 places strong limitations on an originator's ability to cancel or amend his payment order.[127] Moreover, a beneficiary's bank can ignore an originator's request for cancellation since the originator is not the sender of the payment order to the beneficiary's bank.[128] Taken together, these provisions show the drafters intended that a payment order sent by an originator is designed to be virtually irrevocable and insulated until the time it reaches the beneficiary's bank account, except in certain stated cases of error.

Thus, the rule fashioned by the *Winter Storm* court that EFT funds in the hands of an intermediary bank may be attached pursuant to Rule B, is contrary to Article 4A's command that funds held by an intermediary bank in the form of a payment order are not the property of an originator or beneficiary and are not subject to an injunction, a temporary restraining order, or attachment.

3. *Winter Storm's* Rule Inflicted Collateral Damage on the Commercial World.

a. Article 4A Interests

One of the biggest criticisms of the *Winter Storm* rule is that it seemed to ignore the collateral damage it would cause to the commercial world by disrupting the careful balance of interests created by Article 4A. Article 4A created a specialized body of law to create a high-speed, efficient, and low-cost payment system.[129] The drafters of Article 4A made a deliberate decision to use precise and detailed rules to "assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles."[130] A critical consideration in drafting the rules "was that the various parties to funds transfers need to be able to predict risk with certainty, to insure

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[126] *See* § 4A-210 cmt. 3.

[127] *See id.* § 4A-211.

[128] *See id.* § 4A-404 cmt. 3.

[129] *See Banque Worms*, 570 N.E.2d at 195; U.C.C. § 4A Prefatory Note, ¶ Why is Article 4A needed? (1990).

[130] U.C.C. § 4A-102 cmt. (1990).

against risk, to adjust operational and security procedures, and to price funds transfer services appropriately."[131] The official comment to section 4A-102 states that:

> Funds transfers involve competing interests—those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article.[132]

It seems that the *Winter Storm* court disregarded these sentiments. By departing from the delicate balance of interests achieved through the Article 4A drafting process, the court created much havoc in the legal and banking worlds.

b. The Courts

Regarding *Winter Storm's* unintended consequences for the judiciary, the SDNY saw an increasing number of actions for maritime attachment under Rule B filed each year after the *Winter Storm* rule was first announced. The logistical nightmare for court dockets reached unprecedented levels in the time immediately before the *Jaldhi* decision was handed down. For example, of the approximately 10,600 lawsuits filed in the SDNY in 2008, "just over 2000 constituted claims resulting from alleged breaches of maritime contracts."[133] In addition, "from October 1, 2008, to January 31, 2009, maritime plaintiffs filed 962 lawsuits seeking to attach more than $1.35 billion."[134] These attachment lawsuits "constituted 33 percent of all lawsuits filed in the Southern District of New York during that period."[135] Similarly, one district court estimated that maritime

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[131] *Id.*

[132] *Id.*

[133] Taylor, *supra* note 19, at 216.

[134] PEB, *supra* note 5, at 5 n.4.

[135] *Id.*

attachment requests in the SDNY would comprise approximately one-third of all cases filed in 2009.[136]

c. The Banks

Courts were not the only entities feeling the wrath of *Winter Storm*. Banks located in New York City faced a logistical and financial nightmare dealing with the inundation of service of process resulting from Rule B suits instituted in the SDNY. Noting several startling attachment statistics, the Clearing House Association LLC explained that the consequences of Winter Storm for NYC banks were drastic. In February 2006, Citibank "had pending 70 active writs of maritime attachment, seeking to attach over $195 million. JP Morgan Chase Bank was served with an average of 138 writs of maritime attachment *per day* during a week in June 2007."[137] Wachovia Bank was "served in 2007 with an average of 210 writs per day, seeking attachment of over $500 million."[138] UBS "was served with 272 writs per week in June 2007, and the aggregate dollar amount of active writs at UBS" by August 2007 exceeded $267 million.[139] Looking at single day statistics paints an even starker picture. For example, "on July 16, 2007, The Bank of New York received 209 writs seeking to attach $528 million."[140] Similarly, "[o]n July 19, 2007, Deutsche Bank was served with 161 writs, and Bank of America was served with 209 seeking attachment of nearly $495 million."[141]

The volume of maritime attachment orders placed a monumental burden on banks' daily operations. One of the most significant problems they encountered was that the only practical way in which they could effectuate all of the attachment orders was to make frequent amendments to their software screens that list entities and other persons whose financial

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[136] *See* Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group, 613 F. Supp. 2d 426, 431–32 n.37 (S.D.N.Y. 2009).

[137] Brief for Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 7.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

transactions must be blocked.[142] As the Clearing House Association explained in its amicus curiae, "[t]he process of constantly amending software screens to deal with this flood of maritime attachments greatly increased the number of 'hits,' including numerous false hits, that the screens generated, creating real risks of inefficiency and error in the day-to-day processing of funds-transfer payment orders."[143] As a consequence of the deluge of attachment orders, New York banks were forced to hire additional staff and suffered considerable expenses to process such attachments.[144]

d. The U.S. Dollar and New York City as a World Financial Center

This large volume of attachment orders presented a greater danger than merely inhibiting the efficient functioning of daily banking operations. *Winter Storm* threatened to compromise the role of the U.S. Dollar as the world's primary reserve currency and New York City's standing as a center of international funds transfers.[145] Before *Jaldhi*, the PEB warned that companies around the world might begin restructuring their transactions to provide for payments in euros, sterling, yen, or some other currency to avoid using U.S. dollars cleared through intermediary banks in the United States, or, alternatively, clear transactions through one of the proliferating off-shore dollar clearing networks.[146] Because the only contact with the United States in most of these transactions is the use of an intermediary bank in New York City to clear U.S. dollars, costly Rule B attachment litigation could be avoided entirely by the relatively simple option of using a different currency.[147] Yet, the Second Circuit in *Winter Storm* failed to appreciate the possibility that New York City banks might be passed-over as intermediary banks in funds transfer transmission chains. In particular,

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[142] Brief for Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 7, 8, 15; *see Consub Del.*, 543 F.3d 104; PEB, *supra* note 5, at 6 n.4.

[143] Brief for Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 8–9.

[144] *Cala Rosa*, 613 F. Supp. 2d at 431–32 n.37; Brief for Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 8.

[145] *See Consub Del.*, 543 F.3d at 109, 111; PEB, *supra* note 5, at 5 n.4; Brief for Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 11–12.

[146] PEB, *supra* note 5, at 5–6 n.4.

[147] *Id.*

Article Section 4A-302 provides a degree of flexibility to banks and originators with regard to which banks are chosen as intermediary banks.[148] Absent a contractual provision stating otherwise, a receiving bank can choose any intermediary bank through which to route an EFT.[149] Thus, if commercial parties around the world found the *Winter Storm* rule to be too costly, they could very well structure their wire transfers so as to eschew New York City banks and U.S. Dollars in order to prevent Rule B attachment from impeding their transactions.

e. Innocent Third Parties

In addition to court dockets and banking operations, the *Winter Storm* rule also threatened harm to innocent third parties and opposing parties to funds transfers. As The Federal Reserve Bank of New York explained, "[w]hen a funds transfer is attached at an intermediary bank, the funds transfer cannot be completed and the payment obligation that the originator was attempting to discharge through the use of the funds transfer remains unsatisfied."[150] It warned that this could have severe consequences not only for the party that is subject to the attachment order but also for wholly unrelated parties.[151] Indeed, the failure to complete the funds transfer and, by extension, the failure of the originator to discharge its underlying obligation under section 4A-406 could have detrimental effects on contractual relations and goodwill between commercial parties. In particular, these effects and the uncertainty that they produced certainly did not help members of the global shipping industry during the financial turmoil in the depths of the 2008-2009 global recession.[152]

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[148] *See* U.C.C. § 4A-302 (1990); U.C.C. § 4A-302 cmt. 2 (1990).

[149] *See id.* § 4A-302 cmt. 2.

[150] Brief for Amicus Curiae Federal Reserve Bank of New York, *supra* note 88, at 16–17.

[151] *See id.* at 17. The Federal Reserve Bank of New York in its amicus curiae brief further noted that the smooth functioning of the financial markets and commercial trade require parties to wholesale funds transfers to be able to "predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately." The brief continued explaining that "it is impossible for the parties to a funds transfer to predict and mitigate the risks associated with funds transfers that arise because of such attachment orders." *Id.*

[152] *See* Taylor, *supra* note 19, at 218 ("[T]he current economic crisis has wreaked havoc on the global shipping industry. Bulk carrier rates continue to plummet at alarming rates, (footnote omitted) global ship orders are down substantially, (footnote omitted) and huge

Regarding defendants in maritime attachment cases, one SDNY court went so far as to say that the *Winter Storm* rule was an "invitation to strategic abuse."[153] The court wrote that "because a dollar now is worth more than a dollar in the future, any litigant who can satisfy the lightweight requirement of showing a 'prima facie admiralty claim' may impose a tax on his adversary equal to the time value of money for the duration of litigation."[154] Indeed, *Winter Storm* created a series of perverse incentives for maritime plaintiffs to attach property of opposing litigants without much to preclude bad faith suits intended to temporarily disrupt a competitor's cash flow or, perhaps, to create additional leverage in transaction bargaining.

4. Untenable Uncertainty in the SDNY Regarding Rule B Jurisprudence

Possibly the most significant problem with the *Winter Storm* rule was that it created uncertainty in and undermined uniformity of Rule B jurisprudence within the SDNY.[155] It left open the question of whether funds held by an intermediary bank are property only of the originator or whether they also are property of the beneficiary, or of both parties concurrently. At question in *Winter Storm* was the validity of attaching funds held by an intermediary bank, which were *sent by a defendant-originator*. The court relied upon Rule B's broad language to find that EFTs in the hands of an intermediary bank may be attached. The opinion, however, did not offer guidance on whether maritime plaintiffs could use Rule B to attach funds held by an intermediary bank that were *en route to a defendant-beneficiary*. Consequently, SDNY courts struggled with determining how far to extend *Winter Storm's* rule beyond its facts. While some SDNY judges embraced *Winter Storm's* holding, certain other judges, fed up with what they perceive to be an abuse of the Rule B mechanism, "pushed back" by erecting barriers to the flood of Rule B claims brought in

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shipping conglomerates are in the process of drastically slashing the size of their worldwide fleets.").

[153] Hannah Bros. v. OSK Mktg. and Commc'ns, Inc., 609 F. Supp. 2d 343, 351 (S.D.N.Y. 2009).

[154] *Id.* (noting that because a lawsuit's settlement value includes the costs of litigation, it would be economically irrational, all other things being equal, for a party not to attach his adversary's assets via Rule B).

[155] *See* Taylor, *supra* note 19, at 217.

the SDNY—thereby breeding uncertainty about the viability of the practice.[156]

In *HBC Hamburg Bulk Carriers GMBH & Co.*, Judge Buchwald addressed "whether, for purposes of Rule B attachment, an EFT remains the exclusive property of the sending-payor until it enters one of the banks associated with the recipient beneficiary" in a funds transfer.[157] In that case, the EFTs in question had been sent by third parties as payments to the defendants with their ultimate destination being one of the defendant's Mexican bank accounts. The attachment occurred at a New York City intermediary bank before the defendant's receipt of the funds in its Mexican bank account. Extending *Winter Storm's* holding the court found that because the defendant-beneficiary had a clear property interest in the debt owed to it by third parties and "because the EFT in the hands of the intermediary bank is intended to satisfy the debt," the defendant had a property interest in the EFT "before it was technically possessed by its own bank."[158] The defendant argued that, per *Winter Storm*, the EFTs sent by third parties remained the property of the sending-payors until the beneficiary's bank accepted the final payment order.[159] Furthermore, Judge Buchwald reasoned that funds in the hands of an intermediary are simultaneously property of both the sending-payor and the recipient-beneficiary.[160]

The following year the Second Circuit appeared to adopt Judge Buchwald's extension of *Winter Storm's* rule to make funds held by an intermediary bank attachable as property either of the originator or beneficiary. In *Aqua Stoli*, the court held that "EFTs *to or from a party* are attachable by a court as they pass through banks located in that court's jurisdiction."[161] Peculiarly, the court cited *Winter Storm* for this proposition

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[156] *Id.* at 217.

[157] *See* HBC Hamburg Bulk Carriers GmbH & Co. KG v. Proteinas y Oleicos S.A. de C.V., No. 04-civ-6884 (NRB), 2005 WL 1036127, at *3 (S.D.N.Y. May 4, 2005).

[158] *See id.* at *3–4.

[159] *Id.* at *4.

[160] *Id.* (noting that this is the logical result of the broad terms of Rule B's attachment language coupled with the overlapping property rights of sending-payors and recipient-beneficiaries in EFTs).

[161] *Aqua Stoli*, 460 F.3d at 436 (emphasis added).

despite the fact that the *Winter Storm* court never had cause to determine whether funds held by an intermediary bank are property of a beneficiary.[162] Despite clearly affirming and broadening the *Winter Storm* rule, the opinion noted that the rule had been severely criticized by various groups, including the banking entities responsible for the wire transfer system.[163] In order to confuse district courts even more, the court questioned the validity of *Winter Storm* in footnote 6 of the opinion. Judge Walker, writing for the court, stated:

> The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on *Daccarett* to hold that EFTs are property of the beneficiary or sender of an EFT. Because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of whose assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, N.Y. U.C.C. Law §§ 4-A-502 to 504. Under state law, the EFT could not be attached because EFTs are property of neither the sender nor the beneficiary while present in an intermediary bank.[164]

Ironically, the *Aqua Stoli* court recognized that "post-*Winter Storm* district court cases have hardly spoken with a single voice"[165]—a problem the *Aqua Stoli* decision did not help resolve.

Seemingly in defiance of *Aqua Stoli's* explicitly broader formulation of the *Winter Storm* rule, Judge Rakoff rejected the notion that funds held by an intermediary could be the property of a beneficiary in *Seamar Shipping Corp.*, decided in late 2006.[166] He began by noting that the Second Circuit has not spoken with a unified voice on the issue. Citing Footnote 6 in *Aqua Stoli*, he explained that there was a "serious question of whether

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[162] *See id.*

[163] *Id.* at 445.

[164] *Id.* at 445 n.6 (internal citation omitted).

[165] *Id.* at 446.

[166] *See* Seamar Shipping Corp. v. Kremikovtzi Trade Ltd., 461 F. Supp. 2d 222, 224–26 (S.D.N.Y. 2006).

Winter Storm's implicit holding that EFTs may be considered to be a defendant's property," either of an originator or beneficiary, while in transit remains good law.[167] Parsing Judge Walker's language in *Aqua Stoli*, Judge Rakoff wrote that "although the attachment applied to EFTs 'to or from' the defendant, neither the court nor the parties addressed whether the funds that were actually attached had been sent to or from the defendant."[168] He noted that *Aqua Stoli's* statement that "EFTs to or from a party are attachable by a court, if construed as binding law, would substantially broaden *Winter Storm's* holding, which technically applies only where the defendant is the originator of the EFT."[169] Thus, since *Aqua Stoli* called *Winter Storm* into serious doubt, he reasoned that district courts should not broaden *Winter Storm's* rule beyond holding that funds held by an intermediary bank are property of the defendant-originator.[170] Since *Seamar Shipping* involved deciding whether funds held by an intermediary bank were property of a beneficiary, *Winter Storm* was inapplicable.[171] Without a federal precedent to bind the court, Judge Rakoff looked to New York's UCC section 4A-502 and found that the beneficiary-defendant had no property interest in the funds transfer before its bank accepts the funds.[172] Therefore, Judge Rakoff vacated the order of attachment in favor of the defendant-beneficiary.[173]

Absent a clarification from the Second Circuit after *Aqua Stoli* and *Seamar Shipping*, courts in the SDNY were faced with a choice: follow Judge Rakoff's lead and use the undertones from *Aqua Stoli's* footnote 6[174] to push back against the *Winter Storm* rule or follow the literal language of *Aqua Stoli*[175] and broadly apply Rule B. Despite the negative effects of the rule discussed *supra*, some courts in the SDNY continued to choose the

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[167] *Id.* at 224.

[168] *Id.* at 225.

[169] *Id.*

[170] *See id.*

[171] *See id.*

[172] *Id.* at 226.

[173] *See id.*

[174] *Aqua Stoli*, 460 F.3d at 445 n.6.

[175] *Id.* at 436.

latter option to permit attachment of EFTs intended for a defendant-beneficiary.[176] Notwithstanding these courts' broad applications, Judge Rakoff remained loyal to his position in *Seamar Shipping*. In early 2008, he relied on that decision to vacate another Rule B attachment order in *Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*[177] Notably, Judge Rakoff certified his decision for interlocutory appeal to the Second Circuit because of the wild divergence in SDNY applications of Rule B under *Winter Storm* and *Aqua Stoli*.[178]

Before the Second Circuit could address *Jaldhi*, however, it handed down *Consub Delaware LLC*. As in *Aqua Stoli*, the Court expressed doubt about the validity of *Winter Storm*, going as far as to note that New York City's status as a world financial center is some support for applying Article 4A to Rule B attachment cases.[179] Applying the principle of *stare decisis*, however, the court found that federal law governs the question of who owns funds in an EFT as they pass through an intermediary bank.[180] Thus, the rule of *Winter Storm* remained valid.

Some courts in the SDNY, perhaps reading *Consub Delaware* to mean that *Winter Storm* finally might be called into question in a subsequent Second Circuit opinion, began erecting barriers to successful attachment petitions by maritime plaintiffs. The court in *Cala Rosa Marine Co.*, for example, declined to recognize a mandatory continuous service standard for Rule B attachment orders.[181] Judge Scheindlin wrote that if the EFT sought to be attached is in the possession of the intermediary at the

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[176] *See, e.g.*, Mediterranea di Navigazione SPA v. Int'l Petrochemical Group S.A. 90, No. 06-civ-6700(JGK), 2007 WL 1434985 (S.D.N.Y. May 15, 2007); Dolco Inv., Ltd. v. Moonriver Dev. Ltd., 486 F. Supp. 2d 261 (S.D.N.Y. 2007); Navalmar (U.K.) Ltd. v. Welspun Gujarat Stahl Rohren, Ltd., 485 F. Supp. 2d 399 (S.D.N.Y. 2007); Compania Sudamericana de Vapores S.A. v. Sinochem Tianjin Co., No. 06-civ-13765(WHP), 2007 WL 1002265 (S.D.N.Y. Apr. 4, 2007); Gen. Tankers Pte. Ltd. v. Kundan Rice Mills Ltd., 475 F. Supp 2d 396 (S.D.N.Y. 2007).

[177] *See* Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., No. 08-civ-4238(JSR), 2008 WL 2596229, at *1–2 (S.D.N.Y. June 27, 2008), *aff'd in part*, *rev'd in part*, 585 F.3d 58 (2d Cir. 2009).

[178] *See id.*

[179] *See Consub Del.*, 543 F.3d at 109, 111.

[180] *See id.* at 109.

[181] *See Cala Rosa*, 613 F. Supp. 2d at 430.

time of the attachment order, a court can but is not obligated to order continuous service.[182] She explained that the well-established prohibition against maritime attachments of after-acquired property does not obligate the bank to subsequently interrupt an EFT to satisfy the prior order, as the BNY chose to do in *Winter Storm*.[183] Finding little reason to impose such an "enormous strain" on the New York City banking system, Judge Scheindlin declined to issue an order of continuous service for the maritime plaintiff in that case.[184] This ruling severely curtailed the usefulness of Rule B attachment for maritime plaintiffs because intermediary banks ordinarily process funds transfers in less than sixty seconds.[185] Thus, under Judge Scheindlin's approach, a maritime plaintiff was not able to attach funds at an intermediary bank unless it was fortunate enough to serve the order of attachment on the bank during the few seconds in which the bank held the funds.

After deciding *Consub Delaware*, the Second Circuit itself began to retreat from a broad, plaintiff-friendly application of Rule B. In *STX Panocean*, the Court addressed various decisions by the district courts regarding what constitutes "being 'found' within the district" for the purposes of Rule B jurisdiction.[186] It held that registration as a foreign corporation authorized to do business in the State of New York would preclude a Rule B attachment against that corporation's assets.[187] This rule allowed corporations wishing to immunize themselves from the risks of Rule B attachment to register as a corporation in New York in order to preclude maritime plaintiffs from being able to demonstrate that they "cannot be found within the district," one of the elements of a Rule B prima facie case.[188] While registering as a New York corporation carries with it a number of burdens and obligations, the Second Circuit mitigated the threat of Rule B abuse, to an extent, by giving foreign corporations a choice as to

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[182] *See id.*

[183] *See id.*

[184] *See id.* at 431.

[185] Brief of Amicus Curiae The Clearing House Ass'n LLC, *supra* note 11, at 8.

[186] *See* STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd., 560 F.3d 127, 133 (2d Cir. 2009).

[187] *See id.* at 133.

[188] *See Aqua Stoli*, 460 F.3d at 445.

whether they would be willing to put themselves at risk of Rule B attachment.

III. *Jaldhi* and the Future of Rule B Attachment in the SDNY

By late 2009, many commentators realized that *Winter Storm* rested on questionable reasoning, created enormous burdens for New York City banks, stood at odds with Article 4A and New York law generally, and created much tension and uncertainty among courts in the SDNY.[189] *Consub Delaware* and *Aqua Stoli* indicated that the Second Circuit recognized the pitfalls of the rule and that the Second Circuit might need to engage in serious revision in the future to address the above-mentioned problems.[190] Yet, even considering the foregoing, the Court surprised the legal and commercial communities in October 2009 when it overruled *Winter Storm* in an unprecedented fashion. Part III begins with the statement of *Jaldhi* and then addresses the shortcomings of the *Jaldhi* decision.

A. The *Jaldhi* Decision

The relevant facts of the *Jaldhi* decision are as follows.[191] In March 2008, plaintiff Shipping Corp. of India entered into a charter contract with defendant Jaldhi Overseas so that Jaldhi could use Shipping Corp's vessel, the M/V Rishikesh, to transport iron ore from India to China.[192] The plaintiff transferred its vessel to the defendant and the very next day a crane on board "collapsed, killing the crane operator, halting cargo operations," causing the defendant to suspend the charter.[193] The plaintiff then sent the defendant an invoice for the charter but did not receive payment.[194] Though the charter obligated the parties to resolve disputes under English law, the plaintiff brought suit in the SDNY seeking an order of maritime attachment pursuant to Rule B on May 7, 2008 for the amount of $4,816,218.00,

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[189] *See supra* Part II.

[190] *See, e.g.*, *Consub Del.*, 543 F.3d at 109, 111; *Aqua Stoli*, 460 F.3d at 445 n. 6.

[191] For full facts of the case, see *Jaldhi*, 585 F.3d at 64–66.

[192] *Id.* at 64.

[193] *Id.* at 64–65.

[194] *Id.* at 65.

constituting the balance, interest, and attorneys' fees.[195] On May 8, 2008, the district court entered the attachment order.[196] On May 22, 2008, the defendant filed a motion to vacate the attachment in the SDNY.[197] Yet, by the time the defendant filed its motion, the plaintiff had attached almost $5 million in EFTs passing through New York City intermediary banks—a portion of which were EFTs with the defendant as the originator, but the vast majority were with the defendant as the beneficiary.[198] Then, on June 27, 2008, Judge Rakoff vacated the "May 8, 2008, attachment order insofar as it applied to EFTs of which the defendant was the beneficiary," relying on his opinion in *Seamar Shipping* for support.[199] He then certified the question for interlocutory appeal pursuant to 29 U.S.C § 1292.[200]

Judge Cabranes, writing for the Court, began the merits discussion by acknowledging that *Winter Storm* had produced a substantial body of critical commentary, including many of the arguments made in Part II of this article.[201] Like in previous cases, the Court noted that *Winter Storm* introduced uncertainty into the international funds transfer process and undermined the efficiency of New York's international funds transfer business. Judge Cabranes wrote that undermining 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.[202] This, in itself, was not a major change from previous Second Circuit decisions. Indeed, the Court had recognized in prior opinions a multitude of practical and legal criticisms of the rule but nonetheless affirmed the rule on the basis of *stare decisis*.[203] At most, the

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[195] *Id.* at 64–65 n.4.

[196] *Id.* at 65.

[197] *Id.*

[198] *See id.*

[199] *Id.* at 65–66.

[200] *Id.* at 66.

[201] *See id.* at 61–62; *supra* Part II.C.

[202] *Id.* at 62 (noting that efficiency is fostered by protecting the intermediary banks).

[203] *See Consub Del.*, 543 F.3d at 108–09; *Aqua Stoli*, 460 F.3d at 445.

Court implicitly accepted a movement to increasingly cabin *Winter Storm* by erecting various procedural barriers to Rule B attachment.[204]

Yet, unlike previous cases, Judge Cabranes explained that the Second Circuit would no longer attempt to deal with the ills of *Winter Storm* by ignoring its collateral consequences or by attempting to limit its strength by erecting further procedural barriers.[205] Instead, the Court overruled *Winter Storm* outright. Judge Cabranes wrote that:

> We overrule our previous decision in Winter Storm . . . and conclude that EFTs being processed by an intermediary banks are *not* subject to attachment under Rule B.[206]

But, why would the Court change course so dramatically? Judge Cabranes explained that there were two principal reasons for reversing a "relatively recent" case.[207] First, the Court concluded that *Winter Storm* relied upon erroneous reasoning to conclude that EFTs are attachable property.[208] Second, the Court acknowledged that the "effects of *Winter Storm* on the federal courts and international banks in New York are too significant to let this error go uncorrected simply to avoid overturning a recent precedent."[209]

While the Court cited numerous statistics to demonstrate *Winter Storm*'s detrimental impact on banks and court dockets,[210] it is clear from the court's reasoning that its first reason, the weakness of *Winter Storm*'s reasoning, was the impetus for overruling that case outright. He recounted the *Winter Storm* court's three bases of federal support in *Winter Storm*: the broad language of Rule B, the federal rule that a defendant's bank account is attachable property, and *Daccarett's* holding that an EFT while it takes

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[204] *See Jaldhi*, 585 F.3d at 62–64.

[205] *See id.* at 61, 63.

[206] *Id.* at 72 (emphasis added).

[207] *See id.* at 67.

[208] *Id.*

[209] *Id.* at 67.

[210] *Id.* at 61–62.

the form of a bank credit at an intermediary bank is a seizable *res* under the forfeiture statutes.[211]

Turning first to the *Winter Storm* court's reliance on *Daccarett*, Judge Cabranes reasoned that *Daccarett* does not support a holding that the originator or beneficiary of an EFT has a *property interest* in an EFT while held by an intermediary bank because *Daccarett* did not turn on the issue of ownership of the funds; it held only that funds traceable to an illegal activity were subject to forfeiture under 21 U.S.C. § 881.[212] To be eligible for forfeiture, the EFTs needed only to be traceable to the illegal activities and, thus, the court in *Daccarett* was required only to assess whether the EFTs in that case were in fact traceable to illegal activities—no further inquiry into the issue of ownership of the EFTs was necessary.[213] By contrast, Judge Cabranes emphasized that for maritime attachments under Rule B, the question of ownership is crucial.[214]

The court then distinguished civil forfeiture actions, at issue in *Daccarett*, and maritime attachment actions, at issue in *Winter Storm* and *Jaldhi*. Read literally, Rule B has two main requirements that a plaintiff must meet to attach an EFT held by an intermediary bank: first, the EFT must be "tangible or intangible property" and second, that tangible or intangible property must be owned by the defendant.[215] Rule B requires that the defendant not be found within the district so that the *res* is the only means by which a court can obtain personal jurisdiction over the defendant. If the *res* is not the defendant's property, then the court lacks jurisdiction.[216] In contrast, civil forfeiture is a remedy *in rem*, which is based on the well-established theory that the property is itself treated as the offender and made the defendant by name or description.[217] For *in rem* remedies, such as forfeitures, ownership of the *res* is irrelevant because a court has personal jurisdiction regardless of who owns the *res* at issue. Judge Cabranes

[211] *Jaldhi*, 585 F.3d at 67–68.

[212] *See id.* at 68–69.

[213] *Id.* at 69.

[214] *Id.*

[215] *See id.* at 66, 68–69.

[216] *Jaldhi*, 585 F.3d at 69

[217] *Id.*

concluded by stating that the distinction between remedies *quasi in rem* and *in rem* provides a principled basis for allowing EFTs to be subject to forfeiture but not attachment.[218]

Without the support of *Daccarett*, Judge Cabranes wrote that the Court is not persuaded that either the broad language of Rule B or past maritime holdings relating to defendants' bank accounts compel the Court to affirm the *Winter Storm* rule.[219] Similarly, he found no historical or functional policy rationale to compel the Court to affirm the rule.[220]

Then came the court's true innovation in its Rule B jurisprudence: it looked to state law, specifically New York's UCC Article 4A. The Court stated that since the *Winter Storm* court's three reasons were grounded exclusively in federal law, the Second Circuit did not have an occasion to look to state law to determine who, if anyone, has an ownership interest in funds in the hands of an intermediary bank.[221] Unlike previous panels in *Winter Storm*, *Aqua Stoli*, and *Consub Delaware*, the *Jaldhi* panel finally took advantage of an opportunity to substantively discuss at length how Article 4A would characterize funds held by an intermediary bank.[222]

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[218] *See id.*

[219] *Id.* at 69–70.

[220] The court opined:

> Streamlined Rule B practices, however, developed out of the concern that ships might set sail quickly, not because the courts intended to arm maritime plaintiffs with writs of attachment prior to the arrival of the ship in port. Under Winter Storm, however, maritime plaintiffs now seek writs of attachment pursuant to Rule B long before the defendant's property enters the relevant district, often based solely on the speculative hope or expectation that the defendant will engage in a dollar-denominated transaction that involves an EFT during the period the attachment order is in effect. Such practices, which have increased dramatically since Winter Storm, bear little, if any, relation to the text of Rule B or to our jurisprudence relating to the bank accounts of maritime defendants.

Id. at 70.

[221] *See id.* at 68.

[222] *See id.* at 70–71 (noting that in the absence of applicable federal law, the court generally looks to state law for guidance on the question).

In a clear and concise explication of Article 4A, the court firmly stated that New York law does not permit the attachment of EFTs in the possession of an intermediary bank.[223] Citing section 4A-503, the court noted that Article 4A allows a court to restrain the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.[224] Article 4A also permits a court to attach an originator's funds before the originator's bank executes an originator's payment order.[225] Section 4A-503, however, explicitly states that a court may not otherwise restrain *any* activity with respect to a funds transfer.[226] The court looked to the authoritative comment to section 4A-502, which states that "until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of a beneficiary, the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach"[227] to find that, under New York law, EFTs are neither property of the originator nor the beneficiary of a funds transfer while they are briefly in the possession of an intermediary bank.[228] The logical extension of this characterization of New York law, according to the court, is that EFTs cannot be subject to attachment under Rule B since the EFTs would not permit a plaintiff to satisfy one of the key elements of his prima facie case: that the EFTs are property of the defendant-originator or the defendant-beneficiary.

B. Open Questions from *Jaldhi*

While the Second Circuit finally reached the correct result with regard to EFTs passing through intermediary banks in *Jaldhi*, it may have failed to permanently lay to rest the dangers inherent in *Winter Storm*'s reasoning. Perhaps New York City banks and SDNY dockets are not yet out of danger.

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[223] *See id.* at 70.

[224] *Id.* at 70–71; *see* U.C.C. § 4A-503 (1990); U.C.C. § 4A-503 cmt. (1990).

[225] *See Jaldhi*, 585 F.3d at 70; *see also* U.C.C. § 4A-503 (1990); U.C.C. § 4A-503 cmt. (1990).

[226] *See Jaldhi*, 585 F.3d at 70–71; *see also* U.C.C. § 4A-503 (1990) (emphasis added); U.C.C. § 4A-503 cmt. (1990).

[227] *See Jaldhi*, 585 F.3d at 71 (quoting U.C.C. § 4A-502 cmt. 4 (1990)).

[228] *See id.*

1. Time Scope of *Jaldhi* Rule

First, the *Jaldhi* court did not specify whether its decision should be applied by courts in the SDNY retroactively or only prospectively. Even though it was clear that SDNY courts would no longer be permitted to order attachment of EFT funds held by an intermediary bank against the interests of a defendant-beneficiary or defendant-originator, there was a significant number of pending motions for attachment and motions for vacatur with regard to previously granted orders of attachment in the SDNY at the time *Jaldhi* was handed down.[229] Would the Second Circuit permit these orders to stand?

This question promptly was answered in the negative in *Hawknet Ltd. v. Overseas Shipping Agencies*. The Second Circuit stated that the presumption against retroactive application of statutes and regulations does not apply with respect to *Jaldhi* rule.[230] It reasoned that when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law [in the case of *Jaldhi*, interpretation of Rule B] and must be given full retroactive effect in all cases still open on direct review."[231] Thus, it held that because it applied the rule it announced in *Jaldhi* to the parties in that case, the *Jaldhi* rule applies retroactively to all cases open on direct review, including *Hawknet*.[232]

2. Dangerous Dicta: EFTs as Temporary Property of Intermediary Banks

Next, the Court left open the possibility that EFTs in the hands of an intermediary bank remain, despite *Jaldhi's* holding, attachable by a creditor in some situations. While the court issued a powerful and persuasive decision, its opinion included some dicta that might imply that funds held by intermediary banks still could be subject to capture. In particular, footnote 13 leaves open the question of whether property rights regarding EFTs, or their constituent payment orders, must vest in some entity at all times.[233] The court considered whether "New York law envisages EFTs as

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[229] *See* PEB, *supra* note 5, at 5 n.4.

[230] *See* Hawknet Ltd. v. Overseas Shipping Agencies, 590 F.3d 87, 91 (2d Cir. 2009).

[231] *Id.* (quoting Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993)).

[232] *See id.*

[233] *See Jaldhi*, 585 F.3d at 71 n.13.

the property of the intermediary bank for the short while or instant during which they remain in the bank's possession."[234] Because this question was not presented in *Jaldhi*, however, the court stated that it would not address it further. Nonetheless, the court in further dicta attempted to allay any fear of another Rule B catastrophe for banks and courts under this hypothetical scenario. Judge Cabranes wrote,

> If, however, a court were to find that the EFTs were property of the intermediary bank, it would have no effect on the application of Rule B. If EFTs are the property of the intermediary bank and that bank is a defendant for purposes of Rule B, then the property would still not be subject to Rule B attachment because these intermediary banks are necessarily "found within the district" in which the EFTs are found and Rule B only allows the attachment of property within the district that belongs to defendants "not found within the district."[235]

It is true that a rule that funds held by a NYC intermediary bank are the "property" of the intermediary bank would have "no effect" on the application of Rule B. Judge Cabranes correctly noted that such intermediary banks would be free from Rule B process because they would be "found within the district" such that Rule B would be inapplicable to them.[236] But, these dicta and the notion that a bank might "own" the funds it holds momentarily as an intermediary bank in a funds transfer are incorrect as a matter of New York law and policy.

a. Footnote 13 is Incorrect as a Matter of New York Law

As a matter of law, footnote 13 contradicts the insulated nature of a wire transfer as conceived of by New York's Article 4A. The drafters of Article 4A took great care in creating a fast, low-cost, and efficient payment system where payment, once initiated by an originator, is virtually irrevocable.[237] Businesses depend on the system's reliability—which is fostered by keeping a funds transfer significantly insulated from outside

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[234] *See id.*

[235] *Id.*

[236] *See id.*

[237] *Banque Worms*, 570 N.E.2d at 194–95; *See* Mann, *supra* note 1, at 225.

process.[238] In order to create this insulation, the drafters intended that a funds transfer would be understood by courts as nothing more than a series of independent contractual obligations between banks to carry out the instructions of an originator. The drafters of Article 4A specified that "[a]lthough 4A follows convention in using the term 'funds transfer'" to identify a payment from the originator to the beneficiary, "no money or property right" of the originator is actually transferred to the beneficiary.[239] The logical extension of this statement is that no money or property right of the originator passes through an intermediary bank on its way to the beneficiary.

To hold that an intermediary bank might have a property or ownership interest in a mere contractual obligation that it has with a preceding or subsequent bank in a funds transfer would ignore the intentions of the UCC drafters that banks should not have vested property rights in EFT payment orders they hold as intermediary banks. For example, Article 4A's "money back guarantee" is evidence that the drafters did not intend an intermediary bank to have an ownership interest in funds it momentarily holds during a funds transfer. The guarantee, found in section 4A-402(c), states that "[t]he obligation of [the] sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order."[240] If an intermediary bank had a vested ownership interest in the funds it handles during a funds transfer, property law might recognize such bank's independent right to pull the money out of the wire transfer system. However, if an intermediary bank were to pull funds out of the chain of transmission unilaterally such that the beneficiary's bank never accepts the funds, section 4A-402(c) would compel the intermediary bank to reimburse the bank from which it received the payment order in the amount of the payment order.[241] In other words, an intermediary bank cannot pull funds out of the wire transfer system without having to pay back the money to the sender of the payment order. If an intermediary bank cannot pull funds out of the system without suffering any

[238] *See, e.g.*, U.C.C. § 4A-502 (1990); U.C.C. § 4A-502 cmt. 1-5 (1990); U.C.C. § 4A-503 (1990); U.C.C. § 4A-503 cmt. (1990).

[239] U.C.C. § 4A Prefatory Note, ¶ Concept of acceptance and effect of acceptance by the beneficiary's bank. (1990).

[240] U.C.C. § 4A-402(c) (1990); U.C.C. § 4A-402 cmt. 2 (1990).

[241] *See* U.C.C. 4A-402(c) (1990); U.C.C. § 4A-402 cmt. 2 (1990).

repercussions under Article 4A, the drafters probably did not intend banks to have any vested property right with regard to funds they hold as intermediary banks in a funds transfer. The Second Circuit ignored the above-discussed nature of funds transfers under New York law previously in *Winter Storm* and the results were disastrous for banks and courts.[242] The court should apply a strong and continuing presumption against departing from the Article 4A drafters' careful construction of the wire transfer system.

b. Footnote 13 is Unsound as a Matter of Policy

As a matter of sound policy, footnote 13 represents a potential source of precedent to re-introduce *Winter Storm*-esque notions of property rights into the wire transfer chain of transmission. Judge Cabranes correctly explained that Rule B would not be affected by a ruling that an intermediary bank has a vested property interest in the funds it holds during a funds transfer.[243] However, this reasoning does not guarantee in perpetuity that plaintiffs would be precluded from relying upon other, or not-yet-enacted, federal jurisdictional statutes to attach "property owned by intermediary banks." That this is a speculative danger is conceded by the author. But, how many commentators in 1993—when *Daccarett* was decided—anticipated that *Daccarett* would be used as the chief support for allowing attachment of funds held by an intermediary bank under Rule B?[244] How many of those commentators foresaw the damage to banks and court dockets caused by *Winter Storm*?[245] To protect the future of the wire transfer system, the court should refrain from making broad statements about ownership interests in funds transfers, even in speculative dicta, which are at odds with rights, obligations, and characterizations under Article 4A.

3. Questionable Procedural Technique to Overrule *Winter Storm*

Finally, the *Jaldhi* court potentially left *Jaldhi* open to attack because the court relied on the "mini *en banc*" procedure to overrule *Winter Storm* as precedent. The *Jaldhi* panel acknowledged "that a panel of [the

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[242] *See supra* Part II.

[243] *See Jaldhi*, 585 F.3d at 71 n.13.

[244] *See Winter Storm*, 310 F.3d at 278.

[245] *See supra* Part II.

Second Circuit] is 'bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of [the Second Circuit] or by the Supreme Court.'"[246] However, Judge Cabranes, citing *United States v. Crosby* and *Jacobson v. Fireman's Ins. Co.*, wrote that because the opinion was circulated to all active members of the Court prior to filing and no judge objected, the *Jaldhi* panel could overrule its binding precedent in *Winter Storm*.[247] Thus, the *Jaldhi* panel was willing to use this unconventional procedure to break with *stare decisis*, despite not sitting *en banc* and despite there being no opinion overruling binding precedent by the Supreme Court.[248]

It is questionable, however, whether the court had the authority to break *stare decisis* in this manner. One commentator wrote that closer scrutiny of the two cases upon which the court relied for procedural precedent reveals that each case used the mini *en banc* approach "to overrule a prior panel only because of intervening circumstances."[249] A close reading of *Crosby* reveals that the Second Circuit was not writing in

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[246] *Jaldhi*, 585 F.3d at 67 & n.9 (citing United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004)).

[247] *See id.* at 67 (citing United States v. Crosby, 397 F.3d 103, 105 n.1 (2d Cir. 2005); Jacobson v. Fireman's Ins. Co., 111 F.3d 261, 268 n.9 (2d Cir. 1997)). In *Crosby*, the defendant appealed his firearms conviction after he received a ten year sentence as a result of a mandatory application of the Federal Sentencing Guidelines by his sentencing judge in which he received several enhancements based on facts found by the sentencing judge but not the sentencing jury. *See Crosby*, 397 F.3d at 106. The Second Circuit faced the issue of whether to remand the case to allow the district court to resentence the defendant in light of the Supreme Court's intervening case, *Booker*, which made the Federal Sentencing Guidelines advisory as opposed to mandatory. *See id.* at 105–06. The Court held that the sentencing judge committed a Sixth Amendment violation "by mandatorily selecting a sentence dictated by the applicable Guidelines range, which had been calculated on the basis of facts not found by a jury or admitted by the Defendant." *Id.* at 119–20. In *Jacobson*, the plaintiff insured appealed the dismissal of his complaint against the defendant insurer for the defendant's denial of payment of claims under the plaintiff's policy arising from damage to the plaintiff's insured residence. *See Jacobson*, 111 F.3d at 262. The Second Circuit held that the plaintiff's first action in state court, even though it was an unconfirmed umpire's decision in a mandatory appraisal process for disputed insurance claims, barred his subsequent action in federal court on the basis of res judicata. *See id.*

[248] *See Jaldhi*, 585 F.3d at 67 n.9 (citing United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004)); United States v. Parkes, 497 F.3d 220, 230 n.7 (2d Cir. 2007) (discussing the "mini *en banc*" procedure).

[249] Taylor, *supra* note 19, at 215.

the absence of a binding Supreme Court decision. Judge Newman wrote that the "appeal of a sentence imposed in a federal criminal case requires us to begin the process of implementing the decision of the Supreme Court in *United States v. Booker*."[250] Although the Second Circuit was acting pursuant to a Supreme Court ruling, it nevertheless circulated the opinion to all judges on the court.[251] Judge Newman explained that circulation of the opinion served a functional, rather than procedural purpose. He wrote:

> In considering this issue, we are mindful that this will be the first sentencing appeal decided by our Court since the decision in *Booker/Fanfan*. As such, it will likely be of special interest to the district judges of this Circuit as they confront a host of new issues. . . . In formulating our thoughts on these matters, the members of this panel have greatly benefitted [sic] from numerous suggestions and comments *by other judges of this Court*.[252]

Consequently, it appears that the *Crosby* panel did not rely on the mini *en banc* procedure as a means to legitimize a decision overruling binding Second Circuit precedent in the absence of an *en banc* decision or a relevant Supreme Court order. Instead, the court apprised all Second Circuit judges of its decision because of the momentous impact of implementing the Supreme Court's landmark decision in *Booker*, which fundamentally altered the way in which district judges sentence convicted criminals.[253] By contrast the *Jaldhi* court's reliance on a mini-*en banc* procedure was not backed by any relevant Supreme Court ruling.[254]

Furthermore, the intervening circumstance similar to that in *Jacobson* is also absent in *Jaldhi*. On the one hand, *Jacobson* on its face appears to provide some support for the *Jaldhi* court's use of mini *en banc* as the procedural underpin to overruling binding precedent. Footnote 9 explained that the opinion—overturning a prior Second Circuit decision—

[250] *See Crosby*, 397 F.3d at 105 (citing United States v. Booker, 543 U.S. 220, 160 (2005)).

[251] *See id.* at 105 n.1.

[252] *Id.* at 106–07 (emphasis added).

[253] *See id.* at 105 n.1, 106–07.

[254] *See Jaldhi*, 585 F.3d at 67 & n.9.

was circulated to all active members and none had objected to its filing.[255] However, a close reading of the case reveals that the court overruled its own precedent in *Leddy*,[256] in part, because of an intervening ruling from the New York Court of Appeals. Judge Jacobs wrote that

> [o]ur holding contradicts certain statements in *Leddy*; but this Court has an ongoing duty to predict how the Court of Appeals would decide an issue based on the best information currently available, and in this case we now have the benefit of important additional data. Our conclusion that an unconfirmed umpire's determination may (in certain circumstances) have *res judicata* effect rests on *Protocom*[257] and the later decisions following *Hilowitz*,[258] authority that was not available when the *Leddy* Court ruled.[259]

Since *Jaldhi* did not overrule *Winter Storm*, in part, because of intervening pronouncements on New York law from the New York Court of Appeals, it is unclear whether *Jacobson* provides a sound basis for the *Jaldhi* panel's use of circulation in lieu of an *en banc* ruling. Thus, arguably neither *Crosby* nor *Jacobson* provide support for the *Jaldhi* court's use of mini-*en banc* as the procedural underpin to overruling binding precedent.

So far, at least one plaintiff has made an argument to an SDNY court that *Jaldhi* did not properly overrule *Winter Storm* because it was not an *en banc* decision.[260] Only time will decide the propriety of the Second Circuit's procedural strategy.

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[255] *Jacobson*, 111 F.3d at 268 n.9.

[256] Leddy v. Standard Drywall, Inc., 875 F.2d 383 (2d Cir. 1989).

[257] Protocom Devices, Inc. v. Figueroa, 173 A.D.2d 177 N.Y.S.2d 80 (1991).

[258] Hilowitz v. Hilowitz, 85 A.D.2d 621, 444 N.Y.S.2d 948 (1981).

[259] *Id.* at 268.

[260] *See* World Fuel Serv. Sing. PDE Ltd. v. PT Smoe Indon., No. 09-civ-6300(JGK), 2009 WL 4016620, at *1 (S.D.N.Y. Nov. 16, 2009) (Koeltl, J.).

Conclusion

With *Jaldhi*, it seems that the Second Circuit has put an end to the Rule B maritime attachment madness that had gripped New York City banks and the SDNY since the court decided *Winter Storm*. As of the writing of this article, the law of the Second Circuit holds that EFTs are not attachable property of either the originator nor a beneficiary of a wire transfer. It is vital for wise judicial administration in the SDNY, the continuing efficiency and low costs associated with the wire transfer system, and the importance of New York City as a center of world finance for the court to adhere to its holding in *Jaldhi* and refrain form departing from the careful balancing of interests attained in the drafting of UCC Article 4A. The court should address the shortcomings of *Jaldhi* opinion to foreclose the possibility that damage caused by *Winter Storm* reoccurs in the future.