

RE: *Consub*

This memo will provide a brief overview of the outcome of the *Consub* case which was decided by the Second Circuit on September 23, 2008.

The *Consub* case is the third in a series of challenges to the Rule B mechanism, preceded by the decisions in *Winter Storm* and *Aqua Stoli*. *Consub* involved a challenge to the seizure of an EFT (electronic funds transfer) frozen while in the hands of an intermediary bank on the basis that such an EFT should be immune from seizure under New York state law.

In its decision, the Second Circuit rejected this attack, holding that it is federal law which determines the issue, and contrary New York state law (which effectively precludes a restraint of an EFT) does not control. The ruling was significant in that the case presented the most recent challenge, joined in by many of the clearing house banks, anxious to rid themselves of the Rule B attachments by convincing the Second Circuit that the protections afforded by the New York State Uniform Commercial Code should be applicable in a Rule B setting.

The one issue which the Court did not squarely address relates to whether EFTs *to* a defendant can be subject to an attachment. While the Court in *Winter Storm* (the first of three recent decisions) generally held that EFTs were attachable property, it did not make a distinction between EFTs being transmitted to and from defendants. The Court in *Aqua Stoli* indicated that funds going *to or from* a party are attachable, but there is some question as to whether this indication is *dicta* or part of the "holding". Several defendants in later cases have seized on that "distinction" in an effort to carve out an exception where the EFT is en route to a defendant at the time of a seizure, arguing that in *Winter Storm* (upon which *Aqua Stoli* bases its conclusion that EFTs are attachable property), the funds were being sent from the defendant. While the Second Circuit has made clear in its decision yesterday in *Consub* that it did not reach this specific issue, the *dicta* in *Aqua Stoli* (indicating funds are attachable regardless of whether they are moving to or from the defendant) constitutes the majority view of the judges at the District Court level.

Moving forward to the topic of "where do we go from here," the defendant in *Consub* has the option of seeking a rehearing *en banc*. This is an application made before the Second Circuit under which all the judges would consider the issue again. It is an extraordinary remedy which is rarely granted, but it would not surprise us if the defendant (or, more properly stated, the banks) made a run at an *en banc* hearing. They might consider this avenue, however, because one of the grounds upon which the Court today affirmed the *Aqua Stoli* and *Winter Storm* holdings was the fact that one panel of the Court cannot overrule a prior decision of another panel unless (a) there has been an intervening Supreme Court decision which casts doubt on the prior ruling (not the situation here) or (b) an *en banc* review reverses the prior decision. The defendant in *Consub* asked for an *en banc* hearing prior to the argument of the case, but that motion was denied at the time on procedural grounds.

Alternatively, the defendant could seek leave to file an appeal before the Supreme Court but such an appeal would not be as of right, and the Supreme Court would have discretion whether or not to accept the appeal. The vast majority of such petitions for *certiorari* are denied unless they involve a situation where there is a serious split between two or more circuit courts of appeal. As the vast majority of Rule B attachments are initiated in New York, and because there is no split of authority that the defendant can point to, the likelihood of a successful petition is low.

All things considered, therefore, and for those proponents of Rule B, the decision was a welcome victory. It signals that the Rule will likely live on for a considerable period of time as presently employed.