# Rule B Attachments in the United States

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## Attachments in the U.S.

In 1825 the United States Supreme Court formally recognized the use of maritime attachments in *Manro v. Almeida,* 23 U.S. 473 (1825). The language used by the Court in that case suggests that they recognized the "dual" purpose of attachments as a means of securing a claim and of obtaining jurisdiction over a defendant. Admiralty practice in inherently transient and vessels, assets and shipping companies are exceptionally mobile and can be elusive. Many maritime companies operate almost entirely outside the United States, further frustrating the assertion of jurisdiction over them in the United States. Furthermore, many maritime companies are of a questionable ownership structure and may be undercapitalized. Often the only attachable assets are the vessel itself or charter hire or freight.

Following the *Manro* decision, the U.S. Supreme Court promulgated a set of Admiralty Rules in 1844. These rules, last amended in 1920, remained in force until 1966 when the modern Supplemental Rules for Certain Admiralty and Maritime Claims were adopted. Much has been written recently about Rule B attachments but there are actually six Supplemental Rules – A through F. Rule A defines the Scope of the Rules; Rule B relates to *In Personam* Actions for Attachment and Garnishment; Rule C pertains to *In Rem* Actions; Rule D applies to Possessory, Petitiory and Partition Actions; Rule E applies to Actions *In Rem* and *Quasi in Rem* (General Provisions); and Rule F pertains to Limitation of Liability Actions. For the purpose of this article, we will focus on just Rule B attachments and recent developments related to them.

## Rule B Attachments

In order to make a Rule B attachment a plaintiff must first have an *in personam* claim against the defendant based on the Court's Admiralty jurisdiction under 28 U.S.C. 1333. Secondly, plaintiff must demonstrate that the defendant can not be found within the District at the time the Complaint if filed. In order to do so, plaintiff must file an affidavit stating that "to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district." Unfortunately, the Rules have never defined the clause, "if the defendant shall not be found within the district" and the definition of this has been developed on a case by case basis by the Courts. Thirdly, plaintiff must demonstrate that defendant's "tangible or intangible" property is, or soon will be, present in the district. The property must be in the hands of the defendant at the time the Complaint is served. Lastly, a plaintiff is precluded from exercising a Rule B attachment in certain prohibited circumstances, including government property seizure which is excluded under the sovereign immunity doctrine.

Once plaintiff has demonstrated it has met each of the substantive prerequisites, he must follow the procedural requirements outlined in Supplemental Rule E. Plaintiff must file a Verified Complaint accompanied by the above referenced affidavit concerning the lack of

defendant's presence in the District. Because maritime assets can easily be removed from a District, Rule B actions are entitled to priority. Prior to issuing the attachment, the Judge must review the Complaint and, if satisfied that it meets all the necessary criteria, then issue an ex parte order of the requested writ of attachment.

Over the years, there have been many constitutional challenges to Rule B attachments, primarily on there being a lack of procedural safeguards. The Courts largely rejected these challenges on the basis that plaintiffs in Admiralty cases faced unique problems. Other challenges were made based on how to define a defendant's 'presence' within the district. The Courts developed a two element approach to resolve this: Whether a defendant could be served with process in the District; and whether there was jurisdiction over defendant in the District. If either element could not be met, the attachment is proper.

Rule B does not require prior notice to be given to a defendant before his property can be attached. This was the basis of many of the Constitutional challenges to Rule B. In 1985 the U.S. Congress amended Rule B to eliminate any doubt whether Rule B was consistent with the principles of due process and a provision for a prompt post seizure hearing was adopted. Rule E (4)(f) now provides any party with a cognizable interest in the seized property an opportunity for a timely post seizure judicial hearing to challenge any alleged deficiency.

Recent Rule B Developments

In 2002 the Second Circuit Court of Appeals in New York was confronted with two difficult questions in the ***Winter Storm Shipping v. TPI***, 310 F. 3rd 263 (2d Cir. 2002) case: Whether a plaintiff could attach an electronic fund transfer ("EFT"); and whether an EFT qualified as "attachable property" under Rule B. The Court held in that matter that an EFT at an intermediary bank within the District in attachable property as Rule B applies to all "tangible and intangible property'. Subsequent to the decision in ***Winter Storm***, the number of Rule B attachments of EFTs filed in New York increased dramatically such that by the time ***Shipping Corporation of India v. Jaldhi*** was decided by the Second Circuit Court of Appeals in 2009, fully 1/3 of the cases filed in the Southern District of New York were Rule B attachments. The Court in ***Jaldhi*** overturned ***Winter Storm*** and held that EFTs being processed by an intermediary bank are not property subject to attachment under Rule B. The Court recognized that their decision in ***Winter Storm*** produced a "substantial body of critical commentary", not the least of which was by the banks in New York inundated with thousands of Rule B attachments. The Court found that ***Winter Storm*** directly led to strains on the federal courts and international banks operating within the Second Circuit. They even suggested that their decision had threatened the usefulness of the U.S. dollar in international transactions.

It is quite unusual for a Court of Appeals to overrule such a recent decision as ***Winter Storm*** but the Court went to some lengths to show that other, recent decisions by the Courts in New York had "cabined ***Winter Storm*** to minimize its effects on the courts and banks of New York without overturning ***Winter Storm*** directly." In ***STX Panocean v.***

*Glory Wealth*, 560 F. 3d 127 (2d Cir. 2009) the Court held that by merely registering as a domestic corporation with the New York Secretary of State, a defendant could be "found" within the District for the purposes of a Rule B attachment. In *Cala Rosa Marine v. Sucres et Deneres Group*, 613 F Supp. 2d 426 (S.D.N.Y. 2009) the Court denied a plaintiff's request for 'continuous service' and held that only a U.S. Marshall could effect service of a Rule B attachment on a bank. Lastly, in *Marco Polo Shipping v. Supakit Prods*., No. 08 Civ., 10940, 2009 Dist. LEXIS 19057 (S.D.N.Y. 2009) the Court held the plaintiff required a 'plausible' showing that defendant's funds were *actually* passing through the Southern District of New York, as opposed to *hypothetically* passing through the District. All these decisions 'clipped the wings' of *Winter Storm* and help minimize its effects on New York banks.

In overruling *Winter Storm*, the Court in *Jaldhi* found that *Winter Storm* had been wrongly decided to the extent that Winter Storm relied on the *United States v. Daccarett*, 6 F.3d 37 (2nd Cir. 1993) decision. The Court held that *Daccarett* did not decide that the originator or beneficiary of an EFT had a property interest in the EFT; it held only that funds traceable to an illegal activity were subject to forfeiture. The Court went on to hold that the question of ownership of funds is crucial for a Rule B attachment and that "EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank".

The effects of the *Jaldhi* decision have been swift and broad reaching. Most judges in the Southern District of New York promptly dismissed their cases involving Rule B attachments of EFTs. Some judges have allowed the attachments to remain in special circumstances. In any event, the cottage industry of Rule B attachments in New York appears to have ended and plaintiff's will have to now resort to more complicated and time consuming methods of securing their claims.