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The Rejection of the Separate Entity Rule Validates the Separate Entity Rule

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I. INTRODUCTION

THIS Article argues that by rejecting New York's "separate entity rule," federal district courts have unwittingly created problems that, ironically enough, validate the rule. The separate entity rule is a long-standing New York doctrine under which each branch of a bank is treated as a separate entity (that is, as if each branch were a distinct bank) for purposes of garnishment and attachment of assets.[1] Thus, to take an example, under the separate entity rule, a judgment creditor in

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1. *See, e.g.*, Motorola Credit Corp. v. Uzan, 288 F. Supp. 2d 558, 560 (S.D.N.Y. 2003).

New York could not attach or garnish assets held in a bank branch in Paris even if that bank also had a branch in New York.[2] Traditional justifications for the separate entity rule include: (1) comity, including respect for other legal systems; (2) the danger of creating contradictory court judgments regarding the same asset; and (3) the impracticality and enormous costs associated with forcing banks to routinely perform global asset searches.[3] These three justifications—comity, avoiding contradictory judgments, and costs—have been the central justifications for the separate entity rule's existence throughout the past century.[4]

New York state and federal courts are "deeply divided" over "whether the separate entity rule remains good law."[5] In the last three years, a number of federal district courts in New York have concluded that the separate entity rule is a dead doctrine.[6] On the other hand, every New York state court to consider the issue has declared that the separate entity rule remains good law.[7] This "deep divide" between the federal and state courts in New York has resulted in a "lack of clarity" and "varied and inconsistent views" among the courts.[8] A number of courts have themselves discussed this "deep divide," and two court decisions have specifically called for the Second Circuit or the New York Court of Appeals to resolve the split.[9] Writing that she was "acutely aware of the lack of clarity permeating this area of the law," Judge Loretta A. Preska took the unusual step of certifying her decision for immediate interlocutory appeal to the Second Circuit in an attempt to resolve the split between the federal and state courts.[10]

The importance of this issue—whether or not New York continues to recognize the separate entity rule—can hardly be overstated. New York is, of course, an "international financial center,"[11] and the separate entity rule is "of far-reaching importance to the commercial and banking worlds."[12] Entities such as the Institute of International Bankers, the Federal Reserve Bank of New York, and the Clearing House Association

2. Philipp v. Chase Nat'l Bank, 34 N.Y.S.2d 465, 466 (N.Y. Sup. Ct. 1942) (dealing with this precise scenario).

3. *See* discussion *infra*, Section II.A–C.

4. *Id.*

5. Lanier Saperstein & Geoffrey Sant, *The Separate Entity Rule: The Deep Divide*, N.Y. L.J., Apr. 2012, at 4 (quoting Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823, at *1 (N.Y. Sup. Ct. Jan. 11, 2012)); *see also* Shaheen Sports, Inc. v. Asia Ins. Co., Nos. 98-CV-5951 LAP, 11-CV-920 LAP, 2012 WL 919664, at *9 (S.D.N.Y. Mar. 14, 2012) (discussing the different positions of federal and state courts).

6. *See infra* Part IV.

7. *See infra* Part IV.

8. *Shaheen*, 2012 WL 919664, at *9; *Global Tech., Inc.*, 2012 WL 89823, at *1.

9. *See Shaheen*, 2012 WL 919664, at *9; *Global Tech., Inc.*, 2012 WL 89823, at *13; Transcript of Proceedings at *13, Gucci Am., Inc. v. Li, No. 1:10-CV-04974-RIS (S.D.N.Y. June 17, 2011) (No. 73) (Judge Sullivan stated that the higher courts will need "to say once and for all what it is to do in cases like this one").

10. *Shaheen*, 2012 WL 919664, at *9; *see* 28 U.S.C. § 1292(b) (2006) (allowing such an appeal). The notice of appeal to the Second Circuit was filed on April 12, 2012.

11. Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 62 (2d Cir. 2009).

12. Bluebird Undergarment Corp. v. Gomez, 743, 249 N.Y.S. 319, 320 (N.Y. City Ct. 1931).

have each submitted amicus briefs urging courts to recognize that the separate entity rule remains good law.[13]

This Article argues that *the very split* between federal and state courts regarding the viability of the separate entity rule itself demonstrates of the value of the separate entity rule.[14] The problems that federal and state courts have created by disagreeing about the validity of the separate entity rule exactly mirrors the problems created when New York courts order the attachment of assets abroad.[15] In other words, the rejection of the separate entity rule paradoxically validates it.

Specifically, the "deep divide" between the state and federal decisions regarding the separate entity rule has resulted in: (1) problems relating to the issue of comity, due to certain federal district courts' disagreement with and "reject[ion]" of the decisions by New York state courts; (2) contradictory judgments regarding the validity of the separate entity rule; and (3) impracticality and enormous expense, as the same issue is repeatedly litigated to differing results. The division between the state and federal courts has resulted in the exact problems that justified the separate entity rule. To take the analysis a step further, just as the branches of a bank in different jurisdictions are "separate entities" under the separate entity rule (notwithstanding the fact that they are parts of the same bank), so too the federal and state courts are "separate entities" with respect to the separate entity rule (notwithstanding that both are purportedly applying the same New York law).

Ironically, then, those district courts that have rejected the separate entity rule demonstrate its value by creating within the New York court system the very problems of comity, contradictory judgments, and legal expense that the separate entity rule was designed to prevent.

II. THE SEPARATE ENTITY RULE: BACKGROUND AND JUSTIFICATIONS

"Under the separate entity rule, a bank branch in New York is regarded as if it were a separate corporate entity from a bank branch [outside of New York]—as if the two bank branches were different banks altogether—for the purposes of attachment and garnishment."[16] For this reason, "service of a restraining notice upon the New York branch does not restrain any accounts held by the bank branch [outside of New York]."[17]

Courts have repeatedly claimed that the separate entity "doctrine finds

13. *See, e.g.*, Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 N.Y. Misc. LEXIS 2268 (N.Y. Sup. Ct. 2011); Dwight Healy & Marika Maris, *New York Court Determines That Banks Still Have the Protection of the "Separate Entity" Doctrine After* Koehler, 128 BANKING L.J. 668, 670 (2011).

14. *See infra* Sections V–VIII.

15. *Id.*

16. Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823, at *4 (N.Y. Sup. Ct. Jan. 11, 2012).

17. *Id.*

its inception in English law"[18] or "can be traced back to English law."[19] However, the earliest case to express the rule appears to be an 1842 decision by the Supreme Court of Tennessee, declaring that "there can be no doubt but that a branch bank is the owner and holder of [assets deposited with it]. It has a distinct corporate existence . . . [from other branches]."[20]

As will be demonstrated below, the historical justifications for the separate entity rule went through three phases. In the first phase, beginning with the origination of the rule in the 1800s and continuing through the first decades of the 1900s, courts focused on the dangers of having varying claims to the same asset and on the impracticability of requiring bank branches to monitor the status of accounts in other branches.[21] In the second phase, beginning in the 1930s, courts increasingly began to consider comity as a justification for upholding the separate entity rule.[22] In these decisions, comity, inconvenience, and—to a lesser extent—competing claims to the same asset all appeared as justifications for the separate entity rule.[23] In the third and final phase prior to the court of appeals decision in *Koehler*, the justification for the separate entity rule focused primarily on comity and inconvenience, while the concern regarding competing claims to the same asset began to fade.[24]

A. The First Phase: Justifying the Separate Entity Rule Based on the Dangers of Inconvenience and Competing Claims to the Same Asset

During the 1800s, courts in the United States and England encountered a series of disputes resulting from attempts to present a check at one bank branch to withdraw funds located at a separate branch. In some instances, the bank paid out the funds only to discover later that the account in the separate branch had insufficient funds to cover the cost of the check. To avoid this problem, branches frequently refused to pay out funds held at separate branches. In the 1857 case of *Woodland v. Fear*, the court held that "the obligation of a bank to pay the cheques of a customer rested primarily on the branch at which he kept his account, and that the bank . . . had rightfully refused to cash the cheque at another branch."[25] Two decades later, the British courts reaffirmed this principle, stating: "It would be difficult for a bank to carry on its business by means of branches on any other footing, because the officials at one branch do

18. United States v. First Nat'l City Bank, 321 F.2d 14, 19 (2d Cir. 1963), *rev'd*, 379 U.S. 378 (1965).

19. *Global Tech., Inc.*, 2012 WL 89823, at *12.

20. M'Neil v. Wyatt, 22 Tenn. (3 Hum.) 125, 127 (1842).

21. *See infra* Section I.A; *see also First Nat'l City Bank*, 321 F.2d at 19–21 (recounting this history).

22. *See infra* Section I.B.

23. *See infra* Section I.B.; *see also First Nat'l City Bank*, 321 F.2d at 19–21.

24. *See infra* Section I.C.

25. E.B. Savory & Co. v. Lloyds Bank, Ltd., [1932] 2 K.B. 122 (C.A.) 141 *aff'd*, [1933] A.C. 201 (P.C.) (U.K.) (summarizing the decision in Woodland v. Fear, (1857) 119 Eng. Rep. 1339 (K.B.); 7 E. & B. 519 (Eng.)).

not know the state of a man's account at another branch."[26] In these decisions, the courts concluded that bank branches were justified in acting as separate entities due to: (1) the danger of conflicting claims to the same funds; and (2) the impracticality and expense of monitoring accounts in multiple branches.[27]

In the United States, the Civil War presented courts with their first opportunity to deal with some of the realities and impracticalities of cross-border banking. In *McVeigh v. The Bank of the Old Dominion*, the bank president was behind Confederate lines and could not receive notice regarding certain payments that occurred at the bank, which was located in Union territory.[28] Taking advantage of this confusion, an individual in Union territory fraudulently intercepted payment of bank funds intended for someone else.[29] Although this case did not directly focus on the separate entity rule, the court emphasized both the difficulties of conflicting claims and the challenge of monitoring accounts in cross-border banking situations, and concluded that "it is perfectly certain that the Bank of the Old Dominion in the city of Alexandria in the state of Virginia, is the place at which these notes, on their face, are payable."[30]

By 1906, the separate entity doctrine had already been summarized in language similar to that used today by a leading treatise on banking: "Where a bill passes through several branches of the same bank, each branch is a separate bank for giving notice."[31] Half a decade later, a British court felt it could declare the separate entity rule "well settled."[32]

The separate entity rule began to appear in New York court decisions by the early 1900s. Among the earliest of these is *Chrzanowska v. Corn Exchange Bank*.[33] Noting that the then-operative Banking Law required that the business of a bank be conducted at the place specified in its certificate of incorporation, the First Department of the New York Appellate Division concluded, "It would seem, therefore, quite clear that, without express authority elsewhere conferred by statute, a bank would have no right to establish branches."[34] The "express authority" necessary to establish branches, the First Department declared, existed in a separate section of the Banking Law, which permitted a bank to maintain

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26. Prince v. Oriental Bank Corp., (1877–1878) 3 App. Cas. 325 (P.C.) 332 (appeal taken from Wales) (U.K.); *see also* E.B. Savory & Co., [1932] 2 K.B. at 141 (quoting this language from *Prince*).

27. *Prince*, (1877–1878) 3 App. Cas. At 332–33; *E.B. Savory & Co.*, [1932] 2 K.B. at 141.

28. 67 Va. (26 Gratt.) 785 (1875).

29. *Id.* at 789.

30. *Id.* at 830.

31. HENRY DUNNING MACLEOD, THE THEORY AND PRACTICE OF BANKING 575 (6th ed. 1906) (citing Clode v. Bailey, (1843) 152 E.R. 1107 (C. Exchq.); 12 M. & W. 51 (Eng.); *Woodland* (1857) 7 E. & B. at 519).

32. R v. Lovitt, [1912] A.C. 212, 219.

33. Chrzanowska v. Corn Exch. Bank, 159 N.Y.S. 385 (N.Y. App. Div. 1916), *aff'd*, 122 N.E. 877 (N.Y. 1919).

34. *Id.* at 388.

"one or more branch offices in such city for the receipt and payment of deposits and for making loans and discounts to the customers of such branch offices only."[35] Focusing on the word "only," the court concluded that these statutes combined to legislatively limit bank branches to handling the accounts actually maintained in those branches.[36] Therefore, depositors could only "draw their checks on the particular branch in which they were depositors."[37]

Having concluded that bank branches were legislatively required to act as separate entities, the First Department then reviewed the public policy reasons for a separate entity rule. "[D]ifferent branches [are] as separate and distinct from one another as from any other bank."[38] To force one branch to turn over assets that were actually located in another branch "would produce endless confusion."[39] Thus, the earliest New York decision to support the separate entity rule justified itself based on impracticality ("endless confusion"). The phrase "endless confusion" implies that the court was also concerned with the danger of competing claims to the same funds.

Less than a decade later, the Second Circuit discussed the separate entity rule, and it too concluded that it was legislatively required.[40] Quoting the Act of December 23, 1913, the Second Circuit wrote that "national banks having foreign branches 'shall conduct the accounts of each foreign branch independently of the accounts . . . of its home office, and shall at the end of each fiscal period transfer to the general ledger the profit or loss accrued at each branch as a separate item.'"[41] This language, the court concluded, required that foreign branches be treated as if they were separate entities.[42] Summing up the doctrine, the court declared that "[a] branch is not a mere 'teller's window[']; it is a separate business entity."[43]

The wisdom of requiring branches to be treated as separate entities was seemingly demonstrated seven years later in the United Kingdom when certain individuals managed to cash intercepted checks at a branch other than the location where the account was maintained.[44] During trial, evidence revealed that banks with both a London head office and local branch offices had for many years simply accepted, without question, checks presented at any branch, regardless of whether an account was maintained there or not.[45] British banks had apparently followed this

35. *Id.* (internal quotation marks omitted).
36. *Id.* at 388.
37. *Id.*
38. *Id.*
39. *Id.*
40. Pan-Am. Bank & Trust Co. v. Nat'l City Bank, 6 F.2d 762 (2d Cir. 1925), *cert. denied*, 269 U.S. 554 (1925).
41. *Id.* at 767.
42. *Id.*
43. *Id.*
44. E.B. Savory & Co. v. Lloyds Bank, Ltd., [1932] 2 K.B. 122 (C.A.), *aff'd*, [1933] A.C. 201 (P.C.) (U.K.).
45. *Id.* at 123–24.

practice for over forty years.[46] Nevertheless, the House of Lords declared this practice to be unduly risky and susceptible to just the sort of incident being litigated, in which intercepted checks had been improperly cashed.[47] Once again reaffirming the separate entity rule, the House of Lords stated:

> [N]o doubt the respondent bank with its head office and all its branch offices is a single corporation, and consequently can for its own purposes treat the accounts of a customer at different branches as one entire account, at the same time it is clear from the authorities that for certain purposes branch offices, although agencies of one principal firm, are regarded as distinct trading bodies.[48]

Here, the court essentially stated that the failure to follow the separate entity rule led directly to contradictory claims to the same funds (i.e., the contradictory claims of the legitimate recipient of the checks and the possessor of the intercepted checks).[49]

B. The Second Phase: Comity Appears as a New Justification

The second phase of justifications for the separate entity rule began in the late 1920s, at which time a rapid increase in international banking focused the courts' attention on the issue of international comity.[50] Up until this point, courts were primarily concerned with the issues of inconvenience and, more pointedly, the fear of multiple conflicting claims to the same asset.[51]

In 1927, the English Probate Court first applied the separate entity rule to accounts maintained in branches in foreign countries.[52] The Second Circuit has since described this holding as "[a]n important case" and essentially adopted its reasoning.[53] In *United States v. First National City Bank*, a wife seeking a garnishment order against her husband's bank accounts attempted to extend that order to branch offices located in Kenya and Tanganyika.[54] The court concluded, first, that "the contractual obligation between bank and customer contains certain implied terms," namely, that "the bank is to repay [the funds] at the branch where the account is kept . . . and . . . the bank is not required to pay until payment is demanded at [that] branch."[55] Second, the court stated that "the debt of the bank at its main office did not extend to deposits in its branch banks, [therefore] it was not property within the jurisdiction of the English court and was not subject to attachment there."[56] The court based

46. *Id.* at 122.
47. *Id.* at 125–26.
48. *Id.* at 140.
49. *Id.*
50. *See infra* notes 52–58 and accompanying text.
51. *See* discussion *supra* II.A.
52. Richardson v. Richardson, (1927) 137 L.T.R. 492 (Prob.) (Eng.).
53. United States v. First Nat'l City Bank, 321 F.2d 14, 19 (2d Cir. 1963).
54. *Id.* (summarizing *Richardson*).
55. *Id.* at 19.
56. *Id.* at 20.

its rationale in this decision on jurisdiction, which in turn implies a concern with international comity.

A few years after this decision, a New York court considered a similar scenario. The plaintiff attempted to obtain an order requiring a bank to turn over information regarding funds held in a branch in Puerto Rico, and the court rejected the request by stating that '[a] branch bank is a separate and distinct business entity."[57] Elaborating, the court held that "[t]he defendant could not commence an action against the bank in New York for the deposit made by him in the Porto [sic] Rico branch."[58] By the late 1930s, as banking became increasingly global, the issues of impracticality and international comity moved to the forefront. Thus, a New York court quashed an attempt to attach assets held in the Havana branches of a pair of international banks, with the court making special reference to the global nature of the banks and the concomitant issues of competing legal regimes and impracticality: "The Royal Bank of Canada is chartered under the laws of . . . Canada . . . . [I]t has over 650 branches in various countries."[59] It noted further that "Chase National Bank is organized under the laws of the United States, and its Havana branch is operated as a distinct business entity . . . . The Havana branch is conducted as a distinctly Cuban bank, under Cuban laws and Cuban licenses."[60] The increasing number of cases attempting to attach or otherwise access funds held in accounts in foreign countries reflected the ongoing globalization of international banking and finance.

In *Philipp v. Chase National Bank of City of New York*, the court made a principled distinction between funds located in branches in New York and Paris.[61] While funds deposited in the New York branch of a bank were attachable, funds in the Paris branch of Chase Bank were not.[62] "Even if it were indebted . . . , the indebtedness would be that of the Paris Branch and therefore not attachable here."[63]

Although the justifications for the doctrine were shifting, by 1950 New York courts were declaring the separate entity rule "well established."[64] In *Cronan v. Shilling*, the court stated: "The law seems well established that a warrant of attachment served upon a branch bank does not reach assets held for, or accounts maintained by, the defendant in other branches or in the home office."[65] The court explained that "[t]he theory . . . is that for purposes of attachment, among others, each branch of a

57. Bluebird Undergarment Corp. v. Gomez, 249 N.Y.S. 319, 321 (N.Y. City Ct. 1931); *see also id.* ("Not only are branch banks separate entities . . . .").

58. *Id.* at 322.

59. Clinton Trust Co. v. Compania Azucarera Cent. Mabay S.A., 14 N.Y.S.2d 743, 745 (N.Y. Sup. Ct. 1939), *aff'd*, 15 N.Y.S.2d 721 (N.Y. App. Div. 1939).

60. *Id.* at 745.

61. Philipp v. Chase Nat'l Bank, 34 N.Y.S.2d 465, 466 (Sup. Ct. N.Y. 1942).

62. *Id.*

63. *Id.*

64. Cronan v. Schilling, 100 N.Y.S.2d 474, 476 (N.Y. Sup. Ct. 1950), *aff'd*, 126 N.Y.S.2d 192 (N.Y. App. Div. 1953).

65. *Id.*

bank is a separate entity, in no way concerned with accounts maintained by depositors in other bra[n]ches or at the home office."[66] The first justification the court gave was the danger of competing claims to the same asset:

> Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them.[67]

The second justification the court gave was the impracticality and expense of forcing banks to comply with such a demand, stating, "Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case."[68] Although this decision does not mention comity, the overall trend continued to move towards comity and inconvenience as the new justifications for the separate entity rule. The concern with competing claims to the same asset continued to fade.[69]

C. The Third Phase: Comity and Inconvenience Move to the Forefront

In a 1963 case, the Second Circuit discussed in detail "the policy justifications underlying the [separate entity] rule."[70] As discussed above, the earliest decisions relating to the rule focused on the issue of impracticality and upon what was, at that time, the very real problem of bank branches dealing with competing claims to the same asset. By 1963, however, courts had been applying the separate entity rule for over half a century, and memory of the problem of competing claims for the same asset appears to have faded.[71] The Second Circuit continued to reference the impracticality of forcing branches across the world to monitor the status of claims to assets elsewhere: "[T]he policy justifications [for the separate entity] rule rest . . . on the more fundamental notion that to require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community."[72] In this regard, the Second Circuit emphasized "the impracticality of requiring constant transmission of reports on the status of

66. *Id.*
67. *Id.*
68. *Id.*
69. *See infra* Section II.C.
70. United States v. First Nat'l City Bank, 321 F.2d 14, 21 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 378 (1965).
71. In any case, the decision in *United States v. First Nat'l City Bank* did not discuss in depth the issue of competing judgments during its analysis of the policy justifications for the separate entity rule. *See id.* at 21–22.
72. *Id.* at 22.

accounts in one branch to all other branches."[73] Nevertheless, it is the relatively new concern about international comity (and the concern of subjecting banks to contradictory legal systems) that moved to the forefront as the primary justification for the doctrine. The court explained that, with the globalization of finance, "complications . . . arise out of the fact that different branches may be subject to the laws of other countries."[74]

The concern that international banks had to deal with contradictory and independent judicial systems was later reflected in a brief of the United States as amicus curiae, which emphasized that an international bank operating in a foreign country "is necessarily subject to the foreign sovereign's own laws and regulations,"[75] A 1990 state court decision referenced comity[76] but focused on inconvenience,[77] although the discussion of inconvenience did hint at the problem of competing claims to the same asset.[78] Similarly, a 1996 decision focused on the issue of comity and respect for foreign jurisdictions in upholding the separate entity rule; the issue of competing claims was apparently forgotten.[79]

The degree to which the concern regarding contradictory claims to the same judgment had faded as a justification for the separate entity rule is best exemplified by the fact that a recent law journal article on the separate entity doctrine neglects to mention it at all.[80] Rather, the article simply states that the "separate entity rule was historically justified on the basis of both . . . impracticability . . . and on the recognition that any banking operation in a foreign country 'is necessarily subject to the foreign sovereign's own laws and regulations.'"[81] Likewise, a 2003 district court decision stated that "the original rationale of [the rule was] avoiding undue disruption of routine banking practices" and that this rationale

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73. *Id.*

74. *Id.*

75. Brief for the United States as Amicus Curiae Supporting Petitioner at 14, Citibank, N.A. v. Wells Fargo Asia Ltd., 496 U.S. 660 (1990) (No. 88-1260), 1989 WL 1126987.

76. Intercontinental Credit Corp. v. Roth, 578 N.Y.S.2d 955, 956 (N.Y. Sup. Ct. 1990), *vacated*, 595 N.Y.S.2d 602 (N.Y. Sup. Ct. 1991) ("[E]nforcement of the instant judgment . . . must be obtained through the [foreign nation's] courts, by means of comity. . . .").

77. *Id.* at 956–57.

78. *Id.* at 956. ("[N]o bank branch could safely pay a check drawn by a depositor without checking with all other branches to ascertain whether an attachment had been served on any of them.").

79. Fid. Partners, Inc. v. Phil. Exp. & Foreign Loan Guar. Corp., 921 F. Supp. 1113, 1120 (S.D.N.Y. 1996) ("[The plaintiff] seeks to reach funds . . . on the opposite end of the globe and in another sovereign nation.").

80. *See* Healy & Maris, *supra* note 13, at 669; *but see* David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on New York Personal Property)*, 83 ST. JOHN'S L. REV. 43, 96 n.327 (2009) ("For branches existing abroad, where full faith and credit does not reign, New York's 'separate entity' rule is indeed useful. If ten different countries each insisted on the effectiveness of local garnishment with regard to a deposit elsewhere, a bank with foreign branches would have a tenfold liability for a single deposit.").

81. Healy & Maris, *supra* note 13, at 669 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 14, Citibank, N.A. v. Wells Fargo Asia Ltd., 496 U.S. 660, (1990) (No. 88-1260), 1989 WL 1126987).

"may still carry weight when the requested transfers involve banks subject to foreign laws and practices."[82] As is evident from these quotations, courts have forgotten the problem of competing claims to the same asset.

The trend towards comity and inconvenience as the justifications of the separate entity rule has continued to the present. In the most recent New York decision to discuss the separate entity rule, the three international bank defendants—Banco Santander, Itau Unibanco, and UBS—justified the separate entity rule primarily based upon considerations of comity, and secondarily upon considerations of inconvenience and expense.[83] These banks "invoke[d] policy considerations, including the interest in avoiding conflict and interference with foreign law, to support imposition of the rule . . ."[84] There is no mention, however, of the issue of conflicting claims to the same asset.[85]

With the separate entity rule increasingly entrenched in New York, courts felt less need to review the justifications for the doctrine. When a New York state trial court rejected the Sheriff of the City of New York's attempt to attach funds held in bank accounts in Germany, both the First Department and the Court of Appeals simply affirmed the lower court's ruling without discussion.[86] In 1996, a federal district court not only stated that New York's separate entity rule was "well-established," but went on to state that it was "[a] rather extraordinary proposition that a sheriff or marshal serving an execution . . . in New York can levy upon deposits in a bank account in another jurisdiction."[87] A 2002 district court decision swiftly brushed aside an attempt to attach assets held in a bank account abroad, also calling the separate entity rule "well-established" and commenting that the rationale for this doctrine is the "intolerable burden" that "would otherwise be placed upon banking and commerce."[88]

As banking operations became computerized, some plaintiffs began to argue that the separate entity rule should be considered "obsolete in the context of modern centralized and computerized commercial banking."[89] This attack focused only on the justifications of expense and inconvenience.[90] In a similar case a year prior, notwithstanding that the attack only centered on one of the three justifications, a federal court held that the separate entity rule was no longer valid—at least among different domestic branches of the same bank—due to technological advances and

82. Motorola Credit Corp. v. Uzan, 288 F. Supp. 2d 558, 561 (S.D.N.Y. 2003).
83. Ayyash v. Koleilat, No. 151471/2012, at *8 (N.Y. Sup. Ct. Oct. 25, 2012).
84. *Id.*
85. *Id.*
86. McCloskey v. Chase Manhattan Bank, 183 N.E.2d 227 (N.Y. 1962).
87. *Fid. Partners, Inc.*, 921 F. Supp. at 1119.
88. Lok Prakashan Ltd. v. India Abroad Publ'ns, Inc., No. 00 Civ. 5852(LAP), 2002 WL 1585820, at *1–2 (S.D.N.Y. July 16, 2002) (quoting Det Bergenske Dampskibsselskab v. Sabre Shipping Corp., 341 F.2d 50, 53 (2d Cir. 1965)).
89. Therm-X-Chem. & Oil Corp. v. Extebank, 444 N.Y.S.2d 26, 27 (N.Y. App. Div. 1981).
90. *See id.*

improvements in banks' communications and record keeping.[91] In the succeeding years, there was much confusion as to whether or not the separate entity rule remained valid, with courts "determin[ing] the validity of the service of restraining notices and subpoenas on a case by case basis in relation to a bank's existing computer operations and the burden imposed by compliance."[92]

Fighting back against the tendency to assume that computerized banks can easily perform international asset searches, international banks have emphasized the ongoing inconvenience, expense, and difficulties of performing international attachment of assets:

> A global banking corporation . . . would have great difficulty ensuring that all of its far-flung affiliates received notice . . . , searched their respective records for assets (shares, deeds, safe deposit boxes) they might hold in any number of capacities, and secured them. This would not be, even in the computer age, a click-of-a-button exercise.[93]

Eventually, the First Department clarified that the separate entity rule remains valid and continues to prevent all attempts to attach or garnish assets held at a separate branch of the same bank.[94] The only exception is "where the . . . notice is served on the bank's main office; the main office and the branches where the accounts in question are maintained *are within the same jurisdiction;* and the bank branches are connected to the main office by high-speed computers and are under its centralized control."[95] As the First Department's ruling made clear, the separate entity rule continued to shield assets in bank branches located outside of New York from attachment and garnishment.[96] The result is that "the separate entity rule [came to] resemble[ ] a rule of jurisdiction governing attachments of property. The separate entity rule thereby lost its connection to its origin in concerns about the relationship of bank offices."[97]

From its origins in the mid-1800s as a means of protecting provincial branches from overdrafts and fraud, the separate entity rule has evolved into a key backbone of the modern system of global banking and international finance.[98] Over the course of this evolution, the three central justifications for the separate entity rule have been: (1) issues of comity (including respect for foreign courts and laws); (2) competing claims or

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91. Digitrex, Inc. v. Johnson, 491 F. Supp. 66, 68 (S.D.N.Y. 1980).

92. Limonium Mar., S.A. v. Mizushima Marinera, 961 F. Supp. 600, 607 (S.D.N.Y. 1997) (internal quotations omitted) (collecting cases).

93. Brief of Clearing House Association L.L.C. as Amicus Curae in Support of Respondents at 20–21, Koehler v. Bank of Berm. Ltd., 577 F.3d 497 (2d Cir. 2009) (No. 05-2378-CV), 2009 WL 1615261.

94. *In re* Nat'l Union Fire Ins. Co. of Pittsburg, Pa., 703 N.Y.S. 2d 3 (N.Y. app. Div. 2000) (emphasis omitted).

95. *Id.* at 3.

96. *Id.*

97. Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823, at *4 (N.Y. Sup. Ct. Jan. 11, 2012).

98. *See* Prince v. Oriental Bank Corp., (1877–1878) 3 App. Cas. 325 (P.C.) 333 (appeal taken from Wales) (U.K.).

judgments regarding the same asset; and (3) the impracticality of requiring branches to monitor and turn over funds, documents, and assets held in foreign branches.[99] The relative importance of these individual justifications has fluctuated over the centuries, but the three justifications for the doctrine have otherwise remained remarkably consistent.

III. THE *KOEHLER* DECISION CASTS DOUBT ON THE SEPARATE ENTITY RULE

After more than a century in existence, the separate entity rule was thrown into doubt by the New York Court of Appeals' decision in *Koehler v. Bank of Bermuda.*[100] The litigation in *Koehler* was notoriously messy lasting over sixteen years and entangling federal district courts in New York and Maryland, as well as the Second Circuit, the Fourth Circuit, and courts in Arizona, Bermuda, and Nevis, before finally reaching New York's highest court.[101] The legal battle resulted from a failed business partnership between Lee Koehler and A. David Dodwell to build resort properties in Bermuda and other overseas locations.[102] The various lawsuits revolved around Koehler's attempt to collect upon a default judgment by means of the stock that Dodwell owned in a Bermuda corporation, The Reefs Beach Club Limited (The Reefs).[103] Complicating matters was the fact that Dodwell had pledged these stock certificates to the Bank of Bermuda Limited (BBL) as collateral for a loan.[104] BBL physically maintained possession of the stock certificates in Bermuda.[105]

The legal saga began in 1993 when a district court in Maryland awarded Koehler a default judgment of over $2 million against Dodwell.[106] Koehler registered the judgment in the United States District Court for the Southern District of New York and filed a petition to collect by means of attaching the stock certificates.[107] This triggered a ten-year legal battle, in which BBL challenged whether or not there was personal jurisdiction in New York over the bank.[108] Initially, the question of jurisdiction focused on BBL's wholly owned subsidiary, the Bank of Bermuda (New York).[109] The New York district court found that BBL was "doing busi-

99. *See supra* sections II.A, II.B, and accompanying text.
100. Koehler v. Bank of Berm. Ltd., 911 N.E.2d 825 (N.Y. 2009).
101. *See* Lanier Saperstein,, *Limiting* Koehler, INT'L FIN. L.R., MAR. 2011, at 39, 39.
102. *Id.*
103. Koehler v. Bank of Berm. Ltd., Nos. 931745, M18-302, 1994 WL 48825, at *1 (S.D.N.Y. Feb. 16, 1994).
104. Koehler v. Bank of Berm. Ltd., 544 F.3d 78, 80 (2d Cir. 2008).
105. *Koehler*, 911 N.E.2d at 827.
106. *Id.*
107. *Id.* (noting the petition was filed under N.Y. C.P.L.R. 5225 (MCKINNEY, 2009) governing the "payment or delivery of property of judgment debtor").
108. *Koehler*, 544 F.3d at 81.
109. Saperstein, *supra* note 101, at 39. Note that some commentators have mistakenly described the Bank of Bermuda (New York) as a "branch" of BBL. *See, e.g.*, Michael A. Bottar & Kimberly Wolf Price, *2009–2010 Survey of New York Law Civil Practice*, 61 SYRACUSE L. REV. 631, 640 (2011) (stating "Bank of Bermuda Ltd. (the 'Bank'), which had a New York branch").

ness" in New York because BBL and the Bank of Bermuda (New York) had such a close relationship that the subsidiary was in an agency relationship with the parent.[110] During the course of this legal battle, the United States magistrate judge declared that BBL had "failed to comply over an extended period of time both with its discovery obligations and with specific rulings of [the district] court."[111] Facing the threat of sanctions, in October 2003, BBL took the unusual step of conceding personal jurisdiction in New York (as of the commencement of the creditor petition ten years earlier).[112] With BBL now conceding personal jurisdiction, the Second Circuit certified the following question to the New York Court of Appeals:

> [May] a court sitting in New York . . ., pursuant to N.Y. C.P.L.R. 5225(b), order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to N.Y. C.P.L.R. Article 52, when those certificates are located outside New York[?]"[113]

The New York Court of Appeals, in a "sharply divided 4–3"[114] decision, held that a court "that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York."[115] As the majority noted, in a "turnover order," a court can require a third party in possession of a judgment debtor's assets to turn over those assets to the judgment creditor in satisfaction of the debt.[116] The court noted that, under the language of C.P.L.R. section 5225(b), a court "require[s] such person to pay the money"—in other words, the turnover order is directed at the third party and not at the assets themselves.[117] Therefore, a turnover order "involves a proceeding against a person—its purpose is to demand that a person convert property to money for payment to a creditor."[118] This implies that because the proceeding is against a *person* and not against the asset, the physical location of the asset is irrelevant.[119]

The majority emphasized that "CPLR article 52 contains no express territorial limitation" and that the New York legislature had amended a separate section of Article 52, relating to information subpoenas, to "al-

110. Koehler v. Bank of Berm. Ltd., Nos. 931745, M18-302, 1994 WL 48825, at *5 (S.D.N.Y. Feb. 16, 1994). In particular, *Koehler* seized upon promotional literature that advertised BBL's "seven strategically placed offices . . . connected to [its] Bermuda headquarters, and to each other, by a communications system so advanced that they can act and react as one office." *Id.* at *4 (internal quotation marks omitted).

111. Koehler v. Bank of Berm. Ltd., No. M18-302, 2003 WL 289640, at *7 (S.D.N.Y. Feb. 11, 2003).

112. *Koehler*, 544 F.3d at 81.

113. *Id.* at 88.

114. Saperstein & Sant, *supra* note 5.

115. *Id.* (quoting Koehler v. Bank of Berm. Ltd., 911 N.E.2d 825, 831 (N.Y. 2009)).

116. N.Y. C.P.L.R 5225(b) (McKinney 2012); *see also* Koehler, 911 N.E.2d at 827–28 (2003) (discussing turnover orders).

117. *Koehler*, 911 N.E.2d at 828.

118. *Id.* at 829.

119. *See id.*

low[ ] the securing of out-of-state materials by in-state service of a subpoena on the party in control of the materials."[120] From this, the majority concluded that CPLR Article 52 should likewise be interpreted as having extraterritorial reach.[121]

Notably, the court of appeals's conclusion directly contradicts the reasoning of the Supreme Court, which has stated that "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[122] In other words, when a statute is silent as to whether or not it has extraterritorial reach, the Supreme Court interprets the statute as applying only within the territory of the United States.[123] By contrast, the New York Court of Appeals concluded that where the statute is silent ("contains no express territorial limitation"), the statute is deemed to have no jurisdictional limits.[124] The majority further noted that judgment debtors can be ordered to bring property into New York to satisfy the debt, and by logical extension, third parties can also be required to bring the judgment debtor's property into New York.[125]

Judge Robert S. Smith's fiery dissent, joined by two other members of the court, referred to the majority decision as "troubling," possibly "unconstitutional," "unwise," "a recipe for trouble," and "unsupported by any precedent in New York or, apparently, in any other jurisdiction."[126] In its opening sentence, Judge Smith's dissent summarized the majority decision as holding that "a judgment may be enforced by garnishment in New York if the garnishee is subject to New York jurisdiction, even though the judgment creditor, the judgment debtor and the property that the judgment creditor is trying to seize are all elsewhere."[127] "The majority's holding opens a forum-shopping opportunity for any judgment creditor trying to reach an asset of any judgment debtor held by a bank (or other garnishee) anywhere in the world."[128]

Although the decision never discussed nor even directly implicated the separate entity rule,[129] Judge Smith's dissent focused on the same three concerns that have traditionally justified the separate entity rule. Thus, the dissent referred to the concept of comity and respect for the legal process in foreign jurisdictions: "[C]laims against a single asset should be

120. *Id.*
121. *Id.*
122. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (internal quotation marks omitted) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
123. *Id.*
124. *Koehler*, 911 N.E.2d at 829.
125. *Id.* at 830.
126. *Id.* at 831–32 (Smith, J., dissenting).
127. *Id.* at 831.
128. *Id.*
129. *See* Shaheen Sports, Inc. v. Asia Ins. Co., Nos. 98-CV-5951 LAP, 11-CV-20 LAP, 2012 WL 91964, at *5 (S.D.N.Y. Mar. 14, 2012) ("Importantly, the New York Court of Appeals did not mention the separate entity rule as part of its analysis. . . ."); Ayyash v. Koleilat, No. 151471/2012, at *8 (N.Y. Sup. Ct. Oct. 25, 2012) ("*Koehler* did not involve application of the separate entity rule.").

decided in a single forum—and . . . that forum should be . . . a court of the jurisdiction in which the asset is located."[130] This, in turn, leads to the danger that "[t]here may be competing claims to the asset, by parties who think they have as much right to it as the judgment creditor."[131] By not limiting litigation to the forum where the asset is held, the majority holding has created "risks [for international banks] of being subject to conflicting adjudications."[132] Lastly, the dissent focused on the impracticality and expense for "the business of banking itself, [because] banks with offices in several states or countries, will also be disrupted" and forced to absorb "significant administrative burdens."[133] Thus, the dissent highlighted the three perennial concerns that the separate entity rule addresses.[134]

The *Koehler* decision did not directly implicate the separate entity rule.[135] As the federal district court previously noted, "the separate entity rule [had] no role to play in this case."[136] This is because, among other things, BBL took the unusual step of conceding personal jurisdiction.[137] Both the Second Circuit and the New York Court of Appeals found the concession of personal jurisdiction highly significant, with both of these higher courts making repeated reference to BBL's concession of personal jurisdiction.[138] Thus, the Second Circuit's certified question made specific reference to the concession of personal jurisdiction, and the first and last sentences of the majority decision both refer specifically to the presence of personal jurisdiction.[139] Additionally, the Bank of Bermuda (New York) was a wholly owned subsidiary of BBL. Thus, if the court had not concluded it was a mere agent of BBL, it would have existed as a separate corporate entity from BBL (even without the benefit of the separate entity rule).[140] Under these highly unusual facts, there was no need or logical reason to apply or discuss the separate entity rule.

Nevertheless, as discussed below, a number of courts and commentators concluded that the *Koehler* decision implicitly abrogated the separate entity rule.[141] Because the dissent listed the same three concerns that

130. *See Koehler*, 911 N.E.2d at 831 (Smith, J., dissenting).
131. *Id.*
132. *Id.* at 832.
133. *Id.*
134. *Id.*
135. *See Shaheen Sports, Inc. v. Asia Ins. Co.*, Nos. 98-CV-5951 LAP, 11-CV-920 LAP, 2012 WL 91964, at *5 (S.D.N.Y. Mar. 14, 2012); *see also* Ayyash v. Koleilat, No. 151471/2012, at *10 (N.Y. Sup. Ct. Oct. 25, 2012).
136. Koehler v. Bank of Berm. Ltd., No. M18-302 (CSH), 2005 WL 551115, at *12 (S.D.N.Y. Mar. 9, 2005).
137. Koehler v. Bank of Berm. Ltd., 544 F.3d 78, 81 (2d Cir. 2008).
138. *See Koehler*, 911 N.E.2d at 827–31; *Koehler*, 544 F.3d at 81, 86.
139. *Koehler*, 911 N.E.2d at 827, 831; *Koehler*, 544 F.3d at 88.
140. *See* Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823, at *10 (N.Y. Sup. Ct. Jan. 11, 2012).
141. For commentators, see, for example, Daniel L. Brown & Elizabeth M. Rotenberg-Schwartz, *Judgment Secured: Now What?*, N.Y. L.J., July 20, 2009. For courts, see *infra* notes 145–152, 169–174, and accompanying text. On the other hand, the Second Circuit continued to apply the separate entity rule in the pre-judgment attachment context even

traditionally justified the separate entity rule, and because the dissent referred to a leading Second Circuit decision on the separate entity rule as "[t]he case that is perhaps most relevant to the question,"[142] some courts extended the logic of the decision to conclude that the separate entity rule was now dead as a doctrine.[143]

IV. RESPONSES TO *KOEHLER*: A SPLIT AMONG THE COURTS

State and federal courts have split dramatically in their interpretation of the *Koehler* decision, with the state courts uniformly affirming the continued validity of the rule while federal courts have reached various conclusions, the most common being that the doctrine is dead.[144]

One of the first cases to confront the separate entity rule after *Koehler* was *JW Oilfield Equipment v. Commerzbank*.[145] *JW Oilfield*'s unusual factual background included a particularly sympathetic plaintiff. A German entity sued the American company JW Oilfield in the United States and lost at trial.[146] The defendant, the U.S. company JW Oilfield, won fees.[147] When it tried to collect, the German entity refused to pay and instead sheltered its assets in Germany.[148] JW Oilfield then attempted to use the New York branch of the German bank, Commerzbank, to garnish assets held in a German branch of the bank.[149] The federal district court expressed little sympathy toward a judgment debtor that "flouted lawful orders" and "affirmatively avail[ed] [itself] of [the United States'] courts and then attempt[ed] to avoid the consequences."[150] Moreover, Commerzbank took the unusual position of seemingly conceding that *Koehler* had put an end to the separate entity rule.[151] Faced with a sympathetic plaintiff, a judgment debtor that had brought suit in the U.S. and then disappeared, and an international bank that did not contest the death of the separate entity rule, the court rejected any application of the doctrine by predicting that "*Koehler* indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings."[152]

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after *Koehler*. *See* Allied Mar., Inc. v. Descatrade SA, 620 F.3d 70, 74 (2d Cir. 2010); David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 36 TUL. MAR. L.J. 425, 470 (2012) (discussing *Allied Maritime*).

142. *Koehler*, 911 N.E.2d at 832 (Smith, J., dissenting).

143. *See infra* notes 145–152, 169–174, and accompanying text.

144. *See, e.g.*, JW Oilfield Equip., LLC v. Commerzbank AG, 764 F. Supp. 2d 587 (S.D.N.Y. 2011); Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 N.Y. Misc. LEXIS 2268 (N.Y. Sup. Ct. May 12, 2011).

145. 764 F. Supp. 2d.

146. *Id.* at 590.

147. *Id.*

148. *Id.*

149. *Id.* at 590–91.

150. *Id.* at 597–98.

151. *Id.* at 595.

152. *Id.*

Shortly after the *JW Oilfield* decision, the issue of the separate entity rule was raised in dicta in a decision in the Eastern District of New York.[153] In *McCarthy v. Wachovia*, the plaintiff sued a bank for improperly restraining his bank account.[154] The court concluded that the bank was contractually authorized to restrain the bank account, and then added in dicta that, "because Wachovia has branches within New York—and therefore conducts business in New York—it is subject to the jurisdiction of the New York courts."[155] This brief sentence, although not directly discussing the separate entity rule, appears to reject the concept of separate branches as separate entities. In *McCarthy*, just as in *JW Oilfield*, no party specifically defended the separate entity rule as an ongoing and valid doctrine, and thus the court's decision was not based upon an adversarial proceeding regarding the separate entity rule's ongoing validity.[156]

Next to examine the separate entity rule were two New York state court decisions, and both reached very different conclusions regarding the separate entity rule.[157] In May 2011, a New York trial court considered and rejected an attempt by a Korean plaintiff to enforce a London arbitration award through a special proceeding in New York against Chinese banks.[158] In this case, *Samsun Logix v. Bank of China*, Justice Jane S. Solomon expressed concern that, without the separate entity rule, New York would transform into a "global clearinghouse for judgment creditors,"[159] a concern originally raised in Judge Smith's dissent in *Koehler*,[160] and seemingly validated by the panoply of nations represented in *Samsun* (notably, a dispute without any particular connection to New York).[161] Justice Solomon reasoned that the court of appeals would have been explicit had it intended to eliminate the separate entity rule, commenting, "the Court of Appeals in *Koehler* did not even mention the separate entity rule, thereby strongly indicating that it had not intended to overrule that doctrine."[162] In particular, the court found the risk of competing claims to be a particularly compelling justification for the separate entity rule, noting that the banks could be subject to double liability if the New York court required the turning over of the assets while a foreign court ordered the assets to remain with the purported judgment debtor.[163]

One month later, another New York state court also concluded that the

153. McCarthy v. Wachovia Bank, N.A., 759 F. Supp. 2d 265, 274–75 (E.D.N.Y. 2011).
154. *Id.* at 269.
155. *Id.* at 273, 275.
156. *Id.* at 275.
157. *See* Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 N.Y. Misc. LEXIS 2268 (N.Y. Sup. Ct. May 12, 2011); Parbulk II AS v. Heritage Mar. SA, 935 N.Y.S.2d 829 (N.Y. Sup. Ct. 2011).
158. *Samsun*, 2011 N.Y. Misc. LEXIS 2268, at *1–20.
159. *Id.* at *11.
160. Koehler v. Bank of Berm. Ltd., 911 N.E.2d 825, 831 (N.Y. 2009) (Smith, J., dissenting).
161. *Samsun*, 2011 N.Y. Misc. LEXIS 2268, at *1.
162. *Id.* at *8.
163. *Id.* at *15–19.

separate entity rule remains good law.[164] In *Parbulk II AS v. Heritage Maritime SA*, the court dealt with the issue of international judgment creditors using New York courts to pursue claims against foreign entities.[165] A Norwegian plaintiff attempted to collect upon a London arbitration award against a Singaporean firm that was the subsidiary of an Indonesian shipping group.[166] Justice O. Peter Sherwood wrote, "[t]his court disagrees" with the earlier *JW Oilfield* decision, commenting that "[t]he question certified to the New York Court of Appeals . . . did not involve the separate entity rule and the New York Court of Appeals did not address it."[167] With perhaps a surreptitious jab at the federal courts, Justice Sherwood emphasized that the separate entity rule remains valid "[u]ntil the appellate courts in New York hold otherwise."[168]

Just when it might have seemed that the tide had turned in favor of upholding the separate entity rule, in October 2011, another federal district court declared that the separate entity rule was dead.[169] This case, *Eitzen Bulk v. Bank of India*, would appear on the surface to be—like *Parbulk*—a concrete example of Justice Smith's concerns come to life. The company, Eitzen Bulk, was, at the time of the judgment, owned by a Chilean entity (it had been owned by a European shipping entity at the time litigation commenced), and it was pursuing assets held by an Indian company in an Indian branch of an Indian bank based on an English arbitration award.[170] Despite this lack of connection to New York, the court in *Eitzen Bulk* found that "[t]he result in *Koehler* supports the conclusion that Bank of India's subpoena responses must account for information and materials available from branches outside New York."[171] According to Judge Hellerstein's decision, the separate entity rule has no application in the "postjudgment enforcement context."[172] More pointedly, Judge Hellerstein rejected the analysis in *Samsun Logix*, writing: "The court in *Samsun Logix* did discuss *Koehler*, but I do not agree with that court's analysis. In any event, . . . *Samsun Logix* [does not] represent[ ] authority binding upon me."[173] Half a year later, the Second Circuit vacated the *Eitzen Bulk* decision, but without mentioning the separate entity rule, leaving it unclear whether or not the Second Circuit disagreed with the aspect of the decision dealing with the separate entity rule.[174]

In January of 2012, yet another state court reaffirmed the separate en-

164. Parbulk II AS v. Heritage Mar. SA, 935 N.Y.S.2d 829, 831–32 (N.Y. Sup. Ct. 2011).
165. *Id.* at 830.
166. *Id.*
167. *Id.* at 832 n.1.
168. *Id.*
169. Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 240 (S.D.N.Y. 2011).
170. *See id.* at 236; *Dismantling?*, MARINE MONEY INT'L http://www.marinemoney.com/archive/dismantling (June 17, 2010) (login and subscription required) (describing sale of Eitzen Bulk to Chilean entity).
171. *Eitzen Bulk*, 827 F. Supp. 2d at 239.
172. *Id.* at 240.
173. *Id.*
174. Eitzen Bulk A/S v. Bank of India, No. 10-3352-cv (2d Cir. May 12, 2011) (order granting appellee's motion to dismiss and vacating district court's order).

tity rule.[175] In *Global Technology, Inc. v. Royal Bank of Canada*, the plaintiff attempted to obtain assets held by a Mexican company in the Toronto branch of a Canadian bank.[176] Referring to *Koehler*, the court commented that "Justice Smith's concerns about forum shopping . . . appear to have been borne out here."[177] The plaintiff served the bank with a restraining notice and then a turnover order, requiring the bank to turn over "all money/property being held by Royal Bank of Canada that belongs to Judgment Debtor Moto Diesel Mexicana."[178] During the time the restraining order was in place, but prior to the issuance of the turnover order, the Toronto branch of the bank allowed the judgment debtor to withdraw some funds.[179] The plaintiff brought an action against the bank, and the bank responded by citing the separate entity rule, arguing "that the restraining notice served upon respondent's branch in Manhattan was not effective to restrain [the] Toronto bank account, because [the] bank account at issue was allegedly opened in Canada, maintained in Canada only, and could not be accessed in the United States."[180] In a detailed discussion, Justice Stallman not only affirmed the ongoing validity of the rule, but also provided an extended theoretical argument in favor of its existence.[181]

Justice Stallman analogized the separate entity rule to rules governing service of process:[182] "Just as CPLR 311 provides that service upon a corporation is properly made upon certain officers of a corporation . . . the separate entity rule requires that service of a post-judgment restraining notice upon a bank must be made upon the bank branch where the account is maintained."[183] Justice Stallman explained that "[v]iewed as a rule for service . . ., service of a restraining notice upon one bank branch (other than the main branch) would be improper, if the restraining notice sought to restrain an account that the served bank branch did not maintain."[184] Finally, Justice Stallman, like other state courts, concluded that "[w]ithout a clear statement from the Appellate Divisions or the Court of Appeals," he would not consider the separate entity rule to be abrogated.[185] Perhaps the most remarkable aspect of Justice Stallman's decision is that he spent ten pages discussing whether or not the separate entity rule remains valid, including a deep historical discussion of the rule, even though the fact that the plaintiff already recovered the entire amount owed by the judgment debtor, seemingly rendering the lawsuit

175. *See* Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823 (N.Y. Sup. Ct. Jan. 11, 2012).
176. *Id.* at *1.
177. *Id.* at *10 n.7.
178. *Id.* at *1.
179. *Id.* at *2.
180. *Id.*
181. *Id.* at *3–13.
182. *Id.* at *13.
183. *Id.*
184. *Id.*
185. *Id.*

moot.[186]

With Justice Stallman's decision, the split between the federal and state courts became highly pronounced, as three state courts affirmed the separate entity rule as still valid and three federal courts declared the doctrine dead.[187] Stallman's decision makes note of the split, describing the federal courts as "deeply divided from New York trial-level courts on this issue"[188] and commenting that New York state courts "rejected"[189] the federal court opinions declaring the separate entity rule to be extinct.

The very next month, yet another federal district court declared that the separate entity rule was dead.[190] *Amaprop Limited v. Indiabulls Financial Services Limited* appeared to implicate the same "clearinghouse for global creditors" concerns that had led many state courts to insist that the rule remained valid.[191] Here, a Cayman Island company sought to use New York courts to enforce an arbitration award against an Indian company by means of garnishing assets held in India.[192] Nevertheless, despite this seemingly clear-cut case of "a forum-shopping opportunity for [a] judgment creditor trying to reach an asset of [a] judgment debtor . . . anywhere in the world,"[193] the court found that the separate entity rule did not apply.[194] Citing to *JW Oilfield* and *Eitzen Bulk*, the court found personal jurisdiction over the foreign bank.[195] Emphasizing the split between the state and federal courts, Judge Gardephe wrote that "a court in this district has expressly rejected the analysis in *Samsun Logix*."[196] Judge Gardephe agreed with the analysis in *Eitzen Bulk* and *JW Oilfield* that the separate entity rule was dead.[197] Moreover, the court not only found that the defendant bank was required to restrain assets, but it also declared that, if the bank failed to restrain assets, "it [would] be held in contempt and coercive fines [would] be assessed."[198]

One month later, another federal district court considered the issue, but this time found the separate entity rule alive and well.[199] In *Shaheen Sports, Inc. v. Asia Insurance Co.*, Judge Preska dismissed a turnover petition served on the New York branches of two international banks.[200] The judgment creditor, relying on *Koehler*, demanded that the banks turn

186. *Id.* at *2–13.
187. *Id.* at *14.
188. *Id.* at *1.
189. *Id.* at *14.
190. Transcript of Proceedings, Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd., No. 11-CV-2001-PGG-JCF (S.D.N.Y. Feb. 16, 2012) (No. 79).
191. *Id.* at 4–9.
192. *Id.* at 2–3.
193. Koehler v. Bank of Berm. Ltd., 911 N.E. 2d 825 831 (2009) (Smith, J., dissenting).
194. Transcript of Proceedings, *supra* note 190, at 4–9.
195. *Id.* at 9.
196. *Id.* at 8.
197. *Id.* at 9.
198. *Id.* at 22.
199. *See* Shaheen Sports, Inc. v. Asia Ins. Co., Nos. 98-CV-5951 LAP, 11-CV-920 LAP, 2012 WL 919664, at *7–8 (S.D.N.Y. Mar. 14, 2012).
200. *Id.* at *9.

over assets held in branches outside of the United States.[201] Judge Preska, however, concluded that the separate entity rule remained valid and that the turnover petition could not force New York branches of international banks to move assets from outside the United States into New York.[202] Judge Preska noted that the separate entity rule had even been "codified in the Article of the New York Commercial Code governing funds transfers and creditor processes."[203] Judge Preska's decision emphasized that the court of appeal's decision in *Koehler* never mentioned the separate entity rule, and that the court would not extinguish the centuries-old doctrine by implication through silence.[204] She added: "In light of the significant policy principles underlying the separate entity rule and its lengthy history in New York courts, however, it is not unreasonable to expect that if the New York Court of Appeals had chosen to eliminate it, it would have said so [explicitly]."[205]

More significantly, perhaps, Judge Preska noted the severe split between the federal and state courts regarding the separate entity rule, writing that "both of the New York state courts" have upheld the separate entity rule, and commenting that these cases "are instructive in that they are the only New York state post-judgment execution cases to analyze the viability of the separate entity rule post-*Koehler*, and both courts found the rule had survived."[206] She further stated that "[t]he Court is particularly mindful that New York state courts have uniformly rejected Petitioner's reading of *Koehler* while explicitly disagreeing with the only federal holding in this district to embrace it."[207] Judge Preska then took the unusual step of certifying her decision for immediate appeal to the Second Circuit, emphasizing the "lack of clarity permeating this area of the law," "the relative frequency" of these cases, and "the relatively high risk of varied and inconsistent views on this subject going forward."[208]

With Judge Preska's decision that the separate entity rule remains good law, the courts became perfectly split, four-to-four, half declaring the doctrine dead, and half proclaiming it alive and well.

On October 25, 2012, yet another New York state court found the separate entity rule to be good law.[209] In *Ayyash v. Koleilat*, the court displayed an even greater degree of dismissiveness toward those federal courts that have declared the doctrine to be dead by simply ignoring them. Writing as if there were no cases to the contrary, the *Ayyash* court states simply that "courts have rejected arguments that *Koehler* impliedly

201. *Id.* at *1–2.
202. *Id.* at *7, *9.
203. *Id.* at *3 (citing N.Y. U.C.C. LAW §§ 4-A-105(1)(b), 4-A-502(4) (MCKINNEY 2012) ("A branch or separate office of a bank *is a separate bank* for purposes of this Article.")).
204. *Id.* at *4–5.
205. *Id.* at *5.
206. *Id.* at *6 (referring to the decisions in *Samsun Logix* and *Parbulk*). Judge Preska was apparently unaware of Justice Stallman's decision in *Global Technology*. *Id.*
207. *Id.* at *7.
208. *Id.* at *9.
209. *Ayyash v. Koleilat*, No. 151471/2012, at *10 (N.Y. Sup. Ct. Oct. 25, 2012).

abrogated the separate entity rule in post-judgment enforcement proceedings."[210]

The *Ayyash* court was most persuaded by the issues of comity and inconvenience. The court wrote that the "plaintiff's demands implicate the laws of various foreign jurisdictions, including but not limited to, France, Switzerland, Monaco, Spain, [and] Brazil." The court also noted that the banks implicated in the litigation have branches in many foreign countries, including Banco Santander, which "has branches in 40 countries," Credit Suisse, which "operates in 54 countries," Itau Unibanco, which "operates in 19 countries," and UBS AG, which is "present in more than 50 countries."[211] The court then explained that, "[u]nder principles of international comity, a New York court should not encroach upon another nation's sovereignty by requiring citizens to take actions within their home country that would contravene their home country's laws."[212] The court noted that ordering the production of banking information from accounts held in foreign countries would violate those countries' bank secrecy laws.[213]

The *Ayyash* court also made reference to oft-mentioned concern that New York would turn into a clearinghouse for global creditors. According to the court, "plaintiff is attempting to use the New York courts as a springboard for a massive, multi-jurisdictional international exercise in supplemental proceedings, instead of simply complying with the laws of the countries in which the judgment debtor's assets are actually located."[214] This language highlights inconvenience ("a massive multi-jurisdictional international exercise"). Thus, the court made reference to both comity and, to a lesser extent, inconvenience.

At this point, the split remains nearly equal, with five courts declaring the separate entity rule alive, and four declaring it dead. Especially noticeable is the split between the state and federal courts, with all four state courts affirming the validity of the separate entity rule, while all but one federal court has held it abrogated.

V. COMITY

The United States Supreme Court has described the concept of comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[215]

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210. *Id.* *Ayyash* cited to *Global Tech*, *Samsun Logix*, and *Parbulk* (the three state court decisions upholding the separate entity rule) and to *Shaheen Sports* (the federal district court decision upholding the rule), while ignoring the three district courts to announce the rule dead, excepting one passing reference to *Eitzen Bulk*.

211. *Id.* at *13.

212. *Id.* at *14.

213. *Id.*

214. *Id.* at *12.

215. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

The Third Circuit summarized comity as the concept that "any exercise of jurisdiction to prescribe and enforce sanctions based on the effects of foreign activity in a domestic court requires the court to balance the interests it seeks to protect against the interests of any other sovereign that might exercise authority over the same conduct."[216] The separate entity rule implicates the concept of comity due to the reality that an international bank "may be subject to the laws of other countries."[217] In other words, U.S. courts seek to respect the rights of foreign sovereigns and foreign courts to administer justice and to say what the law is in those territories.[218]

In American jurisprudence, Supreme Court Justice Joseph Story is often credited with introducing the concept of comity.[219] Justice Story emphasized the link between the concept of international comity and the concept of comity between the federal government and the states:

To no part of the world is [the concept of comity] of more interest and importance than to the United States, since the union of a national government with already that of twenty-six distinct states, and in some respects independent states, necessarily creates very complicated private relations and rights between the citizens of those states. . . .[220]

Federal courts have often cited comity as a reason for not interfering in matters best left to state courts.[221] It is expected that, in some instances, federal district courts shall "abstain[ ] from hearing a particular proceeding" in "the interest of comity with State courts or respect for State law."[222] Thus, the same principles of comity that support recognizing the right of foreign sovereigns to "determine the meaning of their own laws in the first instance," also supports the view that federal courts should look to the state courts when interpreting issues of state law.[223]

Here, where the separate entity rule is New York law, the principle of comity strongly suggests that federal courts should follow the lead of the state courts. The Second Circuit has repeatedly noted "that states determine the meaning of their own laws in the first instance."[224] "Where a decision is to be made on the basis of state law, . . . the Supreme Court

216. Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 76 (3d Cir. 1994).

217. United States v. First Nat'l City Bank, 321 F.2d 14, 22 (2d Cir. 1963).

218. *Cf.* Marbury v. Madison, 5 U.S. 137, 177 (1803) (stating that it is for the court to say what the law is).

219. *See, e.g.*, Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 23 (2010); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283–84 (1982).

220. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 9 (Melville M. Bigolow 8th ed. 1883) (1834).

221. *See, e.g.*, Wallace v. Kern, 481 F.2d 621, 622 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) ("[U]nder the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts").

222. 28 U.S.C. § 1334(c)(1) (2006).

223. *Cf.* Joseph v. Athanasopoulos, 648 F.3d 58, 68 (2d Cir. 2011) (citing Allstate Ins. Co. v. Serio, 261 F.3d 143, 150 (2d Cir. 2001)).

224. *See id.*

has long shown a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts."[225] The Supreme Court has stated that it is best to "place[ ] state-law questions in [state] courts [which are] equipped to rule authoritatively on them."[226] According to the Supreme Court, federal courts approach state law issues "as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."[227] Not only are state courts best equipped to deal with state law issues, but the principle of comity also requires that federal courts display respect for state courts and their judgments. "[R]espect for the place of the States in our federal system calls for close consideration of that core question;" namely, whether the federal courts should decide a dispute.[228]

The principle of comity, then, leads to two results directly relevant to the separate entity rule. First, the concept of comity calls for courts within the United States to respect the rights of foreign sovereigns to resolve matters relating to assets held within those nations. This is one of the principles that form the separate entity rule. Secondly, however, the concept of comity calls for federal courts to respect the decisions of state courts on matters of state law. Because the New York state courts have unanimously affirmed the continuing existence of New York's separate entity rule, comity calls for the federal courts to respect these conclusions and recognize the ongoing existence of the doctrine. In this way, the principle of comity supports both the tenacity of the separate entity rule and also the view that federal courts should defer to and recognize the decisions of state courts, which have declared that this doctrine remains valid.

From this comes an ironic result: The federal courts that have rejected the separate entity rule have ended up validating the rule by creating the very problem that the separate entity rule was meant to address. Federal courts applying state law must do so by gleaning how the state courts would rule.[229] In the case of the separate entity doctrine, multiple state courts have already ruled that the doctrine remains valid, yet most of the federal courts considering the matter have chosen to reject[230] and "not agree"[231] with these decisions.[232] Judge Hellerstein, for example, described the state court decision as not "binding upon me."[233] These rejections of state court decisions would seem to contradict the principle of comity.

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225. *Allstate*, 261 F.3d at 150.

226. Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997).

227. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

228. *Arizonans for Official English*, 520 U.S. at 75.

229. *Allstate*, 261 F.3d at 150 (describing how federal courts in applying New York law must attempt to glean how New York courts would rule on the issue).

230. Transcript of Proceedings, *supra* note 190, at 8.

231. Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 240 (S.D.N.Y. 2011).

232. *See supra* Part IV.

233. *Eitzen Bulk*, 827 F. Supp. 2d at 240.

Judge Preska has also commented upon this state of affairs: "The Court is particularly mindful that New York state courts have uniformly rejected" the view that *Koehler* eliminated the separate entity rule "while explicitly disagreeing with the . . . federal holding[s]."[234]

By failing to show deference to state court views on matters of state law, the federal courts that have rejected the separate entity rule have instead displayed the problems inherent in ignoring the principle of comity. This, in turn, has unwittingly demonstrated the importance of the separate entity rule itself.

VI. CONFLICTING JUDGMENTS

As described above, the earliest court decisions establishing the separate entity rule focused in particular upon the danger of conflicting claims to the same asset or conflicting judgments regarding that asset.[235] Courts could avoid producing such conflicting judgments regarding the same asset by treating each branch of a bank as a separate entity. As separate entities, only the branch with actual possession of the asset could be required to turn it over. As early as the turn of the twentieth century, the New York Supreme Court, Appellate Division, First Department stated that any contrary doctrine would "produce endless confusion."[236]

As these court decisions show, a seemingly well-founded fear of contradictory results partially motivated the creation of the separate entity rule. With the separate entity rule's existence currently in jeopardy, there has been a renewed risk of inconsistent judgments and competing claims to the same asset. In *Shaheen Sports, Inc. v. Asia Ins. Co.*, Judge Preska wrote that the bank "submitted evidence that such a transfer of assets would violate Pakistani law and [the bank] is currently defending Asia Insurance's pending suit for injunctive relief in Pakistan's courts."[237] She concluded that the bank's "concern for potential inconsistent judgments and double liability is therefore very real."[238] In upholding the continued validity of the separate entity rule, Judge Preska not only cited the current dangers of inconsistent judgments, but also harkened back to the rule's earliest historical justifications: "It will come as no surprise that the separate entity rule from its inception was designed to target the concerns of banks susceptible to such multiple claims, first across branches, and more recently across borders."[239]

234. Shaheen Sports, Inc. v. Asia Ins. Co., Nos. 98-CV-5951 LAP, 11-CV-920 LAP, 2012 WL 919664, at *7 (S.D.N.Y. Mar. 14, 2012).

235. *See* Chrzanowska v. Corn Exch. Bank, 159 N.Y.S. 385, 388 (N.Y. App. Div. 1916), *aff'd*, 122 N.E. 877 (N.Y. 1919); Woodland v. Fear, (1857) 119. Eng. Rep 7; E. & B. 519, 1339 (K.B.) (Eng.); Prince v. Oriental Bank Corp., (1877–1878) 3 App. Cas. (P.C.) (appeal taken from Wales) (U.K.); E.B. Savory & Co. v. Lloyds Bank, Ltd., (1932) 2 K.B. 122 (C.A.) (Eng.), *aff'd*, [1933] A.C. 201 (P.C.) (U.K.).

236. *Chrzanowska*, 159 N.Y.S. at 388.

237. *Shaheen Sports, Inc.*, 2012 WL 919664, at *7.

238. *Id.* at *8.

239. *Id.*

An ironic result of the rejection of the separate entity rule (by some but not all of the federal district courts) is that this very rejection has validated the rule's importance. The rejection demonstrates the dangers inherent in contradictory judgments. By choosing to reject the separate entity rule, certain federal courts have contradicted the interpretations of state law given by the state courts.

In some cases, the contradiction was unintentional. For example, *JW Oilfield v. Commerzbank* and *McCarthy v. Wachovia Bank, N.A.*, the courts commented upon the implications of the *Koehler* decision without the benefit of any state court guidance.[240] In other cases, the federal district courts were aware that New York state court decisions had reaffirmed the separate entity rule, and nevertheless chose to reject these state court decisions.[241] Thus, in some cases, the federal courts incorrectly predicted how the state courts would rule, and in other cases the federal courts simply rejected the rulings already issued. Both of these situations—incorrect predictions, on the one hand, and rejecting the state court decisions, on the other hand—demonstrate in different ways one of the very risks that the separate entity rule so handily addresses.

In *JW Oilfield*, the court assumed that New York state courts would conclude the separate entity rule was dead[242]—an assumption that turned out to be incorrect.[243] This demonstrates the dangers of U.S. courts attempting to anticipate how other tribunals and foreign entities will adjudge rights to assets, as well as the risk that U.S. courts will misjudge how those foreign entities will interpret and enforce their own laws regarding such issues as banking secrecy, privacy, and effective service. If the New York district courts are capable of misinterpreting how the New York state courts will view the validity of the separate entity doctrine, it is even more likely that U.S. courts will misinterpret foreign laws and regulations with which those courts have far less experience.

Similarly, the decision by a number of federal district courts to "reject" the state court rulings regarding the separate entity rule demonstrates that, if U.S. courts begin adjudicating the rights to assets and documents held in bank branches abroad, foreign courts may likewise choose to "reject" these decisions, resulting in conflicting judgments and double liabilities. When one considers that the federal courts reached different results from the New York state courts, despite the fact that the federal courts are expected to follow the rulings of the state courts, it seems even more likely that foreign courts, which are under no obligation to follow American case law, will decide not follow U.S. courts.

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240. JW Oilfield Equip., LLC v. Commerzbank AG, 764 F. Supp. 2d 587, 595–96 (S.D.N.Y. 2011); McCarthy v. Wachovia Bank, N.A., 759 F. Supp. 2d 265, 274–75 (E.D.N.Y. 2011).

241. *See, e.g.*, Transcript of Proceedings *supra* note 190, at 8–9; Eitzen Bulk A/S v. Bank of India, 827 F Supp. 2d 234, 240–41 (S.D.N.Y. 2011).

242. *JW Oilfield*, 764 F. Supp. 2d at 595–96.

243. *See* Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 N.Y. Misc. LEXIS 2268, at *7–8 (N.Y. Sup. Ct. May 12, 2011).

In the case of the separate entity rule, the danger of contradictory judgments is highlighted by the "deep divide" between the federal and state courts regarding the ongoing validity of the rule. As early as 1816, the Supreme Court, in an opinion authored by Joseph Story, emphasized "the importance, and even necessity of *uniformity* of decisions," and the "evils" that would result from "discordant judgments."[244] "Judges of equal learning and integrity" may naturally reach different conclusions, so "[i]f there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws . . . of the United States would be different in different [locations]. . . . The public mischiefs that would attend such a state of things would be truly deplorable."[245]

Judge Katzmann of the Second Circuit emphasized that inconsistencies between the state and federal courts regarding state law results in a litany of mischief:

> Not only does this approach [allowing inconsistencies between state and federal courts] treat identically situated parties differently with no apparent rational basis, it invites forum shopping[.] Indeed, . . . federal law may mean one thing in federal courts, and something else entirely in state courts, a result the Supreme Court found intolerable nearly two hundred years ago. . . .[246]

The dangers outlined above—"discordant judgments," "deplorable" inconsistencies, and "forum shopping"—have each already come into existence as a result of the disagreements over the validity of the separate entity rule.[247] Law firms have even issued "Client Alerts" stating that, due to differing judgments in state and federal court as to the validity of the separate entity rule, clients should carefully consider whether to bring cases in federal or state court.[248]

As demonstrated above, then, the federal district courts that have "rejected" the separate entity rule have created a "deep divide"[249] between state and federal courts, resulting in contradictory judgments, inconsistent results, and forum shopping. For their part, state courts have also specifically "rejected"[250] the federal decisions, creating the same problems and demonstrating the same dangers. As discussed above, the separate entity doctrine exists in part to avoid these harms. The separate

244. Martin v. Hunter's Lessee, 14 U.S. 304, 347–48 (1816).

245. *Id.* at 348.

246. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 407 (2d Cir. 2008) (Katzmann, J., dissenting).

247. *Martin*, 14 U.S. at 347–48.

248. *See, e.g.*, Client Alert, James E. Hough & Geoofrey R. Sant, Morrison & Forester LLP, *Koehler v. Bank of Bermuda*: Two Years Later: The Impact on Attachment in New York (Aug. 1, 2011), *available at* http://www.mofo.com/files/Uploads/Images/110801-Koehler-v-Bank-of-Bermuda.pdf ("Under these circumstances, parties should carefully consider whether to pursue cases in state or federal court.").

249. Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823, at *1 (N.Y. Sup. Ct. Jan. 11, 2012).

250. *Id.* at *14.

entity doctrine was intended to avoid contradictory judgments in the United States and abroad regarding the same assets. The federal courts rejecting the separate entity doctrine have created the litany of harms that the separate entity rule was designed to address. Therefore, the rejection of the separate entity doctrine by certain federal courts unwittingly validate the separate entity rule by demonstrating the dangers of contradictory judgments that would result if the rule did not exist.

VII. IMPRACTICALITY AND EXPENSE

In his *Koehler* dissent, Judge Smith warned in part of the enormous expense and the impracticalities that would result from allowing judgment creditors around the world, many with no connection to New York, to use New York courts as their "global clearinghouse" for disputes unconnected to New York.[251] Judge Smith's dissent focused on the expenses and impracticalities facing international banks.[252] Likewise, as noted above, one of the motivations behind the establishment of the separate entity doctrine was the concern with overburdening international banks with bureaucratic requirements, including the constant transmission of information (and requests for information) regarding bank accounts around the world. Requiring individual branches to track assets and demands for assets in other parts of the world was another motivating factor. International banks forced to act as global debt collectors for judgment creditors would be overwhelmed by the burden of tracking and attaching assets around the globe on behalf of parties unconnected to the bank or its business.

This concern with expense, administrative inconvenience, and bureaucratic burden mirrors the very problems created as a result of the rejection of the separate entity rule by certain federal courts. Much as Judge Smith had warned in *Koehler*, in recent years litigants from around the globe have used the *Koehler* decision as justification for demanding that New York courts enforce foreign judgments that have no apparent connection to New York. Thus, for example, a Korean plaintiff attempted to use New York courts to force Chinese banks to enforce a London arbitration award.[253] Similarly, a Norwegian plaintiff attempted to use New York courts to enforce a London arbitration award against the Singapore subsidiary of an Indonesian shipping group.[254] Another petitioner attempted to use New York courts to force a Canadian bank to turn over the assets of a Mexican company.[255] Another case involved a Lebanese petitioner pursuing the assets of a Brazilian resident based upon a Leba-

251. Koehler v. Bank of Berm. Ltd., 911 N.E.2d 825, 831 (N.Y. 2009) (Smith, J., dissenting).

252. *Id.*

253. Samsun Logix Corp. v. Bank of China, No. 10526/10, 2011 N.Y. Misc. LEXIS 2268, at *2–3 (N.Y. Sup. Ct. May 12, 2011).

254. Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 236 (S.D.N.Y. 2011).

255. Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 WL 89823, at *1–2 (N.Y. Sup. Ct. Jan. 11, 2012).

nese court judgment.[256] The number of turnover proceedings has surged, so much so that Judge Preska commented upon "the relative frequency of these CPLR Article 52 turnover proceedings in both the federal and state courts of New York."[257]

The recent surge in turnover proceedings filed against international banks mirrors a similar surge in attachment cases that took place in the mid-2000s. In 2002, the Second Circuit decided the notorious *Winter Storm* case, in which the court held that electronic fund transfers (EFTs) passing momentarily through New York were attachable property.[258] When funds are electronically transferred from one bank to another, it is typical for the banks to use a third bank as an intermediary.[259] The result was that, even where the two banks on either end of the transaction had no presence in New York, the EFTs would electronically pass through intermediary banks that had a New York presence. The decision by the Second Circuit that EFTs were attachable property led to "a tsunami of Rule B maritime attachment cases," in which international creditors with no particular connection to New York used New York courts to attach funds simply by virtue of a momentary electronic transfer through a bank with a New York presence.[260] Thus, cases piled up in New York courts on the basis of fund transfers that lasted a mere fraction of a second and that had no other connection to New York.[261] Within a few years, Rule B maritime attachment cases accounted for one-third of all lawsuits in the Southern District of New York.[262]

As the Second Circuit later unanimously recognized, the results of *Winter Storm* were disastrous, placing "strains on federal courts and international banks."[263] Not only were the courts and the banks overwhelmed by the sheer number of attachment cases, the threat of attachment cases caused "damage [to] New York's standing as an international financial center" and even affected "the usefulness of the dollar in international transactions," as international banks sought means of avoiding making EFTs through New York banks.[264] The results were so damaging that the Second Circuit took the highly unusual step of unanimously agreeing "with the consent of all of the judges of the Court in active service, that *Winter Storm* was erroneously decided" just seven years after the original

256. Ayyash v. Koleilat, No. 151471/2012, at *11 (N.Y. Sup. Ct. Oct. 25, 2012).

257. Shaheen Sports, Inc. v. Asia Ins. Co., Nos. 98-CV-5951 LAP, IL CV-920 LAP, 2012 WL 919664, at *9 (S.D.N.Y. Mar. 14, 2012).

258. Winter Storm Shipping Ltd. v. TPI, 310 F.3d 263 (2d Cir. 2002). This decision was notorious because the entire Second Circuit ruled, a mere seven years later, that *Winter Storm* had been erroneously decided and was an unmitigated disaster. *See* Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 60 (2d Cir. 2009).

259. *See, e.g.*, *Winter Storm*, 310 F.3d at 266.

260. Saperstein & Sant, *supra* note 5.

261. *Shipping Corp. of India Ltd.*, 585 F.3d at 62–63 (citing Cala Rosa Marine Co. v. Sucres et Deneres Grp., 613 F. Supp. 2d 426, 431–32 & 432 n.7 (S.D.N.Y. 2009)).

262. *Id.* at 62.

263. *Id.* at 61.

264. *Id.* at 61–62.

decision.[265]

Notably, in overturning *Winter Storm*, the Second Circuit expressed from its first sentence frustration that foreign litigants and disputes unconnected to New York were clogging the courts:

> This case is based on a dispute between a company incorporated in India and a company incorporated in Singapore over an accident that occurred in India while one company was shipping products to China; the dispute was to be arbitrated in England. Because the parties' *banks* had accounts in New York banks, [an EFT] . . . was sufficient [under *Winter Storm*] to vest jurisdiction in the United States District Court of the Southern District of New York.[266]

As discussed above, a similar situation—far-flung litigants using New York banks to enforce foreign judgments and seize funds not even held in New York—has appeared in response to the uncertain status of the separate entity rule. Justice Smith's dissent in *Koehler* had warned of this very scenario: "The majority's holding opens a forum-shopping opportunity for any . . . judgment debtor held by a bank (or other garnishee) anywhere in the world."[267] Judge Preska has already made note in *Shaheen* of "the relative frequency of these CPLR Article 52 turnover proceedings in both the federal and state courts of New York."[268] To date, only the separate entity rule prevents a similar storm of foreign litigation flowing through the New York courts.

Moreover, the fact that some federal district courts have announced the death of the separate entity rule has resulted in unnecessary expense. Specifically, because federal and state courts disagree on whether the separate entity rule remains valid, every court case implicating the separate entity rule results in the litigation of the separate entity doctrine. Thus, to date, at least seven different cases have litigated the validity of the separate entity rule, with each side producing motions, affidavits, and often expert reports.[269]

Thus, the third problem created by some district courts' rejection of the separate entity rule is the creation of unnecessary expense. There has been a surge of international turnover proceedings brought to enforce judgments that have no particular connection to New York. These cases would not exist if the separate entity rule were uniformly enforced. Moreover, precisely because some district courts have rejected the state court rulings, there has been confusion and differing judgments in the court system, with each new set of cases litigating the validity of the separate entity rule. These courts' rejection of the separate entity rule validates the usefulness of the separate entity rule by demonstrating the

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265. *Id.* at 61.

266. *Id.* at 60–61.

267. Koehler v. Bank of Berm. Ltd., 911 N.E.2d 825, 831 (N.Y. 2009) (Smith, J., dissenting).

268. Shaheen Sports, Inc. v. Asia Ins. Co., Nos. 98-CV-5951 LAP, 11-CV-920 LAP, 2012 WL 919664, at *9 (S.D.N.Y. Mar. 14, 2012).

269. *See id.*

expense and inconvenience that results if the separate entity rule does not exist.

VIII. CONCLUSION: THE REJECTION OF THE SEPARATE ENTITY RULE PARADOXIALLY VALIDATES THE SEPARATE ENTITY RULE

As demonstrated above, the decisions by certain federal district courts to declare the separate entity rule dead have unwittingly and paradoxically demonstrated the value of the doctrine. First, the decision by certain federal courts to reject the analysis of the state courts demonstrates the risks of ignoring the principle of comity. Second, the federal court decisions rejecting the separate entity rule have demonstrated the danger of creating conflicting judgments. Third, the federal court decisions have created unnecessary expense by both encouraging foreign litigants to bring their attachment claims to New York, and also by expanding the costs of this litigation by forcing each set of litigants to reargue whether the separate entity rule remains valid. In this way, the rejection of the separate entity rule by certain federal courts has ended up creating the three concerns that have traditionally justified the separate entity rule: comity, conflicting judgments, and expense. The rejection of the rule actually validates the necessity for the rule itself.