Restraining Notices, Information Subpoenas and Levies: Compliance Issues Facing Financial Institutions

May 29, 2019

Joseph D. Simon

jsimon@cullenanddykman.com

CULLENandDYKMANLLP

www.cullenanddykman.com

OCC Handbook: Garnishment of Accounts Containing Federal Benefit Payments

Comptroller's Handbook CC-GA

Consumer Compliance (CC)

Garnishment of Accounts Containing Federal Benefit Payments

Version 1.0, April 2014

Office of the Comptroller of the Currency

Washington, DC 20219

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Introduction

The Office of the Comptroller of the Currency's (OCC) *Comptroller's Handbook* booklet, "Garnishment of Accounts Containing Federal Benefit Payments," provides background information and expanded examination procedures for the "Garnishment of Accounts Containing Federal Benefit Payments" regulation. Examiners decide which of these procedures are necessary, if any, after completing a compliance core assessment as outlined in the "Large Bank Supervision," "Community Bank Supervision," or "Federal Branches and Agencies Supervision" booklet of the *Comptroller's Handbook*. Throughout the "Garnishment of Accounts Containing Federal Benefit Payments" booklet, national banks and federal savings associations are referred to collectively as financial institutions or banks, except when it is necessary to distinguish between the two.

Background and Summary

Many consumers receive federal benefit payments that are protected under federal law from being accessed or "garnished" by creditors, other than the U.S. government and certain state agencies, through a garnishment order or similar written instruction issued by a court. Despite these protections, developments in debt collection practices and technology, including the direct deposit of benefits, have led to an increase in the freezing of accounts containing federal benefit payments by financial institutions that receive a garnishment order. As a result, the U.S. Department of the Treasury (Bureau of the Fiscal Service), the Social Security Administration, the U.S. Department of Veterans Affairs, the U.S. Railroad Retirement Board, and the U.S. Office of Personnel Management have jointly issued a regulation[1] (interagency regulation or regulation) that a financial institution must follow when it receives a garnishment order against an account holder who receives certain federal benefit payments by direct deposit. The types of federal payments covered by the interagency regulation are the following:

- Social Security benefits
- Supplemental Security Income benefits
- Veterans benefits
- Federal Railroad retirement, unemployment, and sickness benefits
- Civil Service Retirement System benefits
- Federal Employee Retirement System benefits

[1] The interim final rule was published in the *Federal Register* on February 23, 2011, and was effective May 1, 2011. *See* 76 Fed. Reg. 9939. The interim final rule, subject to certain amendments, was adopted as final and published in the *Federal Register* on May 29, 2013, and was effective June 28, 2013. See 78 Fed. Reg. 32109.

The federal banking agencies are responsible for enforcing compliance with this regulation.[2] Under the regulation, generally, financial institutions that receive a garnishment order are required to follow certain procedures, including the following: (1) Determine whether any account held by the named account holder received exempt federal payments by direct deposit. (2) Determine the sum of protected federal benefits deposited to each individual account during a two-month period. (3) Ensure that the account holder has access to an amount equal to that sum or to the current balance of such account(s), whichever is lower.

When a financial institution receives a garnishment order, it must first determine whether the order was obtained by the United States or issued by a state child support enforcement agency.[3] In both cases, the financial institution follows its customary procedures for handling the order since federal benefit payments can generally be accessed or garnished by such agencies.

If the garnishment order was not obtained by the United States and not issued by a state child support enforcement agency, the financial institution must follow the interagency regulation to protect federal benefit payments directly deposited into a consumer's account during a two-month "lookback" period. The interagency regulation contains provisions on the timing of an account review, the determination of the protected amount, notice to the account holder (including a model form) regarding the garnishment order, and record retention. In addition, the interagency regulation allows a financial institution to rely on the presence of certain Automated Clearinghouse (ACH) identifiers (i.e., character "XX" encoded in the appropriate positions of the Company Entry Description field and the number "2" in the Originator Status Code field of the Batch Header Record) to determine whether a direct deposit payment is a federal benefit payment for purposes of the regulation.

The financial institution must notify the account holder that the financial institution has received a garnishment order, if all of the following conditions are met: (1) A covered benefit agency deposited a benefit payment into an account during the lookback period. (2) The balance in the account on the date of the account review was above zero dollars, and the financial institution established a protected amount. (3) There are funds in the account in excess of the protected amount. For an account containing a protected amount, the financial institution may not charge or collect a garnishment fee against the protected amount. The financial institution may charge or collect a garnishment fee against additional funds deposited to the account up to five business days past the account review date.

[2] The regulation specifically defines federal banking agency to include the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. See 31 CFR 212.3.

[3] A state child support enforcement agency is the single and separate organizational unit in a state that has the responsibility for administering or supervising the state's plan for child and spousal support pursuant to title IV, part D, of the Social Security Act, 42 USC 654. See 31 CFR 212.3.

Scope (31 CFR 212.2)

The interagency regulation applies to financial institutions that hold accounts into which the following benefits have been *directly* deposited:

- Social Security Administration
  - Social Security benefits
  - Supplemental Security Income benefits
- Department of Veterans Affairs
  - Veterans benefits
- Railroad Retirement Board
  - Federal Railroad retirement, unemployment, and sickness benefits
- Office of Personnel Management
  - Civil Service Retirement System benefits
  - Federal Employee Retirement System benefits

Definitions (31 CFR 212.3)

Account: An account, including a master account or sub account, at a financial institution to which an electronic payment may be directly routed.[4]

Account holder: A natural person against whom a garnishment order is issued and whose name appears in a financial institution's records as the direct or beneficial owner of an account.

Account review: The process of examining deposits in an account to determine if a benefit agency has deposited a benefit payment into the account during the lookback period.

Benefit agency: The Social Security Administration, the Department of Veterans Affairs, the Railroad Retirement Board, or the Office of Personnel Management.

Benefit payment: A federal benefit payment referred to in 31 CFR 212.2(b) paid by direct deposit to an account with the character "XX" encoded in positions 54 and 55 of the Company Entry Description field and the number "2" encoded in the Originator Status Code field of the Batch Header Record of the direct deposit entry.[5]

Freeze or **account freeze:** An action by a financial institution to seize, withhold, or preserve funds, or to otherwise prevent an account holder from drawing on or transacting against funds in an account, in response to a garnishment order.

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[4] An account does not include an account to which a benefit payment is subsequently transferred following its initial delivery by direct deposit to another account. See 76 Fed. Reg. 9950. If a payment recipient is assigned a customer number that serves as a "prefix" for individual sub accounts, the individual sub account (and not the "master account") is subject to the account review lookback. See 78 Fed. Reg. 32100.

[5] For more information, see the Treasury Department's "Guidelines for Garnishment of Accounts Containing Federal Benefit Payments" (http://fms.treas.gov/greenbook/Garnishment-Guideline-06-13.pdf).

Garnish or **garnishment:** Execution, levy, attachment, garnishment, or other legal process.

Garnishment fee: Any service or legal processing fee, charged by a financial institution to an account holder, for processing a garnishment order or any associated withholding or release of funds.

Garnishment order or **order:** A writ, order, notice, summons, judgment, levy, or similar written instruction issued by a court, a state or state agency, a municipality or municipal corporation, or a state child support enforcement agency, including a lien arising by operation of law for overdue child support or an order to freeze the assets in an account, to effect a garnishment against a debtor.

Lookback period: The two-month period that (a) begins on the date preceding the date of account review and (b) ends on the corresponding date of the month two months earlier, or on the last date of the month two months earlier if the corresponding date does not exist.

> For example, under this definition, the lookback period that begins on November 15 ends on September 15. On the other hand, the lookback period that begins on April 30 ends on February 28 (or 29 in a leap year) to reflect the fact that February does not have 30 days.
>
> Appendix C of the regulation includes other examples illustrating the application of this definition.

Protected amount: The lesser of the following: The sum of all benefit payments posted to an account between the close of business on the beginning date of the lookback period and the open of business on the ending date of the lookback period, or the balance in an account when the account review is performed.[6]

> Appendix C of the regulation includes examples illustrating the application of this definition.

Initial Action Upon Receipt of a Garnishment Order (31 CFR 212.4)

Within two business days after receiving a garnishment order, and before taking any other action related to the order, a financial institution must determine whether the order was obtained by the United States or issued by a state child support enforcement agency.[7] To make this determination, the financial institution may rely on a Notice of Right to Garnish Federal Benefits (see appendix B of the interagency regulation). For such orders obtained by

[6] The account balance includes intraday items such as automated teller machine or cash withdrawals. The balance does not include any line of credit associated with the account. See 78 Fed. Reg. 32099, 32101-32102.

[7] Financial institutions will not violate state law by utilizing the two-day period, because the rule preempts any state requirement that an order be processed on the date of receipt. See 78 Fed. Reg. 32104.

the United States or issued by a state child support enforcement agency, the financial institution should not follow the interagency regulation but instead should follow its customary procedures for handling a garnishment order.

For all other garnishment orders, the financial institution is required to follow the procedures in 31 CFR 212.5 and 212.6.

If a financial institution will not act on a garnishment order due to the operation of state law, the financial institution need not examine the order to determine if a Notice of Right to Garnish Federal Benefits is attached or included, or take any of the additional steps required under the rule.[8]

Account Review (31 CFR 212.5)

Timing of account review: After having been served a garnishment order issued against a debtor, a financial institution must perform an account review:

1. No later than two business days following receipt of both the garnishment order and sufficient information from the creditor to determine whether the debtor is an account holder; or

2. By a later date permitted by the creditor in situations when the financial institution is served a batch of a large number of orders. The date must be consistent with the terms of the orders and the financial institution must maintain records on such batches and creditor permissions, consistent with 31 CFR 212.11(b).

No benefit payment deposited during lookback period: If the account review shows that a benefit agency did not deposit a benefit payment into the account during the lookback period, then the financial institution should follow its customary procedures for handling the garnishment order and not the procedures in 31 CFR 212.6.

Benefit payment deposited during lookback period: If the account review shows that a benefit agency deposited a benefit payment into the account during the lookback period, then the financial institution must follow the procedures in 31 CFR 212.6.

Uniform application of account review: The financial institution must perform an account review without consideration for any other attributes of the account or the garnishment order, such as the following:

- The presence of other funds, from whatever source, that may be comingled in the account with funds from a benefit payment.
- The existence of a co-owner on the account.

[8] State law is not inconsistent with the interagency regulation if it protects benefit payments in an account from being frozen or garnished at a higher protected amount than required under the regulation. For further discussion on preemption of state law (31 CFR 212.9), see "Comments and Analysis" section in part II of Supplementary Information of the final rule. See 78 Fed. Reg. 32099, 32106-32107.

- The existence of benefit payments to multiple beneficiaries, or under multiple programs, deposited in the account.
- The balance in the account, provided the balance is above zero dollars on the date of account review.
- Instructions to the contrary in the order.
- The nature of the debt or obligation underlying the order.

Priority of account review: The financial institution must perform the account review before taking any other actions related to the garnishment order that may affect funds in the account.

Separate account reviews: The financial institution must perform an account review separately for each account in the name of an account holder against whom a garnishment order has been issued. In performing account reviews for multiple accounts in the name of one account holder, a financial institution must not trace the movement of funds between accounts by attempting to associate funds from a benefit payment deposited into one account with amounts subsequently transferred to another account.

Rules and Procedures to Protect Benefits (31 CFR 212.6)

If an account review shows that covered federal benefits have been directly deposited into an account during the lookback period, the financial institution must comply with the rules and procedures to protect federal benefits set forth in 31 CFR 212.6.

Protected amount: The financial institution must calculate and establish the protected amount for an account, ensuring that the account holder has full access to the protected amount.[9] The financial institution may not freeze the protected amount in response to the garnishment order. Further, the account holder may not be required to assert any right of garnishment exemption before accessing the protected amount in the account.

Separate protected amounts: The financial institution must calculate and establish the protected amount separately for each account in the name of an account holder consistent with the requirements in 31 CFR 212.5(f) to conduct distinct account reviews.

Funds in excess of the protected amount: For any funds in an account in excess of the protected amount, the financial institution must follow its customary procedures for handling garnishment orders, including the freezing of funds, provided they are consistent with paragraphs (f) and (g) of 31 CFR 212.6.

[9] Where an account holder had debit card access to an account before receipt of a garnishment order, the requirement to provide "full and customary" access to the protected amount means the account holder should have debit card access to that amount. See 78 Fed. Reg. 32099, 32104. Also, the interagency regulation does not limit a federal credit union's right to exercise its statutory lien authority against the protected amount in a member's account. A lien may be enforced against an account when the member fails to satisfy an outstanding financial obligation due and payable to the federal credit union. 12 USC 1757(11) and 12 CFR 701.39.

One-time account review process: The financial institution is only required to perform the account review one time after it receives a garnishment order. The financial institution should not repeat the account review or take any other action related to the order if the same order is subsequently served again upon the financial institution. If the financial institution is subsequently served a new or different garnishment order against the same account holder, however, the financial institution must perform a separate and new account review.[10]

No continuing or periodic garnishment responsibilities: The financial institution may not continually garnish amounts deposited or credited to the account following the date of account review. It also must take no action to freeze any funds subsequently deposited or credited, unless the institution is served with a new or different garnishment order.

Impermissible garnishment fee: The financial institution may not charge or collect a garnishment fee against a protected amount. The financial institution may charge or collect a garnishment fee up to five business days after the account review if funds other than a benefit payment are deposited to the account within this period, provided that the fee may not exceed the amount of the non-benefit deposited funds.

Notice to the Account Holder (31 CFR 212.7)

A financial institution must send an account holder a notice if

- a covered federal benefit payment was directly deposited into an account during the lookback period;
- the balance in the account on the date of account review was above zero dollars and the financial institution established a protected amount; and
- there are funds in the account in excess of the protected amount.

Notice content: The notice must contain the following information in readily understandable language:

- The financial institution's receipt of an order against the account holder.
- The date on which the order was served.
- A succinct explanation of garnishment.
- The financial institution's requirement under the interagency regulation to ensure that account balances up to the protected amount specified in 31 CFR 212.3 are protected and made available to the account holder if a benefit agency deposited a benefit payment into the account in the last two months.
- The account subject to the order and the protected amount established by the financial institution.

[10] Refer to https://www.fiscal.treasury.gov/fsservices/gov/pmt/eft/Garnishment-Guideline-06-13.pdf, p. 11.

- The financial institution's requirement pursuant to state law to freeze other funds in the account to satisfy the order and the amount frozen, if applicable.
- The amount of any garnishment fee charged to the account, consistent with 31 CFR 212.6.
- A list of the federal benefit payments subject to this part, as identified in 31 CFR 212.2(b).
- The account holder's right to assert against the creditor that initiated the order a further garnishment exemption for amounts above the protected amount, by completing exemption claim forms, contacting the court of jurisdiction, or contacting the creditor, as customarily applicable for a given jurisdiction.
- The account holder's right to consult an attorney or legal aid service in asserting against the creditor that initiated the order a further garnishment exemption for amounts above the protected amount.
- The name of the creditor, and, if contact information is included in the order, means of contacting the creditor.

Optional notice content: The financial institution also may provide the account holder in readily understandable language the following information:

- The means of contacting a local free attorney or legal aid service.
- The means of contacting the financial institution.
- A disclaimer that the financial institution is not providing legal advice by sending the required notice to the account holder.

Amending notice content: The financial institution may also amend the content of the notice to integrate information about a state's garnishment rules and protections in order to avoid potential confusion or harmonize the notice with state requirements, or to provide more complete information about an account.

Notice delivery: The financial institution must issue the notice directly to the account holder, or to a fiduciary who administers the account and receives communications on behalf of the account holder. Only information and documents pertaining to the garnishment order (including other notices or forms that may be required under state or local law) may be included in the communication.

Notice timing: The financial institution must send the notice to the account holder within three business days from the date of account review.

One notice for multiple accounts: The financial institution may issue one notice with information related to multiple accounts of an account holder.

Record Retention (31 CFR 212.11)

A financial institution must maintain records of account activity and actions taken in response to a garnishment order, sufficient to demonstrate compliance with this part, for a period of not less than two years from the date on which the financial institution receives the garnishment order.[11]

Model Notice to Account Holder (31 CFR 212, Appendix A)

A financial institution may use the model notice found in appendix A to the interagency regulation to meet the requirements of 31 CFR 212.7. Although use of the model notice is not required, a financial institution using it properly is deemed to be in compliance with 31 CFR 212.7.

[11] The financial institution has discretion in deciding what documentation to retain. The appropriate documentation may vary depending on the circumstances of each situation. See 78 Fed. Reg. 32107.

Examination Procedures

This booklet contains objectives and expanded procedures for examining compliance with the"Garnishment of Accounts Containing Federal Benefit Payments" regulation. Examiners decide which of these objectives and procedures are relevant to the scope of the examination during examination planning or after drawing preliminary conclusions during the compliance core assessment as outlined in the "Community Bank Supervision," "Large Bank Supervision," or "Federal Branches and Agencies Supervision" booklet of the *Comptroller's Handbook*.

Objective: To determine whether the bank has policies and procedures designed to ensure compliance with the "Garnishment of Accounts Containing Federal Benefit Payments" regulation.

Review the adequacy of the bank's policies and procedures by using the Garnishment of Accounts Worksheet.

Objective: To determine the bank's level of compliance with the "Garnishment of Accounts Containing Federal Benefit Payments" regulation.

Determine the bank's level of compliance by using the Garnishment of Accounts Worksheet.

Garnishment of Accounts Worksheet

This worksheet can be used for reviewing audit work papers, evaluating bank policies, performing expanded procedures, and training, as appropriate. Complete only those sections of the worksheet that specifically relate to the issue being reviewed, evaluated, or tested, and retain those completed sections in the work papers.

When reviewing audit or evaluating bank policies, a "no" answer indicates a possible exception or deficiency and should be explained in the work papers. When performing expanded procedures, a "no" answer indicates a violation and should be explained in the work papers. If a line item is not applicable within the area you are reviewing, indicate "NA."

Underline the applicable use: **Audit** **Bank Policies** **Expanded Procedures**

Initial Action Upon Receipt of a Garnishment Order (31 CFR 212.4)	**Yes**	**No**	**NA**
1. Does the financial institution, within two business days after receiving a garnishment order, review a garnishment order before taking any other action with regard to the order to ascertain whether the order is obtained by the United States or issued by a state child support enforcement agency? If a garnishment order is obtained by the United States or issued by a state child support enforcement agency as indicated by an attached or included Notice of Right to Garnish Federal Benefits, does the financial institution follow its customary procedures to comply with the order? If a garnishment order is not accompanied by a Notice of Right to Garnish Federal Benefits, proceed with the remaining examination procedures to determine whether the institution follows the requirements of 31 CFR 212.5 and 31 CFR 212.6			
Account Review (31 CFR 212.5)	**Yes**	**No**	**NA**
2. Does the financial institution perform an account review: • No later than two business days following receipt of both the garnishment order and sufficient information from the creditor to determine whether the debtor is an account holder; or • By a later date permitted by the creditor in situations when the financial institution is served a batch of a large number of orders? **Note:** The date must be consistent with the terms of the orders and the financial institution must maintain records on such batches and creditor permissions consistent with 31 CFR 212.11(b).			
Rules and Procedures to Protect Benefits (31 CFR 212.6)	**Yes**	**No**	**NA**
3. Does the financial institution appropriately calculate and establish the protected amount for an account if an account review shows that a covered benefit agency deposited a benefit payment into an account during the lookback period (i.e., during the preceding two-month period as defined in 31 CFR 212.3)?			
4. Does the financial institution refrain from charging or collecting a garnishment fee against the protected amount?			

5. Does the financial institution refrain from charging or collecting a garnishment fee against additional funds deposited to the account after five business days past the account review date?			
6. Does the financial institution follow its customary procedures for handling garnishment orders, including the freezing of funds, for any funds in an account in excess of the protected amount?			
7. Does the financial institution cease to garnish amounts deposited or credited to the account following the date of account review?			
8. Does the financial institution perform a one-time account review upon the first service of the order and only take action to freeze funds subsequently deposited or credited, if the institution is served with a new or different garnishment order consistent with the interagency regulation?			
Notice to the Account Holder (31 CFR 212.7)	**Yes**	**No**	**NA**
9. Does the financial institution send a notice within three business days of account review to the account holder named in the garnishment order if (a) a covered benefit agency deposited a benefit payment into an account during the lookback period; (b) the balance in the account on the date of account review was above zero dollars and the financial institution established a protected amount; and (c) there are funds in the account in excess of the protected amount?			
10. Does the notice include the following:			
• The financial institution's receipt of an order against the account holder?			
• The date on which the order was served?			
• A succinct explanation of garnishment?			
• The financial institution's requirement under the interagency regulation to ensure that account balances up to the protected amount specified in 31 CFR 212.3 are protected and made available to the account holder, if a benefit agency deposited a benefit payment into the account in the last two months?			
• The account subject to the order and the protected amount established by the financial institution?			
• The financial institution's requirement pursuant to state law to freeze other funds in the account to satisfy the order and the amount frozen, if applicable?			
• The amount of any garnishment fee charged to the account, consistent with 31 CFR 212.6?			
• A list of the benefit payments subject to this part, as identified in 31 CFR 212.2(b)?			
• The account holder's right to assert against the creditor that initiated the order a further garnishment exemption for amounts above the protected amount, by completing exemption claim forms, contacting the court of jurisdiction, or contacting the creditor, as customarily applicable for a given jurisdiction?			
• The account holder's right to consult an attorney or legal aid service in asserting against the creditor that initiated the order a further garnishment exemption for amounts above the protected amount?			
• The name of the creditor, and, if contact information is included in the order, means of contacting the creditor?			
Record Retention (31 CFR 212.11)	**Yes**	**No**	**NA**
11. Does the financial institution maintain records of account activity and actions taken in response to a garnishment order for at least two years from the date on which it receives the garnishment order?			

Conclusions

Conclusion: The aggregate level of compliance risk is (low, moderate, or high).
The direction of compliance risk is (increasing, stable, or decreasing).

Objective: To determine, document, and communicate overall findings and conclusions regarding the examination of "Garnishment of Accounts Containing Federal Benefit Payments" regulation.

1. Determine preliminary examination findings and conclusions and discuss with the examiner-in-charge (EIC), including

   - quantity of compliance risk.
   - quality of risk management.
   - aggregate level and direction of compliance risk.
   - overall risk in the "Garnishment of Accounts Containing Federal Benefit Payments" regulation.
   - violations and other concerns.

2. Discuss examination findings with bank management, including violations, recommendations, and conclusions about risks and risk management practices. If necessary, obtain commitments for corrective action.

3. Compose conclusion comments, highlighting any issues that should be included in the report of examination. If necessary, compose a matters requiring attention (MRA) comment.

4. Provide final examination findings and conclusions to the EIC.

5. Update the OCC's information system and any applicable report of examination schedules or tables.

6. Write a memorandum specifically setting out what the OCC should do in the future to effectively supervise the "Garnishment of Accounts Containing Federal Benefit Payments" regulation, including time periods, staffing, and workdays required.

7. Update, organize, and reference work papers in accordance with OCC policy.

8. Ensure any paper or electronic media that contain sensitive bank or customer information are appropriately disposed of or secured.

References

Regulation

31 CFR 212, “Garnishment of Accounts Containing Federal Benefit Payments”

Jackson v. Bank of America, N.A.

149 A.D.3d 815 (2nd Dep't 2017)

[Wage exemption under EIPA applies per account, not per person]

149 A.D.3d 815
Supreme Court, Appellate Division, Second Department, New York.

Delores JACKSON, et al., respondents,
v.
BANK OF AMERICA, N.A., appellant.

April 12, 2017.

Synopsis
Background: Account holders brought putative class action against bank alleging the Exempt Income Protection Act (EIPA) was violated during bank's placement of a restraint on accounts in response to documentation received by bank from third-party judgment creditor. The Supreme Court, Kings County, Velasquez, J., 40 Misc.3d 949, 971 N.Y.S.2d 800, denied the bank's motion to dismiss. Bank appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] trial court properly exercised its discretion by granting account holders' motion to convert action into a special proceeding, and

[2] EIPA applied to each account maintained at a bank.

Affirmed.

West Headnotes (12)

[1] **Pretrial Procedure**
Error as to nature or form of remedy

Generally, where an action or proceeding is brought in the wrong form or under an inappropriate statute, the court, in its discretion, may deem it brought in a proper fashion, thus avoiding a dismissal. McKinney's CPLR 103(c).

Cases that cite this headnote

[2] **Action**
Change of character or form

Trial court properly exercised its discretion by granting account holders' motion to convert putative class action against bank, alleging the Exempt Income Protection Act (EIPA) was violated during bank's placement of restraint on accounts in response to documentation received by bank from third-party judgment creditors, into a special proceeding to determine rights in property or debt at issue; after commencement of lawsuit Court of Appeals held that judgment debtors' sole avenue of relief against a bank was commencing a special proceeding. McKinney's CPLR 103(c), 5222–a, 5239, 5240.

Cases that cite this headnote

[3] **Pretrial Procedure**
Sufficiency and effect

A motion to dismiss a complaint or petition on the ground that a defense is founded on documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's or petitioner's allegations, conclusively establishing a defense as a matter of law. McKinney's CPLR 3211(a)(1).

Cases that cite this headnote

[4] **Pretrial Procedure**
Availability of relief under any state of facts provable
Pretrial Procedure
Construction of pleadings
Pretrial Procedure
Presumptions and burden of proof

On a motion to dismiss a pleading for failure to state a cause of action, the court must afford the

pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff or petitioner the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. McKinney's CPLR 3211(a)(7).

Cases that cite this headnote

[5] **Pretrial Procedure**
Insufficiency in general
Pretrial Procedure
Evidence

Where evidentiary material is submitted and considered on a motion to dismiss a pleading for failure to state a cause of action, and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader has stated one, and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate. McKinney's CPLR 3211(a)(7).

Cases that cite this headnote

[6] **Statutes**
Intent

It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature.

1 Cases that cite this headnote

[7] **Statutes**
Language and intent, will, purpose, or policy
Statutes
Plain Language; Plain, Ordinary, or Common Meaning

Since the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.

1 Cases that cite this headnote

[8] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning
Statutes
Contemporary and Historical Circumstances

In determining legislative intent, the plain meaning of the language of a statute must be interpreted in the light of conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage.

Cases that cite this headnote

[9] **Statutes**
Plain, literal, or clear meaning; ambiguity

Where statutory language is ambiguous, a court may examine the statute's legislative history.

Cases that cite this headnote

[10] **Administrative Law and Procedure**
Relationship of agency with statute in general

Although, in general, courts defer to the construction of statutes by the authority responsible for their administration, where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, a court is free to ascertain the proper interpretation from the statutory language and legislative intent.

2 Cases that cite this headnote

[11] **Exemptions**
Specific exemptions in general

Exempt Income Protection Act (EIPA) applied to each account maintained at a bank, not the total amount on deposit at a bank.

1 Cases that cite this headnote

[12] **Appeal and Error**
Ratification, estoppel, waiver, and res judicata

Issue of res judicata was improperly raised for first time on appeal.

Cases that cite this headnote

Attorneys and Law Firms

****73** Zeichner Ellman & Krause LLP, New York, NY (Benjamin H. Green and David S.S. Hamilton of counsel), for appellant.

G. Oliver Koppell, New York, NY (Daniel F. Schreck of counsel), and Charles Juntikka & Associates, LLP, New York, NY, for respondents (one brief filed).

JOHN M. LEVENTHAL, J.P., SHERI S. ROMAN, SANDRA L. SGROI, and FRANCESCA E. CONNOLLY, JJ.

Opinion

***815** In a putative class action, inter alia, to recover damages for the restraint of bank accounts in violation of the Exempt Income Protection Act of 2008 (L. 2008, ch. 575) and for injunctive relief, the defendant appeals, as limited by its brief, from (1) so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated May 21, 2013, as denied that branch of its motion which was pursuant to CPLR 3211(a) to dismiss the cause of action alleging violations of the Exempt Income Protection Act of 2008, and (2) so much of an order of the same court dated January 16, 2015, as granted the plaintiffs' motion to convert the cause of action alleging violations of the Exempt Income Protection Act of 2008 into a special proceeding pursuant to CPLR article 52, and denied that branch of its cross motion which was for leave to renew and reargue that branch of its prior motion which was pursuant to CPLR 3211(a) to dismiss the cause of action alleging violations of the Exempt Income Protection Act of 2008.

ORDERED that the appeal from so much of the order dated January 16, 2015, as denied that branch of the defendant's motion which was for leave to reargue that branch of its prior motion ***816** which was pursuant to CPLR 3211(a) to dismiss the cause of action alleging violations of the Exempt Income Protection Act of 2008 is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated May 21, 2013, is affirmed insofar as appealed from; and it is further,

ORDERED that the order dated January 16, 2015, is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs.

This putative class action was commenced by the plaintiffs seeking, inter alia, injunctive relief and money damages against their bank, the defendant, Bank of America, N.A. (hereinafter BOA), based on allegations that accounts they held at New York City BOA branches were restrained in violation of the Exempt Income Protection Act of 2008 (L. 2008, ch. 575) (hereinafter the EIPA). The plaintiffs are judgment debtors whose bank accounts were restrained by judgment creditors in anticipation of enforcement of money judgments pursuant to CPLR article 52. The plaintiffs Delores Jackson and her daughter Shawn Jackson (hereinafter together the Jackson plaintiffs) allege that, when a restraining notice was sent to BOA by a nonparty judgment creditor of Shawn Jackson, BOA aggregated the amounts in their joint savings and joint checking accounts, sent Shawn Jackson a check for the statutorily exempt amount of $1,740, restrained the remaining funds in their accounts, and charged them related bank fees. The plaintiff Odamis Villa similarly alleges that, when a restraining notice was sent to BOA by a nonparty judgment creditor, BOA aggregated the amounts in his savings and checking accounts, sent him a check for the statutorily exempt

amount of $1,740, restrained the remaining funds in his accounts, and charged him related bank fees.

The plaintiffs allege that the restraints were invalid because BOA improperly aggregated ****74** the total amount of funds on deposit for the purpose of determining the amount that was statutorily exempt from restraint in violation of CPLR 5222(i) rather than apply the exemption to each account, automatically sent them checks for the exempt funds, thereby depriving them of the ability to use those funds in their banks, and improperly assessed them fees associated with the restraint in violation of CPLR 5222(j). As redress for these alleged wrongs, the plaintiffs seek monetary damages, including reimbursement of funds restrained and disbursed in error as well as any consequential damages caused by the lack of access to funds, punitive damages, and injunctive relief. The plaintiffs allege ***817** that BOA employed a general practice of noncompliance with the EIPA, and seek class action certification on behalf of themselves and other similarly-situated account holders.

BOA moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, contending that it complied with the EIPA and, in any event, the EIPA does not create a private right of action permitting an account holder to bring a plenary action against a depository bank seeking injunctive relief or money damages arising from a violation of the EIPA. The Supreme Court denied the motion in an order dated May 21, 2013.

Thereafter, the Court of Appeals, answering two questions certified by the United States Court of Appeals for the Second Circuit, held that: (1) a private right to bring a plenary action for injunctive relief and money damages cannot be implied from the EIPA, and (2) the only relief available to a judgment debtor from a bank arising from a violation of the EIPA is that provided in CPLR article 52 (*see Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 78–79, 979 N.Y.S.2d 257, 2 N.E.3d 221). In light of the Court of Appeals' decision in *Cruz*, the plaintiffs moved pursuant to CPLR 103(c) to convert the cause of action alleging violations of the EIPA into a special proceeding pursuant to CPLR 5239 and 5240. BOA cross-moved for leave to renew and reargue its prior motion to dismiss the complaint. By order dated January 16, 2015, the Supreme Court granted the plaintiffs' motion, denied that branch of BOA's cross motion which was for leave to renew as academic, and denied that branch of the cross motion which was for leave to reargue on the ground that the court did not misapprehend or overlook either the facts or the law.

The plaintiffs withdrew their common-law causes of action at the time they moved to convert the cause of action alleging violations of the EIPA into a special proceeding pursuant to CPLR article 52. With respect to the remaining cause of action, which alleges that BOA violated the EIPA, the Court of Appeals has held that the exclusive remedy for a judgment debtor alleging that his or her bank has violated the EIPA is a special proceeding pursuant to CPLR article 52 (*see Cruz v. TD Bank, N.A.*, 22 N.Y.3d at 78–79, 979 N.Y.S.2d 257, 2 N.E.3d 221). Although we agree with BOA's contention that the plaintiffs herein seek certain relief—including punitive damages and a permanent injunction—that is not available in a proceeding pursuant to CPLR article 52, we reject its contention that, as a result, the action must be dismissed in its entirety. An action should not be dismissed because it was not brought in the proper form or because the plaintiff requested relief to which he or she was not entitled (*see* CPLR 103[c]; *Matter of* ***818** *Phalen v. Theatrical Protective Union No. 1*, 22 N.Y.2d 34, 41, 290 N.Y.S.2d 881, 238 N.E.2d 295; *Wander v. St. John's Univ.*, 99 A.D.3d 891, 893–894, 953 N.Y.S.2d 68; *Tae Hwa Yoon v. New York Hahn Wolee Church, Inc.*, 56 A.D.3d 752, 870 N.Y.S.2d 42; *Matter of* ****75** *Maggi v. Maggi*, 187 A.D.2d 722, 590 N.Y.S.2d 293).

[1] [2] Although the plaintiffs did not commence this action as a special proceeding pursuant to CPLR article 52, " '[g]enerally, where an action or proceeding is brought in the wrong form or under an inappropriate statute, the court, in its discretion, may deem it brought in a proper fashion, thus avoiding a dismissal' " (*Tae Hwa Yoon v. New York Hahn Wolee Church, Inc.*, 56 A.D.3d at 755, 870 N.Y.S.2d 42, quoting *Matter of Schmidt [Magnetic Head Corp.]*, 97 A.D.2d 244, 250, 468 N.Y.S.2d 663). Consequently, the Supreme Court properly exercised its discretion in granting the plaintiffs' motion to convert the cause of action alleging violations of the EIPA into a special proceeding pursuant to CPLR article 52 (*see* CPLR 103[c]; *Port Chester Elec. Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 653, 389 N.Y.S.2d 327, 357 N.E.2d 983; *Matter of First Nat. City Bank v. City of N.Y. Fin. Admin.*, 36 N.Y.2d 87, 94, 365 N.Y.S.2d 493, 324 N.E.2d 861; *Tae Hwa Yoon v. New York Hahn Wolee Church, Inc.*, 56 A.D.3d at 755, 870 N.Y.S.2d 42; *Melvin v. Union Coll.*, 195 A.D.2d 447, 600 N.Y.S.2d 141).

CPLR article 52 sets forth procedures for the enforcement of money judgments in New York, which may include the imposition of a restraining notice against a judgment debtor's bank account to secure funds for later transfer to the judgment creditor through a sheriff's execution or turnover proceeding (*see generally Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 979 N.Y.S.2d 257, 2 N.E.3d 221;

Distressed Holdings, LLC v. Ehrler, 113 A.D.3d 111, 976 N.Y.S.2d 517). Under both federal and state law, certain types of funds are exempt from restraint or execution, including Social Security benefits, public assistance, unemployment insurance, pension payments and the like (*see generally* CPLR 5205). Although the clear legislative intent is that funds of this nature are not to be subject to debt collection (and therefore excluded from any pre-execution restraint), prior to 2008, banks served with restraining notices often inadvertently froze accounts containing income from these sources, leaving judgment debtors without access to much-needed exempt funds (*see Cruz v. TD Bank, N.A.*, 22 N.Y.3d at 66–67, 979 N.Y.S.2d 257, 2 N.E.3d 221; *Distressed Holdings, LLC v. Ehrler*, 113 A.D.3d at 114–116, 976 N.Y.S.2d 517).

The EIPA was intended to ameliorate this problem, amending certain existing statutes in CPLR article 52 and adding a new CPLR 5222–a (*see* L. 2008, ch. 575). The amendments restricted the scope of the restraint that can be implemented against the bank account of a natural person and created a new procedure aimed at ensuring that this class of judgment ***819** debtors is able to retain access to exempt funds (*see generally Cruz v. TD Bank, N.A.*, 22 N.Y.3d at 66, 979 N.Y.S.2d 257, 2 N.E.3d 221). In substance, subject to limited exceptions consistent with federal law, the EIPA precludes a bank from restraining baseline minimum balances in a "natural person's" account absent a court order. Specifically, $2,500 is free from restraint "if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments ... were made to the judgment debtor's account during the [45] day period preceding" the restraint (CPLR 5222[h]). Otherwise, the statute excludes from restraint an amount that corresponds to 240 times the hourly minimum wage under the federal or state minimum wage laws, whichever is greater, to be periodically adjusted—$1,740 as of July 2009, and as of the service of the subject restraining notices (*see* CPLR 5222[i]). In addition to limiting the scope of a restraint, ****76** the EIPA added new notification and claim procedures in CPLR 5222–a intended to educate judgment debtors concerning the types of funds that are exempt from restraint or execution in order to facilitate the filing of exemption claims.

Insofar as is relevant here, CPLR 5222(i), which is entitled, "Effect of restraint on judgment debtor's banking institution account," provides that a restraining notice "shall not apply to an amount equal to or less than [$1,740 at the time the subject accounts were restrained] except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents" (CPLR 5222[i]). It further provides that if an "account contains an amount equal to or less than [90%] of [$1,740 at the time the subject accounts were restrained], the account shall not be restrained and the restraining notice shall be deemed void, except as to those funds that a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents" (CPLR 5222 [i]).

[3] [4] [5] A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint or petition on the ground that a defense is founded on documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's or petitioner's allegations, conclusively establishing a defense as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Matter of White Plains Plaza Realty, LLC v. Cappelli Enters., Inc.*, 108 A.D.3d 634, 636, 970 N.Y.S.2d 47). On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be ***820** true, accord the plaintiff or petitioner the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d at 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703–704, 864 N.Y.S.2d 70). Where evidentiary material is submitted and considered on a motion to dismiss a pleading pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader has stated one, and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274–275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Norment v. Interfaith Ctr. of N.Y.*, 98 A.D.3d 955, 951 N.Y.S.2d 531).

Here, the plaintiffs, pointing to the Legislature's use of the term "account" in the singular in CPLR 5222(i), contend that CPLR 5222(i) should be applied separately to each account. Therefore, the plaintiffs urge, even though the total balance of their respective bank accounts was greater than $1,740, BOA could not lawfully restrain any of their accounts that contained 90% of $1,740 or less, and the first $1,740 of each of their accounts containing over $1,740 was exempt from restraint or execution. BOA, pointing to the Legislature's use of the phrase "amount equal to or less than [$1,740]" in the statute, contends that the total amount in restrained bank

accounts must be aggregated to calculate the statutory exemption.

[6] [7] [8] [9] [10] " 'It is fundamental that a court, in interpreting a statute, should attempt to **77 effectuate the intent of the Legislature' " (*Matter of Shannon*, 25 N.Y.3d 345, 351, 12 N.Y.S.3d 600, 34 N.E.3d 351, quoting *Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978; *see Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York*, 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338). Since " 'the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' " (*Matter of Shannon*, 25 N.Y.3d at 351, 12 N.Y.S.3d 600, 34 N.E.3d 351, quoting *Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 N.Y.2d at 583, 673 N.Y.S.2d 966, 696 N.E.2d 978; *see Consedine v. Portville Cent. School* **821 *Dist.*, 12 N.Y.3d 286, 290, 879 N.Y.S.2d 806, 907 N.E.2d 684). In determining legislative intent, "[t]he plain meaning of the language of a statute must be interpreted 'in the light of conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage' " (*People v. Litto*, 8 N.Y.3d 692, 697, 840 N.Y.S.2d 736, 872 N.E.2d 848, quoting *People v. Koch*, 250 App.Div. 623, 624, 294 N.Y.S. 987; *see Consedine v. Portville Cent. School Dist.*, 12 N.Y.3d at 290, 879 N.Y.S.2d 806, 907 N.E.2d 684; *Riley v. County of Broome*, 95 N.Y.2d 455, 463–464, 719 N.Y.S.2d 623, 742 N.E.2d 98; *Matter of Seidel v. Board of Assessors, County of Nassau*, 88 A.D.3d 369, 378, 931 N.Y.S.2d 623). "[W]here the language is ambiguous, we may examine the statute's legislative history" (*Matter of Shannon*, 25 N.Y.3d at 351, 12 N.Y.S.3d 600, 34 N.E.3d 351 [internal quotation marks omitted]). Although, in general, courts defer to the construction of statutes by the authority responsible for their administration, where the question is one of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent," a court is "free to ascertain the proper interpretation from the statutory language and legislative intent" (*Matter of Astoria Gas Turbine Power, LLC v. Tax Commn. of City of N.Y.*, 14 A.D.3d 553, 556, 788 N.Y.S.2d 417 [internal quotation marks omitted], *affd.* 7 N.Y.3d 451, 824 N.Y.S.2d 189, 857 N.E.2d 510; *see Matter of T–Mobile Northeast, LLC v. DeBellis*, 143 A.D.3d 992, 994, 40 N.Y.S.3d 164).

[11] Applying these principles, we find that CPLR 5222(i) is ambiguous as to whether it applies to an "amount" on deposit at a bank or to each "account" maintained at a bank. Turning to the legislative history of the EIPA, the bill jacket indicates that the stated legislative purpose was to create a procedure for the execution of money judgments on bank accounts containing exempt funds to ensure that debtors can keep access to exempt funds (*see* L. 2008, ch. 575). The legislative history, as reflected in the bill jacket, particularly in a letter in support of the bill written by the bill's Assembly sponsor, Helene Weinstein, indicates that the statute applies to each account.

Accordingly, BOA failed to establish its entitlement to dismissal of the cause of action alleging violations of the EIPA, and that branch of its motion pursuant to CPLR 3211(a) was properly denied.

BOA's contentions with respect to certain of the Supreme Court's factual findings made in the order dated May 21, 2013, either do not require reversal of that order (*see Matter of Eichberg v. Maisano*, 2 A.D.3d 444, 445, 767 N.Y.S.2d 795), or were raised only in connection with that branch of BOA's subsequent cross motion which was for leave to reargue, the denial of which is not appealable (*see Cash on Spot ATM Servs., LLC v. Camia*, 144 A.D.3d 961, 963, 43 N.Y.S.3d 361; **78 *Diller v. Munzer*, 141 A.D.3d 630, 631, 34 N.Y.S.3d 610; *Finch v. Dake Bros., Inc.*, 139 A.D.3d 1001, 1002, 33 N.Y.S.3d 325).

[12] BOA's contention that an order of the Civil Court, Kings County, directing it to turn over certain of the Jackson plaintiffs' funds to the judgment creditor was res judicata with regard to the Jackson plaintiffs' claims is improperly raised for the first time on appeal (*see Matter of Candlewood Holdings, Inc. [Moore]*, 124 A.D.3d 775, 776, 2 N.Y.S.3d 184).

**822 BOA's remaining contentions are without merit.

All Citations

149 A.D.3d 815, 53 N.Y.S.3d 71, 2017 N.Y. Slip Op. 02780

End of Document

CPLR Rule 5224

[Party issuing an information subpoena must have a reasonable belief that the bank being served has in its possession information about the judgment debtor that will assist the creditor in collecting its judgment]

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 52. Enforcement of Money Judgments (Refs & Annos)

McKinney's CPLR Rule 5224

Rule 5224. Subpoena; procedure

Effective: September 2, 2011

Currentness

(a) Kinds and service of subpoena. Any or all of the following kinds of subpoenas may be served:

1. a subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein; or

2. a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein; or

3. an information subpoena, accompanied by a copy and original of written questions and a prepaid, addressed return envelope. Service of an information subpoena may be made by registered or certified mail, return receipt requested. Answers shall be made in writing under oath by the person upon whom served, if an individual, or by an officer, director, agent or employee having the information, if a corporation, partnership or sole proprietorship. Each question shall be answered separately and fully and each answer shall refer to the question to which it responds. Answers shall be returned together with the original of the questions within seven days after receipt. Where the person serving the subpoena is a judgment creditor, other than where the state, a municipality or an agency or officer of the state or a municipality is the judgment creditor, the following additional rules shall apply:

(i) information subpoenas, served on an individual or entity other than the judgment debtor, may be served on an individual, corporation, partnership or sole proprietorship only if the judgment creditor or the judgment creditor's attorney has a reasonable belief that the party receiving the subpoena has in their possession information about the debtor that will assist the creditor in collecting his or her judgment. Any information subpoena served pursuant to this subparagraph shall contain a certification signed by the judgment creditor or his or her attorney stating the following: I HEREBY CERTIFY THAT THIS INFORMATION SUBPOENA COMPLIES WITH RULE 5224 OF THE CIVIL PRACTICE LAW AND RULES AND SECTION 601 OF THE GENERAL BUSINESS LAW THAT I HAVE A REASONABLE BELIEF THAT THE PARTY RECEIVING THIS SUBPOENA HAS IN THEIR POSSESSION INFORMATION ABOUT THE DEBTOR THAT WILL

ASSIST THE CREDITOR IN COLLECTING THE JUDGMENT. By signing the certification, the judgment creditor or attorney certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the individual or entity receiving the subpoena has relevant information about the debtor.

(ii) if an information subpoena, served on an individual or entity other than the judgment debtor, does not contain the certification provided for in subparagraph (i) of this paragraph, such subpoena shall be deemed null and void.

(iii) if an information subpoena, served on an individual or entity other than the judgment debtor, does contain the certification provided for in subparagraph (i) of this paragraph, the individual, corporation, partnership or sole proprietorship receiving the subpoena, may move to quash the subpoena pursuant to section twenty-three hundred four of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

(iv) failure to comply with an information subpoena shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

4. an information subpoena in the form of magnetic tape or other electronic means. Where the person to be served consents thereto in writing, an information subpoena in the form of magnetic tape or electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon the individual, or if a corporation, partnership, limited liability company, or sole proprietorship, upon the officer, director, agent or employee having the information. Answers shall be provided within seven days.

(a-1) Scope of subpoena duces tecum. A subpoena duces tecum authorized by this rule and served on a judgment debtor, or on any individual while in the state, or on a corporation, partnership, limited liability company or sole proprietorship doing business, licensed, qualified, or otherwise entitled to do business in the state, shall subject the person or other entity or business served to the full disclosure prescribed by section fifty-two hundred twenty-three of this article whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state. Section fifty-two hundred twenty-nine of this article shall also apply to disclosure under this rule.

(b) Fees. A judgment debtor served with a subpoena under this section and any other person served with an information subpoena shall not be entitled to any fee. Any other person served with a subpoena requiring attendance or the production of books and papers shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.

(c) Time and place of examination. A deposition on oral or written questions or an examination of books and papers may proceed upon not less than ten days' notice to the person subpoenaed, unless the court orders shorter notice, before any person authorized by subdivision (a) of rule 3113. An examination shall be held during business hours and, if taken within the state, at a place specified in rule 3110. Upon consent of the witness, an examination may be held at any other place within the state and before any officer authorized to administer an oath.

(d) Conduct of examination. The officer before whom the deposition is to be taken shall put the witness on oath. If requested by the person conducting the examination, the officer shall personally, or by some one acting under his direction, record and

transcribe the testimony and shall list all appearances by the parties and attorneys. Examination and cross-examination of the witness shall proceed as permitted in the trial of actions in open court. Cross-examination need not be limited to the subject matter of the examination in chief. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or of a person recording it, or to the manner of taking it, or to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court orders or the witness agrees otherwise. If the witness does not understand the English language, the judgment creditor shall, at his own expense, provide a translation of all questions and answers. Unless the court orders otherwise, a person other than the judgment debtor served with a subpoena duces tecum requiring the production of books of account may produce in place of the original books of account a sworn transcript of such accounts as are relevant.

(e) Signing deposition; physical preparation. At the request of the person conducting the examination, a deposition on written questions or a deposition on oral questions which has been transcribed shall be submitted to the witness and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition with a statement of the reasons given by the witness for making them; and the deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign the deposition, the officer before whom the deposition was taken shall sign it and state on the record the fact of the witness's failure or refusal to sign together with any reason given. The deposition may then be used as fully as though signed. Where testimony is transcribed, the officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.

(f) Subsequent examination. Leave of court is required to compel a judgment debtor to appear for the taking of his deposition or to compel the production by him of books and papers within one year after the conclusion of a previous examination of him with respect to the same judgment.

Credits

(Added L.1962, c. 315, § 6. Amended L.1963, c. 532, § 30; L.1994, c. 302, § 1; L.2000, c. 409, § 2, eff. Sept. 29, 2000; L.2006, c. 257, § 1, eff. Aug. 25, 2006; L.2006, c. 452, § 1, eff. Jan. 1, 2007; L.2006, c. 552, § 1, eff. Jan. 1, 2007; L.2011, c. 342, § 1, eff. Sept. 2, 2011.)

Editors' Notes

PRACTICE COMMENTARIES

by Richard C. Reilly

Mr. Reilly notes that Commentaries for this section were previously prepared by Professor David Siegel. See the Preface for an explanation of the relationship between Professor Siegel's Commentaries and the present ones.

C5224:1. The Enforcement Subpoenas, Generally.

C5224:2. Service of Enforcement Subpoenas.

C5224:3. Enforcement Deposition.

C5224:4. Amendment to Avoid Promiscuous Use of Information Subpoenas Served on Third Parties.

C5224:5. Obligations of Persons Served With Subpoena Inside New York With Respect to Materials They Control Outside New York.

C5224:6. Subsequent Disclosure.

C5224:1. The Enforcement Subpoenas, Generally.

CPLR 5223 supplies the disclosure criterion applicable to post-judgment disclosure to aid enforcement, but the devices and their details are contained in CPLR 5224. The devices are subpoenas. Three kinds are available.

The first is the ordinary subpoena, whose formal name is subpoena ad testificandum. It requires the recipient to appear at a designated time and place to be questioned. It specifies the parties to the action, the court and date of the judgment's entry, the amount of the judgment and the amount still due, and it warns that a failure to comply is punishable as a contempt of court. Those contents are as enumerated in CPLR 5223. Under CPLR 5224(a)(1), which refers more specifically to the testimonial subpoena, the subpoena must also set forth the time and place of the examination.

The second is the subpoena duces tecum, CPLR 5224(a)(2), also well known in trial practice. It requires the production of a tangible thing, usually a paper or document, but it is also available for any other item relevant to the debtor's property. Its content, except to require the thing instead of testimony, is essentially the same as that of the testimonial subpoena.

The third is known as an "information subpoena," and although it bears the impressive caption of "subpoena" it is in essence just a set of questions asked and answered by mail. It is analogous to the interrogatories met in pretrial disclosure under CPLR 3130-3133. Unlike the first two subpoenas, which contemplate the recipient's appearance at a designated time and place, the information subpoena, as supplied and governed by subdivision (a)(3) of CPLR 5224, contemplates that all will be done by mail. See Commentary C5224:2, below.

No subpoena under CPLR 5224 commences a special proceeding. Each is but an adjunct of the action that gave rise to the judgment, and ordinarily bears its caption. But the subpoena is one of the so-called "supplementary proceedings," which means that when used in conjunction with a judgment of a town or village court, it must issue out of the supreme court or a county court. See CPLR 5221, and Siegel, New York Practice, 5th Ed., §§ 492, 493. This merely means that the subpoena must bear the caption of the higher court, and that any proceedings to punish for contempt for disobedience of the subpoena must also be brought in that court.

C5224:2. Service of Enforcement Subpoenas.

The testimonial subpoena authorized by paragraph 1 of CPLR 5224(a) and the subpoena duces tecum authorized by paragraph 2 are both subject to the ordinary rules governing subpoena service. This means that CPLR 2303 applies, which requires that subpoenas be served in the same manner as a summons. As a result, CPLR 308 governs the service in the case of an individual deponent; CPLR 310 in the case of a partnership; and CPLR 311 in the case of a

corporate deponent; etc. See the Commentaries on CPLR 2303.

The information subpoena, although it may be served in the same manner as a summons, need not be. It may instead be served by mail under paragraph 3 of CPLR 5224(a). The mailing must be by either registered or certified mail, with return receipt requested. Certified mail is less expensive, and for the subpoena purpose usually just as effective as registered mail. The information subpoena, like the other subpoenas, is available against any person; it is no longer limited, as it once was, to financial institutions.

A fee must accompany the subpoena when served on other than the judgment debtor. The amount of the fee depends on which subpoena is being used. The testimonial and duces tecum subpoenas, since they require the recipient to appear and either testify or produce something, are accompanied by one day's witness fee plus "authorized traveling expenses," as required by subdivision (b). See CPLR 8001. There is no fee for an information subpoena.

Although an excellent case can be made for permitting an enforcement subpoena to be served outside New York, especially when it seeks to reach the judgment debtor himself--taking into account that the judgment emanates from an action in which there was in personam jurisdiction and in which the judgment debtor had a full day in court on the merits--some case law holds that the subpoena may not be served outside the state. See, e.g., *Israel Discount Bank Ltd. v. P.S. Products Corp.*, 65 Misc.2d 1002, 319 N.Y.S.2d 554 (Sup.Ct., N.Y. County, 1971). The case is based on a rigid construction of § 2-b of the Judiciary Law. See Siegel, New York Practice, 5th Ed., § 383. Commentary C5224:5, below. *Israel* was favorably cited in *Siemens & Halske, GmbH. v. Gres*, 37 A.D.2d 768, 324 N.Y.S.2d 639 (1st Dept. 1971).

The same court later held that a judgment debtor, immune from service of a New York enforcement subpoena outside New York, was similarly immune (under the immunity New York affords voluntary witnesses) from its service within the state when he entered only to participate in his own federal court tax proceedings. *DuPont v. Bronston*, 46 A.D.2d 369, 362 N.Y.S.2d 471 (1st Dept. 1974). More recently, however, the court limited *DuPont* to situations involving comity--where the court sought to carefully avoid "any possible interference with authority and dignity of another court." To the extent *DuPont* could be read to hold that, apart from reasons of comity, a CPLR 5224 subpoena may not be served on a judgment debtor while voluntarily attending court in an unrelated proceeding, it [was] overruled. *AABCO Sheet Metal Co. Inc. v. Lincoln Center for Performing Arts, Inc.*, 249 A.D.2d 39, 670 N.Y.S.2d 494 (1st Dept. 1998).

In another case, *Banco do Estado de Sao Paulo S.A. v. Mendes Junior Int'l Co.*, N.Y. Law Journal, Nov. 24, 1997, p.29, col.4 (Sup.Ct., N.Y. County; Ramos, J.), a court found a way to allow the extraterritorial service of at least an information subpoena.

The court noted that the information subpoena may be distinguished from the other two subpoenas (the testimonial subpoena and the subpoena duces tecum) in that it entails nothing more than written answers to written questions and can be carried out entirely by mail. The statute that supplies the information subpoena, moreover, CPLR 5224(a)(3), specifically authorizes its service by "registered or certified mail, return receipt requested," a permission not extended to the other subpoenas. Aided by this distinction, the court in *Banco* upheld as valid an information subpoena served on the judgment debtor by registered mail to Brazil.

C5224:3. Enforcement Deposition.

The subpoena authorized by subdivision (a)(1) of CPLR 5224 contemplates a regular question-and-answer deposition session. Subdivisions (c), (d), and (e) supply incidental details.

Subdivision (c) provides for the time and place of the deposition. A minimum of 10-days' notice must be given to the person to be deposed, and it will often benefit the judgment creditor's lawyer to arrange with that person for a time and place of mutual convenience. The rules applicable to pretrial depositions govern where the deposition is to take place, in this case by express adoption of CPLR 3110.

Although CPLR 3110 stipulates the proper county for the examination, it does not specify where, within the county, the examination is to be held. It should be permissible, as it is with a pretrial deposition, to schedule the examination at any reasonable place within the county, such as at the office of the judgment creditor's lawyer. See Commentary C3110:4 on CPLR 3110. If any objection should be made to this, the court can direct that the examination proceed at the courthouse or at any other place found satisfactory by the court. The court can do this in a protective order on the general authority of CPLR 5240.

The conduct of the examination is governed by subdivision (d) of CPLR 5224, which also takes its cue from the pretrial disclosure article. The contents of subdivision (d) are lifted, almost verbatim, from subdivisions (b) and (c) of CPLR 3113 and from CPLR 3114. See the Commentaries on those provisions in McKinney's, which apply in just about full measure to the counterpart provisions of CPLR 5224. The last sentence in CPLR 5224(d) allows a third person (not the judgment debtor) served with a subpoena duces tecum seeking account books to satisfy the subpoena by producing "a sworn transcript" of the account rather than the original. The court can require the original if convinced of its necessity.

Subdivision (e), governing the preparation and signing of the deposition, borrows wholesale from subdivisions (a) and (b) of CPLR 3116 in the pretrial disclosure article. In this respect, however, two points should be stressed. In making corrections, the witness should make them at the end of the deposition, referring to the pages of the deposition on which the allegedly erroneous statements appear. The witness should not obliterate the original. (That is the rule in respect of the pretrial deposition, but it took an amendment of CPLR 3116[a] in 1966 to clarify that rule; and no coordinate change was effected in CPLR 5224[e]. Since the latter obviously intends to borrow for the enforcement deposition what CPLR 3116 provides for the pretrial deposition, however, it would be reasonable to adopt a similar standard for the enforcement deposition, too.)

CPLR 5224(e) authorizes the officer before whom the deposition was taken to sign it in the witness's behalf if the witness refuses to. That was at one time the rule applicable to the pretrial deposition, too, under CPLR 3116(a), but it was abandoned. The rule under CPLR 3116(a) now is that if the deponent--party or nonparty witness--does not sign within the allotted time, the deposition may be used as fully as though signed. See Issues 28 and 46 of Siegel's Practice Review. It would seem reasonable here, too, to deem the CPLR 3116 procedure applicable as well to the CPLR 5224 deposition.

If the CPLR 3116 procedure is not adopted, the practical difficulties met in seeking out the officer to sign on behalf of a balking witness will remain on the scene, as they did under CPLR 3116(a) before its amendment. Having the officer sign in the witness's behalf, moreover, is feasible only when the officer before whom the deposition was taken sat at the table and heard it all. That may not be the case. (When the deposition is taken at the courthouse, for example, and the clerk acts as the swearing "officer" for a number of depositions being conducted at different tables simultaneously, the clerk is not present at any one of them and cannot attest to the verity of the deposition one way or the other.) In such an instance, in which it is impossible for the clerk to verify the accuracy of the deposition, the remedy of contempt should be available against the unreasonably recalcitrant deponent.

Third-Party Liable for Delayed Response?

The information subpoena of CPLR 5224(a)(3) is designed to get information to the judgment creditor about the scope and whereabouts of the debtor's property expeditiously. The recipient of the subpoena just writes out answers to questions and sends them back to the creditor's lawyer. CPLR 5224(a)(3) recognizes the need to impose some kind of time limit on responding, and fixes a period of 7 days.

Will a delay in responding ground a personal liability against the responder if it turns out that property of the debtor--on which the creditor might have laid hands with a prompter response--gets beyond reach of the creditor because of the delay? Case law holds that it will not, at least not where the delay is not intentional or willful. *Syndicate Bldg. Corp. v. City University of New York*, 159 Misc.2d 898, 607 N.Y.S.2d 551 (Ct.Cl. 1993). Issues 28 and 56 of Siegel's Practice Review.

This is in contrast to the liability that arises when a garnishee served with a CPLR 5222 restraining notice negligently enables the debtor--no intent involved--to get the money or property. There the garnishee does face a personal liability. See Commentary C5222:2 on CPLR 5222. The court in *Syndicate* explained the difference based on the consequences the recipient of the enforcement device could reasonably be expected to anticipate. The premise is that allowing property to slip away after a restraint is in hand can be foreseen as carrying the consequence of liability, but that a short delay in responding to questions about the debtor's property cannot.

Practitioners should note, however, that it would clearly be unwise for any lawyer to counsel delay, or to suggest immunity from liability for it. A judgment creditor, detoured by the cited cases away from a simple action for a money judgment, would henceforth, under the force of those same cases, be seeking a contempt citation. And the potential for liability on that application differs only in degree, and perhaps only slightly in degree, from a simple claim for money based on the disobedience of the subpoena.

Certainly, if the subpoenaed person is in cahoots with the judgment debtor, that person can be hit hard on a contempt application, and made to pay whatever loss the disobedience has occasioned the judgment creditor. *Corpuel v. Galasso*, 240 A.D.2d 531, 659 N.Y.S.2d 65 (2d Dept., June 16, 1997).

In *Corpuel*, a fine of $1.5 million dollars was imposed on the debtor's wife for not cooperating in the enforcement of the judgment against her husband, and the root of the contempt was the ignoring of a subpoena. The applicable statute on the contempt punishment, Jud.L. § 773, requires a sum "sufficient to indemnify the aggrieved party," the court noted, and in *Corpuel*, where the wife's conduct was found to have completely frustrated the collection of the judgment, the amount of the judgment itself was the fine leveled against the wife.

Contempt Procedure for Disobeyed Subpoena Re Foreign Judgment

If a CPLR 5224 subpoena issued out of the supreme court is being used not in connection with a judgment originally rendered there, but in enforcement of a judgment that got there through the transcripting procedure of CPLR 5018(b), the mere transcripting does not give all-purpose jurisdiction to the supreme court over the judgment debtor. If the subpoena is disobeyed, therefore, and it becomes necessary to seek contempt against the defendant, the procedure of a mere motion will not do. No jurisdiction having yet been formally acquired by the supreme court over the defendant, a special proceeding is needed. That is the rule, in any event, for a federal judgment seeking state enforcement after transcripting. See *Federal Deposit Insurance Corp. v. Richman*, 98 A.D.2d 790, 470 N.Y.S.2d 19 (2d Dept. 1983).

In *Richman*, the defect led to a dismissal of the contempt application. The motion papers that sought to bring it on had been served by ordinary mail. Perhaps if they had been served in the same manner as a summons, as CPLR 403(c) requires for a special proceeding, the denomination of the application as a motion could have been

disregarded as a mere defect in labelling, and jurisdiction deemed acquired.

It is usually better for the judgment creditor to avoid depending on such judicial "deeming" powers in the first place by using the terminology as well as the substance of a special proceeding. As a perusal of CPLR Article 4--which prescribes the procedures of a special proceeding in a neat handful of provisions--indicates, it is not asking much.

C5224:4. Amendment to Avoid Promiscuous Use of Information Subpoenas Served on Third Parties.

The Legislature altered CPLR 5224(a)(3) in 2006 in the amendments that took effect January 1, 2007. (The amendments were in Chapters 452 and 552 of the Laws of 2006.)

The amendments were concerned with information subpoenas served on third persons, singling them out and adding, and then amending, four subparagraphs to CPLR 5224(a)(3) designed to protect them. The amendment does not apply to information subpoenas served on the judgment debtor. The amendment also does not apply where the judgment creditor is the state or one of its municipal subdivisions or officers.

Subparagraph (i) requires non-governmental judgment creditors or their attorneys to certify, in the information subpoena itself, with signature, that they have "a reasonable belief," formed after "an inquiry reasonable under the circumstances," that the person served knows something that will assist in collection of the judgment.

Subparagraph (ii) provides that an information subpoena lacking the certification "shall be deemed null and void."

Subparagraph (iii) says that even if the subpoena does include the certification, the person served may still dispute the statement and deny such knowledge, doing so with a motion to quash the subpoena under CPLR 2304. The motion must be made in the court that issued the underlying judgment.

Subparagraph (iv) refers to CPLR 2308, the statute addressed to disobeyed subpoenas, and treats the information subpoena as the equivalent of a non-judicial subpoena, therefore invoking subdivision (b) of CPLR 2308, which contemplates a court application to enforce a subpoena issued by other than a court (such as one by an administrative agency). But CPLR 5224(a)(3)(iv) provides that the motion under CPLR 2308(b) must be made in the court that rendered the underlying judgment.

C5224:5. Obligations of Persons Served with Subpoena Inside New York with Respect to Materials They Control Outside New York.

A 2006 amendment of CPLR 5224 added a "subdivision (a-1)" to CPLR 5224. Subdivision (a-1) is concerned only with the subpoena duces tecum. It addresses the situation in which the person served with the subpoena--whether a third person or the judgment debtor himself--is served in New York, but the materials sought, while under the control of the person served inside the state, are kept outside New York. It requires the person served to produce those materials for review by the judgment creditor.

The assumption, of course, is that the materials are "relevant to the satisfaction of the judgment," the CPLR 5223 standard. That would include any information reflecting on the nature of the judgment debtor's assets, their extent, and their location.

How and where the materials are to be produced should be worked out by those involved. If the materials are of readily portable size, they or copies of them should be furnished to the judgment creditor in New York. If they are massive and involve substantial duplication or transportation costs, and the parties cannot agree on how to apportion them, the court can always be asked to give directions through the making of a motion for a protective order under CPLR 5240.

The statute is really a flank attack on Judiciary Law § 2-b, which bars the service of a New York subpoena outside the state no matter how much justification there may be for it. See Siegel, New York Practice, 5th Ed., § 383. The new statute does the same job by requiring the person served--in New York, making Jud.L. § 2-b happy--to produce relevant materials under its control no matter where the servee may be storing the materials.

That the servee is subject to New York jurisdiction, that the materials are relevant to the satisfaction of a duly rendered New York judgment, and that the servee has sufficient power to compel their production, would appear to answer all potential constitutional objections to this procedure.

CPLR 5224(a-1) was not new and novel when adopted. Realizing that it is unfair, if not absurd, to impede the collection of a duly rendered New York judgment by the imposition of an artificial restriction such as that imposed by Jud.L. § 2-b, the courts had often found ways around it.

A prime example was *Coutts Bank (Switzerland) Ltd. v. Anatian*, 275 A.D.2d 609, 713 N.Y.S.2d 45 (1st Dept. 2000), in which an extensive treatment of the subject was offered in a concurring opinion by Presiding Justice Sullivan. It acknowledged that Jud.L. § 2-b bars subpoena service outside the state, but pointed out that it does not bar the use of *substituted* methods inside the state, which accomplish the same thing. CPLR 308(5) (court-invented service) may be used. This was another endeavor to in effect allow subpoena service outside the state by having the court invent some imaginative way of serving it within the state to accomplish the same result. (There is an extensive note on the *Coutts* case in Siegel's Practice Review No. 104.)

In similar fashion, CPLR 5224(a-1) does not seek subpoena service outside the state at all. It seeks merely to clarify that a subpoena duces tecum served on a judgment debtor within the state may compel the judgment debtor to produce records that it controls outside the state.

In fact, New York has gone even further than what CPLR 5224 (a-1) confirms. (CPLR 5224 [a-1] addresses only the production of records from outside the state when relevant to proceedings seeking to enforce a judgment already rendered by a New York court--and rendered with full jurisdiction.)

In its influential opinion in *Standard Fruit & Steamship Co. v. Waterfront Comm. of N.Y. Harbor*, 43 N.Y.2d 11, 400 N.Y.S.2d 732, 371 N.E.2d 453 (1977), the Court of Appeals said that if a corporation is subject to in-state service of the subpoena, thus avoiding the problem of extrastate service, the corporation may be required to produce knowledgeable officers and employees even if they are stationed outside the state.

Hence, if testimony is sought from the employee of a corporate party, a regular *testimonial* subpoena served on the corporation can compel the appearance of the employee even without service on the employee proper. The new CPLR 5224(a-1) does not go that far. It does not seek to make the local party produce a witness from outside the state; it seeks only to clarify that the local party must produce relevant *records* that the party controls outside the state, which will often be less intrusive.

C5224:6. Subsequent Disclosure.

If a second examination or production of books and records is sought against the judgment debtor within one year after the conclusion of a prior post-judgment disclosure under CPLR 5223, leave of court is necessary. CPLR 5224(f). The theory is that any more than one annual inquiry amounts to harassment of the judgment debtor. If the reason for a second examination is the judgment debtor's unwarranted refusal to answer proper questions put to him at the first examination, at least one court has held that a second examination is permitted without court leave. See *City of New York v. Marchese*, 74 Misc.2d 367, 343 N.Y.S.2d 547 (Sup.Ct., Queens County, 1973).

Practitioners should note that the rule that a court order is needed for a second examination within a year after the first one does not apply against a third person. Since fees must be paid to the third person under subdivision (b)--they are not payable to the judgment debtor--the theory is that the fee requirement will deter excessive disclosure attempts against third persons. Considering the amount of the fees involved, CPLR 8001, this is one of the more amusing notions of New York practice. If, however, a judgment creditor should tender the fees and schedule a second or third examination of a third person without adequate ground, the remedy would be a motion for a protective order under CPLR 5240.

LEGISLATIVE STUDIES AND REPORTS

The following comments concerning the provisions of this section are from the Third Report to the Legislature and other Reports as expressly indicated.

According to the Sixth Report, subd. (a) is based on the following provisions of the civil practice act:

Par. 1 on § 774(4) (part of second sentence and last sentence), 775(2) (first and second sentences), 779(2) (in part), 782(2) (in part) and 782(6) (in part); cf. 687-a(3), 773 (last sentence), 775(1) (first sentence), 779(1) (first sentence), 782(1) (first sentence), 1189 (part of first sentence) and 1195.

Par. 2 on §§ 774(4) part of second sentence and last sentence), 782(6) (in part) and 784-a part of first sentence); cf. 773 (last sentence), 782(1) (last sentence), 1189 (part of first sentence) and 1195.

Par. 3 on §§ 774(4) (first and last sentences), 782-a(2) (in part), 782-a(3) (in part), 782-a(4) (in part) and 782-a(5) (in part); cf. 773 (last sentence), 1189 (part of first sentence) and 1195.

According to the Fifth Report, provision for obtaining disclosure before the expiration of the limitation period has been omitted. See notes to § 5222(b).

Subd. (a) is derived from parts of §§ 774(4), 775, 779, 782 and 782-a of the civil practice act, which relate to the manner in which judgment debtors, third parties, witnesses and financial institutions may be examined in supplementary proceedings. It also replaces subd. 3 of § 687-a which contains an entirely separate procedure, derived from the attachment sections, for disclosure from a debtor of the judgment debtor. These sections are extremely prolix, they contain numerous inconsistencies and technicalities, and their procedures have proven wasteful of the time of the court, the judgment creditor and the person to the examined.

An examination may be obtained, by subpoena, of the judgment debtor within two years from the "recovery" of the judgment under § 775(2), and of a third party or witness within two years from the "date" of the judgment under §§ 779(2) and 782(2). Subd. 6 of § 782, however, apparently permits a subpoena to examine a witness to issue after the two-year period, if an examination of the judgment debtor or a third party is in progress or was concluded less than six months before.

An "information subpoena," for obtaining disclosure from a financial institution by requiring it to answer questions by mail regarding accounts and deposits maintained by the judgment debtor, may only be utilized "within the time allowed for examination of witnesses under section seven hundred eighty-two." Civ.Prac.Act § 782-a(2). Since § 782 imposes no limitation upon examination by order, the clause quoted apparently refers to examination by subpoena. But, as noted above, § 782 contains two distinct time provisions for examination by subpoena: a two-year provision in subd. 2 and a provision in subd. 6 determined by the duration of an examination of the judgment debtor or a third party. Even if the time limitation on information subpoenas was clear, its utility may be seriously questioned, for its expiration only serves to prevent the simple letter procedure, for a fee--even if a small one--to the person examined, and leaves the judgment creditor no alternative but to seek an examination in which appearance with books and records may be compelled, and transfer restrained, without fee.

It should also be noted that subds. 2 and 4 of § 774 indicate that the period within which a subpoena may be served upon the judgment debtor, a third party or a witness, as well as that within which an information subpoena may be served upon a financial institution, is "two years from the date" of the judgment.

Section 5223 places no time limit on examination by any type of subpoena. Under it, examination may be had at any time before the judgment is satisfied or vacated. Par. (3) also expands the information subpoena procedure so that it may be used to obtain information from any person and relaxes the present limitation on the questions that may be asked.

Although § 782-a(4) provides for service of an information subpoena by ordinary mail, since failure of the person to whom the subpoena is directed to respond within seven days is punishable as a contempt, expansion of this procedure to other persons dictates a manner of service better calculated to insure actual receipt. Par. 3 of subd. (a) requires that if service is not made personally, as with other subpoenas, it be made by registered or certified mail. The requirement that an original and a copy of the questions be enclosed is similar to that of § 782-a(3)(c) and is designed to enable the person served to keep a record of the event without undue burden.

Although answers to information subpoenas need not be under oath under § 782-a, par. 3 of subd. (a) adds this requirement. This change should not result in any substantial burden to financial institutions. Indeed, financial institutions, and other third parties, under present practice are frequently permitted by the attorney for the judgment creditor to mail an affidavit in lieu of an appearance, in cases where a subpoena requiring appearance is served primarily to effect the restraint it contains. The requirement of an oath should also impress other persons who may be served with an information subpoena under subd. (a) with the importance of answering truthfully. Because of this requirement of an oath, which would necessitate a notarial fee, the fee of subd. 4 of § 782-a has been increased from twenty-five cents to fifty cents. See subd. (b).

This expansion of the information subpoena procedure, together with the severance of the restraining notice effected by § 5222, limits a subpoena requiring appearance to its proper use. Accordingly, where a person is served with such a subpoena, he will be be actually required to appear for an examination. It that event, unless it is the judgment debtor himself who has been served, the person subpoenaed should be paid witness fees and traveling expenses; there is no sound reason for the present rule that such fees need not be paid if there is "reason to believe" that the third person has property of the judgment debtor. See notes to subd. (b).

Service of a subpoena under pars. 1 or 2 of subd. (a) would be made, in accordance with § 2303, in the same manner as a summons. Accordingly, subds. 1 and 2 of § 783, which are to the same effect, have been omitted from this article. Similarly,

§ 2302(a) covers who may issue a subpoena and replaces the many provisions specifying the attorney for the judgment creditor in the supplementary proceedings article of the civil practice act.

The phrase "all matters relevant to the satisfaction of the judgment" in § 5223 is new and is designed to change the rule of those cases which have held that examination must be limited to material means for satisfying the judgment. Cf. Estate of Schwartz v. Dunishtock, 175 Misc. 860, 25 N.Y.S.2d 742 (N.Y.C.Ct.1941). There is no reason for precluding the judgment creditor from discovering such matters as the judgment debtor's address, place of employment, number of dependents or other obligations, especially if the witness' fees are paid as required by subd. (b).

Each of the subpoenas specified by subd. (a) are captioned in a court in which a proceeding may be brought. See rule 2101(c) and § 5221(b). Unlike the present provisions, service of a subpoena under this article does not itself initiate a separate proceeding. The place of examination is similar to that under present practice, however. See subd. (c).

Subd. (a) is designed to make it clear that service of one kind of subpoena does not preclude subsequent or simultaneous service of another. It is limited with respect to repeated examination of the same judgment debtor by subd. (f); the fee provision of subd. (b) and the protection of the court under § 5240 also operate to keep repeated examinations within bounds.

Although many of the present provisions provide for examination by court order, rather than by attorney-issued subpoena, they are only significant when an attorney is prevented from issuing a subpoena because of lapse of time or because of a previous examination. In § 5223 and this rule, the time limitation provision has been abolished, and the limits upon repeated examination are handled by requiring fees to be paid all witnesses but the judgment debtor and by requiring leave of court to issue a second subpoena for examination of the judgment debtor. See subds. (b) and (f). Therefore, it is contemplated that post-trial examination will be primarily attorney-instigated and attorney-conducted, subject to the power of the court to supervise proceedings or to protect a witness under § 5240.

The provision in § 782(7) and 783(3) of the civil practice act requiring payment of witness fees at the time of service has been changed to "paid or tendered." Although § 2303 was drafted to require a demand by the witness, the advisory committee, on reconsideration, decided that the language be changed to read as follows (brackets indicate deletions, italics indicate insertions):

A subpoena shall be served in the same manner as a summons. Any person subpoenaed [, upon demand,] shall be paid *or tendered* in advance authorized traveling expenses and one day's witness fee.

Subd. (b) is based upon § 782(7), (first sentence), 782-a(4) (in part) and 783(3) (last sentence) of the civil practice act.

The provision in § 783(3) that the judgment debtor shall not be entitled to fees is continued in subd. (b). He is protected against harassment by subd. (f) and § 5240. The distinctions made in § 783(3) and other sections between witnesses and third parties, however, have been eliminated. Under the present section, fees and traveling expenses are denied to "third parties," even those who have no intent to impede collection of the judgment, apparently in an effort to minimize the expense of enforcing judgments. On the other hand, "witnesses" are entitled to their fees. Civ.Prac.Act, §§ 782(7), 783(3). The distinction is not a clear one; an attorney for the judgment creditor may not know in advance whether a person is a "witness" or a "third party." A "third party" may actually have no property belonging to the judgment debtor but so long as the attorney for the judgment creditor alleges that there is "reason to believe" that he has at least ten dollars worth of such property, he can be denied fees. It is not uncommon for a person to be subpoenaed as a "third party," rather than as a "witness," solely to avoid fees. While there are restrictions on the questions that a third party can be asked which do not exist for witnesses (see City of New York v. Rein, Weinstein Fur Corp., 49 N.Y.S.2d 833 (Sup.Ct.1944)), the restrictions are seldom observed.

Moreover, a prudent attorney is induced to treat all persons as third parties, because a third party order or subpoena contains a restraining provision, while a witness subpoena does not.

The last sentence of subd. (b) is based upon a provision of § 782-a(4), except that the fee has been increased from twenty-five cents to fifty cents to cover the additional expense resulting from the requirement of an oath. See notes to subd. (a).

The imposition of fees for all third parties should serve to prevent indiscriminate use of supplementary proceeding subpoenas. Fear of such use apparently leads to the present restrictions upon the matters which may be inquired into. See Estate of Schwartz v. Dunishtock, 175 Misc. 860, 25 N.Y.S.2d 742 (N.Y.C.Ct.1941). These restrictions have been abolished in the CPLR. See notes to subd. (a). Some of the difficulties alluded to in the Dunishtock case could also be alleviated by the proposed expansion of the information subpoena procedure to all third parties.

The Sixth Report states that subd. (b) continues the present common practice of not requiring a municipality to pay a fee when the municipality serves a subpoena requiring appearance and then waives such appearance upon the receipt of an affidavit with the information required by not requiring a municipality to pay for an expanded information subpoena and thus avoids increasing the cost to municipalities of collecting judgments.

Subd. (c) is new and replaces parts of §§ 775, 777, 780, 782, 783(3) and 791 of the civil practice act.

Section 783(3) of the civil practice act provides that subpoenas shall be served "not less than three days nor more than twenty days before the return date." Subd. (c) extends the minimum period between service and return date to ten days to afford the witness more time to arrange his schedule and to gather any documents which are required for the examination. It conforms with rule 3107. The twenty-day maximum limitation serves no real purpose; it has been eliminated as unnecessary.

The provision regarding persons before whom the examination may be conducted incorporates rule 3113(a), which relates to disclosure generally. Cf. Civ.Prac.Act § 791. Because it specifies the person before whom an examination may be taken within or without the state, it makes unnecessary a provision such as subd. 8 of § 782 of the civil practice act, which incorporates the provisions of article 29 of the civil practice act permitting examinations "of the judgment debtor or any witness" outside the state; the omission of third parties from the quoted phrase is undoubtedly inadvertent.

While § 791 seemingly limits the person before whom an examination may be conducted by consent, no reason appears why consent cannot be validly given to any time and place and to any person.

Section 777, 780 and 782(3) relate to the place of examination as well as to the courts in which supplementary proceedings may be instituted against judgment debtors, third parties and witnesses. This accounts, in part, for their length and complexity. Under present law, a separate supplementary proceeding is usually instituted for each examination. For example, § 774(4) even provides that service of an information subpoena upon a financial institution commences a proceeding. Under this article, however, this would be unnecessary as post-trial examinations do not alone institute a new proceeding. Rather they are considered to be proceedings in the main action in the same manner as pre-trial examinations.

In this article, the court in which a proceeding may be instituted is specified in subd. (a) of § 5221; under subd. (b) of such § 5221 this is the court in which a subpoena is captioned. Subd. (c) specifies the place where an examination may be held. No substantial change in present practice results from this division of provisions.

Under present law, an examination within the state must be held in a courtroom unless the person to be examined consents to its being conducted elsewhere. And, although the statutory subpoena form contained in § 775 provides that the person subpoenaed must appear "before one of the justices of our court," in practice judges are virtually never present at the examination. Most courts have no facilities adequate for the conduct of examinations and the proceedings on an examination ordinarily present an unseemly spectacle not befitting the dignity of the courts.

Since examinations are largely unsupervised, there appears to be no reason for requiring them to be held in court. Under present law, examinations may be held by consent at another place before a notary public or commissioner of deeds. Civ.Prac. Act § 791. This is similar to the practice for pre-trial examinations which need not be conducted in court. Accordingly, subd. (c) utilizes the general disclosure provision of rule 3110 to cover the place of examination within the state. Attorneys would still be able to schedule examinations at court within the proper county under subd. (c) and a person subpoenaed would be able to seek a protective order to prevent abuse under § 5240.

This article does not appreciably to the county in which the examination must be held. Section 777 of the civil practice act requires proceedings to be instituted, and hence examinations to be held, in a county where the judgment debtor resides, is regularly employed or has a place for the regular transaction of business in person. If there is no such county in the state, he may be examined wherever he can be served. The elaborate provisions of § 777, when the particular court requirements are removed, reduce to a preference for the county where the judgment was rendered, if that county is otherwise proper. Sections 780 and 782(3) have similar requirements for the place of examinations of a third party or witness. Rule 3110, when read with § 5221, which specifies the court from which the subpoena is issued, also has similar requirements.

Subd. (d) is based upon parts of rules 3113(b) and (c) and 3114, which are contained in general disclosure article 31. They are set forth here, rather than referred to, for convenience and because minor changes have been made to conform them to post-judgment examination procedure. See notes under such rules 3113(b) and (c) and 3114.

Some of the provisions of subd. (d) replace parts of § 784 of the civil practice act. The last sentence of subd. (d) is derived from the last sentence of the first paragraph of § 784-a of the civil practice act. The remainder of § 784-a is omitted. Its specific provisions for the protection of trade secrets are covered by § 5240. Cf. also C.P.A. § 687-a(3) (in part).

According to the Sixth Report, provision of § 784 of the civil practice act that either party may be examined as a witness in his own behalf has been omitted from subd. (d) as inappropriate to enforcement disclosure procedures. The opening of such subd. (d) indicates that it is not required that testimony be transcribed except where the person conducting the examination so requests.

Subd. (e) is based upon parts of subds. (a) and (b) of rule 3116, which are contained in general disclosure article 31. They are set forth here, rather than referred to, for convenience and because minor changes have been made to conform them to post-judgment examination procedure.

According to the Fifth Report, subd. (e) accords with subd. (d) and indicates that transcription is not required and that the deposition, if transcribed, may be signed before any officer authorized to administer an oath. See notes to rule 3116(a).

Subd. (f) is based upon §§ 775(1) (second sentence), 775(2) (last sentence) and 779(4) of the civil practice act. Under subds. 1 and 2 of § 775, a subsequent examination of the judgment debtor may be obtained only by court order upon a showing that one year has elapsed since he was last examined in supplementary proceedings or that there is reason to believe that he has or will acquired nonexempt property. Similarly, the provision of subd. 1 of § 779, that to obtain an order for the initial examination of a third party it must be shown that "the judgment creditor or his attorney has reason to believe" that the

person to be examined is a garnishee, is apparently to be read into subd. 4 of the same section, which provides for a subsequent examination upon a showing that one year has elapsed since the last examination of the third party.

In the case of a person examined as a witness, there is no restriction regarding subsequent examinations, apparently because of the requirement for fees. See notes to subd. (b). If the subsequent examination is sought within two years from the date of judgment (Civ.Prac.Act §§ 774(2), 782(2)) or within six months from the conclusion of an examination of the Judgment debtor or a third party (id. § 782(6)), it may apparently be obtained by subpoena. At any other time, the examination may be obtained by order upon a showing either that there is reason to believe that the witness has relevant information (id. § 782(1)) or that the examination is "necessary." Id. § 782(7).

Subd. (f) eliminates all restrictions upon subsequent examination except as to the judgment debtor. The requirement of subd. (b) that fees be paid should deter abuse of the examination as to witnesses or third parties; when it does not, the person subpoenaed may apply for a protective order pursuant to § 5240.

To prevent undue harassment of judgment debtors, subd. (f) restricts examinations with respect to the same *judgment*; thus, if after examination, the judgment is assigned, the assignee would have to secure leave of court in order to reexamine the debtor unless one year has expired from the conclusion of the previous examination.

The last paragraph of subd. 2 of § 775 provides that a judgment debtor may not subsequently be examined by subpoena, but subd. 1 of § 775 provides that subsequent examinations may be obtained by court order upon a bare showing that the judgment is unsatisfied and that one year has elapsed since the last examination. Since the court is not required to exercise judgment or discretion, the requirement of a court order is little more than a useless formality. It is an unnecessary annoyance for judgment creditors and courts.

Subd. 1 of § 775 also permits the court to grant a subsequent examination, although one year has not elapsed, upon a showing that there is reason to believe that the debtor has acquired, or is about to acquire nonexempt property. In this case, the court may apparently exercise discretion in deciding if the showing of "reason to believe" is sufficient, in order to protect the judgment debtor from undue harassment. Accordingly, subd. (f) provides that leave of court is only necessary where a subsequent examination is sought within one year after a previous examination.

Official Reports to Legislature for this rule:

3rd Report Leg.Doc. (1959) No. 17, p. 256.

5th Report Leg.Doc. (1961) No. 15, p. 610.

6th Report Leg.Doc. (1962) No. 8, p. 479.

Notes of Decisions (81)

McKinney's CPLR Rule 5224, NY CPLR Rule 5224
Current through L.2019, chapter 29. Some statute sections may be more current, see credits for details.

End of Document

Cruz v. TD Bank, N.A.,
22 N.Y.3d 61 (2013)

[No private right of action under EIPA]

22 N.Y.3d 61
Court of Appeals of New York.

Gary CRUZ et al., Appellants,
v.
TD BANK, N.A., Respondent.
Geraldo F. Martinez et al., Appellants,
v.
Capital One Bank, N.A., Respondent.

Nov. 21, 2013.

Synopsis
Background: Judgment debtors whose bank accounts had been frozen by judgment creditors in anticipation of enforcement of money judgment filed two separate putative class actions in federal court against bank, alleging it had failed to comply with notification requirements of Exempt Income Protection Act (EIPA). The United States District Court for the Southern District of New York, 855 F.Supp.2d 157 and 863 F.Supp.2d 256, granted bank's motions to dismiss, and judgment debtors appealed. The United States Court of Appeals for the Second Circuit consolidated actions for purposes of appeal, and certified question to state court, 711 F.3d 261.

Holdings: The Court of Appeals, Graffeo, J., held that:

[1] EIPA created no private right of action, and

[2] debtors' sole avenue of relief was to commence special proceeding against judgment creditor.

Question answered.

West Headnotes (4)

[1] **Action**
Statutory rights of action

In the absence of an express private right of action, a plaintiff can seek civil relief in a plenary action based on a violation of a statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history.

19 Cases that cite this headnote

[2] **Action**
Statutory rights of action

Essential factors to consider in deciding whether statute gives rise to implied private right of action are: whether plaintiff is one of class for whose particular benefit the statute was enacted; whether recognition of private right of action would promote legislative purpose behind statute; and whether creation of such a right would be consistent with legislative scheme.

18 Cases that cite this headnote

[3] **Action**
Statutory rights of action

Exempt Income Protection Act (EIPA), which required banks to provide judgment debtors with notice of judgment creditors' enforcement of money judgments on bank accounts, created no private right of action against bank in favor of judgment debtors, since intent to create a private right of action would not be consistent with, nor could be inferred from, the legislative scheme; statutory language merely setting forth that banks were not liable for inadvertent failures to notify judgment debtors did not, by implication, create a private right of action, and parallel statutes' enforcement mechanisms against judgment creditors militated against recognition of a new type of claim against banks, which played only a limited role as garnishees. McKinney's CPLR 5222–a, 5239, 5240.

25 Cases that cite this headnote

[4] **Exemptions**

Nature and Form of Action

Since Exempt Income Protection Act (EIPA) created no private right of action against banks in favor of judgment debtors, debtors' sole avenue of relief was commencing a special proceeding against judgment creditor to determine rights in the property or debt at issue. McKinney's CPLR 5222–a, 5239, 5240.

11 Cases that cite this headnote

Attorneys and Law Firms

*****258** Law Offices of G. Oliver Koppell & Associates, New York City (G. Oliver Koppell and Daniel F. Schreck of counsel), for appellants in the first and second above-entitled proceedings.

Duane Morris LLP, Philadelphia, Pennsylvania (Alexander D. Bono and Ryan E. Borneman of counsel), for TD Bank, N.A., respondent in the first above-entitled proceeding.

McGuireWoods LLP, New York City (Robert Plotkin of counsel), McGuireWoods LLP (Nicholas B. Lewis, of the District of Columbia bar, admitted pro hac vice, of counsel) and McGuireWoods LLP *****259** (Matthew A. Fitzgerald, of the Virginia bar, admitted pro hac vice, of counsel) for respondent in the second above-entitled proceeding.

AARP Foundation Litigation, Washington, D.C. (Julie Nepveu of counsel), New Economy Project Inc., New York City (Claudia E. Wilner of counsel), and St. John's University School of Law, Jamaica (Gina M. Calabrese of counsel), for AARP and others, amici curiae.

Sullivan & Cromwell LLP, New York City (Bruce E. Clark, Nicolas Bourtin, Adam R. Brebner and Zeh S. Ekono of counsel), for New York Bankers Association, amicus curiae.

OPINION OF THE COURT

GRAFFEO, J.

****223 *65** Plaintiffs are judgment debtors whose bank accounts were "frozen" by judgment creditors in anticipation of enforcement of a money judgment pursuant to CPLR article 52. Plaintiffs allege that the restraints were invalid because their banks failed to comply with requirements imposed on financial institutions under the Exempt Income Protection Act of 2008 (EIPA). That legislation compels banks served with restraining notices by judgment creditors to forward certain forms to judgment debtors intended to assist them in asserting potential claims that their accounts contain funds that are exempt from restraint or execution. In this case, we have been asked by the United States Court of Appeals for the Second Circuit to resolve whether ***66** plaintiffs may bring plenary actions in federal court against their banks seeking money damages allegedly arising from the banks' failures to send the forms, among other deficiencies. Before addressing the questions certified to us by that Court, it is necessary to describe CPLR article 52 and the EIPA in some detail.

CPLR Article 52 and the EIPA:

CPLR article 52 sets forth procedures for the enforcement of money judgments in New York, which may include the imposition of a restraining notice against a judgment debtor's bank account to secure funds for later transfer to the judgment creditor through a sheriff's execution or turnover proceeding. Under both federal and state law, certain types of funds are exempt from restraint or execution, including Social Security benefits, public assistance, unemployment insurance, pension payments and the like (*see generally* CPLR 5205). Although the clear legislative intent is that funds of this nature are not to be subject to debt collection (and therefore excluded from any pre-execution restraint), prior to 2008 banks served with restraining notices often inadvertently froze accounts containing income from these sources, leaving judgment debtors without access to much-needed exempt monies.

The EIPA was intended to ameliorate this problem, amending certain existing statutes in CPLR article 52 and adding a new CPLR 5222–a (L. 2008, ch. 575). The amendments restricted the scope of the restraint that can be implemented against the bank account of a natural person and created a new procedure aimed at ensuring that this class of judgment debtors is able to retain access to exempt funds. In substance, subject to limited exceptions consistent with federal law, the EIPA

precludes a bank from restraining baseline minimum balances in a "natural person's" account absent a court order. Specifically, $2,500 is free from restraint "if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments ... were made to the judgment debtor's account during the forty-five day period preceding" the restraint (CPLR 5222[h]). Otherwise, the statute excludes ****224 ***260** from restraint an amount that corresponds to 90% of 60–days wages under the federal or state minimum wage laws, whichever is greater, to be periodically adjusted—$1,740 as of July 2009 (CPLR 5222 [i]).

In addition to limiting the scope of a restraint, the EIPA added new notification and claim procedures in CPLR 5222–a intended ***67** to educate judgment debtors concerning the types of funds that are exempt from restraint or execution in order to facilitate the filing of exemption claims. A judgment creditor restraining a bank account (in anticipation of a sheriff's execution by levy or court-ordered transfer of assets) must serve the bank with specific forms: two copies of the restraining notice, an exemption notice and two exemption claim forms (CPLR 5222–a [b][11]). The restraint is void if the judgment creditor fails to provide these documents to the bank; in that event, the bank "shall not restrain the account" (CPLR 5222–a [b][1]), nor can the bank charge fees associated with a restraint (CPLR 5222[j]).

CPLR 5222–a also imposes a new obligation on financial institutions because it compels banks to mail to judgment debtors (the account holders) copies of the exemption notices and exemption claim forms received from judgment creditors (CPLR 5222–a [b][3]). The statute states, however, that "[t]he inadvertent failure by a depository institution to provide the notice required ... shall not give rise to liability on the part of the depository institution" (CPLR 5222–a [b][3]). The notice advises the judgment debtor that the bank account is being restrained, describes the categories of funds that are exempt from restraint, and provides information concerning how to seek vacatur of the money judgment to avoid a subsequent transfer of the funds to the judgment creditor (CPLR 5222–a [b][4][a]). The exemption claim form lists specific income sources that are not subject to restraint or execution (such as Social Security benefits, unemployment insurance, child support, veteran's benefits, etc.) and directs the debtor to check the box next to any applicable exempt funds that have been deposited in the account (CPLR 5222–a [b][4][b]). The debtor is then advised to return one copy of the claim form to the bank and the other to the creditor (or its representative) within 20 days (CPLR 5222–a [b][4][b]). If 25 days have elapsed and the bank has not received an exemption claim form from the judgment debtor, all funds in the account in excess of the applicable statutory minimum remain subject to the restraining notice (CPLR 5222–a [c] [5]). However, a failure to return the claim form may not be interpreted as a waiver of any exemption the judgment debtor may possess (*see* CPLR 5222–a [h]).

Upon receipt of an exemption claim form from the account holder, the bank must notify the judgment creditor "forthwith" of the exemption claim and the creditor then has eight days to object (CPLR 5222–a [c][2], [3]). If no objection is lodged, the ***68** restraint is lifted with respect to the disputed funds and the monies are released to the judgment debtor (CPLR 5222–a [c][3]). To object to an exemption claim, the creditor must timely commence a special proceeding under CPLR 5240, serving papers on both the debtor and the bank before the expiration of the eight-day objection period (CPLR 5222–a [d]). Within seven days of commencement of the proceeding, a hearing is to be held before a court, resulting in issuance of a judicial decision no later than five days after the hearing (CPLR 5222–a [d]). In the meantime, the bank is required to hold the disputed funds for 21 days unless a court order directs otherwise; if 21 days pass and no judicial resolution of the exemption issue is forthcoming, the bank must release the disputed ****225 ***261** funds to the judgment debtor (CPLR 5222–a [e]). Another subdivision imposes special liability upon judgment creditors that object to exemption claims in bad faith (CPLR 5222–a [g]).

The EIPA did not alter the preexisting provisions in CPLR article 52 permitting the commencement of special proceedings whereby creditors, debtors and "any interested person" can adjudicate disputes over the ownership of income or property (CPLR 5239, 5221), nor did it restrict the power of the court to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure" (CPLR 5240).

The Federal Litigation:

The certified questions before us arose from two separate federal lawsuits—*Cruz v. TD Bank, N.A.* and *Martinez v. Capital One, N.A.* Both actions were initiated by judgment debtors who brought putative class actions seeking injunctive relief and money damages against their banks based on allegations that accounts they held at New York branches were restrained in violation of the EIPA. In *Cruz*, plaintiffs alleged that, when restraining notices were sent to the bank, the judgment creditors failed to

include the exemption notices and claim forms that were required under CPLR 5222–a and, as a consequence, TD Bank never forwarded these forms to plaintiffs. They claimed that the bank nonetheless restrained the funds in their accounts, and charged them related bank fees, in violation of statutory requirements. The *Martinez* plaintiffs similarly contended that Capital One did not forward the required exemption notices and claim forms, also asserting other violations of ***69** the EIPA. As redress for these alleged wrongs, plaintiffs sought monetary damages, including reimbursement of funds restrained and disbursed in error as well as any consequential damages caused by the lack of access to funds. In each case, plaintiffs alleged that the respective financial institutions employed a general practice of noncompliance with the EIPA, seeking class action relief on behalf of themselves and other similarly-situated New York account holders. Plaintiffs also attempted to pursue various common-law tort claims that are beyond the scope of the questions certified to this Court.

As relevant here, TD Bank and Capital One moved to dismiss the complaints, contending that the EIPA does not create a private right of action permitting an account holder to bring a plenary action in federal court against a depository bank seeking injunctive relief or money damages arising from a violation of the EIPA.[1] The motions to dismiss were granted in each case (*see Cruz v. TD Bank, N.A.*, 855 F.Supp.2d 157 [S.D.N.Y.2012]; *Martinez v. Capital One, N.A.*, 863 F.Supp.2d 256 [S.D.N.Y.2012]). After reviewing the statutory scheme as a whole, including the EIPA amendments, the District Courts found no basis to imply a private right of action given the comprehensive nature of the CPLR article 52 enforcement scheme. Both rejected plaintiffs' arguments that the clause exempting a bank from liability for inadvertent failure to forward the required notices and forms should be interpreted ****226 ***262** by negative implication, to impose liability for other types of EIPA violations.

Plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which consolidated their cases for the purpose of appeal only. After reviewing CPLR article 52, including the EIPA, the court concluded that the cases presented novel issues of New York law that should be resolved by this Court, certifying the following questions:

> "*first*, whether judgment debtors have a private right of action for money damages and injunctive relief against banks that violate EIPA's procedural requirements; and
>
> ***70** "*second*, whether judgment debtors can seek money damages and injunctive relief against banks that violate EIPA in special proceedings prescribed by CPLR Article 52 and, if so, whether those special proceedings are the exclusive mechanism for such relief or whether judgment debtors may also seek relief in a plenary action" (711 F.3d 261, 271 [2d Cir.2013]).

We accepted the certified questions (21 N.Y.3d 906, 966 N.Y.S.2d 356, 988 N.E.2d 884 [2013]).

[1] [2] The first certified question was directly presented in the federal litigation. There, plaintiffs conceded that the EIPA did not expressly create a private right of action permitting a judgment debtor to sue a bank for violation of the statutory requirements. To the contrary, the only provision addressing a bank's liability is a safe harbor clause stating that the inadvertent failure to provide the required notices and forms to the account holder "shall not give rise to liability on the part of the depository institution" (CPLR 5222–a [b][3]). In the absence of an express private right of action, plaintiffs can seek civil relief in a plenary action based on a violation of the statute "only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history" (*Carrier v. Salvation Army*, 88 N.Y.2d 298, 302, 644 N.Y.S.2d 678, 667 N.E.2d 328 [1996] [internal quotation marks and citations omitted]). This determination is predicated on three factors:

> "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 633, 543 N.Y.S.2d 18, 541 N.E.2d 18 [1989]).

We have repeatedly recognized the third as the most important because

> "the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory ***71** scheme" (*id.* at 634–635, 543 N.Y.S.2d 18, 541 N.E.2d 18 [citation omitted]; *see Uhr v. East Greenbush Cent. School Dist.*, 94 N.Y.2d 32, 698 N.Y.S.2d 609, 720 N.E.2d 886 [1999]).

We have therefore declined to recognize a private right of action in instances where "[t]he Legislature specifically considered and expressly provided for enforcement

mechanisms" in the statute itself (*see Mark G. v. Sabol*, 93 N.Y.2d 710, 720, 695 N.Y.S.2d 730, 717 N.E.2d 1067 [1999]).

For example, in *Sheehy* we held that plaintiff, a minor who was sold alcohol in ****227 ***263** violation of the Penal Law, could not sue the seller to recover for injuries she sustained as a result of her ensuing intoxication. Although plaintiff satisfied the first two prongs of the standard, it was evident from the statutory scheme that "the Legislature ha[d] already considered the use of civil remedies to deter the sale of alcoholic beverages to those under the legal purchase age" and expressly provided the remedies it determined were appropriate, which did not include a private suit against the seller (*Sheehy*, 73 N.Y.2d at 636, 543 N.Y.S.2d 18, 541 N.E.2d 18). We have reached the same conclusion in several other recent cases where the statutes in question already contained substantial enforcement mechanisms, indicating that the legislature considered how best to effectuate its intent and provided the avenues for relief it deemed warranted (*see e.g. Schlessinger v. Valspar Corp.*, 21 N.Y.3d 166, 969 N.Y.S.2d 416, 991 N.E.2d 190 [2013] [General Business Law provision relating to termination of service contracts did not create private right of action]; *Matter of Stray from the Heart, Inc. v. Department of Health & Mental Hygiene of the City of N.Y.*, 20 N.Y.3d 946, 958 N.Y.S.2d 674, 982 N.E.2d 594 [2012] [Animal Shelters and Sterilization Act did not create a private right of action permitting lawsuit by animal rescue organization]; *Metz v. State of New York*, 20 N.Y.3d 175, 958 N.Y.S.2d 314, 982 N.E.2d 76 [2012] [Navigation Law provisions concerning inspection of public vessels did not create private right of action in favor of parties killed or injured when tour boat capsized]; *City of New York v. Smokes–Spirits.Com, Inc.*, 12 N.Y.3d 616, 883 N.Y.S.2d 772, 911 N.E.2d 834 [2009] [public health statute precluding shipment of cigarettes into New York State did not create a private right of action permitting City to sue noncompliant cigarette retailers]; *McLean v. City of New York*, 12 N.Y.3d 194, 878 N.Y.S.2d 238, 905 N.E.2d 1167 [2009] [Social Services Law provision requiring registration of family day-care homes created no private right of action]; *Hammer v. American Kennel Club*, 1 N.Y.3d 294, 771 N.Y.S.2d 493, 803 N.E.2d 766 [2003] [Agriculture and Markets Law statute precluding animal cruelty did not create a private right of action in favor of dog owner]).

[3] In this case, the banks do not dispute that the first two *Sheehy* factors are satisfied—plaintiffs fall within the class the EIPA was intended to benefit and permitting judgment debtors to ***72** bring plenary suits would arguably promote the legislative purpose of protecting exempt funds from improper restraint by encouraging compliance with the EIPA. However, as is usually true in implied private right of action cases, the controversy focuses on the third factor—whether an intent to create a private right of action would be consistent with, and can be inferred from, the legislative scheme.

Plaintiffs contend that a private right of action can fairly be implied by negative implication from the safe harbor clause relating to banks under the doctrine of *expressio unius est exclusio alterius*—the interpretive maxim that the inclusion of a particular thing in a statute implies an intent to exclude other things not included. Plaintiffs theorize that, by explicitly saying that banks cannot be liable for inadvertently failing to provide the forms required by CPLR 5222–a, the legislature signaled that financial institutions could be liable for all other failures to comply with the statute, whether inadvertent or otherwise.

As both District Courts concluded, this would be an unusual application of the *expressio unius* doctrine for it is typically used to limit the expansion of a right or exception—not as a basis for recognizing unexpressed rights by negative implication ****228 ***264** (*see e.g. Morales v. County of Nassau*, 94 N.Y.2d 218, 224–225, 703 N.Y.S.2d 61, 724 N.E.2d 756 [1999]). If the legislature intended to create new liability for banks, it is odd that it would choose to do so by expressly stating that banks are *not liable* in particular circumstances while, at the same time, remaining silent as to any instances when banks *are liable* under the new statute. The banks point out that, when interpreting a statute, courts typically do not rely on legislative silence to infer significant alterations of existing law on the rationale that legislative bodies generally do not "hide elephants in mouseholes" (*see generally Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 [2001] ["Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"]). Put another way, if the legislature had intended to impose new liability on banks when they act as garnishees of the funds of judgment debtors, it would have said so in the statute.

Notably, the EIPA was modeled in many respects on Connecticut legislation that similarly requires financial institutions to forward notices of exemption and exemption claim forms to judgment debtors. Connecticut, however, explicitly imposes ***73** liability on banks in its statute.[2] Connecticut also has a safe harbor clause preventing a bank from being held liable for an act or omission done in good faith or a bona fide error that occurred despite the bank's efforts to comply with the statute (Conn. Gen. Stat. Ann. § 52–367b [*o*]). But when

New York adopted a procedure very similar to Connecticut's, the legislature did not duplicate the provision specifically authorizing judgment debtors to sue banks; instead, it adopted only the safe harbor clause excluding liability. The fact that the legislature chose not to include a liability provision—despite the Connecticut model—militates against judicial recognition, by implication, of the broad private right of action urged by plaintiffs. Indeed, the Connecticut statute's clear recognition of liability does not even authorize an action of the scope sought by plaintiffs in these actions—the Connecticut statutory language suggests that recovery is limited to reimbursement of exempt funds wrongly transferred and restitution of bank fees and related expenses improperly assessed (Conn. Gen. Stat. Ann. § 52–367b [n], *supra* n. 2).

It is also significant that the EIPA explicitly provides that a judgment debtor can recover money damages arising from noncompliance with the EIPA from *judgment creditors*—the party charged with initiating the exemption notice process—lending significance to the legislature's failure to declare the same to be true relating to banks. In a section marked "Proceedings; bad faith claims," the statute declares that where "the court finds that the judgment creditor disputed the claim of exemption in bad faith ..., the judgment debtor shall be awarded costs, reasonable attorney fees, *actual damages and an amount not to exceed one thousand* ****229 ***265** *dollars* " (CPLR 5222–a [g] [emphasis added]). While clearly expressing an intent to hold judgment creditors liable—even permitting the imposition of a ***74** penalty in addition to actual damages—the legislature said nothing comparable in relation to financial institutions.

Plaintiffs point to CPLR 5222–a (h) which reads: "Nothing in this section shall in any way restrict the rights and remedies otherwise available to a judgment debtor, including but not limited to, rights to property exemptions under federal and state law," arguing that this means that there are no restrictions on their right to commence a plenary action against a bank for injunctive relief and money damages. But it appears from the language that the provision stands for the proposition that a debtor does not lose the right to claim a valid exemption by failing to timely return an exemption claim form. Thus, when the creditor later takes action to obtain delivery of the restrained funds through some means, such as a sheriff's execution of the levy or a turnover proceeding, the debtor remains free to assert that the funds are exempt, despite a prior failure to timely submit an exemption form. We do not view this language reserving the rights of debtors to pursue exemptions as creating a new right to bring plenary actions against banks.

Nor would recognition of such a right be compatible with the comprehensive enforcement mechanisms the legislature included elsewhere in CPLR article 52. For one thing, the enforcement provisions contain detailed venue provisions that govern the court in which relief may be sought (CPLR 5221). Permitting a party to seek relief for violation of the statute in a plenary action in some other court would essentially read the venue provisions out of the statute. Moreover, the statutory scheme provides several mechanisms for enforcement that can be used to obtain significant relief.

Given that the primary purpose of article 52 is to facilitate the enforcement of judgments, it provides procedures that can be invoked by judgment creditors—the delivery or turnover proceedings described in CPLR 5225 and 5227 chief among them. But the article also contains general provisions that permit "any interested person"—including a judgment debtor—to secure remedies for wrongs arising under the statutory scheme. Under CPLR 5239, "[p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt" and the court may permit "any interested person to intervene in the proceeding." As a result of a CPLR 5239 proceeding, "[t]he ***75** court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded." CPLR 5240 permits a court "at any time, on its own initiative or the motion of any interested person" to issue an order "denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure"—and therefore grants the court substantial authority to order equitable relief. The flexible nature of such a proceeding is evident from the EIPA itself, which directs that a judgment creditor who objects to an exemption claim must, in expedited fashion, initiate a CPLR 5240 proceeding to resolve the dispute (*see* CPLR 5222–a [d]). The fact that significant enforcement mechanisms are built into CPLR article 52—and, indeed, predated the EIPA—militates against recognition through implication of a new type of claim against banks falling outside the statutory scheme.

*****266 **230** In somewhat contradictory fashion, plaintiffs assert both that CPLR article 52 does not provide them a means to seek redress in one of its special proceedings—hence the need to recognize a plenary action for injunctive relief and money damages—and also that they already had a right to sue a bank for a violation of article 52 before enactment of the EIPA and that right was not extinguished by the legislation. As to the former,

nothing prevents a party injured in the manner alleged by plaintiffs from seeking redress against a bank in a CPLR 5239 or 5240 proceeding. A judgment debtor is certainly an "interested person" and CPLR 5239 permits such a party to bring a proceeding against any "other person with whom a dispute exists to determine rights in the property."[3] Thus, if a judgment debtor believes that a bank has restrained assets in error in violation of the EIPA—meaning there is a controversy between the bank ***76** and the account holder over access or "rights" in the deposited funds—he or she can obtain a civil remedy, such as the release of any money unlawfully restrained, an injunction barring transfer of exempt property to the sheriff or judgment creditor, or reimbursement of any bank fees improperly charged. Comparable relief would be available under CPLR 5240, even after the assets have been transferred to the judgment creditor; in that event, the judgment creditor could be joined as a party and the court could reverse the transfer by issuing an order "denying" the execution and directing restitution by the judgment creditor.[4] Provided relief is sought in the appropriate forum in a timely manner, the judgment creditor is not entitled to retain exempt funds secured in error. If banks make mistakes, the special proceedings in CPLR article 52 afford an avenue for relief.

But recognition of new liability for banks of the type proposed by plaintiffs would be incompatible with the legislative scheme, which recognizes the bank's limited role as garnishee. When a judgment creditor has properly imposed a restraint on a bank account, the bank has no choice but to freeze the assets. Whether issued by a court or an attorney acting as an officer of the court, a restraining notice is an injunction and "disobedience is punishable as a contempt of court" (CPLR 5222[a]; *see generally* 5251). Yet the EIPA now imposes significant obligations ****231 ***267** on banks by requiring them to forward the exemption and claim notices to the judgment debtor and to participate in the processing of exemption claims.

[1] Considering the statutory scheme overall, it appears that the legislature intended to use banks as a conduit for information so that exemption rights would be timely communicated to judgment debtors but did not intend this role to subject banks to a new type of liability. The point of the legislation was to help debtors notify banks of the presence of exempt funds in their accounts in order to prevent those funds from being restrained in the first instance—not to create yet another opportunity for ***77** litigation on the back end after an improper restraint was imposed. There is no indication that the legislature adopted the EIPA because it believed that CPLR article 52 failed to supply adequate means for a judgment debtor to seek judicial recourse during the enforcement process (thereby necessitating a new avenue in the form of a plenary private right of action against a bank)—the intent was to remove the need for litigation altogether. If a lawsuit remains necessary due to a bank's noncompliance with the EIPA, the existing proceedings in CPLR article 52 are adequate to afford a judgment debtor appropriate relief. The summary proceedings have the advantage of being swift and without procedural complexity—there is no basis to suppose that the legislature expected that injured judgment debtors would commence complicated and lengthy plenary proceedings to vindicate their rights, such as the federal court actions plaintiffs brought here.

As for plaintiffs' other argument—that they already possessed a right to bring a plenary action against a bank for money damages before the new legislation and the EIPA did not eliminate that right—we are unpersuaded. To be sure, account holders have contractual relationships with their depository banks and may therefore bring a breach of contract action arising from a violation of any duty owed under the contract, depending on the terms of their agreements. And we certainly do not rule out the possibility that other statutes governing debt collection might create non-contractual duties on the part of financial institutions that, if breached, could give rise to a private right of action. But plaintiffs have not cited any persuasive pre-EIPA precedent in which a New York court recognized an account holder's right to sue a depository bank for a violation of CPLR article 52 outside the special proceedings discussed above.

Plaintiffs' reliance on *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 439 N.Y.S.2d 316, 421 N.E.2d 808 (1981) for the contrary view is misplaced. In *Aspen*, a judgment creditor brought a CPLR 5227 turnover proceeding against a bank arising from the bank's alleged willful failure to comply with a restraining notice. The judgment creditor asserted that, in violation of the restraint, the bank had permitted the judgment debtor to continue to access a restrained account and to deposit funds, then applied the new deposits to a debt the account holder owed the bank—fulfilling its business interests at the expense of the judgment creditor. In addressing that dispute, we observed: "violation of the restraining notice by the party served is punishable by contempt (***78** CPLR 5222, subd [a]; 5251) and subjects the garnishee to personal liability in a separate plenary action or special proceeding under CPLR article 52 brought by the aggrieved judgment creditor" (*Aspen*, 52 N.Y.2d at 580, 439 N.Y.S.2d 316, 421 N.E.2d 808).

Plaintiffs seize on the dictum referencing "a separate plenary action" to argue that a judgment debtor should be

able to bring a plenary action for money damages ****232 ***268** against a bank for a violation of the EIPA. However, assuming the reference to be good law, any right to bring a plenary action in the *Aspen* context arises from the fact that the legislature has declared this type of noncompliance with a restraining notice to constitute contempt (*see* CPLR 5222[a]; 5251); the dictum is consistent with the general proposition that a party injured as a consequence of a contempt of court can sue to secure money damages (*see* Judiciary Law § 773).[5] The fact that a judgment creditor may be able to bring a plenary action to punish a bank's contemptuous failure to honor a restraining notice does not establish that noncompliance with other technical aspects of CPLR article 52 can give rise to a plenary action for money damages when errors of that type have not been declared by the legislature to constitute contempt—which is, of course, the case with the EIPA.

[4] We agree with the District Courts that a private right to bring a plenary action for injunctive relief and money damages cannot be implied from the EIPA—and we therefore answer the first certified question in the negative. As for the second certified question, a judgment debtor can secure relief from a bank arising from a violation of the EIPA in a CPLR article 52 special proceeding as we have explained. And our determination that the legislation created no private right of action compels the conclusion that the statutory mechanisms for relief are exclusive. Banks had no obligation under the common law to forward notices of exemption and exemption claim forms to judgment debtors. It therefore follows that any right debtors have to enforce that obligation, among others imposed under ***79** CPLR 5222–a, arises from the statute and, since the EIPA does not give rise to a private right of action, the only relief available is that provided in CPLR article 52 (*see generally Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236, 879 N.Y.S.2d 17, 906 N.E.2d 1049 [2009]).

Accordingly, the certified questions should be answered in accordance with this opinion.

Chief Judge LIPPMAN and Judges READ, SMITH, PIGOTT, RIVERA and ABDUS–SALAAM concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

All Citations

22 N.Y.3d 61, 2 N.E.3d 221, 979 N.Y.S.2d 257, 2013 N.Y. Slip Op. 07762

Footnotes

1 The banks also disputed plaintiffs' factual allegations. For example, Capital One submitted an affidavit from its New York operations supervisor contending that the bank had promptly implemented the EIPA and that its business records indicated that it had timely mailed the required forms to plaintiffs upon receipt of restraining notices from their judgment creditors but plaintiffs never returned completed claim forms. However, since the allegations arise in the posture of a motion to dismiss, we assume plaintiffs' allegations to be true, as did the Second Circuit.

2 In a section entitled "Liability of financial institution," the Connecticut legislation provides:
"If such financial institution pays exempt moneys from the account of the judgment debtor over to the serving officer contrary to the provisions of this section, such financial institution shall be liable in an action therefor to the judgment debtor for any exempt moneys so paid and such financial institution shall refund or waive any charges or fees by the financial institution, including, but not limited to, dishonored check fees, overdraft fees or minimum balance service charges and legal process fees, which were assessed as a result of such payment of exempt moneys" (Conn. Gen. Stat. Ann. § 52–367b [n]).

3 Nothing in the statute suggests that CPLR 5239 was intended to be restricted to priority disputes between competing judgment creditors, although such controversies are often resolved in that forum. Plaintiffs mistakenly rely on a statement of Professor David Siegel indicating that judgment creditors competing over the same property of the debtor can either iron out their differences via a CPLR 5239 proceeding or a plenary action (*see* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C5239:1 at 469 [1997]). Parties seeking to collect a debt can, of course, bring a declaratory judgment action to resolve priority issues. But that is not because a private right of action can be implied under CPLR 5239, nor does it follow that tort-like relief can be obtained such as the damages plaintiffs seek here. Rather, the priority rights of creditors are derived from their

underlying dealings with the judgment debtor (contractual or otherwise) and the nature and timing of the judgments they seek to enforce. Professor Siegel's comment therefore has no bearing on the issue we confront here—whether a duty imposed by statute has given rise to a private right of action.

4 There is no concrete temporal limitation on initiation of a CPLR 5240 proceeding, which is largely equitable in nature, although such relief should be pursued within a reasonable time after the injury is incurred; where tangible or real property is at issue, post-execution relief will generally be unavailable once third parties obtain an interest in the property, thereby introducing countervailing equitable concerns (*see generally Guardian Loan Co. v. Early,* 47 N.Y.2d 515, 419 N.Y.S.2d 56, 392 N.E.2d 1240 [1979]).

5 The other New York cases cited by plaintiffs in this regard similarly involved instances where a bank violated a restraining notice by failing to freeze an account (*see Nardone v. Long Is. Trust Co.,* 40 A.D.2d 697, 336 N.Y.S.2d 325 [2d Dept.1972]; *Matter of Sumitomo Shoji New York v. Chemical Bank N.Y. Trust Co.,* 47 Misc.2d 746, 1965 WL 19791 [Sup.Ct., N.Y. County 1965], *affd.* 25 A.D.2d 499, 267 N.Y.S.2d 477 [1st Dept.1966]; *Jackson v. TD Bank,* 28 Misc.3d 1222[A], 2010 N.Y. Slip Op. 51431[U], 2010 WL 3221569 [Civ.Ct. Kings County 2010]; *Mazzuka v. Bank of N. Am.,* 53 Misc.2d 1053, 280 N.Y.S.2d 495 [Civ.Ct., Queens County 1967]; *see also Goldberg v. Active Fire Sprinkler Corp.,* 194 A.D.2d 765, 599 N.Y.S.2d 1010 [2d Dept.1993] [noncompliance with income execution]).

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Acevedo v. Citibank, N.A.

10 Civ. 8030 (PGG),

2019 WL 1437575

(S.D.N.Y. Mar 31, 2019)

[Rejection of class action status for claims under EIPA]

2019 WL 1437575
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Celinda ACEVADO and Jacqueline Lopez, individually and on behalf of all others similarly situated, Plaintiffs,
v.
CITIBANK, N.A., Defendant.

10 Civ. 8030 (PGG)
|
Signed 03/31/2019

Attorneys and Law Firms

Gabriel Oliver Koppell, Daniel Feist Schreck, Law Offices of G. Oliver Koppell & Assoc., Charles Wayne Juntikka, Charles Juntikka & Associates, LLP, New York, NY, for Plaintiff Celinda Acevado.

Gabriel Oliver Koppell, Daniel Feist Schreck, Law Offices of G. Oliver Koppell & Assoc., New York, NY, for Plaintiff Jacqueline Lopez.

Stuart Alan Krause, Benjamin H. Green, David Scott Hamilton, Tracee Elaine Davis, Zeichner Ellman & Krause LLP, New York, NY, for Defendant.

MEMORANDUM OPINION & ORDER

Paul G. Gardephe, United States District Judge

***1** In this putative class action, Plaintiffs Celinda Acevado and Jacqueline Lopez allege that Defendant Citibank, N.A., restrained their bank accounts and charged them fees in violation of New York's Exempt Income Protection Act.

Citibank has moved to dismiss the Second Amended Complaint ("SAC") pursuant to Fed. R. Civ. P. 12(b)(1) and (6), or, in the alternative, to compel arbitration.[1] (Mot. (Dkt. No. 157); Def. Br. (Dkt. No. 165) at 5) Citibank argues, inter alia, that the SAC alleges no theory under which the amount in controversy exceeds $ 5 million, as required under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), and that in any event Plaintiffs' claims are subject to binding arbitration and class action waiver. (See Def. Br, (Dkt. No. 165) at 15-23)

Plaintiffs have moved for leave to file a Third Amended Complaint ("TAC"), which would add (1) a new representative plaintiff to the action; and (2) certain remedies not sought in the SAC. (See Mot. (Dkt. No. 152; Pltf. Br. (Dkt. No. 155) at 6-7)

For the reasons stated below, Defendant's motion to dismiss the Second Amended Complaint will be granted, and Plaintiffs' motion for leave to file a Third Amended Complaint will be denied.

BACKGROUND

I. FACTS

A. THE EXEMPT INCOME PROTECTION ACT

The New York Legislature passed the Exempt Income Protection Act (the "EIPA") in 2008. (SAC (Dkt. No. 91) ¶ 19) At the time Plaintiffs filed the SAC, the Act prohibited judgment-creditors from placing a restraint on the first $ 2,100 in a debtor's bank account, regardless of the source of those funds.[2] (Id. (citing C.P.L.R. § 5222(i)) The EIPA also protects up to $ 2,500 of " 'reasonably identifiable' federally exempt benefits payments." (Id. ¶ 20) Where judgment-creditors serve restraining notices on banks concerning accounts that contain an amount equal to or less than 90 percent of the protected amount – or, in the case of federally exempt benefit payments, an amount equal to or less than $ 2,500 – banks are to deem the restraining notices void. (Id. ¶ 19; C.P.L.R. §§ 5222(h)-(i)) Where judgment-creditors attempt to restrain such accounts, or otherwise fail to follow the procedures set out in the EIPA for restraining accounts, banks may not charge fees to the account-holder in connection with the attempted restraint. (SAC (Dkt. No. 91) ¶ 19)

B. THE PARTIES

***2** Plaintiffs are New York residents who maintained bank accounts at Citibank branches in New York City. (Id. ¶¶ 10-11) Citibank is a Delaware corporation. (See id. ¶ 9)

In or about June 2009, Plaintiff Acevado received a notice from Citibank stating that her savings account had been frozen due to a restraining notice and/or levy served on Citibank by non-party judgment creditors. (Id. ¶ 12) At that time, Acevado's Citibank account contained approximately $ 2,000 in wages she had earned. (Id.) Acevado alleges – "[u]pon information and belief" – that as a result of the restraint, she "could not access any of the funds in her account, either in person, through an automated teller machine, by debit card[,] or by check," and that Citibank charged her administrative fees totaling approximately $ 100 in connection with the restraint. (Id. ¶ 13)

On or about January 5, 2011, Lopez received a notice from Citibank stating that her checking account had been frozen due to a restraining notice and/or levy served on Citibank by non-party judgment creditors. (Id. ¶ 14) At that time, Lopez's account contained approximately $ 3,305.60 in wages she had earned. (Id.) Lopez alleges – again, "[u]pon information and belief" – that she "could not access any of the funds in her account, either in person, through an automated teller machine, by debit card[,] or by check," and that Citibank advised her that her funds would be transferred to a Citibank holding account, and charged her an administrative fee of approximately $ 125 in connection with the restraint. (Id. ¶ 15)

Plaintiffs contend that Citibank violated the EIPA by restraining their accounts and charging them fees in connection with the restraints; moreover, Plaintiffs claim that Citibank has "unlawfully regularly restrained" similarly situated customers' accounts, "in numerous instances subsequently transferr[ing] the funds to creditors" and "impos[ing] fees and penalties" in "clear violation of the [EIPA's] terms." (Id. ¶ 4)

II. PROCEDURAL HISTORY

This case has a lengthy procedural history. Plaintiff Acevado commenced this action on October 21, 2010, alleging essentially the same facts as are outlined above. (See Cmplt. (Dkt. No. 1)) Plaintiff asserted claims for conversion, unjust enrichment, breach of fiduciary duty, negligence, and breach of contract, and sought an injunction enjoining Citibank from engaging in the alleged EIPA violations and requiring Citibank to comply with the EIPA. (Id.) Acevado brought these claims on behalf of a proposed class consisting of all Citibank account holders "who, during the period between January 1, 2009, and the present, had their accounts restrained and/or levied upon ... despite the fact that the accounts contained funds exempted from restraint and/or levy, and/or contained an amount lower or equal to the statutorily prescribed protected amount from restraint and/or levy." (Id. ¶ 23)

The Amended Complaint was filed on February 14, 2011. (See Am. Cmplt. (Dkt. No. 10)) The Amended Complaint adds Lopez as a representative plaintiff. (Id.) Unlike the Complaint – which states that the Court has jurisdiction pursuant to 28 U.S.C. § 1332 (see Cmplt. (Dkt. No. 1) ¶ 7) – the Amended Complaint invokes federal jurisdiction pursuant to the Class Action Fairness Act (the "CAFA"), alleging that "[u]pon information and belief, the damages of the Class exceed $ 5,000,000." (Am. Cmplt. (Dkt. No. 10) ¶ 7) The Amended Complaint also adds a cause of action for "violations of the [EIPA]." (Id. ¶¶ 36-43)

***3** On March 23, 2012, this Court dismissed Plaintiffs' (1) common law causes of action, and (2) claim for violations of the EIPA, to the extent that claim sought money damages. The Court concluded that "there is no express or implied private right of action under the EIPA permitting an account holder to sue his or her bank for money damages related to EIPA violations." See Acevado v. Citibank, N.A., No. 10 Civ. 8030 (PGG), 2012 WL 996902, at *5-15 (S.D.N.Y. Mar. 23, 2012).

On March 20, 2013, this Court dismissed Plaintiffs' claim for injunctive relief pursuant to the EIPA, reasoning that there is no private right of action under the EIPA to seek such relief. See Acevado v. Citibank, N.A., No. 10 Civ. 8030 (PGG), 2013 WL 1149666, at *3-6 (S.D.N.Y. Mar. 20, 2013). Plaintiffs then appealed this Court's dismissal orders. (See Corrected Notice of Appeal (Dkt. No. 52))

The Second Circuit subsequently considered two appeals involving the EIPA. See Cruz v. TD Bank. N.A., 742 F.3d 520 (2d Cir. 2013). In both cases, district courts had granted Rule 12(b)(6) motions to dismiss, finding – as this Court had found – that "judgment debtors do not have a private right of action against their banks for the banks' violation of the EIPA's procedural requirements." Id. at 522. In connection with these appeals, the Second Circuit certified the following questions to the New York Court of Appeals:

first, whether judgment debtors have a private right of

> action for money damages and injunctive relief against banks that violate [the] EIPA's procedural requirements; and
>
> second, whether judgment debtors can seek money damages and injunctive relief against banks that violate [the] EIPA in special proceedings prescribed by Article 52 of the CPLR and, if so, whether those special proceedings are the exclusive mechanism for such relief or whether judgment debtors may also seek relief in a plenary action.

Id.

The New York Court of Appeals answered the first question in the negative, ruling that there is no "private right to bring a plenary action for injunctive relief [or] money damages" under the EIPA. Cruz v. TD Bank. N.A., 22 N.Y.3d 61, 78 (2013), As to the second question, the court held that a "judgment debtor can secure relief from a bank arising from a violation of the EIPA in a CPLR article 52 special proceeding[.]" Id. The court further ruled that "the statutory mechanisms for relief [under CPLR article 52] are exclusive." Id.

The Court of Appeals explained that, pursuant to CPLR Article 52, where

> a judgment debtor believes that a bank has restrained assets in error in violation of the EIPA – meaning there is a controversy between the bank and the account holder over access or "rights" in the deposited funds – he or she can obtain a civil remedy, such as the release of any money unlawfully restrained, an injunction barring transfer of exempt property to the sheriff or judgment creditor, or reimbursement of any bank fees improperly charged.

Id. at 75-76: see Cruz v. T.D. Bank. N.A., No. 10 Civ. 8026 (PKC), 2014 WL 1569491, at *9 (S.D.N.Y. Apr. 17, 2014) (noting that "[a]vailable remedies ... do not include punitive or exemplary damages, 'obey-the-law' injunctions, or disgorgement of unjust profits").

After the New York Court of Appeals issued its opinion, the Second Circuit affirmed the judgments of the district courts granting dismissal. See Cruz, 742 F.2d at 522-23. In both cases, however, the Circuit remanded with instructions to permit plaintiffs to move for leave to amend their complaints. Id. at 523.

***4** After the Second Circuit's decision in Cruz, Plaintiffs in the instant action moved for a remand, and asked the Second Circuit to direct this Court to permit them to move for leave to amend. The Second Circuit granted that motion on February 26, 2014. Acevado v. Citibank, N.A., No. 13-1396 (Dkt. No. 55) (2d Cir. Feb. 26, 2014). Plaintiffs subsequently requested that the Court set a briefing schedule for Plaintiffs' anticipated motion for leave to file a Second Amended Complaint. (Dkt. No. 56)

At a May 1, 2014 conference following the Second Circuit's remand, this Court expressed concern – in light of the New York Court of Appeals decision – as to whether the amount in controversy would reach the $ 5 million threshold under CAFA:

> The Court: [T]he question I have is given how the damages have been limited. Because all I have been told is there are thousands of people. I know there are multiple thousands, but I don't know whether that's two thousand or three thousand. I have no idea. So I know the allegation is there are thousands of individuals who have been affected by this, but given how the damages have been limited, I don't know whether it's going to amount to $ 5 million or not, and I wanted to flag that as a concern that I have.
>
> Plaintiffs' Counsel: Understood. As I have said, we really may need some discovery, and I guess we will deal with that in due course.
>
> The Court: Yes.

(May 1, 2014 Tr. (Dkt. No. 66) at 10-11) This Court nonetheless granted Plaintiffs permission to move for leave to file a Second Amended Complaint. (Order (Dkt. No. 58))

Plaintiffs filed their motion to amend on August 1, 2014, and submitted a proposed SAC seeking, inter alia, compensatory, statutory, exemplary, and punitive damages, and an injunction "enjoining Defendant from continuing to engage in the unlawful and inequitable conduct alleged herein and requiring Defendant to comply with [the] EIPA." (Mot. (Dkt. No. 73); Koppell Decl., Ex. 1 (Dkt. No. 74-1)) On March 13, 2015, this Court denied Plaintiffs' motion, explaining that "the remedies sought in the proposed SAC go far beyond [those authorized by the New York Court of Appeals, which include only] 'the release of any money unlawfully restrained, an injunction barring transfer of exempt property ..., or reimbursement

of any bank fees improperly charged.' " (March 13, 2015 Mem. Op. & Order (Dkt. No. 81) at 13 (quoting Cruz, 22 N.Y.3d at 76)) However, the Court's denial of Plaintiffs' motion to amend was "without prejudice to ... a renewed motion founded on a proposed SAC that seeks permissible remedies." (Id.)

On May 21, 2015, Plaintiffs moved for leave to file a revised SAC (see Mot. (Dkt. No, 84)), and this Court granted that motion on September 16, 2015. (Order (Dkt. No. 89))

On September 22, 2015, Plaintiffs filed the SAC. (SAC (Dkt. No. 91)) The SAC asserts two causes of action pursuant to C.P.L.R. § 5239 and C.P.L.R. § 5240, both premised on alleged violations of the EIPA. (Id. ¶¶ 37-53) Plaintiffs bring these claims on behalf of a class defined as

> a) All individual account holders of Defendant who, during the period between January 1, 2009 and the present, had their accounts restrained ... in violation ... of the [EIPA] and whose accounts have ... not been applied by a sheriff or receiver to the satisfaction of a judgment[ ] (the "5239 Class")
>
> b) All individual account holders of Defendant who, during the period between January 1, 2009 and the present, had their accounts restrained and/or levied upon ... in violation ... of the [EIPA][ ] (the "5240 Class").

***5** (Id. ¶ 25)

For the 5239 Class, Plaintiffs seek "a release of any moneys unlawfully restrained in violation of EIPA"; "a refund of any fees improperly charged by Defendant in violation of EIPA"; and an injunction "[e]njoining the Defendant from transferring any of the 5239 Class['s] moneys that have been unlawfully restrained by the Defendant in violation of [the] EIPA." (Id., ad damnum clause)

For the 5240 Class, Plaintiffs seek "a refund of any fees improperly charged by the Defendant in violation of [the] EIPA." (Id.)

On April 8, 2016, Citibank moved to dismiss the SAC. Inter alia, Citibank argued that this Court lacks subject matter jurisdiction, because Plaintiffs have no "reasonable basis to assert that that the amount in controversy could reach the five million dollar threshold required by CAFA." (Mot. (Dkt. No. 107); Def. Br. (Dkt. No. 112) at 16)

In a March 20, 2017 order, this Court ruled that "the issue of subject matter jurisdiction must be resolved before any other issues in Defendant's motion are addressed," and noted that "it is not clear from the SAC whether the $ 5 million threshold set forth in CAFA is met." (Order (Dkt. No. 119) at 6, 9) The Court went on to deny Defendant's motion to dismiss without prejudice and ordered the parties to conduct sixty days of jurisdictional discovery. (Id. at 10)

In a November 30, 2017 letter, Plaintiffs informed the Court that they intended to seek permission to file a Third Amended Complaint, because "review of the files provided [by Citibank] and a recent determination by the Appellate Division Second Department establishes that, if given leave to replead the complaint ... there is sufficient evidence to conclude that well in excess of five-million dollars is at issue in this case." (Nov. 30, 2017 Pltf. Ltr. (Dkt. No. 137) at 1) Plaintiffs explained that jurisdictional discovery "indicated that ... Defendant aggregated the value of multiple depositor accounts together in order to calculate the exemption amount," a practice the Second Department had "recently ruled ... violate[s] [the EIPA]." (Id. at 2 (citing Jackson v. Bank of America, 149 A.D.3d 815 (2d Dept. 2017)) Plaintiffs stated that the proposed Third Amended Complaint would add a representative plaintiff whose accounts had been aggregated impermissibly, and would seek "damages from the unlawful aggregation of depositors' accounts prior to calculating EIPA exemptions, resulting in the deprivation of exempt property from depositors." (Id. at 1)

After multiple discovery disputes and extensions of the jurisdictional discovery deadline, the parties completed jurisdictional discovery. Plaintiffs then moved for leave to file a third amended complaint ("TAC"), while Defendant moved to dismiss the SAC. (Mot. (Dkt. No. 152); Mot. (Dkt. No. 157))

DISCUSSION

I. MOTION TO DISMISS

A. Subject Matter Jurisdiction

1. Applicable Law

Plaintiffs assert that this Court has subject matter jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2), which provides that

> ***6** [t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant[.]

28 U.S.C. § 1332(d)(2). CAFA permits aggregation of the claims of individual class members to reach the jurisdictional amount. See 28 U.S.C. § 1332(d)(6) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs,").

" 'Determining the existence of subject matter jurisdiction is a threshold inquiry[,] and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.' " Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008) (quoting Arar v. Ashcroft, 532 F.3d 157, 168 (2d Cir. 2008)), aff'd, 561 U.S. 247 (2010). "In reviewing a motion to dismiss under Rule 12(b)(1), the court 'must accept as true all material factual allegations in the complaint, but [it is] not to draw inferences from the complaint favorable to Plaintiffs.' " Wood v. Gen. Motors Corp., No. 08 Civ. 5224 (JFB) (AKT), 2010 WL 3613812, at *3 (E.D.N.Y. Aug. 23, 2010) (quoting Toomer v. Cty. of Nassau, 07 Civ. 01495 (JFB) (ETB), 2009 WL 1269946, at *3 (E.D.N.Y. May 5, 2009)).

"On a motion to dismiss challenging the sufficiency of the amount in controversy, the sum claimed by the plaintiff ordinarily controls, so long as it is claimed in good faith," Stengel v. Black, No. 03 Civ. 0495 (GEL), 2004 WL 1933612, at *1 (S.D.N.Y. Aug. 30, 2004) (citing St. Paul Mercury Indem., Co. v. Red Cab Co., 303 U.S. 283, 289 (1938)). Generally, "[a] suit may not be dismissed for lack of the jurisdictional amount in controversy unless it appears 'to a legal certainty' that the plaintiff cannot recover the amount claimed." Id. (quoting St. Paul, 303 U.S. at 289): see also Aros v. United Rentals, Inc., No. 3:10 Civ. 73 (JCH), 2011 WL 1647471, at *2 (D. Conn. Apr. 25, 2011) (applying "legal certainty" standard in a class action under CAFA).

In resolving "disputed jurisdictional factual issues," a court may "reference ... evidence outside the pleadings. The Court may decide the matter on the basis of affidavits or other evidence, but 'argumentative inferences favorable to the party asserting jurisdiction should not be drawn.' " Commer v. McEntee, No. 00 Civ. 7913 (RWS), 2006 WL 3262494, at *8 (S.D.N.Y. Nov. 9, 2006) (quoting Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir. 1992) (internal citations omitted)). Moreover, " '[w]here ... jurisdictional facts are challenged, the party asserting jurisdiction must support those facts with competent proof and justify its allegations by a preponderance of the evidence.' " Lapaglia v. Transamerica Cas. Ins. Co., 155 F. Supp. 3d 153, 157 (D. Conn. 2016) (quoting United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994)); Pang v. Allstate Ins. Co., No. 97 Civ. 4971 (WK), 1998 WL 190291, at *2 (S.D.N.Y. Apr. 21, 1998) (plaintiff's satisfaction of amount in controversy requirement hinged primarily on punitive damages claim; dismissal granted because plaintiff had not demonstrated a "reasonable probability" that his claim for punitive damages was viable), aff'd, 173 F.3d 845 (2d Cir. 1999); see also McNutt v. Gen. Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936) ("If [the plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."); Thomson v. Gaskill, 315 U.S. 442, 446 (1942) (citing McNutt, and explaining that a complaint "must be dismissed if the evidence in the record does not support the allegations as to jurisdictional amount").[3]

2. Available Remedies

***7** As the New York Court of Appeals explained, "if a judgment debtor believes that a bank has restrained assets in error in violation of the EIPA – meaning there is a controversy between the bank and the account holder over the access or 'rights' in the deposited funds – he or she can obtain a civil remedy, such as the release of any money unlawfully restrained, an injunction barring transfer of exempt property to the ... judgment creditor, or reimbursement of any bank fees improperly charged" pursuant to C.P.L.R, § 5239. Cruz, 22 N.Y.3d at 75-76. C.P.L.R. § 5240 permits "[c]omparable relief[,] ... even after the assets have been transferred to the judgment creditor," but such relief is available only against the judgment creditor, and not against the judgment debtor's bank. See id. at 76; see also Cruz, 2014 WL 1569491, at

*9 ("[W]here there has been a transfer of funds by a bank to a judgment creditor which includes improperly restrained exempt property, the judgment debtor's remedy is against the judgment creditor and not the garnishee-bank.") "Each of the three forms of relief cited by the New York Court of Appeals is remedial in nature, aimed at undoing the effects of an improper account garnishment and restoring a judgment debtor to the position in which he or she would have been had the wrongful garnishment never taken place." Cruz, 2014 WL 1569491, at *8.

3. Evidence Obtained Through Jurisdictional Discovery

In a June 9, 2017 joint letter, the parties informed the Court that they had agreed upon a process for jurisdictional discovery. (See June 9, 2017 Jt. Ltr. (Dkt. No. 122)) Citibank reported that – in response to restraining notices obtained under New York law – it had effected a restraint in 27,666[4] cases between 2009 and September 22, 2015 – the date the SAC was filed. Recognizing that this figure is too large to permit review of each individual case, the parties agreed that Professor Merrill Leichty of Drexel University – a statistics expert retained to advise Citibank – would generate a sample from which data about the amount in controversy could be extrapolated. (Id.) Per the parties' agreement, Professor Liechty manually reviewed 554 of the 27,666 restraint files. Citibank provided Plaintiffs with the results of that review, including: (1) the date service of the restraint notice was received; (2) the case number; (3) whether the EIPA was applicable to the restraint; (4) the applicable exemption at the time the restraint notice was served; (5) the amount Citibank collected in fees related to the restraint; (6) the amount of any fee reversal; and (7) the date the file was closed. (Aug. 23, 2017 Def. Ltr. (Dkt. No. 129)) Citibank also provided Plaintiffs with 185 of the actual restraint files from the 554-file sample. (Id.)

Citibank's account of the results of jurisdictional discovery is set out in the declarations of Professor Liechty and various Citibank employees, and is supported by numerous spreadsheets listing the relevant restrained accounts and the fees imposed. Polly Wagner, Citibank's Senior Vice President for Legal Operations, explains that "from January 1, 2009 to September 22, 2015, Citibank opened ... a total of 27,666 [r]estraint [f]iles." (Wagner Decl. (Dkt, No. 159) ¶ 14) Restraint files typically contain "the restraining notice, other documentation received from the judgment creditor, the case card, financial posting, exemption claims, a decision calculator, correspondence with the judgment creditor or account holder, copies of releases, turnover orders and/or executions."[5] (Id. ¶ 18) The 27,666 restraint files opened during this period "are, with perhaps few, if any, exceptions[,] now closed." (Id. ¶ 11)

Professor Liechty explains that Citibank informed him that of the 554 restraint files in the sample he analyzed, a fee was charged in 370 cases[6] – an amount that corresponds to 66.787 percent of the files. (Liechty Decl. (Dkt. No. 158) ¶ 24) Applying that percentage, Liechty concluded that – of the total 27,666 files restrained – fees were imposed in 18,478 cases. After application of the parties' agreed-upon margin for error, the number could be as few as 17,393 or as many as 19,653 files. (Id. ¶¶ 25-26)

***8** Wagner explains that in the 370 files in which a fee was imposed, the average amount collected was $ 122.76. Applying this figure to the 18,478 files Liechty determined were restrained and in which a fee was charged, Wagner concludes that Citibank collected approximately $ 2,268,359.28 in restraint fees.[7] (Wagner Decl. (Dkt. No. 159) ¶¶ 25-26)

Citibank further determined that some restraints resulted in the imposition of additional, non-restraint fees; for the 258 files for which such non-restraint fees were imposed, the average fee was $ 10.11. (Green Decl. (Dkt. No. 162) ¶ 13) Applying that sum to all 18,478 estimated restrained files, these non-restraint fees total $ 186,812.58. (Id. ¶ 17) Citibank estimates that the restraint and non-restraint fees – once totaled – amount to $ 2,455,171.86. (Id. ¶ 18) Citibank's calculations and analyses are set forth in spreadsheets submitted to Plaintiff and the Court. (See, e.g., id., Exs. 31-32 (fee calculations) (Dkt. Nos. 162-5, 162-6); Wagner Decl., Exs. 4-6 (restraint file spreadsheets) (Dkt. Nos. 159-1 to 159-4); Chellappa Decl, Ex. 16 (spreadsheet of restraint files in which an account was restrained) (Dkt. No. 160-1))

Citibank further determined that – in response to restraining notices obtained under New York law between September 23, 2015 and December 31, 2017 – Citibank opened 6,552 restraint files, (Green Decl. (Dkt. No. 162) ¶ 19, Ex. 33; Wagner Decl. (Dkt. No. 159) ¶ 28)[8] Citibank calculates that the total sum of restraint and non-restraint fees imposed with respect to these files is $ 581,439.12 (Green Decl. (Dkt. No. 162) ¶ 19, Ex. 33) When combined with the fees imposed since 2009, the total sum of fees imposed pursuant to restraints amounts to $ 3,026,610.98.

Plaintiffs' understanding of the results of jurisdictional discovery is set out in the declaration of Ian Engoron. When Engoron conducted his analysis of the jurisdictional discovery, he was a third-year law student and law clerk employed by Plaintiffs' counsel. (See Engoron Decl. (Dkt No, 154) ¶¶ 1, 3) Plaintiffs did not provide the Court with the work papers and spreadsheets that presumably underlie or reflect Engeron's calculations.

Engoron reviewed the spreadsheet Citibank created describing the 554 files Citibank analyzed, as well as the 184 actual files Citibank produced. From this information, Engoron compiled his own spreadsheet, and extrapolated the information reflected in these files to the full number of restraints filed during the class period.[9] (Id. ¶ 6) Engeron's extrapolations are based only on the 185 actual files he reviewed, rather than the information reflected in the 554-sample Citibank spreadsheet. (See Pltf. Reply Br. (Dkt. No. 156) at 9 n. 1)

***9** Engeron's calculation of the total amount of restraint and non-restraint fees imposed between 2009 and September 22, 2015 differs slightly from Citibank's calculation. With respect to restraint fees, Engeron concludes that Citibank charged $ 2,330,500 in "full restraint fees" and $ 103,078.92 in partial restraint fees, for a total of $ 2,433,578.92 in restraint fees. (Id. ¶ 8) Engoron further determined that Citibank imposed approximately $ 119,260.07 in non-restraint fees on the class members during this period. (Id. ¶ 10) According to Engoron, the restraint and non-restraint fees total approximately $ 2,552,839.

Engoron further extrapolated the amount of restraint and non-restraint fees for the period between September 23, 2015 and December 31, 2017. Engoron determined that, during this period, Citibank imposed an additional $ 776,875 in full restraint fees; $ 34,344.78 in partial restraint fees; and $ 39,757.32 in non-restraint fees – for a total of an additional $ 850,977.10.[10] (Id. ¶¶ 9, 11) When added to the fees imposed between 2009 and September 22, 2015, the total sum of restraint and non-restraint fees Engoron computes is $ 3,403,816.09. (See id. ¶ 10)

Engoron also performed calculations concerning a component of damages not addressed by Citibank. This category of damages concerns Citibank's alleged aggregation of account holders' accounts, Engoron reported that the 185 files he had reviewed "revealed that for 56 account holders [Citibank had] improperly aggregated their accounts and improperly restrained $ 37,054.37." Extrapolating this figure to all restrained files between 2009 and September 22, 2015, Engoron "calculated that $ 5,482,844.99 in monies were improperly aggregated and restrained [by the] Bank." (Id. ¶ 11) Extrapolating further, to December 31, 2017, Engoron surmises that "an additional $ 1,827,587.78 was likely improperly aggregated and restrained [by the] Bank," totaling "in excess of seven[ ]million three hundred thousand dollars combined." (Id.)[11]

4. Analysis

Citibank argues that jurisdictional discovery has revealed that Plaintiffs cannot satisfy the $ 5 million amount-in-controversy requirement for jurisdiction pursuant to CAFA. According to Citibank, "as of September 22, 201[5], the total amount of fees collected by Citibank was $ 2,455,171,86, less than half of the jurisdictional threshold." Even if fees collected after the filing of the SAC are considered, the $ 5 million threshold would not be met.[12] (See Def. Br. (Dkt. No. 165) at 16, 29 n.11 (emphasis in original)) Citibank further maintains that "Plaintiffs cannot seek to use a demand for injunctive relief, with an entirely unspecified value, to add value to litigation that is otherwise millions of dollars below the CAFA monetary threshold." (Id. at 17)

***10** Plaintiffs contend that – as of December 2017 – they have alleged "more than three million dollars in estimated fees charged by [Citibank]," and "more than seven million dollars in monies improperly restrained by [Citibank] when it chose to improperly aggregate debtors[']s accounts together in calculating the exempt amount." Were damages to be calculated as of September 22, 2015, Plaintiffs contend that they have shown "more than two million five hundred thousand dollars in fee damages and approximately five[ ]million five hundred thousand dollars in aggregation damages." (Pltf. Reply Br. (Dkt. No. 156) at 9-10 (citation omitted))

a. "Aggregation" Damages

The SAC does not allege that Defendants impermissibly aggregated Plaintiffs' accounts, but Plaintiffs seek to add such a claim in their proposed Third Amended Complaint. (Nov. 30, 2017 Pltf. Ltr. (Dkt. No. 137))

In Jackson v. Bank of Am., N.A., 149 A.D.3d 815 (2d Dept. 2017), an EIPA class action, plaintiffs claimed that when restraining notices were sent to the defendant bank, the bank improperly aggregated the account holders' checking and savings accounts. The Second Department affirmed a trial court's denial of the bank's motion to dismiss, concluding that while the law "is ambiguous as to whether it applies to an 'amount' on deposit at a bank or to each 'account' maintained at a bank," the legislative history "indicates that the statute applies to each account" Jackson, 149 A.D.3d at 821.

This court is aware of no other New York court that has addressed the question of whether banks may aggregate accounts before determining what funds are exempt under the EIPA. Accordingly, this Court assumes – for purposes of resolving the pending motions – that the EIPA forbids the aggregation of accounts for purposes of determining the exempt amount. See Cornejo v. Bell, 592 F.3d 121, 130 (2d Cir. 2010) (federal courts are "bound 'to apply the law as interpreted by New York's intermediate appellate courts ... [absent] persuasive evidence that the New York Court of Appeals ... would reach a different conclusion' ") (quoting Pahuta v. Massey-Ferguson 170 F.3d 125, 134 (2d Cir. 1999)); see also Comm'r v. Bosch's Estate, 387 U.S. 456, 465 (1967) ("[T]his Court [has] held that 'an intermediate appellate state court ... is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " (quoting West v. American Tel. & Tel. Co., 311 U.S. 223 (1940))). The Court addresses below whether Plaintiffs can meet the $ 5 million CAFA threshold on the basis of the "approximately seven million dollars" in aggregation damages Plaintiffs assert exist as of December 2017, or the "approximately five[ ]million five hundred thousand dollars in aggregation damages" Plaintiffs assert existed as of September 22, 2015. (Pltf. Reply Br. (Dkt. No. 156) at 9-10)

As an initial matter, in the event that Plaintiffs' accounts were improperly aggregated, Plaintiffs are entitled only to "release of any money unlawfully restrained" as a result of such aggregation. Such funds must currently be restrained by Citibank to be recoverable: if money restrained in the past has since been transferred to a third-party judgment creditor, the New York Court of Appeals has made clear that Plaintiffs' avenue for relief is to sue that judgment creditor, and not the bank. See Cruz, 2014 WL 1569491, at *9. Plaintiffs are likewise not entitled to damages for unlawfully restrained funds that Citibank already has returned to them, because the relief available pursuant to C.P.L.R. 5239 and 5340 is merely "remedial in nature, aimed at undoing the effects of an improper account garnishment and restoring a judgment debtor to the position in which he or she would have been had the wrongful garnishment never taken place." Id. at *8. Here, there is no evidence that Citibank presently is restraining any of the improperly aggregated funds of class members.

***11** Indeed, the only evidence Plaintiffs offer as to the value of the funds that were restrained pursuant to unlawful aggregation is the following statement from the Engoron Declaration:

> Above and beyond [restraint and non-restraint] fees, the 185 files [Engoron reviewed] revealed that for 56 account holders the Bank improperly aggregated their accounts and improperly restrained $ 37,054.37. Extrapolating that for 27,374 individuals, [Engoron] calculated that $ 5,482,844.99 in monies were improperly aggregated and restrained by the Bank through September 22, 2015. Extrapolating further through December 2017, an additional $ 1,827,587.78 was likely improperly aggregated and restrained [by the] Bank. These improperly restrained monies total in excess of seven-million three hundred thousand dollars combined.

(Engeron Decl. (Dkt. No. 154) ¶ 11)

The figures cited by Engoron reflect his estimate of all funds restrained by Citibank between 2009 and 2017 as the result of improper aggregation. But what matters for purposes of the amount in controversy issue is the amount of funds Citibank continues to restrain.[13] Plaintiff provides no estimate of this amount, but Citibank has provided evidence suggesting that the amount of funds currently being held by Citibank is quite low. In her declaration, Wagner asserts that the 27,666 restraint files opened during this period "are, with perhaps few, if any, exceptions[,] now closed." (Wagner Decl. (Dkt. No. 159) ¶ 11)

Because Plaintiffs have offered no evidence that Citibank now holds in restraint improperly aggregated funds that

may be released to Plaintiffs as a result of this litigation – much less proof that the sum currently restrained amounts to millions of dollars – this Court will not consider "aggregation damages" in determining whether Plaintiffs can satisfy the CAFA amount-in-controversy threshold.

b. Damages for Injunctive Relief

The SAC seeks an injunction "[e]njoining the Defendant from transferring any of the 5239 Class[ ]'s moneys that have been unlawfully restrained by the Defendant in violation of [the] EIPA." (SAC (Dkt. No. 91) ad damnum clause). Plaintiffs contend that "the value of the injunctive relief sought [in the SAC] substantially increases th[e] amount [in controversy]." (Pltf. Reply Br. (Dkt. No. 156) at 12) Citibank, by contrast, argues that the value of the proposed injunctive relief is speculative, and contends that "Plaintiffs cannot seek to use a demand for injunctive relief, with an entirely unspecified value, to add value to litigation that is otherwise millions of dollars below the CAFA monetary threshold," (Def, Br, (Dkt. No. 165) at 17)

***12** " 'In actions seeking ... injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.' " Correspondent Servs. Corp. v. First Equities Corp. of Fla., 442 F.3d 767, 769 (2d Cir. 2006) (quoting Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 347 (1977)). "Because that amount is measured from the plaintiff's perspective, the value of the requested relief is the monetary value of the benefit that would flow to the plaintiff if injunctive ... relief were granted." Am. Standard, Inc. v. Oakfabco, Inc., 498 F. Supp. 2d 711, 717 (S.D.N.Y. 2007) (citation omitted); see also Correspondent Servs. Corp., 442 F.3d at 769 ("We have observed that 'the amount in controversy is calculated from the plaintiff's standpoint; the value of the suit's intended benefit or the value of the right being protected or the injury being averted constitutes the amount in controversy....' " (quoting Kheel v. Port of New York Auth., 457 F.2d 46, 49 (2d Cir. 1972)); Parker v. Riggio, No. 10 Civ. 9504 (LLS), 2012 WL 3240837, at *7 (S.D.N.Y. Aug. 6, 2012) (" '[T]he prevailing method of calculating value [of injunctive relief] in this Circuit is the "plaintiff's viewpoint" approach, where one calculates the value to the plaintiff, not the cost to the defendant.' " (quoting Dimich v. Med-Pro, Inc., 304 F. Supp. 2d 517, 519) (S.D.N.Y. 2004))) "Benefits from an injunction must not be 'too speculative and immeasurable,' " however. Dimich, 304 F. Supp. at 519 (quoting Morrison v. Allstate Indemnity Co., 228 F.3d 1255, 1268-69 (11th Cir. 2000)); see also Parker v. Riggio, No. 10 Civ. 9504 (LLS), 2012 WL 3240837, at *7 (S.D.N.Y. Aug. 6, 2012) (same).

Here, Plaintiffs do not offer evidence – or even hazard a guess – as to the value of the injunctive relief they seek. Indeed, Plaintiffs' only response to Citibank's argument that the value of injunctive relief is speculative is the following assertion:

> [H]ad the Bank complied with [the] EIPA from 2009 through the end of 2017, more than ten million dollars would have been retained by class members. This averages to more than one million dollars per year in value if the injunctive relief is obtained going forward. Moreover, the value for class members to have access to their exempt monies ... is also substantial, even if such value cannot be readily quantified.

(Pltf. Reply Br. (Dkt. No. 156) at 11-12) This argument is confusing at best, and misleading at worst.

As an initial matter, it is not clear how a prospective injunction barring Citibank "from transferring any of the 5239 Class[ ]'s moneys that have been unlawfully restrained by the Defendant in violation of EIPA" would provide any quantifiable benefit to Plaintiffs: such an injunction would not put unlawfully restrained funds back in the hands of Plaintiffs.

To the extent that Plaintiffs claim that the requested injunctive relief represents a $ 10 million benefit to the class, that calculation is based on a combination of the restraint and non-restraint fees imposed (which Plaintiffs estimate amounts to $ 3,403,816.09, or roughly $ 378,202 per year) and the amounts restrained as a result of improper aggregation. As discussed above, however, Plaintiffs' aggregation figures reflect all funds ever restrained by Citibank during the class period; they do not reflect the funds Citibank currently has restrained but has not yet transferred to a third party judgment-creditor. Plaintiffs have offered no evidence as to the number of accounts currently restrained, or how much money is held in those accounts.

As for "the value for class members to have access to their exempt monies," this argument is not relevant to the SAC, which does not seek injunctive relief concerning access to exempt funds.[14]

***13** Because Plaintiffs have not offered any evidence demonstrating the value of the injunctive relief requested in the SAC – and indeed, have not offered any estimate as to the value of the injunctive relief sought in the SAC – the Court will not consider the value of injunctive relief in determining whether the amount in controversy threshold has been reached.

Without "aggregation damages" or value associated with injunctive relief, Plaintiffs are left only with their restraint and non-restraint fees, which they agree fall far short of $ 5 million. The Court concludes that Plaintiffs cannot satisfy the amount in controversy requirement, and accordingly grants Defendant's motion to dismiss the SAC for lack of subject matter jurisdiction.

II. MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

A. Legal Standard

Under the Federal Rules of Civil Procedure, leave to amend should be "freely give[n] ... when justice so requires." Fed. R. Civ. P. 15(a)(2). District courts "ha[ve] broad discretion to decide whether to grant leave to amend." Floyd v. City of New York, No. 16 Civ. 8655 (LAP), 2018 WL 4360773, at *4 (S.D.N.Y. Aug. 2, 2018) (internal quotation marks and citation omitted). Leave to amend may properly be denied in cases of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2007) (internal quotation marks and citation omitted). "[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied." Hayden v. County of Nassau, 180 F.3d 42, 53 (2d Cir. 1999).

B. Analysis

1. Futility

This litigation is now in its ninth year, and it has not yet proceeded past the motion to dismiss stage. Plaintiffs' ability to meet the requisite amount in controversy threshold has been at issue throughout. (See Def. Br. (Dkt. No. 20) at 18-19 ("The Amended Complaint contains only the inadequate and erroneous conclusory allegation that the amount in controversy exceeds $ 5 million.... There is no factual basis to support any contention that the amount in controversy in the aggregate is $ 5 million."); Def. Br. (Dkt. No. 112) at 16) ("The limited nature of the relief available to Plaintiffs precludes any reasonable basis to assert that the amount in controversy could reach the five million dollar threshold required by CAFA."); Def. Br. (Dkt. No. 165) at 16 ("[Jurisdictional] [d]iscovery has established that ... as of September 22, 2018, the total amount of fees collected by Citibank was ... less than half of the jurisdictional threshold." (emphasis in original))

The passage of time has worked to Plaintiffs' advantage with respect to the amount in controversy requirement. The class period initially covered only 2009 and 2010, but now encompasses more than a decade's worth of conduct. (See, e.g., Pltf. Reply Br. (Dkt. No. 156) at 8-9 ("The proposed class goes far beyond the date of the filing of the initial complaint, and, in fact, continues until this very day.... As membership in the class continues to grow because of the Bank's ongoing misconduct, the amount in controversy should not be limited to the date of the initial filing....")) Even so, Plaintiffs have not yet come close to demonstrating that they can meet the CAFA threshold.

***14** Plaintiffs argue that – whatever the deficiencies in their earlier complaints – the proposed TAG "addresses the stated concerns of this Court that the five-million-dollar Class Action Fairness Act ('CAFA') threshold cannot be met in this action." (Pltf. Br. (Dkt. No. 155) at 3) In support of this argument, Plaintiffs assert that the proposed TAC (1) "brings the class period forward to the present day"; (2) "includes additional claims for damages due to defendant Citibank N.A.'s ... unlawful conduct in aggregating the monies in judgment debtors' accounts prior to calculating exempt and restrained amounts"; and (3) "includes narrowly tailored requests for injunctive relief designed to stop the unlawful aggregation process and improve access to exempt amounts in judgment debtors' accounts, as well as returning any funds erroneously restrained and/or turned

over to creditors."[15] (Id.)

The Court has already addressed Plaintiffs' first two points. Even assuming arguendo that the class damages should be calculated through the present day, Plaintiffs' calculation of restraint and non-restraint fees does not amount to $ 5 million. Moreover, Plaintiffs have not offered any evidence as to the amount of improperly aggregated funds that currently remain restrained.

As for the "narrowly tailored requests for injunctive relief" Plaintiffs reference, the proposed TAC seeks orders (1) "[e]njoining the Defendant from limiting class members' access to exempt funds to in-person withdrawals from the Defendant and requiring the Defendant to give judgment debtors' access to exempt amounts in their accounts in the same manner as any account holder enjoys"; and (2) "[e]njoining the Defendant from aggregating all of the monies in class members' accounts prior to calculating restrained and exempt amounts," (Proposed TAC (Dkt. No. 153-1) ad damnum clause). The Court concludes that Plaintiffs have not offered a sufficient basis to find that the value of such relief would satisfy the amount in controversy requirement.

As discussed above, "the value of the requested [injunctive] relief is the monetary value of the benefit that would flow to the plaintiff if injunctive ... relief were granted," Am. Standard, Inc. v. Oakfabco, Inc., 498 F. Supp. 2d 711, 717 (S.D.N.Y. 2007) (citation omitted), and the value of such relief "must not be too speculative and immeasurable," Dimich, 304 F. Supp. at 519 (internal quotation marks and citation omitted). Here, Plaintiffs merely argue that "[w]hile the precise value of this injunctive relief cannot be calculated at this juncture, given the moneys at issue discussed above[,] this relief too will add substantial value to the object of this litigation." (Pltf. Br. (Dkt. No. 155) at 11) In short, Plaintiffs have offered no more than speculation as to the value of the benefit to the class of the injunctive relief sought in the proposed TAC.

Even if the value of the injunctive relief sought by Plaintiffs was not entirely speculative, the proposed injunctions go beyond those remedies authorized by the New York Court of Appeals, and thus are not available to Plaintiffs. As this Court has stated, " '[a]vailable remedies under Section 5239 do not include ... 'obey the law' injunctions....' " (March 13, 2015 Mem. Op. & Order (Dkt. No. 81) at 9 (quoting Cruz, 22 N.Y.3d at 76)) But the injunctive relief Plaintiffs seek in the proposed TAC is impermissible "obey-the-law" injunctions that would simply direct Citibank to comply with Plaintiffs' interpretation of the EIPA's requirements. Accordingly, the value of such relief – whatever it may be – cannot be considered in determining whether Plaintiffs can meet the amount in controversy threshold.

***15** Because Plaintiffs are "unable to demonstrate that [they] would be able to amend [their] complaint in a manner which would survive dismissal," Hayden v. County of Nassau, 180 F.3d at 53, Plaintiffs' motion for leave to file a Third Amended Complaint will be denied.[16]

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss the Second Amended Complaint is granted, and Plaintiffs' motion to for leave to file a Third Amended Complaint is denied. The Clerk of the Court is directed to terminate the motions (Dkt. Nos. 152, 157) and to close this case.

SO ORDERED.

All Citations

Slip Copy, 2019 WL 1437575

Footnotes

1 The page numbers of documents referenced in this Order correspond to the page numbers designated by this District's Electronic Case Filing system.

2 The amount judgment creditors are prohibited from restraining varies with New York's minimum wage. In 2008, when the EIPA was enacted, the amount was $ 1716. (SAC (Dkt. No. 91) ¶ 19; see also C.P.L.R. § 5222(i) ("A restraining notice issued pursuant to this section shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage ... or two hundred forty times the state minimum hourly wage...."). As a result of amendments to New York's minimum wage law – which went into effect on December 31, 2016 and which "raised the minimum wage variably in different parts of [New York] State" and made the minimum wage "variable based on the size of an employer" in New York City – the

exempt amount has increased, but varies depending on the accountholder's location and the size of his or her employer. (See April 7, 2017 New York Department of Financial Services Industry Ltr., available at https://www.dfs.ny.gov/docs/legal/industry/il170404.pdf)

3 One court has observed that "although the plausibility requirement is most commonly applied in the context of evaluating whether a complaint substantively states a claim for relief, there is little reason to suppose that it should not equally govern the evaluation of factual allegations that support federal subject matter jurisdiction, such as to evaluate facts alleged concerning an amount in controversy for purposes of federal diversity jurisdiction." Lapaglia, 155 F. Supp. 3d at 155) (citing Wood v. Maguire Automotive, LLC, 508 Fed. Appx. 65, 65 (2d Cir. 2013)) (affirming dismissal of complaint for lack of subject matter jurisdiction where plaintiff's "allegation in her complaint of $ 75,000 in controversy is conclusory and not entitled to a presumption of truth").

4 The June 9, 2017 joint letter refers to "approximately 27,665" cases. The exact number is 27,666. (See June 9, 2017 Jt. Ltr. (Dkt. No. 122); Wagner Decl. (Dkt. No. 159) ¶ 14)

5 The "case card" provides, inter alia, "an audit trail of when the case was opened[ ] [and] closed." (Wagner Decl. (Dkt. No. 159) ¶ 18) The "financial posting" consists of "sheets [that] help identify the [f]ee collected and the amount segregated towards the judgment at the time of service." (Id.)

6 Wagner explains that "these 370 cases include those in which one or more of the judgment debtor's account(s) were partially blocked (frozen) and those in which no account was blocked." (Wagner Decl. (Dkt. No. 159) ¶ 24) A judgment-debtor's account would not be restrained if, for example, the account "contains [an] amount in excess of the sum of the exempt amount, twice the amount of the judgment[,] and the restraint fee." (Id. ¶ 24)

7 After application of the parties' agreed upon margin for error, Citibank could have charged as much as $ 2,412,602.28 in restraint fees, or as little as $ 2,135,164.68.

8 The Wagner Declaration states that Citibank opened 1,276 restraint files between September 23, 2015 and December 31, 2015; 3,014 restraint files in 2016; and 2,262 restraint files in 2017. (Wagner Decl. (Dkt. No. 159) ¶ 28) The sum of these numbers is 6,552. The Wagner Declaration states that sum of these restraint files is 6,197; this appears to be an arithmetic error. Exhibit 33 to the Green Declaration reports the correct figure, and calculates that fees of $ 581,439.12 were imposed between September 23, 2015 and December 31, 2017, based on that figure. (Green Decl. (Dkt. No. 162) ¶ 19, Ex. 33)

9 Plaintiffs rely on a total number of 27,374 restraint files, rather than the 27,666 restraint files cited in Citibank's submissions. According to Plaintiffs, Citibank "inadvertently omitted a list of 292 Restraint Files for restraints effected during the three-month period June 22, 2015 through September 22, 2015" when sending Professor Liechty spreadsheets of all the relevant files. Liechty maintains that "[t]he absence of these 292 cases (1% of the total) from the universe of cases from which the sample was selected has no material effect on the sampling or the conclusions that should be drawn from it." (Liechty Decl. (Dkt. No. 158) ¶ 23)

10 Engoron's figure of $ 850,977.10 is much greater than Citibank's corresponding calculation of $ 581,439.12. The difference stems from estimates Engoron made concerning the number of restraint files opened between September 23, 2015 and December 31, 2017. As discussed above, Citibank determined that it opened 6,552 restraint files pursuant to receipt of restraining notices between September 23, 2015 and December 31, 2017. This is an actual number, not an estimate. Rather than use this actual number, Engoron estimated – based on the number of files produced during the sample period of 2009 to September 22, 2015, "that approximately 4,055 new restraint files were opened per year, or 338 files per month." (Engoron Decl. (Dkt. No. 154) ¶ 9) Accordingly, while Engoron estimated that 4,055 restraint files were opened per year between September 23, 2015 and December 31, 2017, the actual number of restraint files opened during that entire period was 6,552. Engoron's inflated estimate of the number of restraint files opened between September 23, 2015 and December 31, 2017 leads to a correspondingly inflated fee amount for this period.

11 Engoron does not explain how he arrived at this figure, and Plaintiffs have provided no documents supporting his calculations. In any event, as discussed below, the only relief Plaintiffs may recover as a result of improper aggregation is the "release of any money unlawfully restrained" as a result of such aggregation, and there is no evidence that Citibank is currently holding any such funds.

12 Citibank contends that, in any event, amount in controversy may only be calculated as of the filing of the Complaint in 2010. (See Def. Br. (Dkt. No. 165) at 15-16) Since – as discussed below – the outcome of the instant motions does not turn on this question,

the Court does not reach it.

13 In their November 30, 2017 letter, Plaintiffs acknowledge that the total amount of funds restrained since 2009 due to improper aggregation is not the proper amount to consider for purposes of determining amount-in-controversy, After asserting that approximately $ 5,480,000 was unlawfully restrained as a result of aggregation between 2009 and September 22, 2015, Plaintiffs note that "[t]o the extent some of the improperly aggregated money may subsequently have been returned to the depositors, this number may have to be somewhat reduced." (Nov. 30, 2017 Pltf. Ltr. (Dkt. No. 137) at 2 n.1) Plaintiffs have made no such reduction, however, and contend that this Court should look to the $ 5,480,000 figure that they previously conceded was inflated.

14 This argument is relevant to the proposed TAC, which seeks an order "[e]njoining the Defendant from limiting class members' access to exempt funds ... and requir[es] the Defendant to give judgment debtors[ ] access to exempt amounts in their accounts in the same manner as any account holder enjoys...." (Proposed TAC (Dkt. No. 153-1) ad damnum clause). Accordingly, the Court addresses this argument below, in connection with Plaintiffs' motion to amend.

15 The proposed TAC seeks an order "[r]equiring Defendant to return unlawfully turned over exempt monies to members of the 5240 Class." (Proposed TAC (Dkt. No. 153-1) ad damnum clause) As noted above, "where there has been a transfer of funds by a bank to a judgment creditor which includes improperly restrained exempt property, the judgment debtor's remedy is against the judgment creditor and not the garnishee-bank." Cruz, 2014 WL 1569491, at *9. Accordingly, Plaintiffs may not obtain such relief against Citibank.

16 Even if amendment were not futile, this Court would deny Plaintiffs' motion to amend on the basis of undue prejudice to Defendant. In Cruz v. T.D. Bank, N.A., No. 10 Civ. 8026 (PKC), 2016 WL 3162120, at *2 (S.D.N.Y. June 3, 2016), Judge Castel denied Plaintiffs' motion for leave to amend, explaining:

> If the six-year history of this case serves even as partial prologue to the length and complexity of the litigation that would ensue from injecting two new legal theories into this action, resolution of any plaintiffs' claims will be substantially delayed. The legal issues already presented by plaintiff have caused an appeal to the Second Circuit and the certification of two questions to the New York Court of Appeals as well as motions to reconsider, amend, and vacate judgment, and plaintiff has yet to file his motion for class certification. Plaintiff's further amendment of the pleadings at this point would significantly prejudice defendant and, perhaps even more so, the purported class members whose sought after relief would be, at best, distant and remote.

Judge Castel's reasoning applies with equal force here. During eight and a half years of litigation, this case has repeatedly stalled at the motion to dismiss phase. As a result of numerous extensions requested by the parties, the 60-day, limited jurisdictional discovery this Court envisioned on March 20, 2017 took four times as long to complete. As in Cruz, Plaintiffs' proposed TAC "inject[s] two new legal theories into this action" – namely, impermissible aggregation of funds and impermissible limitations on Plaintiffs' access to exempt funds – both of which will undoubtedly require substantial additional briefing on questions of New York law, about which there is precious little authority. The Court concludes that further amendment would cause undue prejudice both to Citibank and to the putative class members.

CULLEN and DYKMAN LLP

Restraining Notices, Information Subpoenas and Levies: Compliance Issues Facing Financial Institutions

May 29, 2019

Joseph D. Simon

Overview

- Why so many compliance challenges?
- Descriptions of restraining notices, information subpoenas and levies
- New York exemptions (Exempt Income Protection Act)
- Federal garnishment regulation
- Common compliance issues

Why so many compliance challenges?

- Confusing statutory language
- No regulations, official commentary, or compliance guides
- No agency to contact for guidance
- Addition of New York State and federal exemptions

Restraining Notice

- Forbids recipient (bank) from transferring any money or property of the judgment debtor (the bank customer)
- Only applies if bank has money or property of judgment debtor at the time the restraining notice is served
- May apply to additional money or property received (subject to federal garnishment rule)
- Hold twice the judgment amount
- Can be issued by a court or by attorney for judgment creditor
- Generally effective for one year
- New York State and federal exemptions may apply

Information Subpoena

- Written questions seeking information
- Need to review exact wording of subpoena
- Answers must be made under oath by an officer, director, agent or employee having the information
- Answer required in seven days
- Almost always accompanied by a restraining notice
- Issuer of subpoena must have a “reasonable belief” that bank has relevant information and must certify to that belief

Levy

- Action by sheriff or NYC marshal to collect money and property to satisfy a judgment
- Only applies if recipient has money or property of judgment debtor at the time the levy is served
- Money and property is to be turned over “forthwith” (subject to EIPA requirements)
- Applies to additional money or property received while levy is effective (subject to federal garnishment rule)
- Levy generally expires after 90 days
- New York State and federal exemptions may apply

Exemptions

- New York Exempt Income Protection Act (EIPA)
  - Benefit payments made by direct deposit/electronic payment
  - Wages
- Federal Garnishment Regulation
  - Benefit Payments

NYS Exemptions (EIPA)

- If direct deposit/electronic payment of amounts "reasonably identifiable as statutorily exempt funds" in prior 45 days, allow customer access to $2,850
- Amount changes every three years; next change is April 1, 2021
- Statutorily exempt funds include social security benefits, VA benefits, public assistance, workers' compensation payments, unemployment insurance, pensions
- Customer can claim a higher exemption amount

NYS Exemptions (EIPA)

- EIPA protects certain amount of wages
- Protected amount is tied to the higher minimum wage under New York State and federal law
- Exemption amount will vary based on where person is employed:
  - New York City: $3,600 (11+ employees) or $3,240 (10 or less employees
  - Nassau, Suffolk, Westchester: $2,880
  - All other areas: $2,664
- DFS guidance on which amount to use

NYS Exemptions (EIPA)

- EIPA requires that customer be provided exemption claim forms by both judgment creditor and bank
- Customer can claim additional exempt amounts
- If judgment creditor does not provide exemption claim forms, the restraining notice/levy is void
- EIPA does not apply if New York State or its agencies or local governments is the creditor and the required notice is on restraining notice/levy

Federal Garnishment Regulation

- Applies to “garnishment orders”
- Protects exempt federal benefit payments that were directly deposited to an account during the prior two month “lookback period”
- Federal benefit payments include social security benefits, SSI, VA benefits, federal railroad retirement benefits, Civil Service Retirement System benefits, Federal Employee Retirement System benefits
- Does not apply if United States or a state child support enforcement agency is the creditor (and the required notice is provided)

Federal Garnishment Regulation

- If protected funds, bank:
  - Must send customer required notice of garnishment order within three business days
  - Cannot garnish or freeze amounts deposited to the account after the account review (unless new garnishment order)
  - Cannot charge or collect a garnishment fee against a protected amount

Top Compliance Issues

Do the EIPA exemptions apply per account or per customer?

Top Compliance Issues

- Both the wage and benefits exemptions apply per account
  - EIPA is clear that benefits exemption is per account
  - EIPA is not clear as to wage exemption, but *Jackson v. Bank of America, N.A. 149 A.D.3d 815 (2d Dep't 2017)* held that wage exemption is also per account

Top Compliance Issues

Can a bank collect its legal processing fee against nonexempt funds prior to paying out on a levy?

Top Compliance Issues

- A bank is generally permitted to collect its legal processing fee against nonexempt funds prior to paying out on a levy under New York State law
- New York State Department of Financial Services has previously advised banks that it cannot collect its legal processing fee against nonexempt funds prior to paying out on a levy, but has backed off this position

Top Compliance Issues

How are New York State Tax Compliance levies handled?

Top Compliance Issues

- Generally treated the same as other levies issued for collection of judgments in New York State
- EIPA is not applicable
- Federal garnishment regulation is applicable

Top Compliance Issues

Do restraining notices and levies apply to subsequently deposited funds?

Top Compliance Issues

- Restraining notices and levies under New York State law generally apply to subsequently deposited funds while the restraining notice/levy is effective
- The key is determining when the restraining notice/levy is “effective”
- If the federal garnishment rule applies to an account, then a levy does not apply to subsequently deposited funds into that account (see 31 C.F.R. §215.6(g))

Top Compliance Issues

When should payment on a levy be made?

Top Compliance Issues

- New York State levy, and EIPA not applicable: pay "forthwith"
- New York State levy, and EIPA applicable: pay after all exemption notice requirements are met and no basis to withhold payment

Top Compliance Issues

Can a financial institution do anything to stop collection attorneys from sending hundreds (and in some cases, thousands) of information subpoenas at a time?

Top Compliance Issues

- Depending on the facts, the collection attorneys may be violating CPLR Rule 5224 which requires a "reasonable belief" that the bank being served has in its possession information about the judgment debtor that will assist the creditor in collecting its judgment

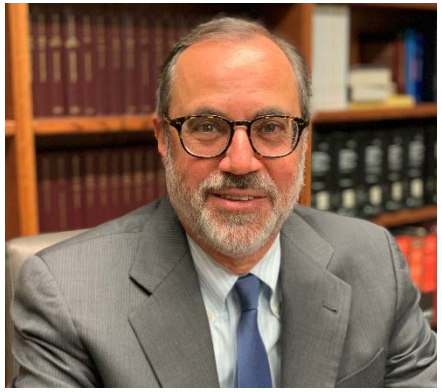
Consequences for Noncompliance

What are the consequences for failing to comply with the legal requirements applicable to restraining notices and levies?

Consequences for Noncompliance

- Possible liability for damages incurred by a judgment creditor for bank's failure to properly hold or pay required funds to creditor
- No private right of action under EIPA (see *Cruz v. TD Bank, N.A., 22 N.Y.3d 61 (2013)*)
- Class action status difficult to attain (see *Acevedo v. Citibank, N.A.* 10 Civ. 8030 (PGG), 2019 WL 1437575 (S.D.N.Y. Mar 31, 2019))
- Regulatory penalties from DFS and/or federal regulator for failing to comply with legal requirements

Contact



Joseph D. Simon

Partner

jsimon@cullenanddykman.com

T: 516.357.3710