CRITIQUE OF MONEY JUDGMENT PART THREE: RESTRAINING NOTICES

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INTRODUCTION 1490
I. RESTRAINING NOTICES 1496
A. *What Are They?* 1496
B. *Lien Significance* 1502
C. *Order of Which Court?* 1511
D. *Who May be Served and How?* 1515
1. Service on the Judgment Debtor or Obligor 1515
2. Service on Third Parties 1520
E. *Transfers* 1521
F. *Property* 1523
1. Personal 1523
2. Secured Creditors as Garnishees 1529
3. Purchasers of Restrained Personal Property 1534
4. Real Property Analogies 1535
5. Exempt Property 1537
6. Fraudulently Conveyed Property 1544
7. Alter Ego Cases 1549
G. *Debts* 1553
H. *Right to Setoff* 1555
I. *Paying Debts v. Setting off Debts* 1560
J. *Contingent Debts* 1561
K. *After-Acquired Property and After Arising Debts* 1573
L. *Rent as Conditional Debt* 1576
M. *Voluntary Compliance* 1580
N. *Effectiveness and Reason to Believe* 1584
O. *Specified in the Notice* 1585
P. *Duration* 1588
Q. *Court Permission for a Second Restraining Notice.* 1590
R. *Twice the Amount of the Judgment* 1591
S. *Foreign Entities Present in New York* 1592

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T. The Effect of a Bankruptcy Petition 1595
II. BANKS AND THE EXEMPT INCOME PROTECTION ACT.....1599
A. In General.....1599
B. A New Exception.....1601
C. Notice to the Debtor in the Case of Bank Accounts 1606
D. Bank Duties in the case of Restraining Notices and Executions.....1607
1. Debtor Remedies When the CPLR Is Violated 1609
2. The Immunity For Banks.....1612
3. The Adequacy of Other Remedies.....1615
4. The Implications for Pre-Judgment Attachment 1620
5. The Judgment Creditor's Liability for Bank Failures.....1621
6. Bank Liability Under Federal Civil Rights Legislation.....1622
E. Claims of Exemption 1624
III. INFORMATION SUBPOENAS.....1631
IV. CONCLUSION.....1640

INTRODUCTION

"In many respects this topic gives law its ultimate test."[1]

In *Verizon New England, Inc. v. Transcom Enhanced Services, Inc.*,[2] a dodgy internet provider lost a major money judgment.[3] The judgment creditor served a restraining notice on a customer of the debtor.[4] The restraining notice prohibited the customer from paying any debt to the internet provider or from assigning, transferring, or interfering with property in which the internet provider had an

[1] DAVID D. SIEGEL, NEW YORK PRACTICE § 476, at 830 (5th ed. 2011). The present Article is the sequel to a pair of prior installments. *See* David Gray Carlson, *Critique of Money Judgment Part One: Liens on New York Real Property*, 82 ST. JOHN'S L. REV. 1291 (2008) [hereinafter Carlson, *Critique I*]; David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on New York Personal Property)*, 83 ST. JOHNS L. REV. 43 (2009) [hereinafter Carlson, *Critique II*].

[2] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121 (N.Y. 2013).

[3] *See* Global Naps, Inc. v. Verizon New England, Inc., 603 F.3d 71, 76 (1st Cir. 2010) (involving a judgment for charges to access the Verizon system, as ordered by the Massachusetts Department of Telecommunications and Energy).

[4] *Verizon*, 990 N.E.2d at 122.

interest.[5] Anticipating such a court order and anxious to receive services from the debtor, the customer had simply arranged to pay in advance.[6] According to the New York Court of Appeals, this had the effect of completely negating the restraining notice served on the customer.[7]

Dissenting from the appellate division opinion in the case, Justice Angela M. Mazzarelli warned, "[t]he majority's narrow view of what constitutes property for purposes of CPLR article 52 . . . places in [the customer's] hands a virtual road map for frustrating the efforts of judgment creditors."[8]

In this Article, I will assess whether Justice Mazzarelli's remark is justified. My conclusion is that *Verizon* exposes serious weaknesses in the New York law of money judgment collection. Nevertheless, the decision in *Verizon* seems eminently correct on the existing statutory scheme in New York. The fault is not with the stars who populate the Court of Appeals but in ourselves, whose elective representatives enacted the CPLR and, in particular, an overzealous extension of the common law right of setoff in New York Debtor & Creditor Law section 151.

Verizon reveals many flaws in the CPLR's governance of the restraining notice and in the surrounding environment of money judgment enforcement. First, the CPLR defines "debt" in a distinctly old fashioned way. According to CPLR section 5201(a), "[a] money judgment may be enforced against any debt, which is *past due or which is yet to become due, certainly or upon demand of the judgment debtor*." In New York, contingent debts are not debts at all.[9]

As is well known, in *ABKCO Industries, Inc. v. Apple Films, Inc.*,[10] the Court of Appeals attempted to palliate this defect by ruling that contingent debts are also contingent property interests of the judgment debtor.[11] According to CPLR section 5201(b), "[a] money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future

[5] *Id.*; *see* N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[6] *Verizon*, 990 N.E.2d at 123.

[7] *Id.* at 124.

[8] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 948 N.Y.S.2d 245, 255–56 (App. Div. 1st Dep't 2012) (Mazzarelli, J.P., dissenting), *aff'd*, 990 N.E.2d 121 (2013).

[9] N.Y. C.P.L.R. 5201(a) (McKinney 2014) (emphasis added).

[10] ABKCO Indus. v. Apple Films, Inc., 350 N.E.2d 899, (N.Y. 1976).

[11] Carlson *Critique II*, *supra* note 1, at 99–100.

right or interest and *whether or not it is vested*."[12] "Vested" means not subject to a condition precedent.[13] So, unvested property is *contingent* property. *ABKCO* implies that all debts are property, so all contingent debts are property. As such, contingent debts can be levied.[14]

In *Supreme Merchandise Co. v. Chemical Bank*,[15] the Court of Appeals discovered that some contingent debts are so contingent that they can't be considered property at all.[16] As such, super-contingent debts can never be levied. And that is what the Court of Appeals also found before it in *Verizon*.[17] The advance payment scheme was merely a unilateral offer by the customer to enter into a contract for the provision of services, the mode of acceptance being actually providing the desired services.[18] This arrangement did not rise to the dignity of property.[19] Therefore the restraining notice was incapable of restraining prepayment for services not yet rendered.[20] According to the *Verizon* court, "the expectation of any continued or future business is too contingent in nature and speculative to create a present or future property interest."[21]

Although *Verizon* arose in the context of restraining notices, it certainly implies that a levy of the customer would be equally ineffective. The prepayment scheme was neither debt nor property. *Verizon* simply makes express what *Supreme Merchandise* implied: not all contingent debts are property.[22]

Verizon also entails the second defect in the CPLR—the failure to associate the restraining notice with liens. Prior to the enactment of the CPLR, service of a restraining notice *did* create a lien.[23] In

[12] N.Y. C.P.L.R. 5201(b) (McKinney 2014) (emphasis added).

[13] *See* Christian v. Cnty. of Ontario, 399 N.Y.S.2d 379, 381 (Sup. Ct. Ontario County 1977).

[14] *See* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarollo, S.A., 190 F.3d 16, 23 (2d Cir. 1999) ("*ABKCO* virtually erases the distinction in § 5201 between 'debt' and 'property' by re-characterizing—as 'property against which a money judgment may be enforced'—debts that otherwise are placed out of reach by § 5201(a)'s requirement that the debt being pursued be either past due or certain to become due upon demand.").

[15] Supreme Merch. Co. v. Chem. Bank, 514 N.E.2d 1358 (N.Y. 1987).

[16] Carlson *Critique II*, *supra* note 1, at 104.

[17] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 122 (N.Y. 2013).

[18] *Id.* at 124.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See* Supreme Merch. Co. v. Chem. Bank, 514 N.E.2d 1358, 1361–63 (N.Y. 1987); Carlson, *Critique II*, *supra* note 1, at 104.

[23] *See* Wickwire Spencer Steel Co. v. Kemkit Sci. Corp., 54 N.E.2d 336, 337 (N.Y. 1944).

its first opinion on the CPLR version of the restraining notice, the Court of Appeals associated the restraining notice with a lien.[24] But, inexplicably, the Court of Appeals overruled itself by dictum.[25] Since then lower courts, with some exceptions, have insisted that restraining notices do not create liens.[26]

This defect should be corrected, but it would not actually have changed the result in *Verizon*. Even if the creditor in *Verizon* had obtained a valid lien against the customer of the debtor—because the customer-debtor relation was *ABKCO*-style property—the result would have been the same. The deeper problem exposed by *Verizon* is that New York law allows for what most states prohibit—the triangular setoff.[27] This is accomplished in New York Debtor & Creditor Law section 151, which is the unacknowledged culprit in *Verizon*.[28]

Verizon brings a third defect to light: the restraining notice contains an after-acquired provision.[29] Not only is the garnishee restrained as to property she *presently* possesses or debts (narrowly defined) she *currently* owes, but also she is restrained as to debtor property obtained *after* the restraining notice is served, or debts that become due *after* service of the restraining notice.[30] But this rule applies only if, on the day of service, the garnishee possessed debtor property or owed a debt to the judgment debtor.[31] If the restraining notice was not effective at the time of service, it is never effective.[32] In the context of *Verizon*, the restraining notice simply did not cover the payment of a super-contingent debt.[33] When the contingent debt became vested a few days later (as the parties knew

[24] Int'l Ribbon Mills, Ltd. v. Arjan Ribbons, Inc., 325 N.E.2d 137, 138–39 (N.Y. 1975).

[25] Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 810–11 (N.Y. 1981) ("In contrast with prior law . . . service of a CPLR 5222 restraining notice confers no priority upon the judgment creditor in the form of a lien on the judgment debtor's property." (citations omitted)).

[26] *See* Carlson, *Critique II*, *supra* note 1, at 202–07.

[27] Turner v. Small Bus. Admin. (*In re* Turner), 59 F.3d 1041, 1045 (10th Cir. 1995) ("The general rule, however, holds that triangular setoffs among related parties do not meet the mutuality requirement."). The triangle would be that the garnishee owes a debt to the sheriff (thanks to the levy). The judgment debtor owes a debt to the garnishee (on a claim that did not exist at the time of the levy). Though these are not mutual, New York Debtor & Creditor Law section 151 permits these non-mutual debts to be set off.

[28] N.Y. DEBT. & CRED. LAW § 151 (McKinney 2014).

[29] Verizon New England, Inc. v. Transcom Enhanced Servs., 990 N.E.2d 121, 123 (N.Y. 2013).

[30] N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[31] *Id.*

[32] *See id.*

[33] *Verizon*, 990 N.E.2d at 124.

it would), the after-acquired debt principle in section 5222(b)'s third sentence did not apply because, at the time the restraining notice was served, the customer owed no debt to the judgment debtor and possessed no property belonging to the debtor.[34]

This article explores the weaknesses of the restraining notice, but also emphasizes its strength. The restraining notice is especially powerful when it is served on a third-party who actually owes a debt (narrowly defined) or who possesses debtor property. Serving a solvent third-party permits the judgment creditor to recover damages if the third-party violates the terms of the restraining notice.[35] Of course, the restraining notice must *restrain*, which is precisely what it did *not* do in *Verizon*.

This article constitutes the first full exploration of the New York institution of the restraining notice.[36] With most of the devices of debt collection, the intercession of a court or a sheriff is necessary. For example, only a sheriff may levy personal property.[37] Only a court may order the judgment debtor or third party to turn property over to the sheriff for sale or to pay a debt to the judgment creditor.[38] The restraining notice constitutes a quasi-exception to this judicial monopoly of debt collection procedure.[39] The

[34] *Id.*; C.P.L.R. 5222(b).

[35] In Mazzuka v. Bank of North America, a creditor was permitted to sue a bank for negligently allowing the debtor to withdraw funds in violation of a restraining notice:

> A judgment creditor's specification of debt or property in a restraining notice is binding on the person served to the extent of forbidding payment or transfer except pursuant to an order of the court. If such person does make payment or transfer in disregard of the restraining notice, he takes the risk of liability for damages and contempt if the judgment creditor can establish that the debt was owed to the judgment debtor or that he had an interest in such property.

Mazzuka v. Bank of N. Am., 280 N.Y.S.2d 495, 500 (Civ. Ct. Queens County 1967) (quoting Sumitomo Shoji N.Y., Inc. v. Chem. Bank N.Y. Trust Co., 263 N.Y.S.2d 354, 358 (Sup. Ct. New York County 1965)); *see* Accounts Receivable Solutions, Inc. v. Tompkins Trustco, Inc., 846 N.Y.S.2d 272, 273 (App. Div. 2d Dep't 2007) (permitting an action for damages based on negligent violation of restraining notice); Doubet, LLC v. Trs. of Columbia Univ., No. 401544/2007, 2011 N.Y. Misc. LEXIS 3235, at *49 (Sup. Ct. New York County July 6, 2011) *aff'd*, 952 N.Y.S.2d 16 (N.Y. App. Div. 2012) (quoting Sec. Trust Co. v. Magar Homes, Div. of R. John Magar & Son Dev. Corp., 461 N.Y.S.2d 103, 104 (App. Div. 4th Dep't 1983) ("When a money judgment is sought for the violation, 'there is no willfulness requirement for imposition of money damages, [but] there must at least be a showing of negligence in failing to comply with the restraining notice.'"). In such actions, the judgment debtor is not a necessary party who must be joined. Conde v. Anton Adjustment Co., 508 N.Y.S.2d 884, 884–85 (Civ. Ct. New York County 1986).

[36] The restraining notice was largely omitted from the analysis in *Critique II*, *supra* note 1, because the restraining notice gives rise to no lien.

[37] N.Y. C.P.L.R. 5232(a), 6214(a), (c) (McKinney 2014).

[38] N.Y. C.P.L.R. 5225(a)–(b), C.P.L.R. 5227 (McKinney 2014).

[39] Doubet, LLC v. Trs. of Columbia Univ., No. 401544/2007, 2011 N.Y. Misc. LEXIS 3235,

restraining notice, to be sure, is a court order,[40] but the CPLR appoints the attorney for the judgment creditor as an officer of the court for the purpose of issuing such a notice.[41] As a result, a creditor's attorney can "costless[ly]" launch this important collection tactic without making a motion to any court.[42]

In exploring the strengths and weaknesses of the restraining notice after *Verizon*, this Article is divided into three parts. Part I deals with all aspects of the restraining notice, except for those restraining notices served on third party banks whose customers receive exempt income stream. Part I analyzes New York's unfortunately narrow definition of "debt" and how it plays havoc with restraining notices.[43]

Restraints on banks are governed by the Exempt Income Protection Act ("EIPA"),[44] enacted in 2008, which is considered in Part II. This legislation is designed to force banks to protect its customers who receive exempt income streams, such as social security payments.[45] Already class actions abound, claiming that banks are failing to conform to the EIPA.[46] So far these class actions have been barred or at least inhibited, on the theory that the legislature did not intend to authorize private rights of action under the EIPA.[47] This very question has been certified by the federal court to the New York Court of Appeals.[48]

In *Cruz v. TD Bank, N.A.*,[49] the New York Court of Appeals ruled that banks who deliberately flout the law and refuse to cooperate with the EIPA cannot be sued for tort damages.[50] A senior citizen who has been wronged by her bank can only obtain relief in a special proceeding under CPLR sections 5239 or 5240,[51] where

at *29–30 (Sup. Ct. New York County July 6, 2011).

[40] *Id.* at *29 ("Although CPLR 5222(a) permits an attorney for the judgment creditor to issue a restraining notice without the court's involvement, it is legal process nonetheless. . . . Like any legal process, it is an assertion of the court's, and the state's, power.").

[41] N.Y. C.P.L.R. 5222(a) (McKinney 2014).

[42] John Infranca, *Safer Than the Mattress? Protecting Social Security Benefits from Bank Freezes and Garnishments*, 83 ST. JOHN'S L. REV. 1127, 1184 (2009).

[43] *See infra* Part I.G.

[44] Exempt Income Property Act, ch. 575, 2008 N.Y. Laws 4085, 4086 (codified as amended at N.Y. C.P.L.R. 5222, 5222-a, 5230, 5231, and 5232).

[45] *See infra* Part II.A.

[46] *See, e.g.*, Cruz v. TD Bank, N.A., 711 F.3d 261, 263 (2d Cir. 2013).

[47] *Id.* at 263–64.

[48] *Id.* at 271.

[49] Cruz v. TD Bank, N. Am., 2 N.E.3d 221 (N.Y. 2013).

[50] *See id.* at 232.

[51] *See id.*

damages may well be unavailable. I will argue that the Court of Appeals has, in effect, used the EIPA to change the tort law of New York. Prior to 2008, anyone victimized by an intentional refusal by a third party to obey the CPLR was indeed able to bring a tort action. Whether this can still happen after *Cruz* is in severe doubt. For example, garnishees in pre-judgment attachment cases have a duty to report whether they owe the defendant a debt or whether they control debtor property.[52] Deliberate falsehoods in such garnishee statements gave rise to an action in tort for damages.[53] It is no longer clear that false statements that harm plaintiffs are tortious, under the law of New York.

Very closely joined with the restraining notice is the information subpoena.[54] Like the restraining notice, a subpoena may be issued without judicial intervention.[55] Indeed, before the CPLR, there was no distinction between the restraining notice and the information subpoena.[56] The subpoena implied the restraining notice. The CPLR has divided these collection tools in two, though universally they will be found together, like a divorced couple still maintaining a household.[57] Accordingly, Part III considers the scope of the information subpoena.

I. RESTRAINING NOTICES

A. What Are They?

For historic and perhaps also for good reason, most enforcement procedures in New York are delegated to judicial officers, such as judges, sheriffs, marshals or receivers.[58] Creditor self-help has long been discouraged.[59] Thus, a levy of property capable of delivery under a post-judgment writ of execution requires a sheriff to take the property into her possession.[60] This is no doubt justified by the

[52] *See* N.Y. C.P.L.R. 6219 (McKinney 2014).

[53] *See* Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895, 898, 900–01 (2d Cir. 1985).

[54] *See* N.Y. C.P.L.R. 5224(a)(3) (McKinney 2014).

[55] *See* C.P.L.R. 5224(a)(3)(i).

[56] *See* SENATE FIN. COMM., SIXTH REPORT OF THE SENATE FINANCE COMMITTEE TO THE LEGISLATURE, N.Y. Legis. Doc. 8, at 47 (1962).

[57] For instance, the garnishee in *Verizon* was served both with a restraining notice and with a subpoena. Verizon New England, Inc. v Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 122 (N.Y. 2013).

[58] *See* N.Y. C.P.L.R. 5232(a) (McKinney 2014).

[59] Osborne v. Moss, 7 Johns. Cas. 161, 164 (N.Y. Sup. Ct. 1810) (per curiam).

[60] *See* C.P.L.R. 5232(b).

notion that dispossession inherently threatens the peace, and we therefore want a judicial officer doing the dispossessing. A levy of property not capable of delivery pursuant to a postjudgment execution involves no dispossession.[61] It requires only the service of the execution on the garnishee.[62] Any levy under a prejudgment order of attachment is likewise accomplished by serving the execution or the order of attachment[63] on a debtor or a garnishee.[64] These we may call "paper" levies. One may question whether we really need a judicial officer to deliver the piece of paper that accomplishes the levy.

A quasi-exception to the state monopoly on debt enforcement is the restraining notice.[65] Newly introduced in 1963,[66] the restraining notice was "added to the arsenal of judgment creditors because of the 'great number of judgments which were never satisfied and those that were satisfied only after years of litigation involving great expenditures of time and money.'"[67] Only Minnesota's "garnishment" summons is similar in this respect.[68]

A restraining notice is a court order commanding its recipient to pay no debt to or transfer no property of a judgment debtor that might be levied pursuant to an execution.[69] It may issue at any time after entry of judgment.[70] In federal cases, a restraining notice

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[61] C.P.L.R. 5232(a).

[62] *Id.*

[63] N.Y. C.P.L.R. 5232(a), 6214(a) (McKinney 2014). A sheriff serving an order of attachment simply serves paper and does not divest a third party garnishee of debtor property. It is open for a plaintiff to insist that the sheriff seize possession of the debtor's property capable of delivery, but the sheriff will insist on an "indemnity satisfactory to him or fixed by the court." N.Y. C.P.L.R. 6215 (McKinney 2014).

[64] N.Y. C.P.L.R. 105(i) (McKinney 2014) ("A 'garnishee' is a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest.").

[65] N.Y. C.P.L.R. 5222 (McKinney 2014).

[66] Civil Practice Law and Rules, ch. 308, 1962 N.Y. Laws 1297, 1444, 1550. Prior to the CPLR, Civil Practice Act section 781 provided that a subpoena on a debtor or garnishee had the effect of restraining alienation by the person served. *See, e.g.*, Prever v. Aetna Life Ins. Co., 43 F. Supp 752, 753 (S.D.N.Y. 1941). But the subpoena had to be issued by a court. *See* Act of Apr. 9, 1938, ch. 605, sec. 1, 3–4, §§ 774(1), 779, 781, 1938 N.Y. Laws 1601, 1601–04.

[67] Plaza Hotel Assocs. v. Wellington Assocs., Inc., 378 N.Y.S.2d 859, 863 (Sup. Ct. New York County 1975) (citation omitted) (quoting Stathopoulos v. Seaways Shipping Corp., 321 N.Y.S.2d 717, 719 (Civ. Ct. New York County 1971)).

[68] MINN. STAT. ANN. § 571.71(3) (West 2013) ("[A] creditor may issue a garnishment summons . . . at any time after entry of a money judgment in the civil action."); MINN. STAT. ANN. § 571.73 (West 2013) ("[S]ervice of the garnishment summons upon the garnishee shall obligate the garnishee to retain possession and control of the disposable earnings, indebtedness, money, and property of the debtor . . . .").

[69] *See* SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 508, at 887.

[70] *See* N. Shore Univ. Hosp. at Plainview v. Citibank Legal Serv. Intake Unit, 883 N.Y.S.2d

may issue under the authority of Federal Rule of Civil Procedure ("FRCP") 69 (which incorporates state law),[71] although a restraining notice issued within fourteen days of entry of a federal judgment violates FRCP 62(a).[72]

A restraining notice may be issued by a court,[73] a clerk of the court, or, most significantly, "*the attorney for the judgment creditor as officer of the court*."[74] It may not, however, be issued by the judgment creditor directly (unless the judgment creditor is an attorney foolishly representing herself).[75] A judgment creditor without an attorney will have to apply, hat in hand, to the clerk of the court for a restraining notice.[76]

Prejudgment restraining notices are also available even earlier—if "a verdict or decision has been rendered."[77] Unlike the ordinary

898, 903 (Dist. Ct. Nassau County 2009); *see also* Kates v. Marine Midland Bank, 541 N.Y.S.2d 925, 927 (Sup. Ct. Monroe County 1989) (restraining notice served one-half hour after judgment was entered). An order directing the clerk to enter a money judgment is not the same as actual entry. H & H Realty Prop. LLC v. Rodriguez, No. L & T 8377/10, 2011 N.Y. Misc. LEXIS 348, at *5 (Civ. Ct. Bronx County Feb. 15, 2011). Premature issuance of the restraining notice may result in awarding attorneys' fees to the judgment debtor per N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2013).

[71] EM Ltd. v. Republic of Arg., 131 F. App'x 745, 746 (2d Cir. 2005).

[72] *See* Whale Square Fire Litig. Greyhound Exhibitgroup, Inc. v. Elul Realty Corp., No. CV-88-3039, 1992 U.S. Dist. LEXIS 14353, at *9–10 (E.D.N.Y. May 11, 1992) (applying a ten day period under a prior version of Rule 62(a)). According to Rule 62(a), "[N]o execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry." FED. R. CIV. P. 62(a).

[73] In *Riverside Capital Advisors, Inc. v. First Secured Capital Corp.*, 814 N.Y.S.2d 646 (App. Div. 2d Dep't 2006), a court was reversed for unilaterally restraining transfers by the recipient of an information subpoena, as the recipients had never been made parties to a proceeding. *Id.* at 649. This is odd, because the attorneys for the creditor could have issued the same restraint without any hearing or motion of any kind.

[74] N.Y. C.P.L.R. 5222(a) (McKinney 2014) (emphasis added). Additionally, a restraining notice may be issued "by the support collection unit designated by the appropriate social services district." *Id.* This unit is concerned with supporting subrogation claims where the state has paid a family member the amount of alimony or child support and the state now wishes to reimburse itself through the support collection unit. *See* N.Y. SOC. SERV. LAW § 111-h(1) (McKinney 2014).

[75] *See* C.P.L.R. 5222(a).

[76] *See id.* ("[A restraining notice] shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it.").

[77] N.Y. C.P.L.R. 5229 (McKinney 2014). A "decision" seems to refer to the grant of summary judgment, see Ibanez v. Pfeiffer, 350 N.Y.S.2d 964, 966–67 (Civ. Ct. Queens County 1973), or victory in an arbitration, see Loew v. Kolb, No. 03 Civ. 5064 (RCC), 2003 U.S. Dist. LEXIS 15628, at *6 (S.D.N.Y. Sept. 5, 2003). In federal cases, the section 5229 restraint is invoked by FRCP 64. Sequa Capital Corp. v. Nave, 921 F. Supp. 1072, 1076 (S.D.N.Y. 1996). One court declined relief under section 5229 in a post-arbitration case because only a "trial judge" can order the prejudgment restraint, and the court was not the "trial judge" of the arbitration. Unex Ltd. v. Arsygrain Int'l Corp., 424 N.Y.S.2d 583, 585 (Sup. Ct. New York County 1979). A magistrate judge can at best recommend to the district court judge that a

postjudgment restraining notice, the prejudgment version requires a motion to and order by the trial judge.[78] Separately, and even before there is a verdict, a court might issue a temporary restraining order or preliminary injunction as an adjunct to prejudgment attachment, but these too would require judicial intervention, plus grounds for the attachment.[79] Only *postjudgment* restraining notices can issue without a judicial seal of approval.[80]

A restraining notice is to be distinguished from a turnover order under CPLR section 5225(a) or (b) or under CPLR section 5227.[81] Only a court can issue a turnover order.[82] The CPLR commands that property be handed over to the sheriff for the purpose of liquidating it (if illiquid), or that a debt due and owing be paid to the judgment creditor.[83] Any proceeds received are to be used to satisfy the money judgment.[84] A turnover order is therefore more intrusive than a restraining notice.[85] It forces the recipient to do *something*, whereas the restraining notice admonishes the recipient to do *nothing*.[86]

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prejudgment restraining notice be issued. *See* Leser v. U.S. Bank Nat'l Ass'n, No. CV 2009-2362 (KAM)(MDG), 2013 U.S. Dist. LEXIS 33168, at *6–7 (E.D.N.Y. Feb. 21, 2013).

[78] N.Y. C.P.L.R. 5229 (McKinney 2014). In general, such a restraint is within the discretion of the court, Berg v. Au Cafe, Inc., No. 108437/05, 2009 N.Y. Misc. LEXIS 5865, at *2 (Sup. Ct. New York County June 24, 2009), and requires a reason, such as evidence of intent to make fraudulent conveyances, see Kaminsky v. Kahn, 258 N.Y.S.2d 1000, 1001 (Sup. Ct. New York County 1965), or failure of the defendant to show up for the hearing on the motion. *See Loew*, 2003 U.S. Dist. LEXIS 15628, at *4. That the defendant has moved to reverse the verdict might be considered but is not *per se* grounds to deny the prejudgment restraint. *See* Gallegos v. Elite Model Mgmt. Corp., 768 N.Y.S.2d 134, 139 (Sup. Ct. New York County 2003). In *Gallegos*, the court remarked: "The restraints imposed by CPLR 5229 do not affect property that is not otherwise available to satisfy a money judgment, such as payment of salaries and living expenses that are ordinarily incurred." *Id.* Surely, it is within the discretion of a court to restrain transfers in the ordinary course of business, though undoubtedly it is also open to sculpt the restraint so that ordinary course transfers are permitted. *See, e.g.*, *Berg*, 2009 N.Y. Misc. LEXIS 5865, at *3.

[79] *See* Green v. Gaskell, No. 87 Civ. 3861 (CSH), 1988 U.S. Dist. LEXIS 3510, at *3, *10–13 (S.D.N.Y. Apr. 15, 1988) (discussing the temporary restraining order and preliminary injunction, but refusing to issue an injunction for want of evidence of the defendant's fraudulent intent); *see also* Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 268–85 (1992) (discussing prejudgment attachment remedies generally, including temporary restraining orders and preliminary injunctions).

[80] *See* SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 508, at 887–88.

[81] N.Y. C.P.L.R 5225(a)–(b), 5227 (McKinney 2014).

[82] *See id.*

[83] *Id.*

[84] N.Y. C.P.L.R. 5234(c) (McKinney 2014).

[85] McCarthy v. Wachovia Bank, N.A., 759 F. Supp. 2d 265, 275 n.4 (E.D.N.Y. 2011).

[86] Thus, a garnishee who has received a restraining notice actually violates it by paying the debtor's money over to the judgment creditor. *In re* Estate of Wooton, 361 N.Y.S.2d 137,

Although it is rarely noticed, the levy by a sheriff of personal property not capable of delivery ends up being nothing more than a combined restraining notice and a turnover order. Section 5232(a)'s seventh sentence establishes the levy as a restraining notice:

> Until such transfer or payment is made, or until the expiration of ninety days after the service of the execution upon him or her, or of such further time as is provided by any order of the court served upon him or her, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or the support collection unit or pursuant to an order of the court.[87]

A levy pursuant to an execution is also a turnover order. According to section 5232(a)'s fifth sentence, "[t]he person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff or to the support collection unit and execute any document necessary to effect the transfer or payment."[88]

Whereas the sheriff is expected to take possession of "property capable of delivery," the role of the sheriff in levying property not capable of delivery is quite passive.[89] Once the sheriff serves the piece of paper (thereby earning a fee of 5 percent), the sheriff takes no further coercive steps against the garnishee.[90] The levy is purely injunctive in nature; if the garnishee refuses to comply, the sheriff is insouciant.[91] Indeed, the levy lapses entirely after ninety days, and with it the duty of the garnishee not to transfer the debtor's property or pay debts to the debtor.[92] To perpetuate the turnover

138 (Sur. Ct. Schenectady County 1974).

[87] N.Y. C.P.L.R. 5232(a) (McKinney 2014). Prior to the CPLR, such a statement existed as to levies of orders of attachment, but not as to levies of post-judgment executions. Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co., 263 N.Y.S.2d 354, 357 (Sup. Ct. New York County 1965), *aff'd mem.*, 267 N.Y.S.2d 477 (App. Div. 1st Dep't 1966).

[88] C.P.L.R. 5232(a).

[89] C.P.L.R. 5232(b). The sheriff may not, however, interfere "with the lawful possession of pledgees and lessees." *Id.*

[90] N.Y. C.P.L.R. 8012(b)(1) (McKinney 2014). Outside New York City, where life is inexpensive, the fee is 3 percent after the first $250,000. *Id.*

[91] SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 496, at 871–872.

[92] *Id.* Restraining notices last one year, insofar as garnishees are concerned. N.Y. C.P.L.R. 5222(b) (McKinney 2014). If a restraining notice is served in addition to a levy, it remains in

order and restraining notice that the levy consists of, the judgment creditor is expected to commence a turnover proceeding to force the turnover to the sheriff.[93] The mere commencement of a turnover proceeding has the effect of extending the restraining and the turnover aspects of the levy.[94] In comparison, in the absence of a levy, the mere commencement of the turnover proceeding creates no lien[95]—only *obtaining* the turnover order does.[96] In short, there is an overlap between a levy, turnover order, and restraining notice.[97] Only the last of these can be issued without judicial involvement.[98]

These same points also apply to the prejudgment order of attachment, except that, presumptively, *all* levies are paper levies.[99] The levy under an order of attachment is, basically, nothing but a combined turnover order and a restraining order.[100] Such a levy is purely injunctive, and purely *in personam* in nature, contrary to some recent careless analysis by the Court of Appeals.[101]

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effect even after the levy lapses. *See* Singh v. Singh, No. 9893/2009, 2010 N.Y. Misc. LEXIS 5503, at *12–14 (Sup. Ct. Queens County Nov. 10, 2010).

[93] SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 496, at 871, § 510, at 896.

[94] C.P.L.R. 5232(a) ("At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought.").

[95] Carlson, *Critique II*, *supra* note 1, at 178 (citing County Nat'l Bank v. Inter-County Farmers Coop. Ass'n, 317 N.Y.S.2d 790, 793 (Sup. Ct. Sullivan County 1970).

[96] N.Y. C.P.L.R. 5202(b) (McKinney 2014). I criticize this aspect of New York law in *Critique II*, *supra* note 1, at 176–82. In ancient times, mere commencement of the equitable action brought property *in custodia legis*. *See id.* at 178–79.

[97] One difference between turnover orders and levies of debt might be noted. A turnover order directs a third party or the debtor to pay money directly to the judgment creditor. N.Y C.P.L.R. 5225(a)–(b) (McKinney 2014). A levy requires that money be paid to the *sheriff*, not to the judgment creditor. C.P.L.R. 5232(a). This may relate to the sheriff's entitlement to a fee for levying. N.Y. C.P.L.R. 8012(b)(1) (McKinney 2014).

[98] N.Y. C.P.L.R. 5222(a) (McKinney 2014).

[99] N.Y. C.P.L.R. 6214 (McKinney 2014). A plaintiff may insist that the sheriff take possession of property capable of delivery, but the sheriff is entitled to an indemnity. N.Y. C.P.L.R. 6215 (McKinney 2014).

[100] C.P.L.R. 6214(b). The levy lasts only ninety days, but is extended if the creditor commences a turnover proceeding against the garnishee. C.P.L.R. 6214(e).

[101] In *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825 (N.Y. 2009), the court remarks, "By contrast, an article 62 attachment proceeding operates only against *property*, not any person." *Id.* at 828. This couldn't be more mistaken. The final product of a levy under an order of attachment is an *in personam* injunction against *a person*. *See* Michael A. McGarry, Jr., Note, *Vestiges of Jurisdiction: On the In Rem Nature of Pre-Judgment Attachment in New York*, 32 CARDOZO L. REV. 1581, 1582 (2011). The thing garnished is left quite unattended by the sheriff, though the garnishee is ordered "personally" to hand it over to the sheriff. *Id.* at 1617.

B. Lien Significance

Regrettably, service of the restraining notice is not to be associated with the creation of a lien on the debtor's property. The restraining notice "is but a 'junior remedy' in the arsenal of enforcement mechanisms under CPLR article 52."[102]

By way of background, a lien can be defined as a power of sale (or a power of collection, in the case of debts owed to the judgment debtor).[103] The creation of a lien constitutes a property transfer between the debtor and the creditor.[104] Once a lien arises, the debtor has been alienated from an aspect of his property.[105] The property, if illiquid, can now be sold by a court officer, whether it be the sheriff, marshal, or a receiver.[106]

In New York, liens on personal property associated with money judgments are created in two ways, as described by CPLR sections 5202(a) and (b).[107] Execution liens are authorized under CPLR section 5202(a).[108] An execution commands the sheriff to levy property of the judgment debtor.[109] This brand of lien we shall leave to one side. More pertinent for our current purpose is section 5202(b), which provides:

> Where a judgment creditor has secured an order for delivery of, payment of, or appointment of a receiver of, a debt owed to the judgment debtor or an interest of the judgment debtor in personal property, the judgment creditor's rights in the debt or property are superior to the rights of any transferee of the debt or property, except a transferee who acquired the

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[102] Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 812 (N.Y. 1981).

[103] Carlson *Critique I*, *supra* note 1, at 1300.

[104] 11 U.S.C. § 101(54)(A) (2012). The Bankruptcy Code recognizes this by defining "transfer" to include "the creation of a lien." *Id.*

[105] *See id.*

[106] A marshal might work for a lower state court, such as the City Court of New York. *See, e.g.*, N.Y. CITY CIV. CT. ACT § 701(b) (McKinney 2014) ("The provisions of law applicable in supreme court practice, relating to the execution of mandates by a sheriff and the power and control of the court over the sheriff executing the same, shall apply in this court; and they shall apply equally to both sheriffs and marshals."). Or a marshal might be an officer of the federal district court. 28 U.S.C. § 561(c) (2006). In the latter case, FRCP 69 makes the CPLR relevant to a federal marshal's power to execute judgments. FED. R. CIV. P. 69(a)(1).

[107] N.Y. C.P.L.R. 5202(a)–(b) (McKinney 2014).

[108] C.P.L.R. 5202(a). Basically, an execution lien arises when the sheriff receives an execution. *Id.* An execution is a court order directing the sheriff to levy personal property. N.Y. C.P.L.R. 5230(a) (McKinney 2014). As with the restraining notice and the subpoena, the attorney for the judgment creditor, as officer of the court, can issue the execution. N.Y. C.P.L.R. 5230(b) (McKinney 2014).

[109] C.P.L.R. 5230(a).

> debt or property for fair consideration and without notice of such order.[110]

It is not easy to wrest from the language of section 5202(b) the point that liens are created, as the provision does not use the word "lien."[111] What one reads here is that a judgment creditor has "rights in the debt or property" upon the occurrence of enumerated events.[112] These rights are said to be "superior to the rights of any transferee of the debt or property."[113] From this we are to conclude that the creditor's power to initiate a procedure that will culminate in a sale (or in the case of a debt, a collection) is superior to the rights of a subsequent transferee. Of course, the word "subsequent" does not appear before the word "transferee." But surely this is what the legislature intended. Otherwise, a turnover order or a receivership erases any pre-existing transfer by the debtor, including absolute transfers.

It is significant that only three events trigger the judgment creditor's "right." First is the securing of "an order for delivery of . . . an interest of the judgment debtor in personal property."[114] This is the turnover order described in CPLR section 5225(a) and (b).[115] Second is an order for "payment of . . . a debt owed to the judgment debtor."[116] This is the turnover order described in CPLR section 5227.[117] Third is the securing of an order for the appointment of receiver of either a debt or property, accomplished pursuant to CPLR section 5228.[118] When any of these events occurs, the creditor achieves a place in the priority scheme when property is finally liquidated.[119]

Conspicuously absent from this list of lien-creating events is the issuance of a restraining notice or information subpoena. This omission has led to the conclusion that the creditor gains no property rights by virtue of serving the restraining notice or subpoena.[120] A restraining notice is supposed to have no influence

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[110] C.P.L.R. 5202(b).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] N.Y. C.P.L.R. 5225 (a)–(b) (McKinney 2014).
[116] C.P.L.R. 5202(b).
[117] N.Y. C.P.L.R. 5227 (McKinney 2014).
[118] C.P.L.R. 5202(b); N.Y. C.P.L.R. 5228(a) (McKinney 2014).
[119] *See* N.Y. C.P.L.R. 5234(c) (McKinney 2014).
[120] *See* Medi-Physics, Inc v. Cmty. Hosp. of Rockland Cnty., 432 N.Y.S.2d 594, 596 (Rockland County Ct. 1980).

on a creditor's priority.[121] Rather, the restraining notice is good against the person served, but not good against the world, which is another way of saying that no lien arises from service of the restraining notice.[122]

Prior to the CPLR, the restraining notice was an adjunct to an information subpoena. Without a court order, attorneys for the judgment creditor could serve a subpoena on a third party.[123] The subpoena implied an injunction against alienating property of or paying a debt to the debtor.[124] In *Wickwire Spencer Steel Co. v. Kemkit Scientific Corp.*,[125] the New York Court of Appeals held that service of a subpoena on a garnishee constituted commencing a supplementary proceeding, thereby creating a lien on the debtor's assets.[126] Since subpoenas were also restraining notices, the case established that the restraining notice was lien significant—that is, it effectuated a transfer of property from the debtor to the creditor.[127]

Wickwire was controversial because the only reference to the lien significance of subpoenas was in former Civil Practice Act section 808, which presupposed the appointment of a receiver.[128] Section 808(1) and (2) provided that the title of a receiver to the debtor's property related back to the service of a subpoena upon either the debtor or a garnishee.[129] Yet there was no receiver in *Wickwire*.[130] The *Wickwire* court induced from the receivership statute a state policy that commencement of a supplementary proceeding creates a lien, and that serving a subpoena on the judgment debtor or garnishee was tantamount to starting a supplementary

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[121] *See* Kitson & Kitson v. City of Yonkers, 778 N.Y.S.2d 503, 507 (App. Div. 2d Dep't 2004) (citing Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 810–11 (N.Y. 1981); Princeton Bank & Trust Co. v. Berley, 394 N.Y.S.2d 714, 721 (App. Div. 2d Dep't 1977); City of New York v. Panzirer, 259 N.Y.S.2d 284, 286 (App. Div. 1st Dep't 1965)); New York v. Birch, 478 N.Y.S.2d 231, 233 (Sup. Ct. New York County 1984); Steingart Assocs. v. Lots of Fun, Inc., 485 N.Y.S.2d 193, 195 (Sullivan County Ct. 1985).

[122] *See Birch*, 478 N.Y.S.2d at 233.

[123] Capital Co. v. Fox, 115 F. Supp. 677, 678 (S.D.N.Y. 1936); N.Y. Civil Practice Act § 779(2), L. 1920, ch. 925 (repealed Sept. 1, 1963).

[124] *See* N.Y. Civil Practice Act § 781, L. 1920, ch. 925 (repealed Sept. 1, 1963).

[125] Wickwire Spencer Steel Co. v. Kemkit Sci. Corp., 54 N.E.2d 336 (N.Y. 1944).

[126] *Id.* at 337.

[127] City of New York v. Panzirer, 259 N.Y.S.2d 284, 287 (App. Div. 1st Dep't 1965) (citing *Wickwire*, 54 N.E.2d at 337).

[128] Daniel H. Distler & Milton J. Schubin, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458, 488 (1960).

[129] *See* N.Y. Civil Practice Act § 808(1)–(2), L. 1920, ch. 925 (repealed Sept. 1, 1963); Distler & Schubin, *supra* note 128, at 491.

[130] Distler & Schubin, *supra* note 128, at 488.

proceeding.[131]

After the enactment of the CPLR, it has proved difficult to claim that the subpoena or a restraining notice is a lien-significant event.[132] Section 5202(b) seems to endow lien significance on just the three enumerated equitable remedies—the two species of turnover order and the commencement of the receivership.[133] Since the newly created restraining notice is not referenced there, the restraining notice, like the information subpoena, has no property significance.[134]

Nevertheless, the New York Court of Appeals briefly entertained the notion that service of a restraining notice gave rise to a lien. In *International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.*,[135] a judgment creditor served a restraining notice on the debtor.[136] Shortly after, the judgment debtor made an assignment for the benefit of creditors.[137] The judgment creditor then sought a turnover against the assignee pursuant to section 5225(b).[138] Obviously, a turnover was appropriate only if the judgment creditor already had a lien prior to the transfer of property to the assignee. If the creditor had to rely solely on section 5202(b) for its lien right, the earlier assignment for the benefit of creditors made any turnover order too late. There would have been no debtor property to which the judgment creditor's lien could attach. The assignee would have had it all before the turnover order could issue.

Nevertheless, Judge Charles Breitel ruled that, by virtue of the

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[131] *See Wickwire*, 54 N.E.2d at 337.

[132] *See* Mantovani v. Fast Fuel Corp., 494 F. Supp. 72, 77 (S.D.N.Y. 1980); Meadow Brook Nat'l Bank v. Fed. Ins. Co., 260 N.Y.S.2d 814, 815 (App. Div. 2d Dep't 1965); *Panzirer*, 259 N.Y.S.2d at 287–88. Because a judgment creditor has no interest in a debtor's property merely by serving a restraining notice on a third party, where the third party violates the restraining notice, the judgment creditor is disentitled to pre-violation interest. Doubet, LLC v. Trustees of Columbia Univ., No. 401544/07, 2011 N.Y. Misc. LEXIS 5607, at *2–4 (Sup. Ct. New York County 2011).

[133] N.Y. C.P.L.R. 5202(b) (McKinney 2014).

[134] *See id.*

[135] Int'l Ribbon Mills, Ltd. v. Arjan Ribbons, Inc., 325 N.E.2d 137 (N.Y. 1975).

[136] *Id.* at 138.

[137] *Id.* Prior to the permanent institution of federal bankruptcy in 1898, debtors could commence a collective creditors' proceeding by making an assignment for the benefit of creditors. Although initially contractual in nature, a history of private abuse led the New York legislature to govern the proceedings by statute. Debtor and Creditor Law, ch. 17, §§ 3–24, 1909 N.Y. Laws 445, 447–54 (Consol.). Federal bankruptcy law has largely eclipsed the assignment for the benefit of creditors, but the procedure still exists and is even occasionally used. *See* Conrad B. Duberstein, *Out-of-Court Workouts*, 1 AM. BANKR. L. REV. 347, 358 (1993).

[138] *See Int'l Ribbon Mills*, 325 N.E.2d at 138.

pre-assignment restraining notice, the judgment creditor was senior to the assignee.[139] He so ruled even as he acknowledged that the legislative history disfavored lien significance for the restraining notice.[140] Early drafts of CPLR section 5222, it seems, had expressly provided that creditors had a lien upon serving a restraining notice.[141] This provision, however, was later deleted.[142]

The thrust of Judge Breitel's analysis is the truism that an assignee takes the same rights as the assignor had.[143] Since the assignor was enjoined from making conveyances, the assignee was likewise enjoined.[144] The restraint was inherited, as it were, by the assignee.[145] Or, in our previous terms, the restraining notice was good against the "world" (and more specifically, against the assignee) even though the assignee had never been served.[146] The only way to escape the injunction was for the assignee to pay the judgment creditor the amount of the judgment.[147]

If logic holds sway, this ruling cannot be contained to assignments for the benefit of creditors. *All* transfers convey only the rights of the debtor; *any* transferee inherits the restraining obligation if the judgment debtor was so restrained. So *International Ribbon Mills* attributes universal lien significance to service of the restraining notice.[148] This would, incidentally, make

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[139] *Id.* at 139. The court cites, with approval, *In re City of New York*, where the city owed a judgment debtor a condemnation award. *In re* City of New York, 289 N.Y.S.2d 680, 682 (Sup. Ct. Queens County 1968). The creditor served a restraining notice and the debtor made an assignment for the benefit of creditors in violation of the restraining notice. *Id.* While denying that the creditor had a lien, the court ordered the city to pay the creditor—which, of course, meant that the creditor *did* have a lien. *Id.* at 684.

[140] *Int'l Ribbon Mills*, 325 N.E.2d at 138–39.

[141] *Id.*

[142] *See* ADVISORY COMM. ON PRACTICE & PROCEDURE, FINAL REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF NEW YORK, N.Y. Legis. Doc. 15, at A562–A563 (1961); ADVISORY COMM. ON PRACTICE & PROCEDURE, THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF STATE OF NEW YORK, N.Y. Legis. Doc. 17, at 252 (1959).

[143] *Int'l Ribbon Mills*, 325 N.E.2d at 139. Property theorists refer to this as the principle of *nemo dat quod non habet*, "the principle that one cannot transfer an interest in property that the transferor does not have." Thomas E. Plank, *Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language*, 68 BUS. LAW. 439, 441–42 (2013).

[144] *Int'l Ribbon Mills*, 325 N.E.2d at 139.

[145] *Id.*

[146] *Id.*

[147] *See id.*; c*f.* Midlantic Nat'l Bank/N. v. Fed. Reserve Bank, 814 F. Supp. 1195, 1197 (S.D.N.Y. 1993) (serving a restraining notice before a receiver was appointed did not create a lien on the receivership estate).

[148] *Int'l Ribbon Mills*, 325 N.E.2d at 139; s*ee also* Spinello v. Spinello, 334 N.Y.S.2d 70, 74 (Sup. Ct. Nassau County 1972) ("There can be little doubt that on December 15, 1971, Mrs.

the lien for the restraining notice better than the lien for the turnover order or receivership. According to section 5202(b), the lien for the turnover or receivership is inferior to the rights of "a transferee who acquired the debt or property for fair consideration and without notice of such order."[149] No express bona fide purchaser protection would exist (at least by statute) with regard to the lien arising from the restraining notice.[150]

Oddly, in *International Ribbon Mills*, Judge Breitel overruled his own earlier opinion for the Appellate Division in *City of New York v. Panzirer*. There, a judgment creditor (JC_1) served a restraining notice on a garnishee, who held proceeds from the sale of the judgment debtor's business.[151] A different judgment creditor (JC_2) obtained a levy before JC_1 could obtain a turnover order.[152] Judge Breitel, citing the very legislative history he scorned in *International Ribbon Mills*, ruled in favor of JC_2:

> The result, then, is that in order for a judgment to attain status in the ranking of priorities there must either be a levy, an order directing delivery of property, or the appointment of a receiver. Any other measures taken by the judgment creditor, no matter how diligent, on an absolute or comparative basis, do not suffice to qualify for priority.[153]

This was quite opposite to the holding in *International Ribbon Mills*.

While *International Ribbon Mills* attributes lien-creating significance to a restraining notice, the Court of Appeals soon sang a different tune (albeit in the key of dictum) in *Aspen Industries, Inc. v. Marine Midland Bank*.[154] Astonishingly, it cited *International Ribbon Mills* as authority for its dictum,[155] even

Spinello, as her ex-husband's judgment creditor personally serving [the garnishee] with a restraining notice, established her lien against any debt owed to [the debtor] by [the garnishee].").

149 N.Y. C.P.L.R. 5202(b) (McKinney 2014).

150 *See id.*

151 City of New York v. Panzirer, 259 N.Y.S.2d 284, 285–86 (App. Div. 1st Dep't 1965).

152 *Id.*

153 *Id.* at 288.

154 Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 810–11 (N.Y. 1981) ("In contrast with prior law, service of a CPLR 5222 restraining notice confers no priority upon the judgment creditor in the form of a lien on the judgment debtor's property." (citations omitted)).

155 As did *Garland D. Cox & Assocs. v. Koffman*, 413 N.Y.S.2d 260, 261 (App. Div. 3d Dep't 1979), *rev'd on other grounds*, 400 N.E.2d 302 (1979) and *Steingart Assocs. v. Lots of Fun, Inc.*, 485 N.Y.S.2d 193, 195 (Cnty. Ct. Sullivan County 1985).

though *International Ribbon Mills* held the dead opposite.

The temptation of common law judges to equate a defendant's equitable duty with a property right in the plaintiff is strong. For example, real estate law makes contracts enforceable by specific performance.[156] To assure remedy's bite against transferees of the contracting seller, it is said that, just as the seller holds title in trust for the buyer, so the seller's (bad faith) transferee equally holds property in trust for the buyer.[157] As a result, a third party with knowledge of the equitable duty takes this "trust" property from the seller and holds it for the buyer.[158] Similarly, where an owner of real estate agrees to hold land as security for some obligation, courts are quick to say that there is an "equitable lien" on the property.[159] Such doctrines guarantee that a bad faith purchaser is fully subject to an injunction that a court might issue with regard to the real property.[160] Only bona fide purchasers for value take free of such equitable encumbrances.[161]

Accordingly, in spite of *Aspen*'s discouraging dictum, some courts, following this strong instinct, have induced lien-like properties in the restraining notice. In *Kates v. Marine Midland Bank*, a judgment creditor served a restraining notice on a trustee of the judgment debtor.[162] After the restraining notice, the garnishee advanced funds to the judgment debtor.[163] It then sought to set off its loan to the judgment debtor against the corpus of the trust, thereby defeating the judgment creditor's restraining notice.[164]

The court did not permit the setoff, although setoffs are generally

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[156] Jason S. Kirwan, Note, *Appraising a Presumption: A Modern Look at the Doctrine of Specific Performance in Real Estate Contracts*, 47 WM. & MARY L. REV. 697, 702 (2005).

[157] *See* N.Y. C.P.L.R. 5225(b) (McKinney 2014).

[158] This is called the doctrine of equitable conversion. Trs. of Union Coll. v. Wheeler, 61 N.Y. 88, 109 (1874).

[159] *E.g.*, Teichman *ex rel.* Teichman v. Cmty. Hosp., 663 N.E.2d 628, 631 (N.Y. 1996) ("[A]n equitable lien 'is dependent upon some agreement express or implied that there shall be a lien on specific property.' The agreement 'must deal with some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for an obligation." (quoting James v. Alderton Dock Yards, 176 N.E. 401, 403 (N.Y. 1931))).

[160] *See, e.g.*, Lipshy v. Sabbeth, 520 N.Y.S.2d 946, 948 (App. Div. 2d Dep't 1987).

[161] Bridges v. Nat'l Bank of Troy, 77 N.E. 1005, 1006 (N.Y. 1906) (citing Buffalo German Ins. Co. v. Third Nat'l Bank of Buffalo, 56 N.E. 521, 525–26 (N.Y. 1900)).

[162] Kates v. Marine Midland Bank, 541 N.Y.S.2d 925, 927 (Sup. Ct. Monroe County 1989).

[163] *Id.*

[164] *See id.* at 928. The case involved some advances made prior to service of the restraining notice. These were treated quite differently. *See infra* text accompanying notes 539–51.

good against levies.[165] In effect, the stuff of the prohibited setoff was made available to satisfy the judgment creditor's judgment. This can only be explained if the restraining notice had already encumbered the corpus of the trust prior to the assertion of the setoff.[166]

Similarly, in *Rafkind v. Chase Manhattan Bank, N.A.*,[167] the SEC had enjoined a bank from paying a bank account.[168] Admittedly, the restraining injunction had a federal origin, but the court cited CPLR section 5201(b) to the effect that "[a] money judgment may be enforced against any property which could be assigned or transferred."[169] The court reasoned that the judgment creditor could not bring a turnover proceeding against the bank under section 5227, because the injunction prohibited the bank from paying anyone but the SEC.[170] If this is correct, then restraining notices generally have a lien effect on bank accounts (at least when they have a federal origin). They reserve for the beneficiary of the injunction the sole right to collect in satisfaction of a judgment.

In *W.J. Towell & Co. v. Perfumer's Workshop Int'l, Ltd.*,[171] attorneys served with a restraining notice had control over a debtor's certificate of deposit.[172] The attorneys asserted a "retaining lien" over the account—something that the common law of New York permits.[173] The "retaining lien" was held to be invalid because the judgment creditor had already served the attorneys with a restraining notice.[174] This result only makes sense if the restraining notice endowed the creditor with a lien.

In spite of these rare examples, it must be concluded that, on the

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[165] *Kates*, 541 N.Y.S.2d at 928.

[166] This result will be criticized later on several grounds. *See infra* text accompanying notes 539–51. For the moment, *Kates* is cited to illustrate the temptation that courts feel to create property concepts in order to effectuate equitable court orders.

[167] Rafkind v. Chase Manahattan Bank, N.A., No. 92 Civ. 6099 (JSM), 1992 U.S. Dist. LEXIS 18625 (S.D.N.Y. Dec. 7, 1992).

[168] *Id.* at *1.

[169] *Id.* at *4 (quoting N.Y. C.P.L.R. 5201(b) (McKinney 2014)).

[170] *Rafkind*, 1992 U.S. Dist. LEXIS 18625, at *3–5, 9–10.

[171] W.J. Towell & Co. v. Perfumer's Workshop Int'l, Ltd., No. 83 Civ. 0323, 1988 U.S. Dist. LEXIS 14551 (S.D.N.Y. Dec. 21, 1988).

[172] *Id.* at *1–5.

[173] *Id.* at *6–7. "The "retaining lien" gives an attorney the right to keep, with certain exceptions, all of the papers, documents and other personal property of the client which have come into the lawyer's possession in his or her professional capacity as long as those items are related to the subject representation." Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C., 370 F.3d 259, 262 n.3 (2d Cir. 2004) (quoting Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 754 N.Y.S.2d 220, 223 (App. Div. 1st Dep't 2002)).

[174] *W.J. Towell & Co.*, 1988 U.S. Dist. LEXIS 14551, at *8.

text of the CPLR, only those orders enumerated in CPLR section 5202(b) create liens on the debtor's property.[175] Undoubtedly, courts will tend to assume that the service of a restraining notice and subpoena no longer give rise to liens, as they did in the fondly remembered days before the CPLR.[176] An execution can be issued by the creditor's attorney.[177] If an execution generated by the judgment creditor's attorney gives rise to a lien when delivered to the sheriff, why shouldn't issuance of the restraining notice when delivered to a debtor or garnishee?

Meanwhile, the levy of property incapable of delivery (i.e., delivery of the execution to the garnishee) constitutes both a turnover order and a restraining notice.[178] But only the sheriff may levy.[179] Yet all the sheriff does is deliver a piece of paper. Why couldn't the attorney for the judgment creditor deliver this piece of paper?[180] As it stands, the restraining notice, a piece of paper delivered by the attorney, has no lien significance.[181] But a piece of paper delivered by the sheriff constitutes the strengthening of a preexisting execution lien.[182]

To be sure, a levy of property not capable of delivery lasts only ninety days.[183] But the levy is perpetuated if the judgment creditor

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[175] N.Y. C.P.L.R. 5202(b) (McKinney 2014).

[176] One practical concern is whether a garnishee who has received a restraining notice may commence an interpleader because the property affected is subject to competing claims. The Federal Interpleader Act requires that "[t]wo or more adverse claimants . . . are claiming or may claim to be entitled to such [interpleaded property]." 28 U.S.C. § 1335(a)(1) (2006). It may be questioned whether a restraining notice gives rise to a "claim" for this purpose. Nevertheless, at least one court has sustained interpleaders on the basis that the interpleading plaintiff has received a restraining notice. Prudential Inv. Mgmt. Servs. LLC v. Forde, No. 12 Civ. 5168 (LAP), 2013 U.S. Dist. LEXIS 89190, at *2–5, *16 (S.D.N.Y. June 25, 2013); *see also* Caro v. Fidelity Brokerage Servs. LLC, 2014 U.S. Dist. LEXIS 110405 (D. Conn. August 11, 2014) (upholding arbitrators who found a broker did nothing wrong by commencing an interpleader and transferring assets to federal interpleader court over opposition of customer).

[177] N.Y. C.P.L.R. 5230(b) (McKinney 2014).

[178] N.Y. C.P.L.R. 5232(a) (McKinney 2014).

[179] *Id.*

[180] This seems to have occurred, however, in *Neshewat v. Salem*, 365 F. Supp. 2d 508, 523 & n.12 (S.D.N.Y. 2005).

[181] *See* C.P.L.R. 5230(b).

[182] By "strengthen," I mean that the lien preexists the levy and arises when the execution is delivered to the sheriff. N.Y. C.P.L.R. 5202(a) (McKinney 2014). Before the levy, the execution lien can be defeated by the debtor's conveyance to a purchaser for value. C.P.L.R. 5202(a)(1). But after the levy, the lien is stronger. It is absolutely perfect if the levy nets property capable of delivery. If not capable of delivery, only a transferee *without knowledge* defeats the lien. C.P.L.R. 5202(a)(2).

[183] C.P.L.R. 5232(a); Metro Burak, Inc. v. Rosenthal & Rosenthal, Inc., 372 N.Y.S.2d 781, 785 (Sup. Ct. Richmond County 1975), *modified*, 380 N.Y.S.2d 758 (App. Div. 2d Dep't 1976).

commences a turnover proceeding prior to lapse.[184] In effect, with regard to property not capable of delivery, a levy is nothing more than the anticipation of a formal turnover order. Why can't the attorney for the judgment creditor perform the levy, whenever it consists only of delivering a piece of paper?

It should be the case that delivery of the restraining notice should be *both* a restraint *and* an order to surrender property to the sheriff. There is no particular reason I can see why the restraining notice should be as impotent as it is. As it stands, the restraining notice is already a half-levy (since all levies are also restraining notices). Other judgment creditors less diligent than the server of the restraining notice are invited to sneak ahead of the server if they motivate the sheriff to act.[185] Why should this be?

Presumably the restraining notice was invented for the case where the sheriff was insufficiently motivated to levy fast enough. But if that is the motive, why not empower the judgment creditor's attorney to levy a garnishee? Then we could simply skip the restraining notice altogether, insofar as third-party garnishees are concerned, and proceed directly to a levy.

C. Order of Which Court?

The restraining notice is an order of the court—but which court? The answer may be induced from CPLR section 5222(a)'s fourth sentence, which provides that the restraining notice

> shall specify all of the parties to the action, the date that the judgment or order was entered, *the court in which it was entered*, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor[186] and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature or copy of the original

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[184] One court has suggested, without much statutory justification, that a restraining notice, without a turnover proceeding, extends a levy. *Metro Burak, Inc.*, 372 N.Y.S.2d at 788–89.

[185] *See* City of New York v. Panzirer, 259 N.Y.S.2d 284, 288 (App. Div. 1st Dep't 1965).

[186] Failure to list the judgment creditors does not make the restraining notice ineffective, and a court need not vacate the restraining notice in light of such mistakes. McLoughlin v. Altman, No. 92 Civ. 8106 (KMW)(MHD), 1997 U.S. Dist. LEXIS 11413 at *4–5 (S.D.N.Y. Aug. 7, 1997).

> signature[187] of the clerk of the court or attorney or the name of the support collection unit which issued it.[188]

It is reasonable to assume, from the emphasized passage, that the restraining notice is an order of the court that entered the judgment in the first place.[189]

Now according to CPLR section 5221(b), a "notice" (as in restraining notice) may be issued from "any court in which a special proceeding authorized by this article could be commenced if the person served with the notice . . . were respondent."[190] Venue for special proceedings is described in section 5221(a).[191] There we learn, for example:

> If the judgment sought to be enforced was entered in . . . the civil court of the city of New York, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within that city, a special proceeding authorized by this article shall be commenced in the civil court of the city of New York.[192]

In *Zarsky v. Law Office of Maury B. Josephson*,[193] a creditor had a judgment from the Civil Court of the City of New York.[194] Her attorney issued a restraining notice to a bank in which the judgment debtor's professional corporation had an account.[195] This bank had branches in New York City, but the corporation's particular branch was in Nassau County.[196] The court proclaimed it had no jurisdiction over the bank and so the restraining notice had no bite.[197]

As we shall see, banks in New York sometimes enjoy the protection of a "branch rule," whereby a creditor must serve judicial process against the very branch with which the debtor does

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[187] Want of a signature makes the restraining notice void. Slepian v. Cnty. of Suffolk, No. 2001-634 S C, 2002 N.Y. Misc. LEXIS 667, at *1–2 (App. Div. 2d Dep't Apr. 3, 2002). The signature, however, may simply be the typed symbols "/S/." Poughkeepsie Sav. Bank, FSB v. RS Paralegal & Recovery Servs., 554 N.Y.S.2d 290, 291 (App. Div. 2d Dep't 1990).

[188] N.Y. C.P.L.R. 5222(a) (McKinney 2014) (emphasis added).

[189] *Id.*

[190] N.Y. C.P.L.R. 5221(b) (McKinney 2014).

[191] C.P.L.R. 5221(a)(1)–(5).

[192] C.P.L.R. 5221(a)(3).

[193] Zarsky v. Law Office of Maury B. Josephson, No. 1764-CV-2005, 2006 N.Y. Misc. LEXIS 3839 (Civ. Ct. New York County Dec. 20, 2006).

[194] *Id.* at *5.

[195] *Id.*

[196] *Id.* at *23–24.

[197] *Id.* at *24–25.

business.[198] This rule is in the course of imploding, because courts have noticed that banks increasingly have instantaneous worldwide capacity to communicate by computer with any given branch.[199] Nevertheless, the *Zarsky* court must have been applying the separate branch doctrine, which requires that garnishment must occur at the Nassau branch where the judgment debtor actually opened the account.[200] If, however, as some courts think, the branch rule is dead for computerized domestic banks, the garnishee bank was indeed present in New York City, and the restraining notice would have been proper. But, because of the restricted venue rule of section 5221(a), coupled with the "separate branch" rule, the attorney for the creditor could not issue the restraining notice to the Long Island branch of the debtor's bank.[201]

What should the judgment creditor have done to obtain a proper restraining notice? The matter is surprisingly complicated. According to CPLR section 5221(a)(4):

> In any other case, if the judgment sought to be enforced was entered in any court of this state, a special proceeding authorized by this article shall be commenced, either in the supreme court or a county court, in a county in which the *respondent* resides or is regularly employed or *has a place for the regular transaction of business in person* or, if there is no such county, in any county in which he may be served or the county in which the judgment was entered.[202]

For the creditor in *Zarsky* to effectuate a restraining notice against the "respondent" in Nassau County, several steps are required. First, the judgment creditor would have to file a transcript of the civil court judgment with the county clerk in New York County.[203] Thereafter, the judgment creditor must obtain a transcript from the county clerk in New York County and file it with the clerk for Nassau County, where the bank branch in *Zarsky* was located.[204] "A judgment docketed by transcript . . . ha[s] the same effect as a docketed judgment entered in the supreme court

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198 *See* discussion *infra* Part I.G.

199 *See* discussion *infra* Part I.G.

200 *See Zarsky*, 2006 N.Y. Misc. LEXIS 3839, at *24–25 ("That the North Fork Bank has numerous branches in New York City does not confer jurisdiction on this court." citing David D. Siegel, *Practice Commentaries*, C5221:2, *in* N.Y. C.P.L.R. 5221 (McKinney 2006))).

201 *See Zarsky*, 2006 N.Y. Misc. LEXIS 3839, at *23–24.

202 N.Y. C.P.L.R. 5221(a)(4) (McKinney 2014) (emphasis added).

203 N.Y. C.P.L.R. 5018(a) (McKinney 2014).

204 *Id.*

within the county where it is docketed."[205] In other words, we may now consider the judgment to have been *entered* in Nassau County. The New York City attorney for the judgment creditor, as officer of the *Nassau* County Supreme Court, may now properly issue a restraining notice as if it were a Nassau County court order.[206]

Federal cases have similar restrictions. In *Hassett v. Goetzmann*,[207] the United States Bankruptcy Court for the Southern District of New York issued a judgment, and the judgment creditor issued a restraining notice against a garnishee.[208] The creditor then sought enforcement in the Northern District of New York.[209] The Northern District sent the creditor packing back down south.[210] The creditor had attempted to register the Southern District judgment in the Northern District but did not succeed in doing so.[211] Had the registration been successful, undoubtedly the Northern District would have entertained the supplementary proceeding against the garnishee.[212] But, absent local registration, only the Southern District of New York could enforce a restraining notice in connection with a judgment entered therein.[213]

A different case presents itself when the restraining notice is served on a debtor. Such a notice is always valid, because if the underlying money judgment is valid, there is jurisdiction over the debtor's person.[214] But where a garnishee is served, the order is valid only if the garnishee can be made to answer in the venue where the judgment was entered.[215]

The point can be expanded nationally. A restraining notice served on a person not domiciled in New York is valid only if that person has sufficient minimum contacts in the *International Shoe*

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[205] *Id.*

[206] Whether such a notice served on a bank is valid with respect to a corporation (where the corporation is not the judgment debtor) is a matter of much controversy. *See infra* Part I.F.7.

[207] Hassett v. Goetzmann, No. Misc. 2867, 1992 U.S. Dist. LEXIS 13218 (N.D.N.Y. Sept. 1, 1992).

[208] *Id.* at *2–3.

[209] *Id.* at *3.

[210] *See id.* at *13–14.

[211] *See id.* at *8–12.

[212] *Id.* at *8.

[213] *See id.* at *14.

[214] If a court has personal jurisdiction over a debtor and enters a money judgment against him, the court also has the authority to enforce the judgment by means of a restraining notice. *See* United States v. First Nat'l City Bank, 379 U.S. 378, 384–85 (1965).

[215] *See* Doubet, LLC v. Trs. of Columbia Univ., No. 401544/2007, 2011 N.Y. Misc. LEXIS 3235, at *29–31 (Sup. Ct. New York County June 6, 2011).

Co. v. Washington[216] sense:

> Without due process limits on the territorial reach of a restraining notice, it would be fundamentally unfair for a party to issue a restraining notice that restrains property of a garnishee located anywhere in the world, with no minimum contacts to the forum where the restraining notice is issued, whereas the garnishee might only be able to challenge the validity of the restraining notice in the state where it was issued, instead of in forum where he or she was served.[217]

D. Who May Be Served and How?

A restraining order may be served "in the same manner as a summons[218] or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section."[219] A debtor, obligor, or third party may be served with a restraining notice.[220]

1. Service on the Judgment Debtor or Obligor

A judgment debtor "or obligor" may be served with a restraining notice.[221] According to CPLR section 105(m), "a 'judgment debtor' is a person, other than a defendant not summoned in the action, against whom a money judgment is entered."[222]

While it is tolerably clear who the judgment debtor is, it is less clear who the "obligor" is supposed to be. The term appears in CPLR section 5222(b) and occasionally appears without definition

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[216] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[217] *Doubet, LLC*, 2011 N.Y. Misc. LEXIS 3235, at *31.

[218] Serving the summons is governed by Article 3 of the CPLR. N.Y. C.P.L.R. 308–16 (McKinney 2014). Service of persons outside the United States is governed by the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 1, Nov. 15, 1965, 20 U.S.T. 361; *accord* Sonera Holding, B.V. v. Çukurova Holding, A.Ş., No. 11 Civ. 8909 (DLC), 2012 U.S. Dist. LEXIS 181485, at *10 (S.D.N.Y. Dec. 21, 2012).

[219] N.Y. C.P.L.R. 5222(a) (McKinney 2014). Subdivision (g) permits service "in the form of magnetic tape or other electronic means," but only if the garnishee has consented in writing. C.P.L.R. 5222(g).

[220] C.P.L.R. 5222(b).

[221] *Id.*

[222] N.Y. C.P.L.R. 105(m) (McKinney 2014).

throughout Article 52 of the CPLR.[223]

A review of New York Domestic Relations Law reveals many references to "support obligors" in connection with child support proceedings.[224] New York Lien Law section 65(1) refers to a lien (for "[t]he New York state office of temporary and disability assistance") on:

> real property owned by a support obligor when such support obligor is or was under a court order to pay a child support or combined child and spousal support to a support collection unit and such support obligor has accumulated support arrears/past due support in an amount equal to or greater than the amount of support due pursuant to such order for a period of four months.[225]

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[223] *See, e.g.*, N.Y. C.P.L.R. 5222(a)–(b), (d)–(e), (g), 5230(a)–(d), 5232(a), (c)–(d), 5234(b) (McKinney 2014). We do get a limited definition in section 5232(d), which governs levies pursuant to executions:

> For the purposes of this section "obligor" shall mean an individual other than a judgment debtor obligated to pay support, alimony or maintenance pursuant to an order of a court of competent jurisdiction who has been found to be in "default" of such order as such term [i.e., default] is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article and the establishment of such default has been subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article, except that for the purposes of this section only, a default shall not be founded upon retroactive child support obligations as defined in paragraph (c) of subdivision one of section four hundred forty and subdivision one of section two hundred forty, and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

C.P.L.R 5232 (d). To be noted here is, first, that "obligor" and "judgment debtor" are mutually exclusive categories. *See id.* Second, the definition by its terms is limited to the governance of the sheriff's levy. *See id.* Under this definition, a person is not an "obligor" unless one is in default on "three payments on the date due in the full amount directed by the order of support, or the accumulation of arrears equal to or greater than the amount directed to be paid for one month, whichever first occurs." N.Y. C.P.L.R. 5241(a)(7) (McKinney 2014). Furthermore, the definition applies only if the obligor has claimed "mistake of fact" with regard to an income execution for support enforcement. C.P.L.R. 5241(e). When the definition applies, the "obligor" is entitled to notice of his rights to exempt property (where no similar notice was served pursuant to CPLR section 5222(e) within the past year). C.P.L.R. 5222(d). We are warned not to extend this definition beyond the purview of section 5232. C.P.L.R. 5232(d). So it may not be used for the purpose of restraining notices. Rather, we must look elsewhere for a definition of "obligor."

[224] *See, e.g.*, N.Y. DOM. REL. LAW §§ 244, 244–b(a) (McKinney 2014).

[225] N.Y. LIEN LAW § 65(1) (McKinney 2014). *See also* LIEN LAW § 211(1) ("The New York state office of temporary disability assistance . . . shall have a lien against personal property owned by a support obligor when such support obligor is or was under a court order to pay child support or combined child and spousal support to a support collection unit and such support obligor has accumulated suporot arreas/past due support in an amount equal to or greater than the amount of of support due pursuant to such order for a period of four months.").

CPLR Section 5234(b), governing priorities between multiple executions delivered by the same sheriff, contemplates that executions will be delivered to enforce a "past-due child support order."[226] Therefore, it is probably the case that the invocation of the word "obligor" in CPLR section 5222 is intended to refer to those liable on child support orders, which are not, strictly speaking, money judgments.[227]

Although restraining notices are effective against "obligors" so defined, we shall, for ease of reference, refer only to restraints on judgment debtors, with the understanding that the rules also apply to "obligors."

A restraining notice served on corporate judgment debtors is also binding on the agents of the corporate debtor, and a corporate officer might be found in contempt for causing the debtor to make prohibited transfers.[228] In this regard, New York resembles FRCP Rule 65(d)(2), which states that:

> The order binds only the following who receive actual notice of it by personal service or otherwise:
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> (A) the parties;
>
> (B) the parties' officers, agents, servants, employees, and

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[226] C.P.L.R. 5234(b).

[227] *See* C.P.L.R. 5222; Bank of Lake Placid v. Rhino, 111 Misc. 2d 639, 640, 444 N.Y.S.2d 562, 563 (Sup. Ct. Clinton County 1981) ("The [alimony and support] order . . . is not a money judgment as defined by CPLR 105 (subd [p])."). It may also be noted that CPLR section 5222 links a definition of "order" (as used in CPLR section 5222 generally) to

> an order issued by a court of competent jurisdiction directing the payment of *support, alimony or maintenance* upon which a 'default' as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a 'mistake of fact' for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article except that for the purposes of this section only a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

C.P.L.R. 5222(f) (emphasis added). Presumably this definition of "order" comes and goes. It applies when the statute refers to a "judgment or order." It does not apply when, for example, section 5222(c) refers to a court order permitting the judgment creditor to serve a second restraining notice on the same third party.

[228] Cordius Trust v. Kummerfeld Assocs., 658 F. Supp. 2d 512, 519 (S.D.N.Y. 2009) ("[V]iolations of a restraining notice by the corporation may be imputed to its president if the president controls the corporation and deliberately disregards a restraining notice that was served on him." (citing Vinos Argentinos Imports USA, Inc. v. Los Andes Imports, Inc., No. 91 Civ. 2587 (JSM), 1993 U.S. Dist. LEXIS 15826, at *3 (S.D.N.Y. Nov. 8, 1993))); Kramer v. Skiatron of Am., Inc., 223 N.Y.S.2d 283, 284–87 (Sup. Ct. New York County 1961) (holding a corporation, its president, and a corporate officer in contempt of court for violating a restraining notice in a pre-CPLR case).

> attorneys; and
>
> (C) other persons who are in active concert or participation with any one described in Rule 65(d)(2)(A) or (B).[229]

This provision is a codification of the common law of injunctions[230] and therefore probably reflects the law of New York with regard to injunctions like the restraining notice. If so, any agent with notice, not just those who were personally served, can be held liable for violating a restraining notice.[231]

Still, courts must not convert restraining notices into liens. Whereas federal courts enforce injunctions against third party buyers of assets,[232] any such holding in New York implies that the restraining notice is a lien, which is not to be tolerated. A challenging case on this score is *Stone Container Corp. v. Tradeway International Corp.*,[233] where, following service of the restraining notice on the corporate debtor, the president and sole shareholder dipped into his personal funds to pay competing creditors of the debtor.[234] The president then made a claim against the debtor for reimbursement.[235] The judgment creditor sought an order holding the debtor in contempt for violating the restraining notice.[236] Rather creatively, the court ruled that what the president paid from his personal funds was a "gift" for which he could not seek reimbursement.[237] Therefore, the corporate debtor was not in violation of the restraining notice, but the debtor was ordered to reduce its liability to the president by the amount of the payments the president had made.[238] The gift was no gift after all! *Stone Containers* stands for the proposition that third parties can

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[229] FED. R. CIV. P. 65(d)(2).

[230] Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13–14 (1945).

[231] Citibank, N. Am. v. Anthony Lincoln-Mercury, Inc., 447 N.Y.S.2d 262, 263 (App. Div. 1st Dep't 1982) (holding that the corporation's president and sole stockholder was personally served and therefore was liable). "[A person] may not use his position as sole stockholder and president of the defendant corporations to shield himself from contempt proceedings . . . ." *Id.*

[232] Golden State Bottling Co. v. NLRB, 414 U.S. 168, 178–79 (1973) (allowing an injunction to bind a bona fide purchaser to corporate assets).

[233] Stone Container Corp. v. Tradeway Int'l Corp., No. 91 Civ. 6882 (JFK), 1994 U.S. Dist. LEXIS 6177 (S.D.N.Y. May 12, 1994).

[234] *Id.* at *1, 3.

[235] *See id.* at *3.

[236] *Id.* at *1.

[237] *See id.* at *5.

[238] *Id.* Mysteriously, the judgment debtor had filed for bankruptcy, yet the court felt entitled to adjudicate the debtor's liability for violating the restraining notice. *See id.* at *6. Such an adjudication surely contradicts bankruptcy's automatic stay. 11 U.S.C. § 362(a)(1) (2012).

volunteer to pay the debt of a judgment debtor and be a subrogee without violating the restraining notice.[239] This seems to presage the *Verizon* result, where advanced payment of a too-contingent debt was held not to violate the terms of CPLR section 5222(b).[240]

It is not entirely clear in *Stone Container* that the officer in question was personally served with a restraining notice.[241] Perhaps this was unnecessary if the corporate debtor was properly served and if the corporate officer knew about it. Officers could also separately be considered garnishable. Indeed, they are third parties with custody[242] of the debtor's property. But where the corporate

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[239] *See Stone Container Corp.*, 1994 U.S. Dist. Lexis 6177, at *4–5.

[240] Verizon New England, Inc. v Transcom Enhanced Servs. Inc., 990 N.E.2d 121, 123–25, (N.Y. 2013).

[241] As occurred in *Citibank, N.A. v. Anthony Lincoln-Mercury, Inc.*, where the president and sole stockholder was personally served with a restraining notice. Citibank, N.A. v. Anthony Lincoln-Mercury, Inc., 447 N.Y.S.2d 262, 263 (App. Div. 1st Dep't 1982).

[242] "Custody" is a word sometimes paired with "possession." *E.g.*, N.Y. C.P.L.R. 5222(b), 5225(a)–(b), 5232(a), 6214(a) (McKinney 2014). Sometimes it is paired with "possession" and "control." *E.g.*, N.Y. C.P.L.R. 5224(a-1) (McKinney 2014). Recently, in response to a certification from the United States Court of Appeals for the Second Circuit, the New York Court of Appeals decided that the omission of the words "or control" in the turnover provision of CPLR section 5225(b) was specifically designed to exclude cases of "constructive possession," which apparently means control over the person who actually possesses. *See* Northern Mariana Islands v. Canadian Imperial Bank of Commerce, 990 N.E.2d 114, 119 (N.Y. 2013). The opinion reduces "possession" to some form of grasping by the hands (manucaption). Property grasped in the hands of an agent is apparently merely constructive possession. This opinion promises to wreak much havoc on money judgment law if this definition of "possession" is taken seriously. For example, if a garnishee is sued for turnover on a Monday and parks property with an agent on Tuesday, the garnishee completely escapes the turnover proceeding because, at the time of the court ruling, the garnishee's possession is merely constructive. Indeed, corporations, having no hands at all, *always* possess "constructively"—i.e. through agents. Thus corporate garnishees are made virtually immune from judicial process.

Oddly, the *Northern Mariana Islands* case involved a garnishee present in New York whose wholly owned subsidiary maintained a bank account for the debtor. *Id.* at 116. The creditor sought a turnover order against the parent corporation. *Id.* In effect the Court of Appeals stated that the turnover order was not available to the creditor. *See id.* at 119. The court seems to have missed entirely that the case is actually a version of the "separate branch rule" or "separate entity rule." This is the rule that states every branch is a different entity than the branch of a bank that actually is garnished. Dewar v. Bangkok Bank Pub. Co. Ltd., N.Y. Branch, No. 112560/2010, 2012 N.Y. Misc. LEXIS 5583, at *5 (Sup. Ct. New York County Oct. 26, 2012) ("The 'separate entity rule' dates back to the early 1900's and provides that 'each branch of a bank is treated as a separate entity, in no way concerned with accounts maintained by depositors in other branches or at a home office.'" (quoting Lanier Saperstein & Geoffrey Sant, The Separate Entity Rule: The Deep Divide, N.Y.L.J., Apr. 13, 2012, at 4, col. 1)). As we shall see, this rule is being whittled down, but it still has validity when a branch is outside the United States, because of the risk that a bank will have double liability for a debt by honoring a New York garnishment. *See* discussion *infra* Part I.S. If a foreign branch of a bank in New York is a separate entity, then surely a foreign branch of a subsidiary of the New York bank is likewise a separate entity.

debtor has been served and the agent violates the order, this should be enough to render the corporate debtor liable for violating the restraining notice.

2. Service on Third Parties

A restraining notice may be served on third persons other than the judgment debtor.[243] The State of New York might be garnished, though extra procedures are heaped upon creditors.[244] Courts, however, have proclaimed that executors of estates may not be served, as that would interfere with the orderly distribution of estates.[245]

At first by case law[246] and then by express statute,[247] restraining notices are ineffective against employers who owe wages.[248] The reason for exempting employers is that the CPLR has a complex set of rules for income executions. In order to save judgment debtors from shame in the workplace, the CPLR requires the sheriff to serve the income execution on the judgment debtor, either by personal service or by certified mail.[249] The income execution demands that the debtor pay the sheriff directly,[250] with the warning that the

[243] Broome v. Citibank, N.A., 632 N.Y.S.2d 410, 412 (Civ. Ct. Queens County 1995).

[244] C.P.L.R. 5222(a). When the State of New York is served, the judgment creditor must serve

> the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany.

Id. The rules require *double* service to the same table. Service on one but not the other renders the restraining notice ineffective. *See* Remo Drug Corp. v. State, 546 N.Y.S.2d 529, 530, 531 (Ct. Cl. 1989). Oddly, the sheriff, wherever located, is invited to serve a restraining notice by registered or certified mail. C.P.L.R. 5222(a). Presumably attorneys could do this too. Service by email, however, is effective only if the third party served consents in writing. C.P.L.R. 5222(g).

[245] *E.g.*, *In re* Estate of Stein, 303 N.Y.S.2d 31, 32 (Sur. Ct. Westchester County 1969) (citing *In re* Estate of Casey, 260 N.Y.S.2d 816, 817 (Sur. Ct. Rensselaer County 1965)).

[246] Silbert v. Silbert, 267 N.Y.S.2d 744, 746 (App. Div. 2d Dep't 1966); Power v. Loonam, 258 N.Y.S.2d 136, 137–38 (Sup. Ct. Nassau County 1965).

[247] Act of July 15, 1991, ch. 314, § 1(a), 1991 N.Y. Laws 2939.

[248] Drawing from CPLR sections 5231 and 5205(d)(2), one court has interpreted wages or salary to mean "money the debtor receives from 'any source' for 'personal services rendered.'" Patrick Ryan's Modern Press v. Bowler, No. 3066-04, 2009 N.Y. Misc. LEXIS 5504, at *4 (Sup. Ct. Albany County 2009). Thus, managing apartments for a percentage of the rents constituted wages. *Id.* at *4–5.

[249] N.Y. C.P.L.R. 5231(d) (McKinney 2014).

[250] If the debtor is paying 10 percent to the sheriff directly, no other creditor can insist that an income execution be levied on the employer. Citibank v. East, 469 N.Y.S.2d 557, 559 (Sup.

employer will be garnished if the debtor defaults.[251] This procedure was designed "to avoid annoyances to third parties and to give the judgment debtor an opportunity to make payment without embarrassment."[252]

Obviously, if a restraining notice could be served directly on an employer, the judgment debtor would suffer embarrassment and so the practice is forbidden. Nevertheless, information subpoenas can be served on employers forthwith, embarrassment notwithstanding.[253]

E. Transfers

If either a judgment debtor or garnishee is served with a restraining notice, such person "is forbidden to make *or suffer* any sale, assignment, transfer or interference with any property in which he or she has an interest."[254] As of 2008, new exceptions apply with regard to bank accounts. These will be separately considered.[255]

"Transfer" is a term that the CPLR neglects to define. In contrast, the United States Bankruptcy Code defines "transfer" very broadly to include "each mode . . . voluntary or involuntary, of disposing of or parting with . . . property."[256] So broad a definition[257] leaves open the possibility that a judgment debtor violates a restraining notice if, say, the IRS assesses a tax against the judgment debtor, thereby obtaining a federal lien on restrained property.[258] Such a debtor has "suffered" a transfer, within the

Ct. Queens County 1983).

[251] C.P.L.R. 5231(a). The form of the income execution for support is rather different. Notably, the income execution must notify the debtor that, unless she claims a mistake of fact, the execution will be served on the employer in fifteen days. N.Y. C.P.L.R. 5241(c)(iv) (McKinney 2014).

[252] County Fed. Sav. & Loan Ass'n v. Cummings, 249 N.Y.S.2d 449, 450 (Sup. Ct. Kings County 1964).

[253] Mancini v. Marine Midland Bank, 586 N.Y.S.2d 61, 62 (App. Div. 4th Dep't 1992) (holding that an information subpoenas served on plaintiff's employer was not libelous per se).

[254] N.Y. C.P.L.R. 5222(b) (McKinney 2014) (emphasis added).

[255] *See infra* Part II.

[256] 11 U.S.C. § 101(54)(D)(i) (2012).

[257] For example, depositing a check technically constitutes transferring a debtor's property to a bank in exchange for a positive balance in the account. At least one court has said that a debtor who has been served does not violate a restraining notice by depositing checks in his bank account. Fasolino Foods Co. v. Banca Nazionale del Lavoro, No. 90 Civ. 334 (JMC), 1992 U.S. Dist. LEXIS 7901, at *4–5 (S.D.N.Y. May 28, 1992).

[258] 26 U.S.C. §§ 6321, 6322 (2006).

meaning of section 5222(b).[259]

The creation of a judicial lien under section 5202(a) or (b) is an involuntary transfer, but it is no violation of the restraining notice. A restraining notice bars transfers "*except* upon direction of the sheriff or *pursuant to an order of the court*."[260] An execution is a court order,[261] which when delivered to a sheriff results in a transfer—the creation of a lien.[262] In contrast, the federal tax lien is *not* created by a court order.[263] Issuance of a *state* tax warrant (which gives rise to a lien once it is docketed) *is* a court order, since the sheriff is instructed to enforce a tax warrant "with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record."[264] Since an execution is a court order and a tax warrant is an execution, then a tax warrant is a court order.

Liens on a judgment debtor's real estate arise upon the local docketing of a money judgment.[265] As with the federal tax lien, the docketing procedure requires no court order, and no intercession of the sheriff.[266] Technically, a judgment debtor violates the restraining order by "suffering" the docketing of some second money judgment against him (not that he could resist this, of course). But as these occur *involuntarily* by operation of law, it is hard to imagine a court punishing a judgment debtor for contempt when the transfer was entirely outside the control of the debtor. Indeed, according to CPLR section 5251, "[r]efusal or *willful* neglect of any person to obey a . . . restraining notice issued, or order granted, pursuant to this title . . . shall each be punishable as a contempt of court."[267]

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[259] N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[260] *Id.* (emphasis added).

[261] N.Y. C.P.L.R. 5230(b) (McKinney 2014).

[262] *See* N.Y. C.P.L.R. 5202(a) (McKinney 2014).

[263] 26 U.S.C. § 6322 (stating that a federal tax lien under § 6321 arises at the time the assessment is made).

[264] N.Y. TAX LAW § 692(f) (McKinney 2014) (regarding personal income tax); *accord* N.Y. TAX LAW § 1141(b) (McKinney 2014) (regarding sales and use tax); N.Y.C., N.Y. ADMIN. CODE § 11-683(6) (2013); *see* David Gray Carlson & Carlton M. Smith, *New York Tax Warrants: In the Strange World of Deemed Judgments*, 75 ALB. L. REV. 671, 694–95 (2012).

[265] N.Y. C.P.L.R. 5203(a) (McKinney 2014).

[266] *Id.* Besides docketing, a lien on real property might arise by the sheriff's levy, which is, basically, a filing in the real estate records. *See* N.Y. C.P.L.R. 5235 (McKinney 2014). These levies are pursuant to an execution, which is a court order. As a result, the levy does not violate the restraining notice. N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[267] N.Y. C.P.L.R. 5251 (McKinney 2014) (emphasis added); s*ee also, e.g.*, Cadle Co v. Brady, No. 99-7202, 1999 U.S. App. LEXIS 26509, at *2–3 (2d Cir. Oct. 20, 1999) (noting that civil

Courts would do well to proclaim simply that, when CPLR section 5222(b) uses the word "transfer," only *voluntary* transfers are implicated. CPLR section 5222 may prevent *judgment debtors* (if served with the restraining notice) from "transferring" property, but nothing in CPLR section 5222 prevents *transferees* from taking property against the will of the debtor. Otherwise, we might as well say that restraining notices create liens. For better or worse, this is precisely what we must not say.

F. Property

1. Personal

If service of a restraining notice is made on the judgment debtor or garnishee "[s]uch a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property . . . to any person other than the sheriff or the support collection unit."[268] "Such property" means, *inter alia*, "[a]ll property in which the judgment debtor . . . is known or believed to have an interest."[269] Payment of debts (narrowly defined) is also restrained, but we shall leave that to one side for the moment.

The application of this prohibition with respect to property, as applied to garnishees, requires some interpretation. A *judgment debtor* served with the restraining notice clearly has full power to alienate her property, as the restraining notice creates no lien in favor of the judgment creditor.[270] Using this power of alienation would, of course, violate the restraining notice.[271] The alienation would nonetheless be effective. Otherwise, restraining notices create liens, which is not to be tolerated.

The garnishee in possession of the judgment debtor's property

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contempt under CPLR 5251 requires the willfull neglect of a restraining notice); Doubet, LLC v. Trs. of Columbia Univ., No. 401544/2007, 2011 N.Y. Misc. LEXIS 3235, at *48 (Sup. Ct. New York County July 6, 2011) ("Willfulness is required to hold respondent . . . in contempt for violating the restraining notice.").

[268] C.P.L.R. 5222(b).

[269] *Id.*

[270] David D. Siegel, *Practice Commentaries*, C5222:8, *in* C.P.L.R. 5222 (McKinney 2014) ("[T]he restraining notice . . . gives the judgment creditor no lien on the defendant's property, personal or real, and no special priority in a race with other judgment creditors.").

[271] C.P.L.R. 5222(b) ("A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest . . . except upon direction of the sheriff or pursuant to an order of the court . . . .").

may well have no power to alienate the judgment debtor's interest in property, as where the garnishee is a bailee of the debtor's personal property.[272] The bailee's interest in the debtor's thing might itself be alienated in a sub-bailment.[273] But this would not alienate the *debtor's* interest in the thing.[274] In order to assess the restraining notice on a bailee, it is necessary to comprehend what the following words mean: "All *property* in which the judgment debtor . . . is known or believed to have an interest."[275]

What is "property"? There are two interpretive possibilities. One is that "property" is the thing in which the debtor has an interest. This is the crude unsophisticated usage of the word "property." The other possibility is that "property" *is* the debtor's interest in a thing. This is a more philosophically respectable definition. Choice between these two definitions is a standard theoretical issue that is posed in many commercial law contexts. The United States Supreme Court faced this question in the context of bankruptcy in *United States v. Whiting Pools, Inc*.[276] In that case, the IRS had achieved a tax levy on all tangible property, including pool chemicals, previously in possession of the taxpayer.[277] The taxpayer filed for bankruptcy and, as debtor-in-possession, sought turnover from the IRS on the theory that the chemicals were property of the estate.[278] Turnover was sought pursuant to Bankruptcy Code section 542(a), which provides, in relevant part: "[A]n entity . . . in possession, custody, or control, during the case, of property [of the bankruptcy estate] . . . shall deliver to the trustee . . . such property."[279] On the debtor-in-possession's view, "property" was the pool chemicals.[280]

The IRS argued that "property of the bankruptcy estate" did not mean the pool chemicals.[281] It meant *the debtor's interest* in the pool

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[272] *See* Kaplan's Jeweler, Inc. v. Hammerman, 246 N.Y.S.2d 972, 973–74 (Sup. Ct. New York County 1964).

[273] *See, e.g.*, Lovetere v. Stackhouse, 267 N.Y.S.2d 758, 759 (App. Div. 1st Dep't 1966); Brindley v. Krizsan, 238 N.Y.S.2d 260, 262 (App. Div. 1st Dep't 1963).

[274] *See, e.g.*, *Lovetere*, 267 N.Y.S.2d at 759; *Brindley*, 238 N.Y.S.2d at 262.

[275] C.P.L.R. 5222(b) (emphasis added).

[276] United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).

[277] *See id.* at 199–200.

[278] *See id.* at 200–01.

[279] *Id.* at 201 n.5 (quoting 11 U.S.C. § 542(a) (1976 & Supp. V 1981)).

[280] *See id.* at 200–01.

[281] *See generally* United States v. Whiting Pools, Inc., 674 F.2d 144, 149 (2d Cir. 1982) ("[T]he Government finds in § 541's definition of 'property of the estate' a distinction between a debtor's *interest in property* and *property in which the debtor has and interest*.").

chemicals.[282] By the time of the bankruptcy petition, the debtor's interest was reduced.[283] It no longer included the right to possess the chemicals.[284] It merely encompassed the debtor's power to redeem the chemicals by paying in full the amount of the tax, or the right to a cash surplus, if any, following an IRS foreclosure sale.[285] The right to *possess* the collateral was *outside* the purview of the bankruptcy estate, or so said the IRS.[286]

The Supreme Court took the Neanderthal approach to the concept of property. It ruled that "property of the bankruptcy estate" meant pool chemicals, not the right to redeem the pool chemicals or the right to receive surplus proceeds of the chemicals following the foreclosure sale.[287] The chemicals were entirely within the bankruptcy estate.[288] Therefore, the IRS had to surrender the chemicals to the debtor-in-possession.[289]

The same difficulty underlies the interpretation of CPLR section 5222(b). Is "property" the debtor's thing or the debtor's interest in the thing? The former definition is totemistic and crude. Airy philosophy strongly prefers the second definition.[290]

Under the CPLR, the answer is clear. Both the grammar and the purpose behind CPLR section 5222(b) point to the troglodytic view that property is the un-Hohfeldian *thing* in which the debtor has an interest.[291] It is not the Hohfeldian debtor's *interest* in the thing.[292]

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[282] *Id.*

[283] *See id.* at 149–50.

[284] *See id.*

[285] *Id.* at 150 n.8.

[286] *See id.* at 150 & n.9.

[287] *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 211 (1983) ("[T]he debtor [i]s the owner of the property after the seizure but prior to the sale. Until such a sale takes place, the property remains the debtor's . . . .").

[288] *See id.*

[289] *See id.*

[290] *See* Plank, *supra* note 143, at 452–55; Thomas E. Plank, *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, 59 MD. L. REV. 253, 255–256 (2000); Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 EMORY L.J. 1193, 1200 (1998).

[291] J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 725 (1996) ("Hohfeld could not have been more insistent in his view that rights in rem are not properly conceived as rights to things.").

[292] According to Hohfeld's famous system of opposites and correlatives, all law can be reduced to eight terms. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING xii–xvi (David Campbell & Philip Thomas, eds., 2001) Arranged by correlatives, any legal relationship between A and B can be described as follows: If A has a: right, privilege, power, immunity, then B has: no-right, duty, disability, liability. *Id.* Hohfeld's system can be viewed as entirely dispensing with the concept of the "thing[]." JEANNE LORRAINE SCHROEDER, THE VESTAL AND THE FASCES:

With regard to the grammar, it is impossible to read CPLR section 5222(b) to mean that property is a debtor's interest in a thing. Otherwise the statute would have said something to the effect that the garnishee is "forbidden to transfer the debtor's property interest," not "property in which the judgment debtor . . . ha[s] an interest."[293] "Property," as used in CPLR section 5222(b), is some *thing* in which the debtor has an "interest."[294]

Pace the philosophers, the non-Hohfeldian reading corresponds to the purpose of restraining notices generally.[295] The idea of the restraining notice is to freeze the status quo until such time as the judgment creditor can establish a lien on the debtor's property.[296] This can only be achieved if property is some *thing*, not the debtor's legal right to the thing.

Let us test this interpretation with a simple hypothetical involving a bailment. Suppose that a garnishee borrows the judgment debtor's lawn mower on a Monday. On Tuesday, a creditor serves the garnishee with a restraining notice. On Wednesday, the debtor purports to end the bailment. If the garnishee surrenders the lawn mower to the judgment debtor, has the garnishee violated the restraining notice?

The answer has to be yes. The property is *the lawn mower* (not the debtor's interest in the mower as bailor). The garnishee *transfers* "it" by surrendering possession to the judgment debtor. So the garnishee has wrongfully "transferred" the lawn mower in the prosaic sense of handing over physical control. This interpretation comports with the purpose of restraining notices. The status quo is preserved, and the judgment debtor is denied access to the lawn mower. This mower the garnishee must hold pending the sheriff's levy[297] or a receiver's demand[298] or a turnover order from a court,[299] which orders the garnishee to hand the mower over to the sheriff for sale.

In effect, the meaning of the restraining notice is that the debtor

HEGEL, LACAN, PROPERTY AND THE FEMININE 163–75 (1998).

293 N.Y. C.P.L.R. 5222(b) (McKinney 2014).

294 *Id.*

295 *See* Penner, *supra* note 291, at 733–34 ("In property theory it is considered almost *de rigeur* to mention simply to dismiss as the benighted layman's concept of property the idea that property concerns the right to things.").

296 C.P.L.R. 5222(b); Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 810 (N.Y. 1981).

297 N.Y. C.P.L.R. 5232(a)–(b) (McKinney 2014).

298 N.Y. C.P.L.R. 5228(a) (McKinney 2014).

299 N.Y. C.P.L.R. 5227, 5232(b) (McKinney 2014).

is deprived of the right to terminate the bailment. In the absence of the restraining notice, the debtor could have terminated the bailment and could even repossess the lawn mower without the garnishee's consent. But in light of the restraining notice served on the garnishee, has the debtor acted wrongly by doing so?

The debtor has indeed acted wrongly, but it does not turn on whether the debtor himself has been served with a different restraining notice. If the debtor has been served, he is forbidden from "transferring" his property, but taking back the lawn mower is *receiving* the property, not transferring it. The debtor is also enjoined from "*interference* with any property in which he or she has an interest."[300] Interference probably means any act designed to reduce the chances that the sheriff will end up controlling the thing. It is possible, but not entirely clear, that taking back the mower reduces the sheriff's ability to levy the mower. It might be the case that the debtor intends to hide the lawn mower from the sheriff's sight, in which case receipt of the property is "interference."[301]

If anything, it is the garnishee who is at fault for letting the debtor take back the lawn mower, even if this occurs without the garnishee's consent. The garnishee is "forbidden to . . . *suffer* any . . . transfer of . . . any such property."[302] Based on what we said before, "transfer" includes surrendering the lawn mower back to the debtor. "Suffer" hints that the garnishee has a duty to resist the debtor's attempt to end the bailment.

Nevertheless, in spite of the forgoing, the judgment debtor acts wrongly if he takes back the lawn mower, *whether or not* the debtor has also been served with a restraining notice. Without the restraining notice, the debtor has a license to enter upon the garnishee's real estate to fetch the mower.[303] The restraining notice (served on the garnishee) means that the debtor has no such right.[304] Rather, the restraining notice makes the debtor's possession wrongful, as the garnishee is forbidden to "suffer" the

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[300] C.P.L.R. 5222(b) (emphasis added).

[301] *Id.*

[302] *Id.* (emphasis added).

[303] *See* RESTATEMENT (SECOND) OF TORTS: § 198(1) (1965) [hereinafter RESTATEMENT (SECOND)] ("One is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel *to the immediate possession of which the actor is entitled*, and which has come upon the land otherwise than with the actor's consent or by his tortious conduct or contributory negligence." (emphasis added)).

[304] C.P.L.R. 5222(b).

transfer. For the same reason, the debtor's privilege to use force against the garnishee to retrieve the property following proper demand[305] is suspended.[306] In fact, both of the following statements are true: A debtor served with a restraining notice does not necessarily violate it by receiving the lawn mower.[307] And, if the bailee is served with a restraining notice, the debtor's right to terminate the bailment is suspended.[308] The bailment is perpetuated against the will of the judgment debtor. That is to say, the restraining notice assures that the garnishee's continued possession is rightful, even though the debtor has attempted to end the bailment.

Accordingly, the bailee violates the restraining notice if he "suffers" the bailor to take the bailed property back.[309] "Transfer" must mean surrender of the bailed property back to the debtor.[310] We have already seen that the term "transfer" might encompass involuntary transfers.[311] So section 5222(b) implies a duty in the bailee to *prevent* the debtor from taking possession.[312] Meanwhile, whether or not served with a restraining notice, the judgment debtor has no right to take back the bailed property and commits a tort against the garnishee if she does so.

Sometimes a bailment is coupled with the power to sell the

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[305] RESTATEMENT (SECOND), *supra* note 303, § 101(1) ("The use of reasonable force against another for the purpose of recaption is privileged if the other . . . has received custody of the chattel from the actor and refuses to surrender it . . . .").

[306] *Id.* § 102 ("The use of force against another for the purpose of recaption is not privileged unless the actor is entitled as against the other to the immediate possession of the chattel."). If the garnishee "knowingly causes the [debtor] to believe" there is no court order, the debtor may rightfully use force to obtain the restrained property. *Id.* § 100.

[307] Although we left open the possibility that the debtor "interferes" by terminating the bailment and taking back the mower. C.P.L.R. 5222(b) ("A judgment debtor . . . served with a restraining notice is forbidden to make or suffer any . . . interference with any property in which he or she has an interest . . . .").

[308] *See id.*

[309] *See id.*

[310] Arguably, the garnishee "disposes of" the lawn mower by surrendering it back to the debtor. But it is to be noted that "dispose of," as it appears in the fourth sentence of section 5222(b), applies solely to *debts*, not to property in general. *Id.* Therefore, we need not decide if Wednesday's relinquishment of the lawn mower constitutes a "disposition." The bailment of the lawn mower is no "debt," and termination of the bailment is no payment of a debt.

[311] *See supra* Part I.E

[312] Perhaps a garnished bailee *interferes* with the bailed property when he surrenders it to the debtor. C.P.L.R. 5222(b)) ("[A garnishee] is forbidden to make . . . any interference with, any such property . . . ."). We have suggested that "interference" means reducing the chance of a successful levy by or turnover to the sheriff. *See supra* text accompanying notes 300–01. In any case, the matter is disposed of because the bailee who acquiesces in recaption by the debtor has "suffered" a transfer.

debtor's interest in the bailed property. For example, a consignee is a bailee coupled with a power to sell.[313] In recent times, a consignee is identified as a secured party in Article 9 of the UCC.[314] A restraining notice served on a consignee bars the exercise of the consignee's power of sale, because the sale puts the property beyond the reach of the sheriff. This point can be extended to secured creditors generally, as we shall see.

2. Secured Creditors as Garnishees

When CPLR section 5222(b)'s fourth sentence refers to transferring the debtor's "property," it is using the crude totemistic notion of property, not the sophisticated Hohfeldian usage that philosophy prefers. Property is a *thing*, such as a lawn mower or a caveman's shillelagh. Property is not the debtor's interest in a thing, as the eggheads insist.

This causes headaches for senior secured creditors with perfected security interests in collateral they have repossessed. This is because the creditor in possession is, basically, a bailee—a person in rightful possession of property of another.[315] A foreclosure sale under Article 9 constitutes the transfer of the debtor's property interest to a buyer.[316] Any such transfer violates the restraining notice served upon the foreclosing secured party.[317] This is so whether the debtor equity is valuable or not.[318]

This is certainly odd. On the one hand, a senior secured party can prevent the sheriff from selling collateral at an execution sale; the sheriff is even guilty of conversion if the sheriff continues an

[313] *See* U.C.C. § 9-102(a)(20) (2012) ("'Consignment' means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and: (A) the merchant: (i) deals in goods of that kind under a name other than the name of the person making delivery; (ii) is not an auctioneer; and (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others; (B) with respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery; (C) the goods are not consumer goods immediately before delivery; and (D) the transaction does not create a security interest that secures an obligation.").

[314] U.C.C. § 1-201(b)(35) ("'Security interest' includes any interest of a consignor . . . ."); *see also* U.C.C. § 9-103(d) ("The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.").

[315] *See* U.C.C. § 9-207 (limiting the property rights of a creditor in possession).

[316] U.C.C. § 9-617(a) ("A secured party's disposition of collateral after default: (1) transfers to a transferee for value all of the debtor's rights in the collateral . . . .").

[317] *See* C.P.L.R. 5222(b) (McKinney 2014).

[318] *See id.*

execution sale over the protest of the secured party.[319] Yet an unsecured creditor with no lien at all can stop the senior secured party from foreclosing, simply by serving a restraining notice.[320] To proceed, the secured party needs to procure a court order permitting the alienation of the debtor's property.[321] According to CPLR section 5222(b) (fourth sentence), alienation of the judgment debtor's property interest is forbidden "except *upon direction of the sheriff* or pursuant to an order of the court."[322]

Could a secured creditor consult a *sheriff* and obtain immunity from the restraining notice? It is may seem strange that the sheriff has authority to negate the effect of the restraining notice, but, in the context of a garnishee who is a senior secured party, the matter makes sense. If the sheriff perceives that the garnishee has a perfected security interest to which any possible judicial lien is junior, the sheriff can say so and permit the foreclosure sale to proceed. Where the security interest is senior, the secured party's possessory right is better than any possessory right of the sheriff pursuant to judicial process. The sheriff should be competent to vacate the restraining notice if it serves no purpose in preserving the status quo in anticipation of a later execution sale. It may be observed, that, historically, sheriffs *were* presiding judges.[323] So this part of section 5222(b) restores to the shrievalty some fragment of its medieval glory.

If the sheriff is unwilling to authorize the foreclosure sale, then a secured party must proceed under CPLR section 5240, which invites the court "at any time, on . . . the motion of any interested person, . . . [to] make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."[324]

In *CIMC Raffles Offshore (Singapore) Ltd. v. Schahin Holding*

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[319] *See* Teddy's Drive In, Inc. v. Cohen, 390 N.E.2d 290, 291 (N.Y. 1979) (concerning a tax compliance officer who stood in for the sheriff in the enforcement of a tax warrant and was found personally liable to the secured party).

[320] *See* Rosenstein v. Kravetz Realty Grp., L.L.C., No. 103684/2010, 2011 N.Y. Misc. LEXIS 1523, at *3–5 (Sup. Ct. N.Y. Apr. 8, 2011). In *Rosenstein*, a judgment creditor served an account debtor with a restraining notice. *Id.* at *3. The debtor moved to vacate the stay because the account was entirely encumbered by a security interest. *Id.* at *3–4. The restraint was kept in place. *Id.* at *5.

[321] *See* O'Hara & Shaver, Inc. v. Empire Bituminous Prods., Inc., 323 N.Y.S.2d 190, 192–93 (Sup. Ct. Onondaga County 1971).

[322] C.P.L.R. 5222(b) (emphasis added).

[323] ROBERT BARTLETT, ENGLAND UNDER THE NORMAN AND ANGEVIN KINGS 1075–1225, at 149 (2000).

[324] N.Y. C.P.L.R. 5240 (McKinney 2014).

S.A.,[325] the court implied that restraining notices are completely ineffective against senior secured parties, where there is no valuable debtor equity in the collateral.[326] In *CIMC*, an account debtor[327] paid funds to a collateral agent for senior secured parties.[328] The collateral agent was served with a restraining notice.[329] The collateral agent froze all the collateral accounts and, as a result, the routine payment of senior debt service was halted.[330] The senior lenders moved that the restraining notice be vacated so that the senior payment could go forward.[331] Appropriately, the court gave that relief, but on grounds far too broad for the problem at hand.

The restraining notices were effective in the first instance only against property "which could be assigned or transferred" by the judgment debtor.[332] According to the *CIMC* court, the debtor could not assign or transfer its interest in the collateral accounts, as these were encumbered by senior security interests.[333]

This misconceives the matter. It is true that a debtor cannot convey its equity interest free and clear of the senior security interests.[334] But it could convey its equity interest in the accounts *subject to the security interest*.[335] Accordingly the debtor always has property which could be "assigned or transferred" within the meaning of CPLR section 5201(b).

Under old Article 9 this was clear. Old section 9-311 provided: "The debtor's rights in collateral may be voluntarily or involuntarily transferred . . . notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."[336] This clear statement of the principle has now been muddied. Under new section 9-401, "whether a debtor's

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[325] CIMC Raffles Offshore (Sing.) Ltd. v. Schahin Holding S.A., No. 13 Civ. 52 (JSR), 2013 U.S. Dist. LEXIS 61765 (S.D.N.Y. May 1, 2013).

[326] *See id.* at *8–11.

[327] U.C.C. § 9-102(a)(3) (2012) ("'[A]ccount debtor' means a person obligated on an account, chattel paper, or general intangible.").

[328] *CIMC*, 2013 U.S. Dist. LEXIS 61765, at *6–7.

[329] *Id.* at *7.

[330] *Id.*

[331] *Id.* at *8.

[332] *Id.* (quoting N.Y. C.P.L.R. 5201(b) (McKinney 2014)).

[333] *CIMC*, 2013 U.S. Dist. LEXIS 61765, at *10–11.

[334] *See id.*

[335] This passes as the doctrine of "*nemo dat quod non habet*: the principle that one cannot transfer an interest in property that the transferor does not have." Plank, *supra* note 143, at 441–42.

[336] U.C.C. § 9-311 (1972).

rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this article."[337] So in modern times, one must consult, not the UCC, but New York common law (badly atrophied since the UCC went effective) as to whether debtor equity in bank accounts could be transferred.

There is no reason to think why not. Bank accounts are commercial property and are, in general, alienable.[338] Granted, the transfer is subject to the rights of the senior secured parties.[339] But it cannot *generally* be said that encumbered bank accounts are property which a debtor cannot assign or transfer, within the meaning of CPLR section 5201(b).

Basically, the *CIMC* court theorized that if the debtor cannot convey free and clear of perfected security interest, it cannot convey at all.[340] On this view, "debtor equity" is inalienable property not susceptible to any levy.[341] If the court's theory were taken to its limit, restraining notices could not be effective to restrain secured parties, even as to collateral as to which the debtor has a valuable equity. Where a valuable equity exists, the debtor still cannot convey free and clear of the senior perfected security interest. On *CIMC*'s reasoning, that makes the debtor's property inalienable.

As we have seen, the CPLR's theory of property is that property is a *thing*—such as a lawn mower. It is not a debtor's interest in a thing. Either the restraining notice applies to the lawn mower or it doesn't. Whether the debtor's interest in the lawn mower is valuable (that is, it is held in esteem by hypothetical buyers in the market) has no bearing on the application of restraining notice. It applies to the *lawn mower*, not to the debtor's interest in the lawn mower. Like it or not, the restraining notice applies to all collateral, or to none at all, in which case a secured party could dispose of valuable debtor equity.

Significantly, the security agreement in *CIMC* provided that one of the judgment debtors could have a distribution from the

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337 U.C.C. § 9-401 (2012).

338 *See* U.C.C. § 9-203(b)(3)(D) ("[A] security interest is enforceable against the debtor and third parties with respect to the collateral only if: . . . the collateral is deposit accounts . . . and the secured party has control . . . pursuant to the debtor's agreement.").

339 *Id.* § 9-203(c); *see also* U.C.C. § 9-315(a)(1) ("[A] security interest . . . continues in collateral notwithstanding sale . . . or other disposition thereof unless the secured party authorized the disposition free of the security interest . . . .").

340 *See* CIMC Raffles Offshore (Sing.) Ltd. v. Schahin Holding S.A., No. 13 Civ. 52 (JSR), 2013 U.S. Dist. LEXIS 61765, at *8–11 (S.D.N.Y. May 1, 2013).

341 *Id.* at *8–10.

encumbered account to cover operating expenses.[342] The restraining notice was deemed effective to prevent the collateral agent from distributing to the judgment debtor. This is inconsistent with the view that the bank account was inalienable by the debtor. If indeed the judgment debtor had no property interest at all in the account, then the withdrawal of expense reimbursements should not have been a transfer of debtor property. In truth, however, the debtor was receiving encumbered dollars in which the debtor had a preexisting valueless equity. This transfer was a violation of the restraining notice. As indeed was any payment of cash collateral to a senior secured party. Such payments extinguish the debtor's technical equity in the encumbered dollars. *Any* transfer of debtor property (regardless of value) violates the restraining notice.

What the court should have said is that the restraining notice was completely effective against the collateral agent, but that the court had discretion to permit payments to the senior secured parties,[343] where the dollars paid were encumbered dollars which the judgment creditor could not use to satisfy a judgment.

Normatively, should senior secured parties be free and clear of the restraining notice? The matter is not simple. Where there is no debtor equity, the restraining notice has no point, as a subsequent levy by the sheriff will not produce value for the creditor. But where a valuable equity does exist, the restraining notice serves the purpose of slowing down the foreclosure sale until the objecting creditor can establish a junior lien, which the senior secured party must respect.[344] Writing a statute that differentiates in advance between valueless and valuable assets poses a profound challenge. In light of that, perhaps the CPLR is wise to make the senior secured party, in all cases, to seek a vacation of the restraining notice from the courts.

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[342] *See CIMC*, 2013 U.S. Dist. LEXIS 61765, at *13–14.

[343] The discretion is located in CPLR section 5240, which federal courts have access via FRCP 69. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 83 (2d Cir. 2002) (denying relief on the merits); AXA Versicherung AG v. N.H. Ins. Co., No. 12 Civ. 6009 (JSR), 2013 U.S. Dist. LEXIS 60802, at *5–6 (S.D.N.Y. Apr. 22, 2013).

[344] A secured party is obligated to distribute a surplus to a junior lien creditor if "the secured party receives from the holder of [the junior lien] . . . an authenticated demand for proceeds before distribution of the proceeds is completed." U.C.C. § 9-615(a)(3)(A).

3. Purchasers of Restrained Personal Property

Suppose a garnishee served with a restraining notice is the bailee of debtor property. A debtor can always sell free and clear of the restraining notice because restraining notices do not create liens.[345] Yet, according to CPLR section 5222(b)'s fourth sentence, the garnishee is not to "suffer" a transfer of the thing in which the debtor has a property interest.[346]

Suppose, for example, that on a Monday a bailee holding the debtor's lawn mower has been served with a restraining notice. Suppose the debtor sells her bailor's interest in the mower to X, a purchaser. If the debtor has not been served with a restraining notice, the debtor does not act wrongly in selling the mower to X. X then shows up and demands the mower. Does the garnishee violate the restraining notice by surrendering the mower to X?

CPLR section 5222(b) is ambiguous on this score. We know that the restraining notice was effective on Monday because the debtor then held debtor property—that is, the mower. Accordingly, the garnishee is "forbidden to . . . suffer any sale . . . [of] such property."[347] The word "suffer" arguably could be read to mean that the garnishee must not recognize X's ownership rights.

This reading ought to be rejected. In interpreting section 5222, it is wise to remember that the goal of the restraining notice is to preserve the status quo as to property that might be used to satisfy a judgment.[348] In this regard, the judgment creditor has no lien on the mower by virtue of serving the restraining notice. This implies that the judgment creditor cannot pursue the mower once X buys it. If the debtor rightfully or even wrongfully conveys the property, the garnishee should not be punished for honoring the rights of the assignee.

Preferred Display, Inc. v. CVS Pharmacy, Inc.,[349] is a recent example of a sale of a debtor's interest when a third party had been served with a restraining notice.[350] In *CVS*, a judgment creditor

[345] Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 810–11 (N.Y. 1981).

[346] N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[347] *Id.*

[348] *See* Gryphon Domestic VI, LCC v. APP Int'l Fin. Co., 792 N.Y.S.2d 14, 14 (App. Div. 1st Dep't 2005) (disseminating bondholder lists of the judgment debtor held not to be a violation of section 5222 as these could not be used to satisfy a judgment).

[349] Preferred Display, Inc. v. CVS Pharmacy, Inc., No. 12 Civ. 560 (KBF), 2013 U.S. Dist. LEXIS 20622 (S.D.N.Y. Feb. 11, 2013).

[350] *Id.* at *2–3.

served a restraining notice on a customer (CVS).[351] CVS had been buying inventory from the judgment debtor on unsecured credit.[352] The judgment creditor served CVS with a restraining notice.[353] Thereafter, CVS bought further inventory from the debtor on credit but regretted the purchase.[354]

Meanwhile, a senior secured party (who had not been served with a restraining notice) declared a default and sold all remaining collateral—inventory *and accounts*—to a buyer X.[355] As a result of this sale, CVS owed its debt for inventory to X, not to the judgment debtor.[356]

CVS made a deal with X for the return of the unwanted inventory, in exchange for a credit against future purchases of inventory from X.[357] CVS did not pay down its debt, now owed to X.[358] The court reasoned correctly that CVS had "title" to the inventory free and clear of the debtor, and that it did not violate the restraining notice by "selling" this inventory on credit to X.[359] It also went further to suggest that, had CVS paid X, CVS would not have been in violation of the restraining notice because, as a result of the foreclosure sale, CVS owed the debt to X, not to the judgment debtor.[360] This suggestion assumes correctly that once the debtor's interest in a thing is sold, the restraining notice no longer applies to that thing (in this case, the account receivable).

4. Real Property Analogies

We have seen that a bailee may not surrender bailed goods back to the debtor.[361] The real estate equivalent to bailment is the

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[351] *Id.* at *6.

[352] *See id.* at *4 & n.1.

[353] *Id.* at *6.

[354] *See id.* at *6–7.

[355] *Id.* at *4. Or, to be more precise, the secured lender (Citibank) assigned its security interest to PMW, who held an auction. PMW was the winner of the auction. PMW then sold the assets to Zaimu, whom I refer to in the text as X. *Id.*

[356] *See id.* at *4–5.

[357] *Id.* at *7.

[358] *Id.* at *8.

[359] *Id.* at *13; *see also* U.C.C. § 2-401(2) (2012) ("[T]itle passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . .").

[360] *Preferred Display*, 2013 U.S. Dist. LEXIS 20622, at *16–17. According to the *Preferred Display* court, even if CVS had paid the debt owed for the regrettable inventory, "the debt thus extinguished would be one CVS owed [X], not one CVS owed [the debtor]." *Id.*

[361] *See supra* text accompanying notes 297–302.

leasehold tenancy.[362] Each consists of rightful possession of property belonging to another. From what was said in the last few sections, it follows that a holdover tenant or tenant at will of real property is prohibited by section 5222(b) from surrendering the premises back to the judgment debtor. Quitting the premises would be like returning the lawn mower in our previous examples.

In truth, the departure of a holdover tenant actually helps the judgment creditor. A recalcitrant tenant is a positive encumbrance on the value of the real property. A better price will be received if the buyer does not need to pursue an expensive eviction action against the holdover. Yet, if consistency governs between real and personal property, the tenant who, in the absence of the restraining notice, properly ought to get out violates the order by leaving, even though this enhances the prospect of the judgment creditor to maximize recovery on the judgment.

Furthermore, one can argue that the holdover tenant gets to live rent free. It has been held that when a garnishee who owes a debt to a judgment debtor is served with a restraining notice, the garnishee's duty to pay interest is suspended, because interest is a penalty for withholding capital.[363] That is to say, where a garnishee rightfully withholds capital from the judgment debtor, the garnishee may hold the money interest free. Interest is to capital what rent is to real property (the fee simple in real property being capital in dirt form). It therefore follows from this analogy that a holdover owes the debtor no rent during the time the restraining notice is in effect.[364] This is at least the result if logic governs this area of law.

Of course, when logic confronts common sense, common sense is bound to prevail. Common sense, "seeing reason leads, finds safer footing than blind reason stumbling without fear."[365] Indeed, the New York legislature has codified the priority of common sense over the logic of the statute. According to CPLR section 5240: "The court

[362] *See* United States v. Wexler, 621 F.2d 1218, 1224–25 (2d Cir. 1980). Indeed, the old nineteenth century term for personal property leases was "bailment leases"—bailments that could not be terminated at will because the bailment was coupled with an interest—a paid-for right of possession for the duration of the lease. *See id.*

[363] Teller v. Hernandez, No. 570446/08, 2009 N.Y. Misc LEXIS 2133, *1 (App. Term 1st Dep't Aug. 14, 2009); Spodek v. Feibusch, No. 10723/1994, 2006 N.Y. Misc. LEXIS 3873, *13–14 (Sup. Ct. Nassau County Nov. 27, 2006).

[364] Later, we will see that New York has bizarre and complicated rules on whether the obligation of a tenant to pay rent is a debt, payment of which might be restrained by a judgment creditor. *See infra* Part I.L.

[365] WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 3, sc. 2.

may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."[366] We may therefore expect that a court will not pursue the analogy between leases of real property and bailments of personal property with too much vigor. If so, the tenant must keep his landlord's lawn mower but perhaps he should get off the premises and take the mower with him.

5. Exempt Property

A debtor served with a restraining notice who pays nonexempt cash for groceries to feed his hungry children is, of course, in contempt of court.[367] But what if the cash is proceeds of an exempt income stream, such as a social security benefit?[368] Does the restraining notice affect exempt property?

According to the third sentence of CPLR section 5222(b):

> *All* property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of [a garnishee] . . . shall be subject to the notice except as set forth in subdivisions (h) and (i) of this section.[369]

This sentence does not distinguish between nonexempt and exempt property. Worse, in 2008, the legislature added as exceptions subdivisions (h) and (i), which refer to exempt funds in bank accounts.[370] One could plausibly argue that, since the New York legislature knew how to make exemptions with regard to bank accounts, it must have intended to restrain disposition of any other kind of exempt property.

Nevertheless, courts reason differently from the purpose of the restraining notice, which is to preserve the status quo until the sheriff's busy schedule allows for a levy of the debtor's property. If the sheriff may not levy because the property is exempt, then the restraining notice oversteps its purpose. Therefore, it is uniformly assumed, contrary to the literal words of section 5222, that a debtor

366 N.Y. C.P.L.R. 5240 (McKinney 2014).
367 *See* N.Y. C.P.L.R. 5222(b), 5251 (McKinney 2014).
368 42 U.S.C. § 407(a) (2006).
369 C.P.L.R. 5222(b) (McKinney 2014) (emphasis added).
370 Exempt Income Protection Act, ch. 575, § 3, 2008 N.Y. Laws 4085, 4088–89.

or a third party may dispose of exempt property.[371]

That restraining notices do not affect exempt property was presupposed without discussion in *Deary v. Guardian Loan Co.*,[372] which proclaimed the CPLR's restraining notice procedure, as it then existed, unconstitutional for failing to warn debtors that exempt property cannot be restrained.[373] If it were really the case that restraining notices restrain the disposition of exempt property, then the due process right of the debtor to notice and a hearing would be useless, as a claim to exemption would not serve to get rid of the restraint.

Given the fact that the restraining notice does not create a lien (i.e., transfers no property right to the creditor), does a restraining notice actually deprive a debtor of property, as the *Deary* court presupposed? The answer is yes. The exact wording of the Fourteenth Amendment is "nor shall any State deprive any person of . . . property, without due process of law."[374] It may be true that a debtor's property has not been "taken" by a creditor, as no lien was created, but the debtor has been "deprived" of the use of the restrained property. An examination of the due process jurisprudence of the Supreme Court reveals that the ability to *use* organizes the definition of property in the Fourteenth Amendment—not the ability *alienate*.[375] For instance, the IRS might obtain a lien on real property or illiquid property.[376] But as this does not interfere with a debtor's ability to *use* the collateral,

[371] *See* Sequa Capital Corp. v. Nave, 921 F. Supp. 1072, 1076 (S.D.N.Y. 1996); Balanoff v. Niosi, 791 N.Y.S.2d 553, 556, 560 (App. Div. 2d Dep't 2005); Scheer v. City of Syracuse, 277 N.Y.S.2d 866, 868 (Sup. Ct. Onondaga County 1967). In *Legal Servicing, LLC v. Mostafa*, 959 N.Y.S.2d 652 (Sup. Ct. Queens County 2013), the court carried the protection of exempt funds too far. In this case, the State of New York had contracted to pay the rent of a welfare recipient to a landlord who was the judgment debtor. *Id.* at 653. The creditor served a restraining notice on the State of New York, but the restraining notice was vacated on the spurious grounds that the funds were exempt. *Id.* at 654–55; *see* N.Y. SOC. SERV. LAW § 137 (McKinney 2014) ("All moneys or orders granted to persons as public assistance or care pursuant to this chapter shall be inalienable by any assignment or transfer and shall be exempt from levy and execution under the laws of this state."). This would be a good point if the welfare recipient were the judgment debtor. But the landlord was no welfare recipient. To the landlord, the income stream from the State of New York was just rent. *See Mostafa*, 959 N.Y.S.2d at 653. But restraining rent ends up raising profound metaphysical difficulties which will be discussed later. *See infra* Part I.L. For the moment, the exemption grounds of the decision must be categorically rejected.

[372] Deary v. Guardian Loan Co., 534 F. Supp. 1178 (S.D.N.Y. 1982).

[373] *Id.* at 1188.

[374] U.S. CONST. amend. XIV, § 1.

[375] *See* Finberg v. Sullivan, 634 F.2d 50, 57–58 (3d Cir. 1980) ("The attachment affects the debtor's interest by depriving her of the continued use of her property.").

[376] 26 U.S.C. § 6321 (2006).

the tax lien regime is constitutional.[377] Lien creation as such does not trigger any right to notice or a hearing.[378] Restraint of a liquid asset, such as a bank account, coupled with the creation of a lien, does create a due process issue.[379] This is because the *restraint* (not the lien) deprives the debtor of her use of the funds.[380] Restraint, not the taking through creation of lien, is the key to due process. Therefore, the *Deary* court was correct that the restraining notice procedure, though it creates no lien, poses a due process issue.[381]

After 2008, the CPLR carefully regulates the restraint of bank accounts containing exempt funds.[382] We will cover this regulation in due course.[383] For the moment, it may be noted that, in 2008, the legislature certainly assumed that restraining notices do not affect exempt property of the debtor.[384]

The thrust of the reasoning in *Deary* was that a debtor may have received due process in the course of procedure leading up to the issuance of the money judgment, but the issue of which property is liable to and which property is exempt from the creditor's judicial lien poses a different question: "While notice of and an opportunity to be heard on the merits is directed to the question whether the debt is actually owed, the attempt to enforce the judgment raises the distinct issue whether particular property of the judgment debtor is available to satisfy the judgment."[385] Given that property affected by the restraining notice might be exempt from judgment, due process jurisprudence required a weighing of creditor interests in prompt enforcement and the debtor's right to exempt property from the execution process.[386]

The *Deary* court ruled that, at a minimum, the debtor has the right to be informed of the availability of a procedure for contesting

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[377] *See* Phillips v. Commissioner, 283 U.S. 589, 593–601 (1931).

[378] *See id.* at 593–94.

[379] *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606–07 (1975); Sniadach v. Family Fin. Corp., 395 U.S. 337, 341–42 (1969).

[380] Carlson & Smith, *supra* note 264, at 684–85.

[381] *See* Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1183, 1185 (S.D.N.Y. 1982).

[382] Exempt Income Protection Act, ch. 575, § 1, 2008 N.Y. Laws 4085, 4085–86.

[383] *See infra* Part II.

[384] *See id.*

[385] *Deary*, 534 F. Supp. at 1185.

[386] Finberg v. Sullivan, 634 F.2d 50, 58 (3d Cir. 1980) (en banc) ("[T]he available procedures must afford the debtor adequate protection against erroneous or arbitrary seizures. The procedural protection is adequate if it represents a fair accommodation of the respective interests of creditor and debtor."). The balancing of interests in due process jurisprudence goes back to *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* McCahey v. L.P. Investors, 774 F.2d 543, 548 (2d Cir. 1985).

application of the restraint to exempt property.[387] Debtors, the court predicted, typically do not know that restraints can be challenged pursuant to CPLR sections 5239 and 5240.[388]

The legislature responded to the *Deary* decision by adding CPLR sections 5222(d) and (e), requiring that debtors be notified of the restraining notice and the possibility of exempting property from judicial process.[389] The exemption notice that the debtor must receive is printed word-for-word in section 5222(e).[390] The notice must set forth a list of possible exemptions that a natural person might claim, such as social security payments and various other exempt income streams.[391] Among other things, the notice must set forth: "If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice."[392] There is no requirement, however, that the devil creditor respond if the Hotspur debtor calls.[393]

The obligation to send the restraining notice to the debtor, however, is contingent on the debtor never having received the notice set forth in section 5222(e) "within a year before service of a restraining notice."[394] So if a creditor serves a restraining notice on A, the creditor must serve both the section 5222(e) notice (plus a copy of the restraining notice) to the debtor.[395] When the creditor, within a year, serves a separate restraining notice on B, neither the section 5222(e) notice nor the second restraining notice need be served on the debtor.[396]

The notice of exemption rights must be served upon the debtor no later than four days after the garnishee is served with the

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[387] *Deary*, 534 F. Supp. at 1187.

[388] *Id.* at 1188; Diana Gribbon Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 MD. L. REV. 61, 73–74 (1986).

[389] *McCahey*, 774 F.2d at 546–47.

[390] N.Y. C.P.L.R. 5222(e) (McKinney 2014).

[391] *Id.*

[392] *Id.*

[393] Contact Res. Servs., LLC v. Gregory, 806 N.Y.S.2d 407, 410–11 (Rochester City Ct. 2005). In *McCahey*, a debtor claimed that this part of section 5222(e) violates due process because it is misleading: "[T]h[e] recommendation leads the debtor into believing that 'the person sending this notice,' usually the attorney for the judgment creditor, will protect the debtor's rights. She also claims that the notice must state that mere contact with the sender does not necessarily protect exempt property from seizure." *McCahey*, 774 F.2d at 552. The court rejected this claim because other sentences in the section 5222(e) notice recommended that the debtor contact a lawyer. *Id.*

[394] N.Y. C.P.L.R. 5222(d) (McKinney 2014).

[395] *Id.*

[396] *Id.*

restraining notice.[397] What are the consequences of failing to do this? Certainly the restraint can be vacated.[398] But is it void of its own account? This is far from clear. With regard to restraining notices served on banks, the 2008 legislation makes clear that failure to provide banks with the exemption notice (which it must forward to the debtor) makes the restraining notice void.[399] The fact that such a rule does *not* apply to nonbanks casts doubt on the status of the restraining notice when the section 5222(e) notice has not been timely served.

In *Cordius Trust v. Kummerfeld Associates*, a creditor served a restraining notice but not the exemption notice.[400] The court nevertheless ruled that the restraining notice was binding, where the judgment debtors were sophisticated tricksters who clearly understood the concept of exempt property.[401] Garnishees therefore take a risk that their clients are sophisticated when they disregard the restraining notice. However, where the creditor fails to send the restraining notice to the debtor and where the creditor permits the restraint to endure after the four days, the creditor is liable to the debtor for any damages caused.[402] Of course, if the debtor is a sophisticated trickster, damages under this provision are likely to be zero.

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[397] *Id.*

[398] Cadles of Grassy Meadows II, L.L.C. v. Katz, No. 106022-2006, 2008 N.Y. Misc. LEXIS 10299, at *21 (Sup. Ct. New York County Sept. 16, 2008); Lincoln Fin. Servs., Inc. v. Miceli, No. 2342/01, 2007 N.Y. Misc. LEXIS 6811, at *15 (Dist. Ct. Nassau County Oct. 9, 2007); Friedman v. Mayerhoff, 592 N.Y.S.2d 909, 911 (Civ. Ct. Kings County 1992). Because CPLR section 5222 uses the word "may," a court can simply deny a creditor a restraining notice for any good reason, as when it interferes with workout negotiations. EM Ltd. v. Republic of Arg., 131 Fed. App'x 745, 746–47 (2d Cir. 2005).

[399] N.Y. C.P.L.R. 5222-a(b)(1) (McKinney 2014) ("Failure to serve the notice and forms together with the restraining notice renders the restraining notice void, and the banking institution shall not restrain the account.").

[400] Cordius Trust v. Kummerfeld Assocs., 658 F. Supp. 2d 512, 519 (S.D.N.Y. 2009).

[401] *Id.* at 523.

[402] *See* Banks v. Leef, 467 N.Y.S.2d 156, 157–58 (Sup. Ct. Kings County 1983). *Banks* involved a tort action commenced by the service of a complaint. *Id.* at 157. The plaintiff can also bring a "special proceeding" to recover damages. N.Y. C.P.L.R. 5239 (McKinney 2014). A special proceeding is governed by article 4 of the CPLR. Basically, the time period for answering the petition is much accelerated. N.Y. C.P.L.R. 403(b) (McKinney 2014).

In *McCarthy v. Wachovia Bank, N.A.*, 759 F. Supp. 2d 265 (E.D.N.Y. 2011), the plaintiff claimed the creditor failed to send the restraining notice to the plaintiff. *Id.* at 279. The plaintiff's cause of action for damages was dismissed: "Nothing in the case law indicates that a defendant's failure to comply with CPLR 5222(d) provides the plaintiff with recourse in the form of money damages." *Id.* at 280. *Banks*, however, is direct authority for the proposition. *See Banks*, 467 N.Y.S.2d at 157–58. In *McCarthy* the bank supplied a copy of the restraining notice, even if the creditor did not. *McCarthy*, 759 F. Supp. 2d at 280. In light of this, the existence of damages was unlikely. *See Friedman*, 592 N.Y.S.2d at 911.

The notice requirement seems to apply only to debtors who are "natural persons."[403] This certainly makes sense, as the notice described in section 5222(e) deals exclusively with exempt property and how a debtor might get relief if exempt property is restrained.[404] Only natural persons are entitled to exemptions.[405]

The creditor must send the debtor a letter when the first restraining notice issues.[406] What if the letter is returned to the creditor by the post office? Then the notice must be sent

> to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns a judgment or order . . . .[407]

Here we again see that the CPLR aspires to avoid shaming a debtor in front of his employer. This is a major motivation in the CPLR's regulation of the income execution.[408]

A return from the post office is likely to be after the four-day period. Nevertheless, the restraining notice continues to be effective, as mailing to a known address is all that is required.[409] But the above-quoted language indicates that the creditor cannot rest on her laurels in light of the unsuccessful mailing.[410] Apparently a second mailing to the employer's address is required.[411] By what time must this second mailing occur? The statute does not say. The instinct of a commercial lawyer would be to say that the second mailing must occur in "a reasonable time."[412]

Finally, if the creditor knows neither the residence nor the place of employment, then the mailing must be made "to the defendant at

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[403] N.Y. C.P.L.R. 5222(d) (McKinney 2014) ("[M]ailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice."); *accord* Vinos Argentinos Imps. USA, Inc. v. Los Andes Imps., Inc., No. 91 Civ. 2587 (JSM), 1993 U.S. Dist. LEXIS 15826, at *3 (S.D.N.Y. Nov. 4, 1993).

[404] C.P.L.R. 5222(e).

[405] *Vinos Argentinos Imps.*, 1993 U.S. Dist. LEXIS 15826, at *3.

[406] C.P.L.R. 5222(d).

[407] *Id.*

[408] Carlson, *Critique II*, *supra* note 1, at 157–60.

[409] C.P.L.R. 5222(d).

[410] *See id.*

[411] *See id.*

[412] *E.g.*, U.C.C. §§ 1-204, 2-205, 2-309(1) (2012).

any other known address."[413] Presumably the "known address" must bear a reasonable relation to the debtor.[414] Mailing to a known friend of the debtor, for instance, might suffice. Mailing to 1600 Pennsylvania Avenue would not, for most debtors.

In *McCahey v. L.P. Investors*, the court declined to rule the post-*Deary* regime was unconstitutional, but it left at least one question open.[415] When a debtor is deprived of the use of property by an *ex parte* order, due process requires that the debtor be guaranteed a *prompt* hearing:

> It is true that the statutory scheme in question does not provide a mandatory outside time limit on according a hearing on an exemption claim. It is also true that the majority of courts that have squarely addressed the issue have stated that only a mandatory period can withstand constitutional scrutiny.[416]

In New York, a motion to vacate a restraining notice is made under CPLR sections 5239 or 5240, neither of which set a limit on the promptness on the post-restraint remedy.[417] The plaintiff in *McCahey*, however, "made no effort to recover her property by using New York's procedures. We are therefore not faced with a concrete example of the New York statute in action, and we are unwilling to invalidate a statute because it might, but need not, be applied in an unconstitutional manner."[418] Therefore it might still be open to challenge the restraining notice procedure for its failure to guarantee a prompt hearing on vacating orders that wrongly restrain exempt property.[419]

This remaining ambiguity no longer exists when a bank is the garnishee. After 2008, special rules apply to banks in consumer cases, and these provide for a very prompt hearing.[420] To those

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[413] C.P.L.R. 5222(d).

[414] *See id.*

[415] McCahey v. L.P. Investors, 774 F.2d 543, 549 (2d Cir. 1985).

[416] *Id.* at 552–53 (citing Dionne v. Bouley, 757 F.2d 1344, 1353 (1st Cir. 1985)); Finberg v. Sullivan, 634 F.2d 50, 59 (3d Cir. 1980).

[417] *See* N.Y. C.P.L.R. 5239, 5240 (McKinney 2014).

[418] *McCahey*, 774 F.2d at 553.

[419] This question impacts upon tax collection procedures, which require a taxpayer to pay presently with no express guaranty of a prompt hearing. Carlson & Smith, *supra* note 264, at 685.

[420] N.Y. C.P.L.R. 5222(d) (McKinney 2014) ("Except where the provisions of section fifty-two hundred twenty-two-a of this article are applicable, pursuant to subdivision (a) of such section . . . .").

rules we will return later.[421]

6. Fraudulently Conveyed Property

One contentious issue is the effect of a restraining notice when the debtor is alleged to have made fraudulent conveyances. Suppose a judgment debtor has fraudulently conveyed property to a garnishee. A judgment creditor then serves the restraining notice on the garnishee. The restraining notice

> is effective only if, at the time of service, [the garnishee] . . . is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor . . . has an interest, or if the judgment creditor . . . has stated in the notice that . . . the judgment debtor . . . has an interest in specified property in the possession or custody of the person served.[422]

Fraudulent conveyance law presents a difficult conceptual issue: If a debtor fraudulently conveys a thing to the garnishee, does the debtor still own the thing?

Properly, the answer is no. The transfer is voidable but not void. The debtor has conveyed the thing once and for all and can never get it back. Only the *creditors* can reach the fraudulently conveyed property on an *in rem* basis with their judicial liens.[423] A garnishee holds such property in trust for the creditors of the debtor. So ownership of the fraudulently conveyed thing must be viewed as owned by a garnishee in trust for the creditors. The debtor has no interest in the fraudulently conveyed things at all.[424]

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[421] *See infra* Part II.C–D.

[422] C.P.L.R. 5222(b).

[423] The Uniform Fraudulent Transfer Act (hereinafter "UFTA") has altered the classical in rem nature of fraudulent conveyance law. Under the UFTA, a creditor may at will substitute an in personam remedy against the garnishee. *See* Unif. Fraudulent Transfer Act § 8(b) (1984); First Nat'l Bank of Seminole v. Hooper, 48 S.W.3d 802, 809 (Tex. App. 2001), (involving in personam liability for property valued at time of fraudulent transfer), *rev'd on other grounds*, 104 S.W.3d 83 (Tex. 2003). Accordingly, under the older Uniform Fraudulent Conveyance Act (hereinafter "UFCA"), the garnishee is not personally obligated to the debtor's creditors (unless the garnishee wrongfully interferes with the creditors' property right). *See* N.Y. DEBT. & CRED. LAW § 278(1) (McKinney 2014); *see generally* 30 N.Y. JUR. 2D *Creditors' Rights* § 312 (2013) (explaining that New York adopted the UFCA by enacting New York Debtor and Creditor Law). Under the UFTA, the fraudulent transfer is the wrongful act of "conversion" that makes the garnishee personally liable to the creditors. Unif. Fraudulent Transfer Act § 8(b). The garnishee's liability, however, is limited to the value of the property actually conveyed. *Id.*

[424] David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination* 45 WM. & MARY L. REV. 157, 168 (2003).

Although it is literally true that the debtor "alienates" all right title and interest *of the debtor* when he fraudulently conveys, this does not imply that a restraining notice cannot affect fraudulently conveyed property under the literal terms of CPLR section 5222(b)'s second sentence.[425] If the restraining notice *falsely* states that the debtor has an interest in a thing, it is an effective restraining notice.[426] It is a striking feature of CPLR section 5222(b)'s second sentence that, if we read it literally, a restraining notice can restrain on the basis of a known falsehood. Yet, as we shall see, courts have concluded, not unreasonably, that restraining notices that falsely allege that the debtor has an interest in a thing does not restrain the thing. In any event, in a fraudulent conveyance case, a creditor is not always in a position to designate a specific thing as having been the subject of a fraudulent conveyance. Therefore, a deeper inquiry is required as to whether a restraining notice is capable of affecting garnishee property that is founded on a fraudulent conveyance.

Account must be taken of the remedial section of the Uniform Fraudulent Conveyance Act (still the law in New York).[427] According to New York Debtor & Creditor Law section 278(1):

> Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may . . .
>
> a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
>
> b. *Disregard the conveyance and attach or levy execution upon the property conveyed*.[428]

This emphasized portion states that the creditor may levy execution against the garnishee's property *as if* it were still the debtor's property.[429] We may observe in passing that *creditors* may not levy at all. Only sheriffs can do this.[430] But clearly this archaic statutory language is intended to empower the *sheriff* to take the garnishee's property to satisfy the creditor's claim against the debtor.[431]

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[425] C.P.L.R. 5222(b).

[426] *See id.*

[427] *Creditors' Rights*, *supra* note 423, § 312.

[428] N.Y. DEBT. & CRED. LAW § 278(1) (McKinney 2014) (emphasis added).

[429] *Id.*

[430] N.Y. C.P.L.R. 5232(a)–(b) (McKinney 2014).

[431] Carlson, *supra* note 424, at 172 n.47. On the constitutional issue raised thereby, see Carlson, *Critique II*, *supra* note 1, at 201–02.

This emphasized passage is consistent with the proposition that a debtor still owns property after she fraudulently conveys it. But it does not *require* any such view. It could be the case that the garnishee (not the debtor) is the legal owner of property (though the garnishee holds in trust for the creditors of the debtor). Yet the sheriff is invited (without any notice or hearing to the garnishee) to simply take the garnishee's property.

On the basis of Debtor and Creditor Law section 278(1)(b), the court in *Blue Giant Equipment Corp. v. Tec-Ser, Inc.*,[432] held that a creditor of the debtor could validly bind a garnishee by serving her with a restraining notice, where the garnishee has received a fraudulent transfer from the judgment debtor.[433] Such a holding implies that a debtor still owns property after he fraudulently transfers it.[434] The lower court had vacated the restraining notice because the debtor had no interest in a fraudulently conveyed thing once it was conveyed.[435] In reversing, the appellate division noted that, under New York's fraudulent conveyance law:

> [P]laintiff has the option of ignoring the conveyance of [the debtor's] interest and pursuing its remedies to enforce its judgment, including the device of service of restraining notices . . . . Section 278 (subd 1, par b) of the Debtor and Creditor law clearly provides, however, that a judgment creditor has the alternate remedy to "[disregard] the conveyance and . . . levy execution upon the property conveyed." In pursuance of its right to levy execution on its judgment in the first action, plaintiff also had the right to employ the device of a restraining notice to preserve the property upon which it sought to execute.[436]

On the basis of *Blue Giant*, a garnishee has to assume that, under New York law, a restraining notice will encumber property that the garnishee received from the debtor, provided the debtor conveyed it fraudulently.[437]

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[432] Blue Giant Equip. Corp. v. Tec-Ser, Inc., 459 N.Y.S.2d 948 (App. Div. 3d Dep't 1983).

[433] *Id.* at 949–50.

[434] *See id.* at 949.

[435] *Id.*

[436] *Id.* (second alteration in original) (citation omitted) (quoting N.Y. DEBT. & CRED. LAW § 278(1)(b) (McKinney 1983)) (citing Plaza Hotel Assocs. v. Wellington Assocs., 378 N.Y.S.2d 859, 864 (Sup. Ct. New York County 1975)); *accord* United States v. Ceparano, No. 98CR0922 (ADS), 2009 U.S. Dist. LEXIS 131257, at *6–10, *12 (E.D.N.Y. May 13, 2009).

[437] *See Blue Giant*, 459 N.Y.S.2d at 949; *see also Ceparano*, 2009 U.S. Dist. LEXIS 131257, at *9–10 (holding that issuance of a restraining notice against assets of a third party is

How can a garnishee know whether a transfer was fraudulent? At least the garnishee knows that if the garnishee bought the thing from the debtor in good faith for value, the garnishee received the thing free and clear of a fraudulent conveyance right. According to New York Debtor & Creditor Law section 278(1), the judgment creditor has no rights against "a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser."[438] Where the garnishee paid no consideration, she risks liability to the judgment creditor if she conveys away property received from the debtor.[439]

In *Blue Giant*, the judgment creditor served a garnishee.[440] A different case is where the judgment creditor serves a third party's bank where the third party has not yet been held liable as the recipient of a fraudulent conveyance. In *Save Way Oil Co. v. 284 Eastern Parkway Corp.*,[441] the judgment creditor tried to stretch the restraining notice to cover the third party's bank from paying the account to the third party.[442] Such restraining notices the court would not allow:

> What is sought here is to extend the creditor's reach to a third tier. Plaintiff is not seeking to restrain money owed directly to the judgment debtor, but rather *money owed to one who in turn is allegedly indebted to the judgment debtor*. It is eminently clear that CPLR 5222 does not encompass this step.[443]

This is put rather confusingly. If a third party has received a fraudulent conveyance from the debtor, she is not "indebted to the judgment debtor." Rather, she holds property that could be used to satisfy the creditor's judgment against the debtor. In New York, this is strictly an *in rem* relation between the third party transfer and the creditor.[444] Nevertheless, putting this confusion aside, the

appropriate where the government has made a prima facie showing that the conveyance in question was fraudulent).

[438] DEBT. & CRED. LAW § 278(1).

[439] *See id.*

[440] *Blue Giant*, 459 N.Y.S.2d at 949.

[441] Save Way Oil Co. v. 284 Eastern Parkway Corp., 453 N.Y.S.2d 554 (Civ. Ct. Kings County 1982).

[442] *Id.* at 555–56.

[443] *Id.* at 556 (citing Smith v. Amherst Acres, Inc., 350 N.Y.S.2d 236, 237 (App. Div. 4th Dep't 1973)).

[444] *See* Comm. of Unsecured Creditors of Interstate Cigar Co. v. Interstate Distrib., Inc., 620 N.Y.S.2d 78, 80 (App. Div. 2d Dep't 1994). Under the newer Uniform Fraudulent

point is valid. Under cases like *Blue Giant*, the judgment creditor could serve a restraining notice on the garnishee and the garnishee would be bound by it.[445] But the creditor cannot restrain the garnishee's bank until the creditor has a money judgment against the garnishee directly.[446]

A question not considered in *Save Way Oil* is that a third party's bank account might itself be proceeds of the fraudulent conveyance the garnishee has received. Suppose for instance that the judgment debtor gratuitously writes the third party a check, meaning that the proceeds of the check, when it clears, is a fraudulent conveyance. The third party then deposits the check with her bank. For simplicity's sake, let us assume that the bank account contains nothing but the proceeds of the fraudulent check. The bank's obligation to its customer is proceeds of the debtor's fraudulent conveyance. In general, if the third party holds a thing that is a fraudulent conveyance, and the third party sells that thing, the consideration received is held in trust for the judgment creditor.[447] Similarly, the bank's obligation to pay the third party is proceeds of a fraudulent conveyance that the creditors of the debtor could get.[448] Now, if the bank is served with a restraining notice, the bank must not honor the third party's checks. On a proceeds theory, the creditors of a judgment debtor can indeed restrain the third party's bank account.

Transfer Act section 8(b), a third party *is* indebted by the very fact of accepting the fraudulent transfer. *See generally* First Nat'l Bank v. Hooper, 48 S.W.3d 802, 808–10 (Tex. App. 2001) (rejecting argument that the creditor must show knowing participation by the third party in the commission of the fraud in order to obtain a money judgment against the third party), *rev'd on other grounds*, 104 S.W.3d 83 (Tex. 2003).

[445] *See Blue Giant*, 459 N.Y.S.2d at 949.

[446] *See, e.g.*, H.J. O'Connell Assocs. v. Ins. Pension & Welfare Fund of Roofers, 381 N.Y.S.2d 659, 660 (Sup. Ct. Albany County 1976).

[447] *See, e.g.*, Rabin v. Delacruz (*In re* St. Claire Clinic, Inc.), No. 94-3943, 1996 U.S. App. LEXIS 1416, at *3, *7–11 (6th Cir. 1996).

[448] This conclusion is based on the idea that fraudulent conveyance law creates a constructive trust on the conveyed item, and proceeds theory is a routine attribute of trust law. RESTATEMENT (SECOND) OF TRUSTS § 202(1) (1959); Carlson, *supra* note 424, at 171–83. In *Bingham v. Zolt*, 647 N.Y.S.2d 220 (App. Div. 1st Dep't 1996), a judgment debtor deposited funds in his wife's account. *Id.* at 221. The court upheld a restraint on the wife's account because it held debtor funds, of which the wife was trustee. *Id.* *Bingham* is directly analogous to the case where a nondebtor deposits fraudulently conveyed funds into her bank account. *See also* ERA Mgmt. v. Morrison Cohen Singer & Weinstein, 605 N.Y.S.2d 91, 91 (App. Div. 1st Dep't 1993) (similar holding).

7. Alter Ego Cases

In cases where the judgment debtor has fraudulently conveyed property to a garnishee and a creditor has served the garnishee with a restraining notice, courts have held that the garnishee is bound by the restraining notice on the metaphysically questionable premise that a fraudulent conveyance is no conveyance.[449] Such a conveyance is void, not voidable. What the debtor conveyed the debtor still owns. A restraining notice served on third party transferee's bank, however, is not effective, unless the bank account itself is proceeds of the fraudulent conveyance.[450]

A distinguishable case arises when the third party is the alter ego of the debtor and the judgment creditor serves a restraining notice on the third party's bank.[451] In such a case, the third party's bank account *is* the debtor's account, and the third party's bank *is* the debtor's bank, capable of being restrained.[452] Alter ego cases routinely uphold the restraint of the bank account merely on the allegation that the corporate veil between the third party and the judgment debtor ought to be pierced.[453]

In *Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co.*, the court, in an alter ego case, made clear that the bank *ignores* the restraining notice at its own risk.[454] If indeed the corporate form is legitimate, the restraining notice has no effect, and the bank may honor checks on the account. But if the alter ego theory is correct, the bank owes damages for disobeying the restraining notice.[455]

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[449] *See* United States v. Ceparano, No. 98CR0922 (ADS), 2009 U.S. Dist. LEXIS 131257, at *6–10, *12 (E.D.N.Y. May 13, 2009); *Blue Giant*, 459 N.Y.S.2d at 949; *see also* RCA Corp. v. Tucker, 696 F. Supp. 845, 851–52 (E.D.N.Y. 1988) (nullifying the assignment of a promissory note to the judgment creditor's wife as a fraudulent conveyance and ruling that the judgment creditors were entitled to the proceeds of the note as a matter of law).

[450] *See, e.g.*, *Bingham*, 647 N.Y.S.2d at 221; *ERA Mgmt.*, 605 N.Y.S.2d at 91.

[451] Save Way Oil Co. v. 284 Eastern Parkway Corp., 453 N.Y.S.2d 554, 556 (Civ. Ct. Kings County 1982).

[452] *See* Briarpatch Ltd., L.P. v. Briarpatch Film Corp., No. 603364/01, 2013 Misc. LEXIS 2503, at *26–27 (Sup. Ct. New York County June 13, 2013) (illustrating that an investment in a company is debtor property when the company is the alter ego of the debtor).

[453] *See* Ivor B. Clark Co. v. Hogan, 296 F. Supp. 407, 410–11 (S.D.N.Y. 1969); Thompson v. Pollack, 873 N.Y.S.2d 173, 175 (App. Div. 2d Dep't 2009) (refusing to vacate restraining notice where creditor presented prima facie evidence of alter ego). *But see* Plaza Hotel Assocs. v. Wellington Assocs., 378 N.Y.S.2d 859, 865 (Sup. Ct. New York County 1975) (indicating that prima facie evidence of alter ego is required to "pierce the corporate veil").

[454] Sumitomo Shoji N.Y., Inc. v. Chem. Bank N.Y. Trust Co., 263 N.Y.S.2d 354, 356 (Sup. Ct. New York County 1965), *aff'd mem.*, 267 N.Y.S.2d 477 (App. Div. 1st Dep't 1966).

[455] *Id.* at 358–59.

In ruling that, where the restraining notice expressly indicates that the bank account is property of a judgment debtor, the restraining notice is invalid, the court exceeds the text of section 5222(b). In fact, the second sentence of section 5222(b) says that the restraining notice is binding whether their allocations are true or not: "A restraining notice served upon a person other than the judgment debtor . . . is effective . . . if the judgment creditor . . . has stated in the notice that a specified debt is owed by the person served to the judgment debtor."[456] But in this interpretation, the *Sumitomo* court behaved sensibly, as the restraining notice is about maintaining the status quo with regard to property that could actually be used to satisfy a judgment.[457] Thus, a restraining notice that *falsely* designates property as belonging to the debtor is, apparently, entirely ineffective. Why should a court order built on a lie be accorded any respect, especially where no public official issues it?

On this view, if the "alter ego" claim is substantively correct (though not yet adjudicated), the bank violates the restraining notice by honoring checks:

> A judgment creditor's specification of debt or property in a restraining notice is binding on the person served to the extent of forbidding payment or transfer except pursuant to an order of the court. If such person does make payment or transfer in disregard of the restraining notice, he takes the risk of liability for damages and contempt if the judgment creditor can establish that the debt was owed to the judgment debtor or that he had an interest in such property. Judgment debtor's "interest" in property must be understood to mean a direct interest in the property itself which, while it may require a court determination, is leviable, and not an indirect interest in the proceeds of the property, such as that of a stockholder in the entity to which the property belongs.[458]

In *Sumitomo*, the garnishee bank honored checks on the corporate account, even though the corporation was not the judgment debtor.[459] This was inappropriate if the alter ego theory

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[456] N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[457] *See, e.g.*, *Sumitomo*, 263 N.Y.S.2d at 357.

[458] *Id.* at 358; *accord* Mazzuka v. Bank of N. Am., 280 N.Y.S.2d 495, 500 (Civ. Ct. Queens County 1967).

[459] *Sumitomo*, 263 N.Y.S.2d at 356.

was true. This put the garnishee bank in the odd position of litigating, in a special proceeding,[460] the genuineness of its customer's corporate form. Meanwhile, the customer, having cleaned out its account, may have no clear motive to cooperate in this litigation, except for a possible liability for having received an unjust enrichment or payment by mistake. This is small incentive where the bank's customer is insolvent.[461]

New York Banking Law section 134(5) does not, apparently, protect a bank that honors checks on the corporate account.[462] According to that provision:

> Notice to any bank . . . of an adverse claim . . . to a deposit of cash . . . standing on its books to the credit of . . . any person shall not be effectual to cause said bank . . . to recognize said adverse claimant unless said adverse claimant shall also either procure a restraining order, injunction or other appropriate process against said bank . . . from a court of competent jurisdiction in the United States in a cause therein instituted by him wherein the person to whose credit the deposit stands . . . is made a party and served with summons . . . .[463]

When the bank is served with a restraining notice designating a corporate account as property of the debtor, the corporation has never been made a party to an action which culminated in an injunction.[464] The *Sumitomo* court ruled that the judgment creditor was not making an adverse claim against the bank account.[465] This is true; the restraining notice does not create a lien. The claim of a lien *would* be an adverse claim,[466] but no lien arises from the

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[460] The garnishee is not entitled to insist that the matter be litigated in a plenary action or in a contempt action, rather than a special proceeding. *Id.* at 359.

[461] Of course, the bank loses only if the alter ego theory is true. But any such holding against the bank has no *res judicata* effect against the corporate customer. The whole matter will have to be litigated again. *See supra* text accompanying notes 446–50.

[462] *See* N.Y. BANKING LAW § 134(5) (McKinney 2014).

[463] *Id.*

[464] *See* Sulil Realty Corp. v. Rye Motors, Inc., 257 N.Y.S.2d 111, 114 (Westchester County Ct. 1965) ("[S]ervice of a restraining notice or an information subpoena does not commence a 'proceeding' . . . .").

[465] *See* Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co., 263 N.Y.S.2d 354, 356–57, 359 (Sup. Ct. New York County 1965), *aff'd mem.*, 267 N.Y.S.2d 477 (App. Div. 1st Dep't 1966).

[466] One sees this assumption in U.C.C. § 8-502 (2012): "An action based on an adverse claim . . . whether framed in . . . [terms of an] equitable lien . . . may not be asserted against a person who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim." *Id.*

issuance of a restraining notice.[467] Thus, restraining notices served on banks are more powerful than levies of banks. A bank is empowered by Banking Law section 134(5) to ignore the levy.[468] But the bank owes damages if it violates the supposedly weaker restraining notice.[469]

The *Sumitomo* court implied that a garnishee acts correctly in restraining the debt or property, even if the judgment creditor is mistaken that the judgment debtor has an interest in the restrained thing.[470] A bank that, for example, refuses to honor checks is not guilty of wrongful dishonor because it is compelled to dishonor the check by a valid court order.[471] Therefore, banks have every incentive to honor a restraining notice, no matter how exotic and wrong the theory of the judgment creditor is.[472]

The court in *JSC Foreign Economic Ass'n Technostroyexport v. International Development & Trade Services, Inc.*,[473] denied that a restraining notice on a nondebtor can be sustained on the allegation that the served person is the alter ego of the debtor.[474] In so ruling, the court had to get rid of the above-discussed contrary authorities from New York state courts.[475] Ignoring, at least for this purpose, the *Sumitomo* case[476]—direct authority for the validity of the

[467] *See supra* Part I.B.

[468] BANKING LAW § 134(5).

[469] Where the underlying money judgment is paid, the cause of action for violating the restraining notice evaporates. Tri-Mar Contractors v. Bank of Suffolk Cnty., 440 N.Y.S.2d 556, 556–57 (App. Div. 2d Dep't 1981); Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 N.Y. Misc. LEXIS 47, at *43 (Sup. Ct. New York County Jan. 11, 2012). Attorneys' fees may not be recovered as damages for violating the restraining notice absent express authority for their recovery. *Global*, 2012 N.Y. Misc. LEXIS, at *46.

[470] *See Sumitomo*, 263 N.Y.S.2d at 357–58; *accord* Schaeffer v. Chem. Bank, 435 N.Y.S.2d 474, 475–76 (Dist. Ct. Suffolk County 1980).

[471] In comparison, a judgment debtor who has been served with a restraining notice cannot use that notice as an excuse for not performing an unrelated contract. *See* Studio No. 54 Disco, Inc. v. Pee Dee Jay Amusement Corp., 428 N.Y.S.2d 806, 808 (Sup. Ct. New York County 1980), *rev'd on other grounds*, 439 N.Y.S.2d 395 (App. Div. 2d Dep't 1981).

[472] On appeal, only the "true owner" of the bank account has standing to vacate the restraining notice or to appeal a lower court's refusal to vacate. *See* Kuslansky v. Kuslansky, Robbins, Stechel & Cunningham, LLP, 966 N.Y.S.2d 674, 675 (App. Div. 2d Dep't 2013). A debtor attempting appeal for the "true owner" curiously confesses that the alter ego theory is correct. *See id.*

[473] JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 295 F. Supp. 2d 366 (S.D.N.Y. 2003).

[474] *Id.* at 393.

[475] *Id.* at 392–93.

[476] *Sumitomo* is cited for the proposition that the "[j]udgment debtor's 'interest' in property must be understood to mean a direct interest in the property itself which, while it may require a court determination, is leviable and not an indirect interest in the proceeds of the property." *Id.* at 391–92 (alteration in original) (quoting Sumitomo Shoji N.Y., Inc. v. Chem.

restraining notice—the *JSC* court thought it could get rid of just one of the many authorities upholding the restraining notice and then call it a day. The case it chose to distinguish was *Plaza Hotel Associates v. Wellington Associates*, which upheld a restraining notice on an allegation that a nondebtor was an alter ego of a judgment debtor.[477] According to the *JSC* court, *Plaza Hotel* was a fraudulent conveyance case, where restraining notices should be upheld.[478] In fact, even a casual glance at this opinion shows that it upheld the restraining notice on an alter ego theory.[479] It was no fraudulent conveyance case.[480] *JSC* should therefore be viewed as a feeble *Erie* guess of New York law.

G. Debts

One of the many errors of judgment by the drafters of the CPLR was its very narrow definition of "debt." According to CPLR section 5201(a), "[a] money judgment may be enforced against any debt, which is *past due or which is yet to become due, certainly or upon demand of the judgment debtor*."[481] Contingent debts are not debts at all. It has been suggested that

> [c]ertitude is the key to the kingdom of debt. This morbid dread of contingency is entirely outmoded . . . . Article 9 of the UCC sees no reason why contingent debts cannot be collateral. Yet New York courts have a woeful history of equating contingent debt with no debt at all. This anxiety has been legislated into the CPLR to no good end.[482]

Section 5222(b) says of debts, so defined, that the garnishee is not

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Bank N.Y. Trust Co., 263 N.Y.S.2d 354, 358 (Sup. Ct. New York County 1965)). Otherwise, *Sumitomo* is ignored.

[477] Plaza Hotel Assocs. v. Wellington Assocs., 378 N.Y.S.2d 859, 863–64 (Sup. Ct. New York County 1975).

[478] *See JSC*, 295 F. Supp. 2d at 392.

[479] *See Plaza*, 378 N.Y.S.2d at 864.

[480] *See id.* The *Plaza Hotel* court remarks, "[P]laintiff has shown, at least prima facie, that movant partnership and defendant corporation are in fact on and the same." *Id.* at 864. As to fraudulent conveyances, the *Plaza Hotel* court remarks, "Movant's additional argument, that plaintiff's sole remedy is a proceeding pursuant to Debtor and Creditor Law, is likewise meritless. That plaintiff may also proceed in accordance with section 273-a of the Debtor and Creditor Law in no way precludes appropriate proceedings pursuant to CPLR Article 52." *Id.* That is, fraudulent conveyance law is considered just another theory that the creditor could have, but did not, pursue. *See id.* For the record, however, the alter ego theory is inconsistent with the fraudulent conveyance theory. If A and B are the same person, there can be no conveyance, fraudulent or otherwise, between A and B.

[481] N.Y. C.P.L.R. 5201(a) (McKinney 2014) (emphasis added).

[482] Carlson, *Critique II*, *supra* note 1, at 97 (footnotes omitted).

to "pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit."[483] So if the garnishee is served on a Monday at a time when he owes a debt (as narrowly defined) and if the garnishee pays on a Tuesday, the garnishee has violated the restraining notice.[484] What if the garnishee mailed a check on Sunday the day before he received the restraining notice? The garnishee is expected to stop payment on that check.[485]

Payment of a debt on Tuesday after receipt of a binding restraining notice on Monday gives rise to a suit for damages, but it does not imply that the creditor, as of Monday, has expropriated the debtor's right to be paid. Any such conclusion implies that the restraining notice is a lien, which is strictly prohibited. After Tuesday, the creditor may not insist that the garnishee pay a second time, but the creditor does have a suit for damages, which may or may not equate with the amount of the debt that the garnishee should not have paid. This distinction makes a difference with the regard to the accrual of interest on the creditor's remedy. Because the creditor is not the owner of anything on Monday, the creditor cannot claim that interest begins to accrue on Monday, rather than on the date when damages are awarded.[486]

Greatly complicating the restraint of debt-paying is the fact that restraining notices apparently do not restrain setoffs at all. This will lead to puzzles which threaten to undermine the restraining notice altogether.

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[483] N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[484] With regard to debts, it should be the case that only paying a debt to, or to the order of, the debtor should be restrained. Paying the debtor's employer on a debt owed to the employer for service performed by the debtor should not be restrained for the simple reason that such a debt is not owed to the debtor. A case apparently to the contrary is *Ray v. Jama Productions, Inc.*, 425 N.Y.S.2d 630 (App. Div. 2d Dep't 1980). In this case, the garnishee hired the services of an employee of a company. *Id.* at 631. The judgment creditor received a judgment against the employee. *Id.* The garnishee fulfilled its contract by paying the company. *Id.* Because the company used some of this money to meet the expenses of the employee, the court held that the garnishee had violated the restraining notice served upon it. *Id.* Carried to its logical conclusion, if a creditor had a judgment against, say, an employee of IBM and the creditor served a restraining notice on IBM's largest customer, the customer is restrained from paying IBM if IBM's debt was generated by the debtor's services rendered to IBM. This seems rather to break down the pales and forts of reason.

[485] Conde v. Anton Adjustment Co., 508 N.Y.S.2d 884, 885 (Civ. Ct. New York County 1986).

[486] *See* Briarpatch Ltd., L.P. v. Briarpatch Film Corp., No. 603364/01, 2013 N.Y. Misc. LEXIS 2503, at *38–39 (Sup. Ct. New York County June 13, 2013).

H. Right of Setoff

Banks jealously guard the common law right of setoff. If a bank has received a restraining notice from a judgment creditor, does the creditor violate it by declaring the setoff?

The metaphysics of setoff have never been well understood. A setoff is the unilateral but reciprocal right of any creditor to declare a mutual countervailing debt to be canceled.[487] Is canceling through setoff a debt the same as paying it? If so, the setoff would seem to violate CPLR section 5222(b) (fourth sentence). In this regard, it may be pointed out that section 5222(b)'s fourth sentence prohibits not only *paying* a debt, but also "*otherwise disposing*" of it.[488] In the context of a third party garnishee, what could "otherwise disposing" mean but setting it off against some mutual debt?

The Court of Appeals, nevertheless, has vindicated the setoff right against restraining notice in *Aspen Industries, Inc. v. Marine Midland Bank*.[489] The court did so on the strength of New York Debtor and Creditor Law section 151, which holds:

> Every debtor shall have the right upon:
>
> (a) the filing of [bankruptcy] petition . . . ;
>
> (b) the making of an assignment by a creditor for the benefit of its creditors;
>
> (c) the application for the appointment . . . of any receiver . . . ;
>
> (d) the issuance of any execution against any of the property of a creditor;
>
> (e) the issuance of a subpoena or order, in supplementary proceedings, against or with respect to any of the property of a creditor; or
>
> (f) the issuance of a warrant of attachment against any of the property of a creditor,
>
> to set off and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor, any amount owing from such debtor to such creditor, at or at any time after, the happening of any of the above mentioned events, and the aforesaid right of set off may be exercised by

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[487] *E.g.*, Official Comm. of Unsecured Creditors v. Mfrs. & Traders Trust Co. (*In re* Bennett Funding Grp., Inc.), 146 F.3d 136, 140 (2d Cir. 1998).

[488] C.P.L.R. 5222(b) (emphasis added).

[489] Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 812 (N.Y. 1981).

> such debtor against such creditor . . . receiver or execution, judgment or attachment creditor of such creditor, or against anyone else claiming through or against such creditor . . . receivers, or execution, judgment or attachment creditor, notwithstanding the fact that such right of set off shall not have been exercised by such debtor prior to the making, filing or issuance, or service upon such debtor of, or of notice of, any such petition; assignment for the benefit of creditors; appointment or application for the appointment of a receiver; or issuance of execution, subpoena or order or warrant.[490]

When enacted, a subpoena, per section 151(e), also entailed a restraining notice.[491] But when the CPLR divorced subpoenas and restraining notices, section 151(e) ceased referring to restraining notices.[492] In modern times, the restraining notice is no longer described in section 151(e), which refers to an "order, in supplementary proceedings . . . with respect to any of the property of a creditor."[493] A restraining notice is an order, to be sure, but it may be issued without the commencement of a supplementary proceeding.[494]

In *Aspen*, the garnishee bank froze a segment ($9,677.60) of the debtor's bank account in accord with the sixth sentence of section 5222(b):

> If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.[495]

The bank accepted post-service deposits and honored post-service checks, consistent with the "twice the amount" freeze.[496] After a while, however, the bank declared a partial setoff of its $124,597.64 claim against the debtor.[497] The creditor then brought a special

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[490] N.Y. DEBT. & CRED. LAW § 151 (McKinney 2014).

[491] *See* West Harlem Pork Ctr., Ltd. v. Empire Nat'l Bank, 400 N.Y.S.2d 859, 860 (App. Div. 2d. Dep't 1978).

[492] *See id.*

[493] DEBT. & CRED. LAW § 151(e); *see Aspen Indus.*, 421 N.E.2d at 812.

[494] C.P.L.R. 5222(a).

[495] *Aspen Indus.*, 421 N.E.2d at 811 (quoting N.Y. C.P.L.R. 5222(b) (McKinney 1981)). The amount required to be frozen in the case was $9,677.60, twice the "balance of $4,838.80, still owing." *Aspen Indus.*, 421 N.E.2d at 809.

[496] *Id.* at 810.

[497] *Id.*

proceeding to obtain a turnover order for the amount of its judgment ($4,846.51).[498]

A majority at the appellate division level thought that the bank had misbehaved, because it honored checks after receiving the restraining notice (even though this was always done by crediting that portion of the account that exceeded the "twice-the-amount" portion of the account).[499]

The Court of Appeals reversed, holding that no lien arose by virtue of the restraining notice.[500] The court found that the bank had not violated the restraining notice by honoring checks, since at no time did the balance in the account fall below $9,677.60.[501] As for the manifestation of the setoff, this was rightful under Debtor and Creditor Law section 151:

> Although the statute does not expressly refer to restraining notices, it seems abundantly clear that, by enacting section 151 of the Debtor and Creditor Law, the Legislature intended to "cover the field" in terms of the garnishee's right of setoff vis-a-vis the various enforcement devices.[502]

This decision is in accord with the purpose of the restraining notice, which is to keep the bank account in place for the subsequent execution or turnover order.[503] Since the setoff right is guaranteed against such subsequent events, there is no sense in saying otherwise with regard to the restraining notice. Why should the bank be forced to seek relief from the restraining notice to manifest the setoff, where the creditor can never obtain the bank account by ordinary judicial process?

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[498] *Id.*

[499] *See id.* This was actually the correct result at this time. The Court of Appeals had proclaimed, in *International Ribbon Mills*, that restraining notices constitute liens, so that after service of a restraining notice the bank account belonged to the creditor. Int'l Ribbon Mills, Ltd. v. Arjan Ribbons, Inc., 325 N.E.2d 137, 138 (1975). Given that lien significance, the setoff was no longer possible once the restraining notice was served. Meanwhile, Debtor and Creditor Law section 151 no longer referred expressly to restraining notices, given the divorce between subpoenas and restraining notices imposed by the CPLR. *See supra* text accompanying notes 488–93. Two judges dissented. Aspen Indus. v. Marine Midland Bank, 426 N.Y.S.2d 620, 623 (App. Div. 4th Dep't 1980) (Cardamone, J.P., dissenting). They thought the bank had violated the restraining notice by honoring postservice checks. *Id.* But they also thought that the creditor was limited to a damages claim. *Id.* Because the bank had the right of setoff which could have been exercised in lieu of honoring checks, the creditor had not been damaged. *Id.*

[500] *Aspen Indus.*, 421 N.E.2d at 810–11.

[501] *Id.* at 811.

[502] *Id.* at 812.

[503] *See, e.g.*, City of New York v. Panzirer, 259 N.Y.S.2d 284, 288 (App. Div. 1st Dep't 1965).

Suppose a bank has a setoff opportunity. That is, there are mutually countervailing debts, but the bank has not yet manifested its intent to set off. Setoffs, at least as a matter of state law, are subject to the rule of "use it or lose it." So, for example, a bank with a setoff opportunity honors a check, it is obviously too late to declare a setoff. The setoff horse has already left the barn.

Section 151 protects setoffs against judicial process and, per *Aspen*, against the restraining notice.[504] But section 151 does not protect honoring the debtor's checks in violation of the restraining notice.[505] Nevertheless, in *Nielson Media Research, Inc. v. Carlton Hotel, LLC*,[506] the court held that, where the payor *could* have set off, the payment of a debt to a judgment debtor does not violate the restraining notice.[507] In *Nielson Media*, the judgment debtor was a contractor.[508] The account debtor forwarded money to the debtor so that it could pay the subcontractors.[509] It can be pointed out, however, that in the context of real estate improvements, New York Lien Law section 72(2) makes the contractor the trustee of receivables for the benefit of subcontractors, and "[t]rust assets shall not be levied upon or subject to a restraining notice issued pursuant to section fifty-two hundred twenty-two of the civil practice law and rules as the individual property of the trustee."[510] A trust asset includes "any right to receive payment at a future time."[511] So *Nielson Media* was correctly decided without any reference to setoff, because the New York Lien Law applied. Under the law of setoff, a fiduciary may not set off a trust obligation against a personal obligation.[512]

Had the New York Lien Law *not* applied, *Nielson Media* suggests that a creditor with a setoff opportunity is free to pay a judgment debtor in spite of the restraining notice.[513] This is a very doubtful proposition. The *Aspen* court perhaps stretched Debtor and Creditor Law section 151 to cover setoffs in the face of a restraining

504 N.Y. DEBT. & CRED. LAW § 151 (McKinney 2014); *Aspen Indus.*, 421 N.E.2d at 812.

505 *See* DEBT. & CRED. LAW § 151.

506 Nielsen Media Research, Inc. v. Carlton Hotel, LLC, 774 N.Y.S.2d 8 (App. Div. 1st Dep't 2004).

507 *Id.* at 8–9.

508 *Id.* at 8.

509 *Id.*

510 N.Y. LIEN LAW § 72(2) (McKinney 2014).

511 *Id.* § 70(1)(a).

512 *See, e.g.*, Bohlinger v. Zanger, 117 N.E.2d 338, 341 (N.Y. 1954).

513 *Nielson Media*, 774 N.Y.S.2d at 9.

notice,[514] but section 151 cannot be made to extend to payments where the creditor chooses to *lose* rather than *use* the setoff opportunity.

Nevertheless, the result in *Nielson Media* is consistent with dicta from the *Aspen* opinion. The *Aspen* court thought the restraining notice had never been violated, but conceding otherwise *arguendo*, the creditor could prove no damages on the premises that if the bank did not honor the checks, the bank would have taken the corresponding bank balance as part of the setoff.[515]

Another case that stretched the concept of setoff past its proper breaking point is *Kates v. Marine Midland Bank*, where a bank was a fiduciary of a trust and the judgment debtor was the beneficiary.[516] The bank had, in effect, a commitment to lend to the judgment debtor.[517] If it advanced funds, it could liquidate assets of the trust to reimburse the advance.[518] In effect, the bank had a security interest in the rest of the trust of which it was trustee.[519]

Half an hour before a restraining notice was served on the bank, the judgment debtor received an advance in the form of a wire transfer to an out-of-state bank.[520] After service of the restraining notice, the bank liquidated money market shares and took the proceeds in reimbursement for the wire transfer.[521] The judgment creditor claimed that this selling of the money market shares violated the restraining notice.[522] The court, however, declared the entire transaction to be a setoff, which could be manifested in spite of the restraining notice.[523]

The subsumption of this security interest in money market shares under the concept of setoff is most unwarranted. In effect, the bank was simply foreclosing on its security interest on Article 8

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[514] *Aspen Indus.*, 421 N.E.2d at 812.

[515] *Id.* at 811–12 ("[E]ven if it were assumed that [the bank] violated the restraining notice, [the judgment creditor] would not be entitled to recover. While a violation of a restraining notice can subject the garnishee to liability, a judgment creditor, in order to recover, must establish that it sustained damages as a result of the granishee's disobedience of the notice. . . . Here, however, because of [the bank's] right of setoff to satisfy a pre-existing obligation of the judgment debtor to the bank, [the judgment creditor] cannot establish such damages." (citations omitted)).

[516] Kates v. Marine Midland Bank, 541 N.Y.S.2d 925, 927 (Sup. Ct. Monroe County 1989).

[517] *Id.*

[518] *Id.* at 928–29.

[519] *Id.* at 928.

[520] *Id.* at 927.

[521] *Id.* at 927, 928.

[522] *Id.* at 927.

[523] *Id.* at 928–29.

securities. The money market is nothing more than a series of mutual funds that invest for shareholders in short-term debt obligations.[524] Shares in these funds are redeemed rather than traded.[525] We have seen, for better or worse, that foreclosure sales are violations of the restraining notice.[526] Properly, the garnishee was in violation of the restraining notice by foreclosing on its security interest. However, as the bank was an over-secured creditor, damages would have been zero.

I. Paying Debts v. Setting off Debts

The setoff exception to the restraining notice is subversive of the entire idea of the restraint. Suppose a garnishee owes a debt (narrowly defined) of $100 and is served with a restraining notice. The garnishee violates the order by paying. Suppose on the other hand the garnishee does not pay the debt but instead *lends* $100 to the debtor. The lending of money does not violate the restraining notice and the debtor's subsequent setoff of the two countervailing debts doesn't either. Therefore, the setoff exception permits a cooperative garnishee to structure the payment as a loan free and clear of the restraining notice.

Obviously there is something very wrong with this picture. May a garnishee so easily avoid the restraining notice? Courts, jealous of their powers, are unlikely to allow this. They are likely to pierce the form of the loan and proclaim it in essence a payment, where the garnishee can tell no tale of ordinary course of business lending between the garnishee and the creditor. Because the concept of payment and setoff are so intimately intertwined, I can think of no other tactic—the privledge of substance over form—whereby the courts can protect the force of the restraining notice.

Yet such a tactic—accusing the garnishee of bad faith in characterizing the payment as a loan setting up a setoff opportunity—can be defeated if in fact the setoff is nevertheless undeclared. In that case, no debt has been "paid." Meanwhile, the debtor has the cash and can hide it from the sheriff as he will. Furthermore, a payment being a *voluntary* act of the debtor, it is up to the debtor—not the courts—to proclaim what the transfer of

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[524] *See* William A. Birdthistle, *Breaking Bucks in Money Market Funds*, 2010 WIS. L. REV. 1155, 1164 (explaining the development of the Reserve Fund—the first money market fund).

[525] *Id.* at 1167–68.

[526] *See supra* notes 308–11 and accompanying text.

funds means.[527] Especially given the fact that the garnishee is initially not even a party to any lawsuit (other than by virtue of the restraining notice), it seems a dangerous assault on liberty for courts to announce that the garnishee may not lend funds to the debtor.

We may note, however, that this contradiction would not disappear if the restraining notice instituted a lien. In such a case, the payment intangible that the garnishee owes to the debtor would be transferred to the creditor, so that only payment to the creditor would satisfy the obligation. However, it is still true that the garnishee could defeat this by lending money to the debtor. Debtor & Creditor Law section 151 still protects the garnishee from liens if the garnishee elects to manifest a setoff in lieu of paying the creditor.[528] Although a lien interferes with setoffs in the absence of section 151, the very purpose of section 151 is to permit post-lien advances to be used in setoffs.[529] This contradiction is therefore endemic to New York law. Perhaps the only solution to it is terrorism. If the courts were to hang a few garnishees for their bad faith, it might discourage bad faith games and increase the efficiency of debt collection. If garnishees think that a setoff strategy buys litigation expense, perhaps they will think twice before trying it.

J. Contingent Debts

Contingent obligations are not debts, as "debt" is defined by CPLR section 5201(a).[530] As a result, in *Verizon New England, Inc. v. Transcom Enhanced Services, Inc.*, a garnishee was able to evade a restraining notice by simply paying for services *in advance*.[531] Since the prepayments were not "pay[ing] over . . . any . . . debt"[532] (narrowly defined), the restraining notice had no bite.[533] The strategy of prepaying a contingent debt constitutes a potential

[527] *See* 15 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1795 (3d ed. 1972).

[528] N.Y. DEBT. & CRED. LAW § 151 (McKinney 2014). Where the lien is an execution lien, it should be remembered that the sheriff's levy pursuant to the execution is nothing *but* a restraining notice. *See supra* note 81 and accompanying text.

[529] Carlson, *Critique II*, *supra* note 1, at 153.

[530] *See* N.Y. C.P.L.R. 5201(a) (McKinney 2014).

[531] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 124 (N.Y. 2013).

[532] N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[533] *Verizon*, 990 N.E.2d at 124.

threat to the efficacy of a restraining notice. Whether this is so is the topic for the remainder of this section.

The New York Court of Appeals has issued a well-known and progressively complex series of cases on contingent debts and whether they can be garnished. I have analyzed this sequence of cases elsewhere.[534] Here I will summarize the pertinent holdings very briefly, with a digression as to a contradiction that may have recently arisen.

The sequence starts with *Glassman v. Hyder*,[535] where a prejudgment defendant owned rental property in New Mexico.[536] The plaintiff sought prejudgment attachment in New York and, to that end, served an insurance company present in New York but renting space from the defendant in New Mexico.[537] The *Glassman* court ruled that the insurance company's obligation to pay future rent was not a debt because the future debt was contingent on the landlord not being in breach of the lease.[538] Meanwhile, the contingent obligation of the garnishee was "property" and *this* could be reached, but not in New York.[539] Since the rental property was located in New Mexico, so was the contingent debt to pay rent.[540] This contingent obligation could not be reached by an order of attachment in New York.[541]

Next in the sequence is *ABKCO Industries, Inc. v. Apple Films, Inc.* In this famous case, a plaintiff sought to attach a film royalty.[542] The court held that the royalty obligation was not a debt because it was contingent.[543] It was not clear that enough people would pay to see the film such that a royalty "debt" would be absolutely due.[544] But the same royalty obligation was contingent

534 Carlson, *Critique II*, *supra* note 1, at 97–106.

535 Glassman v. Hyder, 244 N.E.2d 259 (N.Y. 1968).

536 *Id.* at 260.

537 *Id.*

538 *See id.* at 261.

539 *See id.*

540 *See id.* at 262.

541 *Id.* If the real property had been located in New York, a paper levy under CPLR section 6214(a) would have been ineffective, since paper levies suffice for *personal* property, and rent receivables are *real* property. N.Y. C.P.L.R. 6214(a) (McKinney 2014). According to CPLR section 6216, the sheriff levies on real property "by filing with the clerk of the county *in which the property is located* a notice of attachment." N.Y. C.P.L.R. 6216 (McKinney 2014) (emphasis added). Since the land in *Glassman* was located in New Mexico, the sheriff could never have satisfied this requirement.

542 ABKCO Indus. v. Apple Films, Inc., 350 N.E.2d 899, 900 (N.Y. 1976).

543 *Id.* at 901.

544 *Id.*

(i.e., unvested) *property*.[545] *This* could be garnished.[546] Unlike the garnishee's rent obligation in *Glassman*, which was located in New Mexico, the obligation of the *ABKCO* garnishee was located in New York, and therefore garnishable.[547] The *ABKCO* principle fully applies to restraining notices.[548] So, for example, a restraining notice served at the time a third party owes a contingent broker's fee for property not yet purchased effectively restrains payment of the fee when the deal closes.[549]

The *ABKCO* court held that a defendant's right to a film royalty could not be levied as a debt because film royalties are contingent.[550] But the royalty could be levied as *property* within the meaning of section 5201(b).[551]

At this point, a digression is called for, to point out something heretofore unnoticed. The court focused on section 5201(b), which makes contingent property leviable.[552] But to levy contingent property requires a plaintiff to pass through the postern gate of section 5232(a).[553] It hardly matters that contingent debts are property under section 5201(b) if, by the terms of section 5232(a), the sheriff is not empowered to levy.[554]

According to section 5232(a):

> A levy by service of the execution is effective only if, at the time of service, *the person served . . . is in the possession or custody of property not capable of delivery* in which he or she

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[545] *Id.*; *see* N.Y. C.P.L.R. 5201(b) (McKinney 2014) ("A money judgment may be enforced against any property which could be assigned or transferred . . . whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.").

[546] *ABKCO Indus.*, 350 N.E.2d at 901–02.

[547] *Id.* at 902.

[548] Doubet, LLC v. Trs. of Columbia Univ., No. 401544/2007, 2011 N.Y. Misc. LEXIS 3235, at *35 (Sup. Ct. New York County July 6, 2011).

[549] *See id.* at *25. The court rejected the respondents' argument that they did not owe a debt to the judgment debtor because "the obligation to pay a broker's fee was contingent upon the closing of the sale of the property." *Id.* at *25, *38.

[550] *ABKCO Indus.*, 350 N.E.2d at 901.

[551] *Id.*

[552] According to section 5201(b), a "judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested." N.Y. C.P.L.R. 5201(b) (McKiney 2013). Vested means "noncontingent." Christian v. Cnty. of Ontario, 399 N.Y.S.2d 379, 381 (Sup. Ct. Ontario County 1977).

[553] N.Y. C.P.L.R. 5232(a) (McKinney 2014). Because *ABKCO* was a prepetition attachment case, the proper citation is to CPLR section 6214(b), but everything I will say about post-judgment execution under 5232(a) is equally true on the face of section 6214(b). N.Y. C.P.L.R. 6214(b) (McKinney 2014).

[554] N.Y. C.P.L.R. 5201(b); C.P.L.R. 5232(a).

> knows or has reason to believe the judgment debtor or obligor has an interest . . . .[555]

The garnishment of the film distributor presupposes that the film distributor is a person "in the possession or custody of property" in which the defendant has an interest. So, implicit in *ABKCO* is the view that a garnishee "possesses" property of the defendant by virtue of owing the defendant a contingent debt. *Owing money to and possessing property of the judgment debtor must have been the same thing*.

In *Hotel 71 Mezz Lender LLC v. Falor*,[556] however, the Court of Appeals ruled that a debtor (not the garnishee) "possesses" her intangible property.[557] In *Falor*, a defendant was served with an order of attachment.[558] This was held to encumber the defendant's right against various limited liability companies not present in New York.[559] Attachment presupposes that "property to be levied upon is in the defendant's possession or custody."[560]

The *Falor* opinion holds, in effect, that a creditor possesses intangible property (not the garnishee). In other, words, owing money is *not* the same as possessing the debtor's intangible property. *Falor* arguably *denies* that the garnishee is in possession and, if so, it is inconsistent with *ABKCO*. If *Falor* is applied to the *ABKCO* facts, although the royalty agreement may have been debtor property, only the debtor had possession of it. [561] The garnishee did not have possession, so that the royalty obligation could not be levied from the garnishee. In short, when it comes to contingent debts (or even vested debts), the debtor is in possession and the creditor is out of possession. If so, the garnishment in *ABKCO* did not conform to section 5232(a) or section 6214(b).

In order to avoid this conclusion, somehow it must be possible

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[555] C.P.L.R. 5232(a) (emphasis added).

[556] Hotel 71 Mezz Lender, LLC v. Falor, 926 N.E.2d 1202 (N.Y. 2010).

[557] "Because personal jurisdiction was properly asserted over [the defendant] . . . the Supreme Court had the authority to order prejudgment attachment of the property [the] defendant . . . *owned and/or controlled*, and service of the order upon him while he was in New York was appropriate." *Id.* at 1208 (emphasis added). "Just as debt clings to the debtor when he enters a state other than the state where the debt was incurred, it follows that defendants' uncertificated ownership interests, which defendant Mitchell *possesses or has custody over*, travel with him, and were attachable in New York based on his presence in this state." *Id.* at 1210 (emphasis added).

[558] *Id.* at 1204–05.

[559] *Id.* at 1209.

[560] N.Y. C.P.L.R. 6214(a) (McKinney 2014).

[561] Jeanne L. Shroeder & David Gray Carlson, *Where Corporations Are: Why Casual Visits to New York Are Bad For Business*, 76 ALB. L. REV. 1141, 1153 (2013).

that the garnishee and the debtor are *cotenants* of the royalty. If so, *ABKCO* and *Falor* can coexist without contradiction. But this seems absurd. Possession is, fundamentally, the right to exclude others.[562] Surely the debtor has the right to exclude the garnishee from intangible property. For example, the debtor might forgive the contingent obligation to pay, because the debtor is in possession of her intangible property. The garnishee could not forgive itself and abrogate its obligation to pay. This implies that the garnishee is *out* of possession. The right of forgiveness, or the right to be paid, is *exclusive* to the debtor who is in possession. It will take some fancy word chopping to show that *ABKCO* has not been overruled by *Falor*. The best I can do to defend *ABKCO* from *Falor* is that property is a bundle of sticks, as the *Verizon* court acknowledged.[563] Of this bundle, the garnishee "possesses" some sticks and the debtor possesses some. By owing a contingent debt, a garnishee possesses just enough sticks to eke out a levy under section 6214(b).[564] But the debtor owns enough sticks to sustain a levy against the *debtor's* property pursuant to section 6214(a).[565] They are not cotenants in that the garnishee's set of sticks is disjoint from the debtor's set of sticks. In topological terms, garnishees and debtors occupy disjoint normal Hausdorff spaces.[566] On this view, *both* parties have possession, but somehow they are not cotenants.

But what is the garnishee's set of sticks when the defendant has only an *in personam* claim against the garnishee? The best that could be said is that the garnishee possesses the means by which payment of the contingent debt could be realized. But, as the defendant's claim is *in personam*, the defendant owns none of these means before the garnishee voluntarily conveys them to the defendant, or before the defendant obtains some judicial lien against specific property of the garnishee. In short, possession of intangible property in section 6214(b) means one thing, and it means quite the opposite thing in section 6214(a). By considerable violence to the English language and common sense, it might be

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[562] College Sav. Bank v. Fla. Prepaidpostsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others.").

[563] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 124–25 (2013). The court cites Penner who, ironically, argued at length that a "'bundle of [sticks]' . . . [is a] linguistic expression [that] can be nothing more than a slogan, [which] has no . . . critical power." Penner, *supra* note 281, at 819–20.

[564] *See* C.P.L.R. 6214(b).

[565] *See* C.P.L.R. 6214(a).

[566] *See* JAMES R. MUNKRES, TOPOLOGY 195–96 (2d ed. 2000).

possible to rule that *ABKCO* is not overruled.

But let's set aside the interesting contradiction between *ABKCO* and *Falor*. Let us assume that an *ABKCO* garnishment is still possible on some sort of stick-partitioning gambit. What does a levy actually mean in the case of a levied contingent debt? In particular, since *Verizon* involved the status of *prepayments for services*, could the *ABKCO* garnishment have been defeated by a careful scheme of prepaying the defendant for royalties not yet due? I contend that the garnishment, if valid, *can* be defeated by prepayment. And if garnishments can be defeated, so can restraining notices pertaining to contingent debt.

Ordinarily, creation of a lien on a debt, contingent or vested, would interfere with the strategy of setoff. But we have already seen that Debtor & Creditor Law section 151 plays havoc with liens. First, recall that a sheriff's levy is both a restraining notice and a turnover order.[567] But an execution, which authorizes the levy, gives rise to a *lien*. We know this from CPLR section 5202(a), which provides:

> Where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights in a debt owed to the judgment debtor or in an interest of the judgment debtor in personal property, against which debt or property the judgment may be enforced, are superior to the extent of the amount of the execution to the rights of any [subsequent] transferee of the debt or property . . . .[568]

While this section does not mention the word "lien," it refers to the plaintiff's "right" to a debt or to personal property.[569] This "right," whatever it is, is better than the right of subsequent transferees.

Section 5202 establishes that a creditor's rights are better than a transferee's rights. The challenge is that the creditor needs to have better rights than the garnishee, who claims to have paid a debt in advance. Therefore, we must contrive to make the garnishee into a transferee of debtor property, such that the creditor's right is better than the garnishee's subsequent right.

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[567] N.Y. C.P.L.R. 5232(a) (McKinney 2014).

[568] N.Y. C.P.L.R. 5202(a) (McKinney 2014). Omitted are two exceptions, which protect good faith and bad faith transferees for value (before the levy) and good faith transferees of property not capable of delivery (after the levy). *Id.* The addition of the bracketed word "subsequent" is justified *supra* in Part 1.B.

[569] *Id.*

The key to the interpretive move is to see that payment does not *extinguish* the garnishee's obligation but transfers it to the garnishee. The garnishee is thus like a corporation that buys its public debt on the market. It is a buyer of its own debt. To buy a debt (when one owes the debt) is to extinguish it. In that sense, *every* payor is a transferee. So, on this basis, flimsy as it may seem, the creditor's rights, per section 5202, are better than the garnishee's rights. If the garnishee pays after the execution is delivered to the sheriff, the garnishee's right to the debt it has "bought" is inferior to the creditor's right. The garnishee, having "paid" the judgment debtor, must pay the sheriff a second time.[570]

In effect, what section 5202 says, however inarticulately, is that service of the execution on the sheriff transfers the garnishee's obligation to the sheriff (who holds it as agent of the creditor). Once the execution is served, the only way for the garnishee to buy back his obligation (i.e., pay it) is to pay the sheriff (to the extent of the lien). Any attempt to pay the defendant does not extinguish the garnishee's obligation, which now belongs to the sheriff (on behalf of the judgment creditor).

Using this insight, we can analyze an advance payment, not as a payment, but as a transfer of collateral to the debtor.[571] Bestowing extra collateral or property of any sort on the debtor does not violate the restraining notice.[572] It does not extinguish the contingent debt simply because the debt is still contingent at the time of the prepayment. When the debt finally becomes due, the debtor is empowered to declare a setoff of the debt (narrowly defined).[573]

In the absence of Debtor & Creditor Law section 151, a levy prior to prepayment interferes with the debtor's right of setoff. Where, prior to the prepayment, an execution has been served and a levy

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[570] The same issue arises as to whether forgiveness of debt is a fraudulent conveyance. In order for this to be true, it must be the case that the insolvent debtor transfers the debt to the garnishee. If forgiveness is a transfer, then extinguishment by the garnishee's payment is likewise a transfer. See Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 594–96 (1989), for discussion in the context of insolvents renouncing inheritances.

[571] The appellate division analyzed the prepayment as the garnishee's "credit balance." Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 948 N.Y.S.2d 245, 248 (App. Div. 1st Dep't 2012), *aff'd*, 990 N.E.2d 121 (2013).

[572] *See* Briarpatch Ltd., L.P. v. Briarpatch Film Corp., No. 603364/01, 2013 N.Y. Misc. LEXIS 2503, at *29 (Sup. Ct. New York County June 13, 2013). For example, a well-wisher who has been served with a restraining notice may still send a birthday gift to a judgment debtor. But if the well-wisher asks a garnishee to forward a gift, the garnishee violates the restraining notice if he complies. *See id.*

[573] N.Y. DEBT. & CRED. LAW § 151 (MCKINNEY 2014).

accomplished, the debtor is divested of the claim against the garnishee and can no longer exercise the setoff right. The setoff has become triangular and therefore not permissible. The garnishee's obligation can only be satisfied by paying the sheriff. Meanwhile, the prepayment was certainly not intended to be a gift, so the garnishee would undoubtedly have a restitutionary right to retrieve the advance payment from the debtor, if he can.

Key here is that the creditor, under section 5202, has received a transfer from the debtor of the right to collect.[574] This is precisely what is absent with regard to restraining notices, which are not supposed to be liens.[575] After the restraining notice is served, the debtor is still "in possession," as it were, of the right to collect from the garnishee.

But now we must add Debtor & Creditor Law section 151 back to the mix. This allows for setoffs free and clear of any lien.[576] Whenever a countervailing debt exists, a levied garnishee need *never* pay the sheriff.[577] Instead of paying the sheriff, the garnishee can simply declare a setoff, even though it is quite triangular in shape.[578]

To summarize, prepayment defeats the *ABKCO* style levy because Debtor & Creditor Law section 151 always authorizes the setoff of a previously encumbered obligation. Prepayment is designed to give the debtor a setoff opportunity. In the absence of Debtor & Creditor Law section 151, the setoff right is defeated by the existence of a lien. But given section 151, prepayment should effectively defeat the lien by substituting the concept of setoff for the concept of payment.

Already it should be apparent that *Verizon* was rightly decided on the text of the CPLR. But *Verizon* has one more angle that requires a visit to the third in our parade of cases on contingent debt. In *Supreme Merchandise Co. v. Chemical Bank*, a bank issued a documentary letter of credit to a defendant.[579] Basically, the bank was obligated to pay the defendant, no questions asked, if the defendant tendered conforming documents.[580] The lower court

[574] *See* N.Y. C.P.L.R. 5202(a) (McKinney 2014).
[575] Siegel, *Practice Commentaries*, *supra* note 260, C5222:8.
[576] DEBT. & CRED. LAW § 151.
[577] *Id.*
[578] *Id.*
[579] Supreme Merch. Co. v. Chem. Bank, 514 N.E.2d 1358, 1358 (N.Y. 1987).
[580] *Id.*

reasoned, from *ABKCO*, that contingent debts are property and the garnishment is good.[581] The Court of Appeals affirmed the Appellate Division's reversal of the lower court because *ABKCO*, as applied to letters of credit, would undercut the certainty of payment, which is cherished by the letter of credit industry.[582]

Although the *Supreme Merchandise* decision casts the matter as an exception to the *ABKCO* principle, subsequent lower courts have analyzed that the contingent letter of credit obligation was simply "too contingent" to be property.[583] Such obligations cannot be garnished at all, because they are neither debts nor property.[584] Only "slightly contingent" debt can be property.[585]

Verizon is basically an application of the *Supreme Merchandise* principle that some contingent debts are simply too contingent to be considered property. In *Verizon*, the debtor was in the business of supplying "voice-over-internet termination services."[586] The judgment creditor had domesticated a federal judgment from Massachusetts and had served restraining notices on the debtor and on various garnishees in New York.[587]

The garnishee, Transcom, denied owing a debt or having "possession or custody of property" of the debtor.[588] Transcom's relation to the debtor was this: the parties had signed an underlying contract that did not obligate Transcom to buy services, but if Transcom paid in advance for services, the debtor would provide

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[581] *See id.* at 1359.

[582] *Id.* at 1362.

[583] Carlson, *Critique II*, *supra* note 1, at 104.

[584] *Id.*

[585] *See Supreme Merch., Co.*, 514 N.E.2d at 1361 ("[E]ven claims that depend on further action by the debtor may constitute 'property' and . . . this distinction from *ABKCO* is not alone dispositive.").

[586] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 948 N.Y.S.2d 245, 246 (App. Div. 1st Dep't 2012). Voice termination refers to the routing of telephone calls from one telephone company to another and "termination" refers to the end point of the call. *Wholesale Call Origination, Call Termination and Transit Services Provided Over Fixed Electronic Communication Networks,* MALTA COMM. AUTHORITY, 42 (Sept. 18, 2006), http://www.mca.org.mt/sites/default/files/articles/wholesale_call_OrigTerm%26TransFixed.pdf. Where the end point was within the debtor's network, the debtor could charge a fee for routing the call. *See* Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., No. 104208/10, 2010 N.Y. Misc. LEXIS 1988, at *2 (Sup. Ct. New York County 2010), *aff'd*, N.Y.S.2d 245 (App. Div. 1st Dep't 2012), *aff'd*, 990 N.E.2d 121 (2013).

[587] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 122 (N.Y. 2013). *See generally* N.Y. C.P.L.R. § 5401 (McKinney 2014) ("'[F[oreign judgment' means any judgment . . . of a court of the United States . . . ."); N.Y. C.P.L.R. 5402(a) (McKinney 2014) (explaining how to file a foreign judgment).

[588] *Verizon*, 990 N.E.2d at 122.

them.[589] The Court of Appeals characterized the "week-to-week" decision to pay in advance as an oral agreement.[590] Properly, in prepaying,[591] Transcom was offering the debtor a unilateral contract, the mode of acceptance being actually providing the service.[592] No "debt" was being paid when the prepayment was tendered.[593]

The restraining notice was served on Transcom on Thursday, April 2, 2009.[594] On Wednesday, April 1, Transcom had sent a personal check by overnight courier, covering services to begin in the week commencing Sunday, April 5.[595] Presumably this check was not honored until the middle of the next week.[596] This meant that, while the check was pending, the debtor must have provided services to the garnishee even though the check had not cleared. If so, the check, when it cleared, in part constituted payment for *services already rendered* and in part constituted a payment for *services not yet rendered*—an advance payment.[597] None of this matters, however, if the restraining notice was not effective on April 2. If ineffective, Transcom was free to pay the debtor for any future debt when it became due any time after April 2.[598] The after-

[589] *Id.*

[590] *Id.* at 124.

[591] The prepayments were actually in response to an invoice submitted by the judgment debtor to the garnishee, customer, but this did not prove that the garnishee was paying a debt. *Id.* at 123. The invoice was simply a request for advance payment. *Id.* at 122.

> Transcom presented testimony that it had a week to week arrangement with GNAPs that allowed Transcom to decide weekly whether to engage GNAPs for services. Various Transcom witnesses testified that GNAPs sent monthly invoices for proposed services to be rendered the following month, and Transcom prepaid for services each week, rather than paying monthly for services rendered by GNAPs as provided by 2003 contract.

Id. at 123.

[592] *Id.* at 124.

[593] *Id.*

[594] *Id.* at 122.

[595] *See* Verizon New England Inc. v. Transcom Enhanced Servs., Inc., 948 N.Y.S.2d 245, 247 (App. Div. 1st Dep't 2012), *aff'd* 990 N.E.2d 121 (2013).

[596] In a proceeding against a different garnishee who had a similar arrangement to that of Transcom, the court noted that the garnishee's check did not clear for eight days. Verizon New England, Inc. v. IDT Domestic Telecom, Inc., 950 N.Y.S.2d 375, 377 (App. Div. 1st Dep't 2012).

[597] *See supra* note 570 and accompanying text (discussing the concept of an advance payment).

[598] As of April 1, Transcom's name is on a negotiable instrument. Does this means a "debt" (narrowly defined) exists after April 1? If so, the restraining notice is effective on April 2. But issuance of the check does not mean that Transcom owed a debt at the time the restraining notice was served. According to New York's version of the Uniform Commercial Code, "[t]he drawer engages that upon dishonor of the draft . . . he will pay the amount of the draft." N.Y. U.C.C. LAW § 3-413(2) (McKinney 2014). This clearly describes a *contingent*

acquired debt clause in section 5222(b)'s third sentence is contingent on the restraining notice being effective on April 2.[599]

Following service of the restraining notice, the creditor brought a turnover proceeding against Transcom, which had made $2,454,250 in similar payments to the debtor.[600] It also brought an action for civil contempt and a special proceeding for a money judgment in the amount of this sum.[601] The supreme court dismissed all these actions, concluding "that there is no property or debt in the instant matter subject to a restraining order, levy or turnover pursuant to Article 52 of the CPLR."[602] The appellate division and Court of Appeals both affirmed.[603]

The Court of Appeals held that Transcom could not be constrained because, at the time the restraining notice was served, Transcom owed no debt.[604] Nor was Transcom "in the possession or custody of property in which [Transcom knew or had] . . . reason to

obligation. Therefore, issuance of the check does not create a debt to which the restraining notice of April 2 applies.

[599] *See* N.Y. C.P.L.R. 5222(b) (McKinney 2014).

[600] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 122 (N.Y. 2013). A procedural quibble is more than possible here. A turnover proceeding does not seem like the proper procedure. Under CPLR section 5227, an order requiring a garnishee to pay a debt requires that the garnishee "is or will become indebted to the judgment debtor." N.Y. C.P.L.R. 5227 (McKinney 2014). If indeed Transcom had paid a "debt," a matter in dispute, the creditor could only show that, historically, the creditor once owed a debt which it then paid (in violation of the restraining notice). This is not good enough to sustain the turnover proceeding. It will not serve to claim that equity will view as not done that which ought not to have been done (because the payment violated the restraining notice). This turns the restraining notice into a lien. This, apparently, must not be done. *See supra* text accompanying notes 75–92.

The other turnover provision, CPLR section 5225(b), also fails. This requires that the garnishee be "a person in possession or custody of money . . . in which the judgment debtor has an interest." N.Y. C.P.L.R. 5225(b) (McKinney 2014). But the debtor would have no interest in "money" possessed by Transcom until that money was actually transferred to the debtor. By that time, Transcom was no longer in possession of it, and so the turnover proceeding does not lie.

The proper procedure is for the creditor to seek a contempt order, or to sue the garnishee in a money judgment for tort. *See* Aspen Indus. v. Marine Midland Bank, 421 N.E.2d 808, 811 (N.Y. 1981) ("[V]iolation of the restraining notice by the party served is punishable by contempt and subjects the garnishee to personal liability in a separate plenary action or a special proceeding under CPLR article 52 brought by the aggrieved judgment creditor.") (citation omitted).

[601] *Verizon*, 990 N.E.2d at 122.

[602] *Id.* at 123 (quoting Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., No. 104208/10, 2010 N.Y. Misc. LEXIS 1988, at *11 (Sup. Ct. New York County June 17, 2010)) (internal quotation marks omitted).

[603] *Verizon*, 990 N.E.2d at 123, 125.

[604] *Id.* at 124.

believe the judgment debtor or obligor ha[d] an interest."[605]

On the debt side of the equation, recall that debt is defined as that "which is past due or which is yet to become due, certainly or upon demand of the judgment debtor."[606] On April 2, 2009, the time Transcom had been served with the restraining notice, Transcom had already issued a check intended to pay for services not yet delivered.[607] Provision of the services created a debt, but this debt was "after-acquired" and did not exist on April 2.[608] Therefore, the restraining notice was ineffective on April 2.[609] It was incapable of having an after-acquired effect on a debt (narrowly defined) that only arose the next week.[610] It seems clear that the court was correct on the debt side of the equation.

On the property side, we have the *ABKCO* rule that contingent debt is property.[611] But we also have the *Supreme Merchandise* rule that a debt that is "too contingent" is not property.[612] If *Supreme Merchandise* applies, the restraining notice could have no bite because Transcom possessed no debtor property on April 2.

Indeed, *Verizon* fell into the "super-contingent" category. According to the *Verizon* court, "the expectation of any continued or future business is too contingent in nature and speculative to create a present or future property interest."[613]

Suppose, however, that the contract had been of the *ABKCO* variety. How exactly would the restraining notice operate? The answer is that the restraining notice is impotent to prevent the prepayment dodge exploited in *Verizon*. Thanks to Debtor & Creditor Law section 151, not even a lien can interfere with prepayment, because prepayment establishes a setoff opportunity, which is senior to any lien.[614] If the setoff is free and clear of a lien, it is certainly free and clear of the restraining notice, which does *not* give rise to liens.

Meanwhile, having received the advance payment and upon the vesting of the garnishee's obligation to pay for services, the debtor

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605 C.P.L.R. 5222(b).
606 N.Y. C.P.L.R. 5201(a) (McKinney 2014).
607 *Verizon*, 990 N.E.2d at 122.
608 *See id.* at 123.
609 *Id.* at 124.
610 *See supra* text accompanying note 34.
611 *See* ABKCO Indus. v. Apple Films, Inc., 350 N.E.2d 899, 901 (N.Y. 1976).
612 Supreme Merch. Co. v. Chem. Bank, 514 N.E.2d 1358, 1361 (N.Y. 1987).
613 *Verizon*, 990 N.E.2d at 124.
614 *See* N.Y. DEBT. & CRED. LAW § 151 (McKinney 2014).

does not lose the ability to declare a setoff.[615] And the garnishee is specifically invited to set off a countervailing debt, even when that debt postdates a lien on the debt that the garnishee owes the debtor.

One last consideration. We have suggested that a garnishee who pays a debt is a transferee who has "bought" the debt from the debtor.[616] We have also suggested that *ABKCO* implies that the garnishee is in possession of the debtor's claim against him (though *Falor* suggests the opposite). Assuming these two premises, it is still true that the prepaying garnishee must not "suffer" transfers of debtor property against the garnishee's will. Has the garnishee "suffered" a transfer of possession of the debt (previously contingent but now due) when the debtor exercises his unilateral right of setoff?

Earlier, we suggested that some involuntary transfers of bailed property (those not arising from court orders) technically violate the restraining notice, but given this is against the will of the garnishee, the garnishee cannot be held in contempt of court. A setoff is also an involuntary transfer, on the above-mentioned assumptions. But the setoff opportunity arises because the garnishee has consented to a tricky prepayment strategy. May we say that the willfulness of the prepayment authorizes a contempt proceeding?

Courts will be sorely tempted to punish a garnishee who is so tricky as to attempt a prepayment strategy. But on behalf of our tricky garnishee, the prepayment itself is clearly no violation of the restraining notice.[617] The later manifestation of the setoff, at that point in history, is entirely against the will of the garnishee and therefore is no different from the attachment of a lien arising from operation of law.

K. After-Acquired Property and After Arising Debts

One of the reasons *Verizon* seems so provocative is that, on April 2, the garnishee knew perfectly well that, starting the next Sunday, the garnishee would receive services from the judgment debtor.[618]

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[615] This follows from what was said about bailees served with restraining notices, where the debtor sells the bailor's interest. *See supra* text accompanying notes 299–304.

[616] *See supra* text accompanying notes 569–572

[617] *Verizon*, 990 N.E.2d at 124. Indeed, it is open for the creditor to garnish that prepayment from the judgment debtor, now that it has become the debtor's property.

[618] *Id.* at 122.

Yet the restraining notice was ineffective on April 2.[619] Restraining notices served on third parties other than a judgment debtor are effective only if the third party knew or had reason to believe, at some level, that she was in possession of debtor property.[620] With regard to knowledge in any of its forms, the test is to be performed at the time the restraining notice is received.[621] If none of the enumerated forms of knowledge exists, the restraining notice is not effective as to after-acquired property or after-arising debts. But if on that date the restraining notice is effective, it does succeed in applying to after-acquired property.

> All property in which the judgment debtor or obligor is known or believed to have an interest then in and *thereafter* coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and *thereafter* coming due to the judgment debtor or obligor, shall be subject to the notice except as set forth in subdivisions (h) and (i) of this section.[622]

This third sentence of CPLR section 5222(b) is conditioned by the second sentence, which states that the restraining notice is completely ineffective if, at the time of service, the garnishee "possesses" (that word again!) no property or owes no debt that is (or is believed to be) property of the debtor.[623]

For example, suppose a garnishee is served with a restraining notice on Monday. At that time the garnishee possesses no property of the debtor. On Tuesday, however, the garnishee borrows the judgment debtor's lawn mower. It is no violation of the restraining notice to return the lawn mower to the judgment debtor on Wednesday, because on Monday the garnishee held no property of the debtor. The reason for this is apparently that garnishees who have no connection with the judgment debtor on Monday are not expected to watch for after-acquired property thereafter.[624]

Oddly, if we read the CPLR literally, the after-acquired property clause of the third sentence is triggered if the creditor designated

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[619] *Id.* at 124.

[620] N.Y. C.P.L.R 5222(b) (McKinney 2014).

[621] *Id.*

[622] *Id.* (emphasis added).

[623] *Id.*

[624] A similar rule exists for levies of after-acquired property. If the levy is not good on day one, it does not encumber after-acquired property. If effective on that day, after-acquired property is caught in the dragnet. N.Y. C.P.L.R. 5232(a) (McKinney 2014).

(wrongly) some thing that the garnishee owns is really debtor property. We may apply this observation to the *Verizon* facts. Suppose the restraining notice in that case had falsely alleged, "the garnishee has possession of the judgment debtor's stapler." The restraining notice is effective on April 2 because "the judgment creditor . . . has stated in the notice that . . . the judgment debtor . . . has an interest in specified property in the possession or custody of the person served."[625] Later, on Sunday, when a debt for services rendered actually accrues, the restraining notice bars effectively payment. Though a check was written on April 1, it probably had not cleared by Sunday. Therefore, the garnishee has a duty to stop payment of the check because if it is cashed, it satisfies, in part, a debt, as the CPLR narrowly defines that term.[626]

It is unlikely courts will read the CPLR literally, because it rewards judgment creditors who tell base falsehoods in official court orders. Rather, it must be the case that the restraining notice is effective on April 2 only if it *accurately* claims that the garnishee possesses the debtor's stapler.

The key to after-arising debts is that, on the day of service, the garnishee must owe a debt or be in possession of debtor property. In the case of banks, it has been held that the restraining notice is ineffective if, at the time the restraining notice is served, the judgment debtor's bank account is overdrawn.[627] If later wire transfers post funds into that same account, the now-healthy bank account is not restrained because of the overdraft on the day the restraining notice was received.[628]

It is possible, however, to argue that the restraining notice is effective if served on a bank at a time when the account is

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[625] C.P.L.R 5222(b).

[626] *See supra* text accompanying notes 482–84.

[627] *See* European Am. Bank v. Bank of Nova Scotia, No. 107603/01, 2003 N.Y. Misc. LEXIS 1598, at *2–4 (Sup. Ct. New York County 2003).

[628] *See id.* In spite of this principle, the court in *River Seafoods, Inc. v. JPMorgan Chase Bank*, 796 N.Y.S.2d 71 (App. Div. 1st Dep't 2005), over a dissent, found that the bank was estopped from claiming the court order was not effective. *Id.* at 74. The bank had responded to a restraining notice and accompanying subpoena with a form letter that stated, "a hold has been placed on the judgment debtor(s) accounts(s)." *Id.* at 72–73 (internal quotation marks omitted). The letter gave the type and number of the account and included the words "NO FUNDS AVAILABLE." *Id.* at 73. The attorney for the judgment creditor wrote back, "stating that he trusted the . . . account remained restrained." *Id.* The bank responded again, "a hold has been placed on the judgment debtor(s) accounts(s)," together with the information that the account now amounted to $2,140. *Id.* (internal quotation marks omitted). Thereafter, wire transfers hit the account. *Id.* The bank let the judgment debtor withdraw the funds. *Id.* This was held to be grounds for an estoppel. *Id.* at 74.

temporarily overdrawn. True, the bank owes no "debt" at that time, as the CPLR defines it. But the bank has a contractual relation with the customer that obliges the bank to accept deposits, and so forth. Because of this, it could be said that the customer has a contingent claim against the bank. Since, in New York, contingent claims are garnishable property,[629] the restraining notice is effective after all. Because it is effective, any after-acquired deposits are restrained as well. Of course, tempering this point is the observation that the bank's right of setoff is completely senior to any judicial process, thanks to New York Debtor & Creditor Law section 151.

But to reach the conclusion that a restraining notice is effective if the bank account is overdrawn on the day of service, we must find that the overdrawn bank is in "possession" of debtor property. This is what the second sentence of CPLR section 5222(b) requires:

> A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she . . . is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest.[630]

Once again, New York law is deeply ambiguous on the question of who, between a contingent debtor and a contingent creditor, "possesses" intangible property. The conflict between *ABKCO* and *Falor* as to who possesses property not capable of delivery is fully present in CPLR section 5222, which governs restraining notices.

L. Rent as a Conditional Debt

Justice Mazzarelli has said of the *Verizon* result that, "[t]he majority's narrow view . . . hands a virtual road map for frustrating the efforts of judgment creditors."[631] To what extent does the strategy of advance payment of contingent debt compromise the worth of restraining notices? A vital test case is prepayment of rent not yet due. Under *Glassman v. Hyder*, rent obligations are not debts (narrowly defined).[632] They are contingent obligations.[633] *And*

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[629] ABKCO Indus. v. Apple Films, Inc., 350 N.E.2d 899, 901 (N.Y. 1976).

[630] C.P.L.R 5222(b).

[631] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 948 N.Y.S.2d 245, 255–56 (App. Div. 1st Dep't 2012) (Mazzarelli, J., dissenting), *aff'd*, 990 N.E.2d 121 (2013).

[632] Glassman v. Hyder, 244 N.E.2d 259, 261 (N.Y. 1968) (citing *In re* Estate of Ryan, 60 N.E.2d 817, 821 (N.Y. 1945)).

[633] *Glassman*, 244 N.E.2d at 261.

these obligations are the debtor-landlord's property, but not his *personal* property.

We saw in a prior section that when the creditor has an execution lien, advance payment of a contingent debt relieves the garnishee from the obligation to pay the sheriff, since Debtor and Creditor Law section 151 invites triangular setoffs at the sheriff's expense. As applied to the garnishment of rent, we note first that rent receivables are not considered personal property at all. They are considered real property.[634] Therefore, rent cannot properly be levied under CPLR section 5232(a), which applies only to personal property.[635]

How can a judgment creditor obtain rent? The Court of Appeals gives helpful advice in *Glassman*: the appointment of a *receiver* is required to reach rents.[636] Under New York law, the rule is that a tenant of real property must pay the owner of the reversionary interest until that owner is dispossessed. The act of dispossession is the court appointment of a receiver.[637] Once the receiver is in "possession," the tenant owes rent to the receiver. In this scheme, a levy of the tenant can play no part.

So far we may observe that when a tenant prepays rent, the tenant is not paying a debt because at the time of the prepayment, the debt is contingent, as the *Glassman* court emphasizes.

Suppose a tenant who has paid last month's rent on time receives a restraining notice. The restraining notice cannot restrain the payment of next month's rent because that future obligation is contingent at the time the tenant received the restraining notice. Therefore, assuming the tenant has not borrowed the landlord's power drill or lawn mower, the restraining notice is completely ineffective under the second sentence of section 5222(b).[638]

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[634] *Id.* at 262 ("Under traditional, even ancient law, rents were not personal obligations but rights and duties (however treated) associated with or 'emanating from' the land." (citing BOUVIER'S LAW DICTIONARY 2880 (8th ed. 1914)).

[635] *See* N.Y. C.P.L.R. 5232(a) (McKinney 2014).

[636] *Glassman*, 244 N.E.2d at 261.

[637] N.Y. C.P.L.R. 5228(a) (McKinney 2014).

[638] According to that sentence:

> A restraining notice served upon a person other than the judgment debtor or obligor is *effective only if*, at the time of service, he or she *owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest*, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served.

Therefore, when next month's rent becomes overdue, the tenant properly pays the debtor-landlord without violating the CPLR.

To further complicate matters, suppose, by coincidence, at the exact moment the creditor serves the tenant with the restraining notice, the tenant owes back rent. Overdue rent qualifies as a debt (narrowly defined).[639] Therefore, the restraining notice is effective when served. Now, under the third sentence of section 5222(b), all debts that thereafter become due are subject to the restraining notice.

So far, we have established that a tenant who is paid up on rent owes no debt (narrowly defined) on the day she receives the restraining notice. The *ABKCO* principle applies to say that the rent obligation is unvested property—not *personal* property, to be sure, but real property. Could we now say that the restraining notice served on a tenant who is current on rent is binding?

According to the troublesome second sentence of section 5222(b), the restraining notice is effective only if the tenant is "in the *possession* or custody of property in which he or she knows or has reason to believe the judgment debtor . . . has an interest."[640] A tenant is obviously in possession of the land, but is the tenant also in *possession* of the landlord's entitlement to receive rent?

A classic New York case on receiverships in mortgage foreclosures indicates that (a) the tenant is in possession of the *land* but (b) the landlord is in possession of the rent receivable. In *Holmes v. Gravenhorst*,[641] a mortgage lender had obtained the appointment of a receiver.[642] The mortgagee was still in residence, and so the receiver thought the mortgagee should have to pay rent for occupancy after the commencement of the receivership.[643] The court ruled that the receiver was not entitled to rent.[644] The receiver was only entitled to "take possession" of a rent income stream, if any.[645] In the case of rent, the word "possession" was used in the following way: the tenant was in possession of the *land*.[646] But the landlord

N.Y. C.P.L.R. 5222(b) (McKinney 2014) (emphasis added).

[639] *See* Tenzer, Greenblatt, Fallon & Kaplan v. Abbruzzese, 293 N.Y.S.2d 634, 640 (Sup. Ct. Queens County 1968).

[640] C.P.L.R. 5222(b) (emphasis added).

[641] Holmes v. Gravenhorst, 188 N.E. 285 (N.Y. 1933).

[642] *Id.* at 285.

[643] *Id.*

[644] *Id.* at 286–87.

[645] *Id.*

[646] *See id.*

was in possession of the rent receivable.[647] The receiver had no right to take possession of the *land* from either the landlord or the tenant, but the receiver *did* have the right to take *possession* of the landlord's right to receive rent.[648] Here is an extended passage from *Holmes* in which such usage is apparent.

> Where, however, the mortgagor is not in *possession* during the foreclosure . . . a receiver may be appointed in a proper case to *take possession* of the premises, collect the rents and apply them to the payment of the carrying charges on the property and the reduction of the mortgage debt.
>
> It seems to us that there is no inconsistency in holding, in the absence of an express agreement in the mortgage to that effect, that while a mortgagor-owner in *possession* during the pendency of a foreclosure action . . . may not be disturbed in his *possession* or required to pay rent which he was not theretofore obligated to pay, when he has relinquished that *possession* to others and is receiving an income from the premises which might be applied to the payment of carrying charges and the reduction of the mortgage debt, a receiver upon a proper showing may be required to take *possession* and control of the premises and so apply the revenue. Under the law governing the relation of mortgagor and mortgagee of real property as now firmly established in this State, a mortgagee himself has no right of *possession* by virtue of a mortgage pending its foreclosure, and he does not acquire such a right by applying for and having appointed a receiver . . . . The right of *possession* given to a receiver is incidental to the purpose for which the receiver is appointed, namely, the collection of the rents and profits, and if there be no rents and profits because actual *possession* is in one having the right of *possession* inherent in his ownership, no right of *possession* exists which may be conferred upon a receiver.
>
> It is conceivable that a receiver might find applicable to the maintenance of the property and reduction of the mortgage debt an income from property wholly in the actual *possession* of the mortgagor-owner, as where the mortgagor-owner in full *possession* of the premises is receiving income therefrom. As illustrative of this possible situation, we

[647] *See id.* at 287.
[648] *See id.*

> might suggest a case where the exterior walls of a dwelling house are used for the display of advertising matter not connected with the business of the mortgagor-owner in *possession* and for which a rental is being paid or could be collected. Right of *possession*, beyond the extent of its existence in the lessee of the advertising space, would not thereby be conferred upon the receiver. While he undoubtedly would be entitled to collect such rental for advertising space, his right would not extend to the use in that manner of premises where advertising space was not theretofore in use, as to accord to him *possession* of premises not theretofore so used for such a purpose would be to interfere with the actual possession of the owner.[649]

The import of this passage is that the landlord is in possession of the rent receivable, and the tenant *is not*. Therefore, although the rent receivable is definitely "property," it is not property that the tenant *possesses*. Since CPLR section 5222(b)'s second sentence requires garnishee *possession*, the restraining notice must fail, if all we have before us is a garnishee that owes the landlord some rent next month. If the garnishee has also borrowed the landlord's lawn mower, that is another matter entirely. The lawnmower bailments makes the restraining notice effective when served and thereby triggers the after-acquired debt feature in the third sentence of section 5222(b).

True, the tenant possesses the *land*. We have seen that the tenant must not, apparently, abandon possession of the *land* back to the landlord, as that would violate the restraining notice.[650] But the tenant's obligation to pay rent is something that the landlord possesses and as to which a receiver might *dispossess* him.

M. Voluntary Compliance

Reverting to our prior lawn mower example, where the garnishee has borrowed nothing on Sunday, receives the restraining notice on Monday, and borrows the debtor's mower on Tuesday, the restraining notice is not effective, because on Monday the garnishee was not in possession of any debtor property at the moment of service.

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[649] *Id.* at 286–87 (emphasis added).

[650] *See supra* Part I.F.4. CPLR section 5222 refers to "property" generally, never to "real" or "personal" property. N.Y. C.P.L.R. 5222 (McKinney 2014).

> A restraining notice served upon a person other than the judgment debtor . . . is effective only if, at the time of service, he or she . . . is in the possession or custody of property in which . . . the judgment debtor or obligor has an interest . . . .[651]

The garnishee may return the mower at any time. But what if the garnishee *chooses* to honor the restraining notice, even though it is not effective? May the garnishee resist the debtor's demand for the lawn mower?

One might be tempted to conclude that there is no court order in this case. The garnishee violates the debtor's rights by retaining the mower against the debtor's demand for return. The court in *Palestine Monetary Authority ("PMA") v. Strachman*[652] has implied that garnishees can *choose* to be bound.[653] The decision involved an intermediary bank in the middle of a chain of wire transfers.[654]

In this case, the PMA was a judgment debtor.[655] The PMA had an account with the Palestine International Bank ("PIB").[656] PIB had an account with the Bank of New York (BNY).[657]

To understand the holding in *PMA*, it is necessary to fathom how wire transfers work. Let us imagine that PMA wished to pay X for some reason. PMA (the originator) has an account with PIB (the originator bank).[658] PIB has account with BNY. BNY has an account at X Bank. X has an account with X Bank. A chain exists linking PMA to X through three banks.

To accomplish the payment, PMA must instruct PIB to debit PMA's account at PIB[659] and to debit PIB's account at BNY, on

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[651] C.P.L.R. 5222(b).

[652] Palestine Monetary Auth. v. Strachman, 873 N.Y.S.2d 281 (App. Div. 1st Dep't 2009).

[653] *See id.* at 291–92.

[654] *See id.* at 284.

[655] *Id.*

[656] *Id.* at 286.

[657] *Id.*

[658] An originator bank is "the receiving bank to which the payment order of the originator is issued." U.C.C. § 4A-104(d) (2012).

[659] "When a receiving bank accepts a payment order, the bank normally receives payment from the sender by debiting an authorized account of the sender." U.C.C. § 4A-502 cmt. 1. PIB is a receiving bank. U.C.C. § 4A-103(a)(4). A payment order is

> an instruction of a sender to a receiving bank . . . to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if: (i) the instruction does not state a condition to payment to the beneficiary other than time of payment, (ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and (iii) the instruction is transmitted by the sender directly to the receiving bank . . . .

U.C.C. § 4A-103(1). "Acceptance" of a payment order occurs when a receiving bank executes

further condition that PIB instruct BNY to takes the steps to accomplish payment of X. None of the banks in the chain has any discretion. The steps are very mechanically set forth by the originator.[660] Thus, on instruction from PIB, BNY debits PIB and credits X Bank. X Bank credits X and X is successfully paid. Each accepts the payment order from a prior party in the chain when it executes the order it has received.[661]

In *PMA*, a judgment creditor served a restraining notice on BNY.[662] Under Article 4A of the Uniform Commercial Code ("UCC"), BNY could have ignored this restraining notice.[663] According to UCC section 4A-503:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. *A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer*.[664]

Applying this section to our hypothetical wire transfer, a restraining notice might be issued to PMA under clause (i) or PIB under clause (ii) or X Bank or X under clause (iii). BNY, however, falls entirely under the last sentence of section 4A-503. Accordingly, the restraining notice is not effective.

Nevertheless, BNY volunteered to receive PIB funds pursuant to the payment order and, instead of sending them on to X Bank, simply restrained those funds (as if they were PMA funds) for the benefit of the judgment creditor.[665]

> [I]n this case, it was the BNY who chose to obey the court order and froze funds, all of which happened to be wire-fund transfers. The BNY sought no relief with regard to the injunctions. Consequently, we do not find that the order by which BNY restrained the funds was improper or a violation

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the payment order. U.C.C. § 4A-209(a).

[660] For an example, see Grain Traders, Inc. v. Citibank, N.A., 160 F.3d 97, 100 (2d Cir. 1998).

[661] U.C.C. § 4A-209(1).

[662] *Palestine Monetary Auth.*, 873 N.Y.S.2d at 284.

[663] *Id.* at 291–92.

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

[665] *Palestine Monetary Auth.*, 873 N.Y.S.2d at 291–92.

of UCC § 4A-503.

> Moreover, we find persuasive the [judgment creditor's] argument that nothing in UCC § 4A-502 prohibits the bank from honoring creditor process to turn over the funds. The [judgment creditor] point[s] to UCC 4A-502(4) which provides as follows:
>
> > "Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process *is not obliged to act* with respect to the process."
>
> . . . [T]he plain meaning of the provision is that it allows a bank to honor the process if it so chooses but it does not always have to honor that process.[666]

The court, however, did not go so far as to order a turnover of funds to the judgment creditor. The funds might not belong to PMA but rather to PIB. On the other hand, perhaps PIB was the alter ego or agent of PMA. In the latter case, the frozen funds would be available to satisfy the judgment. Nevertheless, the funds were successfully frozen because BNY chose to be bound.

There is clearly a contradiction in the case. On the one hand, the court order did not bind BNY. But BNY chose to be bound. Since *choice* was involved, it cannot really be said that BNY was bound. But because it acted under color of law, it apparently had no Article 4A liability for failing to execute the payment orders.

Meanwhile, if a garnishee chooses to ignore a restraining notice and then later wishes it hadn't, it cannot retroactively choose to be bound and seek restitution. In *Chemical Bank New York Trust Co. v. Brown*,[667] a restraining notice had designated the bank account of the debtor's ex-spouse.[668] There seemed no evidence that the ex-spouse was holding any funds for the debtor.[669] The bank nevertheless honored the debtor's check.[670] Retroactively, the bank tried to claim that the honor was an overdraft in light of the

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[666] *Id.* (quoting N.Y. U.C.C. § 4-A-502(4) (McKinney 2009)).

[667] Chem. Bank N.Y. Trust Co. v. Brown, 312 N.Y.S.2d 343 (Civ. Ct. New York County 1970).

[668] *Id.* at 344.

[669] *Id.* at 344–46.

[670] *Id.* at 346.

restraining notice (and subsequent levy).[671] It therefore sought to recover the mistaken payment from its customer.[672] The court dismissed the complaint on the basis that the restraining notice was ineffective when it was served.[673] According to the court:

> The bank by its action assumed to contract a liability for the defendant without her knowledge or authority and without inquiry as to the validity of the claim. Their red-carpet treatment of the judgment creditor sets a dangerous precedent which could lead to great abuses, putting in jeopardy the bank accounts of all relatives of judgment debtors.[674]

Although these comments generally condemn "red-carpet" treatment for creditors, these remarks should probably be limited to the facts: a garnishee who chooses *not* to be bound cannot change its mind.

N. Effectiveness and Reason to Believe

A restraining notice is effective if the garnishee isn't certain but nevertheless has reason to believe the judgment debtor has an interest. The phrase "reason to believe" could imply (1) the judgment debtor *does* have an interest in a thing, and a reasonable garnishee *should know* of that interest (but doesn't in fact know). It could also imply that (2) the judgment debtor has *no* property interest in the thing but the garnishee reasonably believes (incorrectly) that the debtor does have an interest.

These possibilities have their attractive and unattractive sides. With regard to the first possibility, suppose a warehouse, in possession of debtor property, is served with a restraining notice. The agents of the warehouse haven't memorized who every client is, but they have goods records that could easily be consulted. These records show that the debtor has stored property with the warehouse. The debtor then shows up at the warehouse and demands the property; the warehouse complies. Hailed before the court for contempt, the court need not listen to the claim that the garnishee was subjectively confused, because objectively it should *not* have been confused. Consultation of the records gives the

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671 *Id.* at 344.
672 *Id.*
673 *Id.* at 346.
674 *Id.* at 345–46.

warehouse reason to know that it is in possession of debtor property.[675]

The second possibility, however, is that the debtor does *not* have an interest in property; the garnishee mistakenly thinks otherwise. For example, a broker maintains an account for a debtor and the debtor's corporation is the judgment debtor. The garnishee, without any prompting from the judgment creditor, assumes that the corporation is simply the alter ego of its customer. Has the broker committed a wrong against its customer?

We have just seen that a garnishee served with an ineffective restraining notice can choose to be bound. So it must be the case that where the creditor, under a mistaken belief that the restraining notice is binding, operates under color of law when it obeys the restraining notice based on its erroneous belief. Therefore, reasonable belief in an ineffective restraining notice does not give rise to garnishee liability.

O. Specified in the Notice

A notice is effective if the garnishee *knows* or *should know* that the debtor owns property in the possession of the garnishee.[676] But knowledge of any sort becomes irrelevant if the judgment creditor specifies the property that is to be restrained.[677] As redacted, the second sentence in section 5222(b) provides:

> A restraining notice served upon a [garnishee] . . . is effective . . . if . . . the judgment creditor . . . has stated in the notice that . . . the judgment debtor . . . has an interest in specified property in the possession or custody of the person served.[678]

If indeed the judgment debtor obviously has a property interest in the specified thing, this sentence is not problematic. But often, whether a debtor *does* have property in a thing is a deep matter

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[675] *See* Schulman v. N. Fork Bank, No. 116595/07, 2009 N.Y. Misc. LEXIS 4597, at *5 (Sup. Ct. New York County Mar. 6, 2009). In *Pan American World Airways, Inc. v. Chemical Bank*, 433 N.Y.S.2d 160 (App. Div. 1st Dep't 1980), the corporate name on the restraining notice was slightly different from the name on the bank account. *Id.* at 160. The bank honored the judgment debtor's check and the creditor sought to recover the amount of the check from the bank. *Id.* The court held that the restraining notice was effective if the bank had reason to believe that the restraining notice actually referred to its customer. *Id.* The matter was remanded for further findings on this score. *Id.*

[676] Niagara Mohawk Power Corp. v. Young, 523 N.Y.S.2d 275, 276 (App. Div. 4th Dep't 1987) (citing DAVID D. SIEGEL, NEW YORK PRACTICE § 508, at 688 (1st ed. 1978)).

[677] SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 508, at 889.

[678] N.Y. C.P.L.R. 5222(b) (McKinney 2014).

requiring complex adjudication. A garnishee can always find out by moving to vacate the restraining notice. If the judgment creditor has insufficient evidence to prove the debtor has a property interest, the court will vacate the restraint.[679]

We have already opined that the literal meaning of the CPLR must be supplemented. An allegation of property ownership makes a restraining notice effective only if the allegation is *true*. Otherwise, creditors have an incentive to tell lies in order to trigger the after-acquired property clause contained in the third sentence of CPLR section 5222(b).

Suppose a lie is told and the garnishee, out of caution, does nothing, as the restraining notice commands. The true owner of the property designated in the restraining notice, whether it be the garnishee or someone else, has a remedy against the judgment creditor. According to the fifth sentence of section 5222(b): "A judgment creditor . . . which has specified personal property or debt in a restraining notice shall be liable to the owner of the property . . . if other than the judgment debtor . . . for any damages sustained by reason of the restraint."[680] Because the judgment creditor[681] has this absolute liability in case a mistake is made,[682] it follows, according to the court in *Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co.*, that the garnishee receiving the restraining notice has no liability at all if it honors the restraining notice on the strength of an incorrect designation of property in the restraining notice.[683]

Special emphasis is made by the *Sumitomo* court on the fact that

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[679] *See, e.g.*, Claymont v. Levitt, 528 N.Y.S.2d 644, 644 (App. Div. 2d Dep't 1988).

[680] C.P.L.R. 5222(b).

[681] There seems to be a cause of action against the judgment creditor's attorney if he was negligent in wrongfully restraining a third party's property. Walter v. Doe, 402 N.Y.S.2d 723, 725–26 (Civ. Ct. New York County 1978).

[682] In *Reisman v. Kerry Lutz, P.C.*, 774 N.Y.S.2d 345 (App. Div. 2d Dep't 2004), a garnishee's complaint was dismissed when the facts showed that her husband deposited funds in her account. *Id.* at 345. Although the court did not say so, presumably the deposited funds were indeed fraudulently conveyed to her. *See id.* If the judgment creditor simply erred, then the complaint had merit. In *Stathopoulos v. Seaways Shipping Corp.*, 321 N.Y.S.2d 717 (Civ. Ct. New York County 1971), the court held that damages could not be awarded against a creditor who in good faith believed that the debtor had an interest in property at the time of service. *Id.* at 720–21.

[683] Sumitomo Shoji N.Y., Inc. v. Chem. Bank N.Y. Trust Co., 263 N.Y.S.2d 354, 358–59 (Sup. Ct. New York County 1965), *aff'd mem.*, 267 N.Y.S.2d 477 (App. Div. 1st Dep't 1966); *see also Walter*, 402 N.Y.S.2d at 726 ("[CPLR 5222(b)] was not intended to permit, or encourage lack of care on the part of those seeking to collect the judgment." (citing *Stathopoulous*, 321 N.Y.S.2d at 719–20)).

the restraining notice designates a specific item of property as belonging to the judgment debtor.[684] What if the restraining notice does not designate a specific account? What if, instead, the restraining notice in general requires debtor property to be restrained, but, insofar as the bank knows, the corporate account is genuine? In such a case, it is doubtful that the restraining notice is effective.[685] What made the restraining notice binding on the garnishee in *Sumitomo* was the "judgment creditor's specification of debt . . . in a restraining notice."[686]

Sumitomo makes it dangerous for a garnishee to ignore a restraining notice that designates specific property as belonging to the debtor (even though facially that does not appear to be the case). In *Sumitomo*, no levy had occurred—only service of the restraining notice.[687] A levy would have been an adverse claim, authorizing the bank to ignore the levy, as it created an "adverse claim" to the checking account, thereby triggering Banking Law section 134(5). Oddly, the bank was vulnerable to the weaker restraining notice, when it would have been immune from the stronger levy pursuant to an execution.[688]

Courts say broadly that "[i]f third parties 'do not have property or debts in which the judgment debtor has an interest, the restraining notices are not effective.'"[689] But this assessment is not accurate. Reasonable but erroneous belief makes the restraining notice effective on the plain meaning of the statute.

In *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak*

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[684] *Sumitomo*, 263 N.Y.S.2d at 357.

[685] *See* Bregman v. NBC Universal, Inc., No. 111953/08, 2009 N.Y. Misc. LEXIS 5720, *4–5 (Sup. Ct. New York County May 28, 2009) (holding a restraining notice ineffective when served on an account debtor of a corporation partly owned by a judgment debtor, where the account debtor had no reason to believe that the corporate entity was not separate).

[686] *Sumitomo*, 263 N.Y.S.2d at 358.

[687] *Id.* at 356.

[688] The procedural posture of *Brown* was rather odd. In a restraining notice, a creditor had designated the bank account of the debtor's ex-spouse. Chem. Bank N.Y. Trust Co. v. Brown, 312 N.Y.S.2d 343, 344 (Civ. Ct. New York County 1970). There seemed to be no evidence that the ex-spouse was holding any funds for the debtor. *Id.* The bank nevertheless honored the debtor's check. *Id.* Retroactively, the bank tried to claim that the honor was an overdraft in light of the restraining notice (and levy). *Id.* It therefore sought to recover the mistaken payment from its customer. *Id.* The court dismissed the complaint on the basis that the restraining notice was ineffective. *Id.* at 346.

[689] Verizon New England, Inc. v. IDT Domestic Telecom, Inc., No. 104207/2010, 2010 N.Y. Misc. LEXIS 4243, at *4 (Sup. Ct. New York County Sept. 1, 2010) (quoting JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 295 F. Supp. 2d 366, 391 (S.D.N.Y. 2003)), *aff'd*, 950 N.Y.S.2d 375 (App. Div. 1st Dep't 2012).

Dan Gas Bumi Negara,[690] a bank received a restraining notice with regard to bank accounts that, at the time, might have been fiduciary accounts for the benefit of a third party, or might have been wholly the property of the judgment debtor, where the third party was simply an unsecured creditor of the judgment debtor.[691] In the midst of this uncertainty, the bank kept a restraint on the entire account.[692] Later, the accounts were found to be *mostly* (i.e., 60/65) fiduciary.[693] The balance constituted a commission to which the judgment debtor was entitled in its own right.[694] Nevertheless, in this period of uncertainty, the bank kept up the restraint and apparently had no liability to the third party, who was deprived of the funds for years.[695] Such a result reflects the view that a garnishee served with a restraining notice has a duty to freeze assets of non-judgment debtors if the restraining notice states (however falsely) that designated property belongs to the judgment debtor.[696]

Once again, CPLR section 5222(b) provides that a judgment creditor "*which has specified personal property or debt* in a restraining notice shall be liable to the owner of the property."[697] It might seem that the negative pregnant of this sentence is that an attorney who does not specify specific debtor property bears no liability to a wronged garnishee. But this is not the case.[698] For example, negligent service of a restraining notice when the attorney should have known that he entered a default judgment against the wrong defendant might sustain a finding of the creditor's liability.[699]

P. Duration

Restraining notices served on judgment debtors are effective as

[690] Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 305 F. Supp. 2d 304 (S.D.N.Y. 2004).

[691] *Id.* at 307.

[692] *See id.* at 311.

[693] *See id.*

[694] *See id.* at 308–09.

[695] *See id.* at 311.

[696] *See generally id.* (stating that pursuant to CPLR section 5222(b), the bank was required to apply the restraining notice to all funds that it knew or believed that the judgment debtor had an interest in).

[697] N.Y. C.P.L.R. 5222(b) (McKinney 2014) (emphasis added).

[698] Feldman v. Upton, Cohen & Slamowitz, 740 N.Y.S.2d 790, 791–92 (Dist. Ct. Nassau County 2002).

[699] *See id.* at 792–93; Walter v. Doe, 402 N.Y.S.2d 723, 725 (Civ. Ct. New York County 1978).

long as the judgment is.[700] Restraining notices served on garnishees, however, are effective[701] for "one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs."[702] Pursuant to CPLR section 5240, however, a court may extend the effective period on motion of the creditor.[703]

It has been held that a court order *staying* a restraining notice is not the same as an order *vacating* a notice, and so the restraining notice is still effective upon being stayed.[704] "Staying" the restraining notice seems to make no difference at all—a meaningless event.

A restraining notice is automatically canceled if the creditor's default judgment is vacated.[705] Failure of an attorney to remove a restraining notice in light of an order vacating a default judgment is sanctionable.[706]

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[700] Cordius Trust v. Kummerfeld Assocs., 658 F. Supp. 2d 512, 517–18 (S.D.N.Y. 2009); Beller & Keller v. Kindor, No. 94 Civ. 7682 (RPP), 2003 U.S. Dist. LEXIS 13171, at *6–7 (S.D.N.Y. June 4, 2003); Singh v. Singh, No. 9893/2009, 2010 N.Y. Misc. LEXIS 5503, at *12 (Sup. Ct. Queens County Nov. 10, 2010); *In re* City of New York, 289 N.Y.S.2d 680, 682–83 (Sup. Ct. Queens County 1968).

[701] Even though attorneys are officers of the court, they are still obliged to honor restraining notices served upon them. Briarpatch Ltd., L.P. v. Briarpatch Film Corp., 932 N.Y.S.2d 451, 452 (App. Div. 1st Dep't 2011). This is so even when the attorney holds debtor funds as a retainer for future employment. Potter v. MacLean, 904 N.Y.S.2d 551, 553 (App. Div. 3d Dep't 2010).

[702] C.P.L.R. 5222(b). After the year has lapsed, it is error for a court not to order the lapsed notice vacated. Tweedie Constr. Co. v. Stoesser, 409 N.Y.S.2d 444, 445 (App. Div. 3d Dep't 1978).

[703] *See Briarpatch Ltd., L.P.*, 932 N.Y.S.2d at 452; Kitson & Kitson v. City of Yonkers, 778 N.Y.S.2d 503, 507 (App. Div. 2d Dep't 2004). A restraining notice on a commingled fund was perpetuated pending further proceedings to determine which funds were exempt from the levy. Int'l Airline Emps. Fed. Credit Union v. Jonas, No. 570769-01, 2002 N.Y. Misc. LEXIS 534, at *2 (App. Term 1st Dep't May 10, 2002).

[704] Nardone v. Long Island Trust Co., 336 N.Y.S.2d 325, 327 (App. Div. 2d Dep't 1972) ("Were the rule otherwise, any judgment debtor could obtain such an order, without notice to the court that a restraining notice had been served, or to the judgment creditor, and recover his property theretofore properly made the subject of the restraining notice."); USA Auto Funding, LLC v. Wash. Mut., Inc., No. 16440/05, 2006 N.Y. Misc. LEXIS 1310, at *3 (Sup. Ct. Nassau County Mar. 30, 2006).

[705] *See* Brookhaven Anesthesia, Assocs. v. Flaherty, No. 2003-1258 S C, 2004 N.Y. Misc. LEXIS 1590, at *2 (App. Div. 2d Dep't Sept. 20, 2004) (citing Citibank, N.A., v. Second Dev. Servs., Inc., 708 N.Y.S.2d 806, 807 (App. Term 2d Dep't 2000)); 215 African & Hispanic Am. Realty of N.Y., LLC v. Air Chef, Inc., No. 117923/09, 2012 N.Y. Misc. LEXIS 4001, at *10 (Sup. Ct. New York County Aug. 20, 2012).

[706] *See* Phx. Consulting, Inc. v. Republic Nat'l Bank, No. 97 CV 3249, 1998 U.S. Dist. LEXIS 2854, at *2–3 (E.D.N.Y. Feb. 20, 1998).

Q. Court Permission for a Second Restraining Notice

What if the judgment creditor fails to levy property in the possession of the garnishee during the year in which a restraining notice is valid? May a second restraining notice be served in the second year?

The answer is yes, but "[l]eave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order."[707] A second restraining notice served without the required court permission is invalid.[708] Second restraining notices, however, are utterly prohibited within the original one year with regard to "a natural person's banking institution account."[709] But, as the original restraining notice lasts for a year, there are little grounds for a creditor to seek permission within that year. Beyond the one-year period (or within the one-year period for unnatural persons), the failure of the restraining notice to be effective against a bank in the first place is grounds for a court to approve a second notice.[710]

Can a debtor sue a judgment creditor for serving a second restraining notice on a garnishee? One court held no.[711] The rule against second restraining notices is for the benefit of garnishees to prevent their being harassed.[712] Judgment debtors are not harmed by wrongful service of the second restraining notice.[713]

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[707] C.P.L.R. 5222(c).

[708] Cordius Trust v. Kummerfeld Assocs., 658 F. Supp. 2d 512, 518 (S.D.N.Y. 2009). It is not, however, an unlawful collection practice under the New York Penal Law. N.Y. PENAL LAW § 190.50 (McKinney 2014) ("A person is guilty of unlawful collection practices when, with intent to enforce a claim . . . he knowingly sends . . . a notice, document or other instrument which has no judicial or official sanction and which in its format . . . simulates a summons . . . or process . . . ."); *accord* Finkelstein, Mauriello, Kaplan & Levine, P.C. v. McGuirk, 395 N.Y.S.2d 377, 380 (Sup. Ct. Orange County 1977) ("[T]he act of issuing [a] restraining order without prior court approval does not fall within the parameters of the provisions of section 190.50 of the Penal Law as an unlawful collection practice . . . .").

[709] C.P.L.R. 5222(c). The court in *Friedman* overlooks this point in suggesting that, where the creditor does not serve the debtor with the restraining notice within four days of serving the bank, the creditor can simply serve a new restraining notice. Friedman v. Mayerhoff, 592 N.Y.S.2d 909, 912 (Civ. Ct. Kings County 1992).

[710] Fasolino Foods Co. v. Banca Nazionale Del Lavoro, No. 90 Civ. 334 (JMC), 1992 U.S. Dist. LEXIS 7901, at *5–6 (S.D.N.Y. May 28, 1992).

[711] Tadco Constr. Corp. v. Gottesman, No. 603259/06, 2009 N.Y. Misc. LEXIS 5746, at *10 (Sup. Ct. New York County May 26, 2009).

[712] *See, e.g.*, Grossman v. Liker, 442 N.Y.S.2d 63, 65 (App. Div. 1st Dep't 1981).

[713] Nevertheless, this same second restraining notice became the basis of a successfully pleaded abuse of process claim, as the restraining notice violated an earlier stipulation suspending enforcement of the judgment. *See Tadco Constr. Corp.*, 2009 N.Y. Misc. LEXIS 5746, at *11–14.

We have seen that garnishees served with ineffective restraining notices can choose to be bound.[714] If this is so, then certainly a garnishee who receives a second restraining notice without court permission may choose to view it as binding and therefore enjoy the color of law in refusing to surrender property or to pay a debt that is due. This possibility, however, is apparently not enough to justify the debtor receiving damages from the judgment creditor.

A "second restraining notice" must be distinguished from a "corrected restraining notice." A second notice that does not extend the one-year effective period and that merely corrects mistakes does not require a court order.[715]

R. Twice the Amount of the Judgment

A garnishee served with a restraining notice may rely upon that order and refuse to pay debts, but there is a quantitative limit to this privilege. According to CPLR section 5222(b):

> If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.[716]

This rule applies only to money, not to illiquid property generally.[717] "The purpose of securing twice the amount due upon the judgment is to ensure payment of costs and interest in addition to the balance outstanding on the judgment."[718] It is no violation of the restraining notice if a bank honors checks out of that part of the bank account that is more than twice the amount of the

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[714] *See supra* Part I.M.

[715] McLoughlin v. Altman, No. 92 Civ. 8106 (KMW)(MHD), 1997 U.S. Dist. LEXIS 11413, at *6–7 (S.D.N.Y. Aug. 7, 1997).

[716] N.Y. C.P.L.R. 5222(b) (McKinney 2014). Courts may use section 5240 to alter the "twice the amount" rule. C.P.L.R. 5240; *see* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 80 (2d Cir. 2002), ("Finally, we modified the stay to apply only to those funds that would be necessary and sufficient to satisfy a judgment."). Another use of section 5240 is to facilitate the debtor's desire to open a new bank account. The court directed that any future restraining notice include a sentence instructing the garnishee not to restrain if it appeared that the garnishee had received exempt social security payments. Contact Res. Servs., LLC v. Gregory, 806 N.Y.S.2d 407, 412–13 (Rochester City Ct. 2005).

[717] *See* C.P.L.R. 5222(b).

[718] Planned Consumer Mktg., Inc. v. Coats & Clark, Inc., 535 N.Y.S.2d 520, 521 (Sup. Ct. New York County 1988) (citing Aspen Indus. V. Marine Midland Bank, 421 N.E.2d 808, 811 (N.Y. 1981)).

judgment.[719] This excess of restraint has been found constitutionally permissible.[720]

S. Foreign Entities Present in New York

New York has recently expanded the power of courts to force garnishees to bring property outside New York into the state.[721] *Koehler v. Bank of Bermuda, Ltd.* involved a turnover proceeding against a bank that was holding collateral from a judgment debtor in Bermuda.[722] Answering a question certified from the Second Circuit Court of Appeals, the New York Court of Appeals affirmed that, where the garnishee is jurisdictionally present in New York, such an injunction is appropriate.[723]

These holdings fully apply to restraining notices, which are a form of injunctive relief only slightly different from turnover orders. The turnover order commands that the garnishee do *something*. The restraining notice commands that the garnishee do *nothing*. They are both personal obligations that can be imposed on entities jurisdictionally in New York.

Thus, a restraining notice served on a bank in New York restrains a bank account in Florida. However, *McCarthy v. Wachovia Bank, N.A.* adds a constitutional wrinkle.[724] The debtors claimed that the default judgment against them in New York was unconstitutionally obtained for want of personal jurisdiction.[725] The court, however, swept this objection aside, suggesting that, if the allegation was true, the debtors should have traveled to New York and had the default judgment set aside pursuant to CPLR section 5239.[726]

Nevertheless, the restraining notice had what real estate lawyers might call "color of title." The *McCarthy* court held that the bank

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[719] *Aspen Indus.*, 421 N.E.2d at 811.

[720] *See* A.R. Fuels v. A.F. Supply Corp., 491 N.Y.S.2d 962, 963 (Sup. Ct. Kings County 1985).

[721] *See, e.g.*, Koehler v. Bank of Berm. Ltd., 911 N.E.2d 825, 831 (N.Y. 2009); Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 N.Y. Misc. LEXIS 47, at *30–31 (Sup. Ct. New York County Jan. 11, 2012).

[722] *Koehler*, 911 N.E.2d at 827.

[723] *Id.* at 831. The Court of Appeals has recently added that only property held outside New York directly by an entity present in New York can be reached by a turnover order while property held by a subsidiary controlled by the New York entity cannot be reached. *See* Northern Mariana Islands v. Canadian Imperial Bank of Commerce, 990 N.E.2d 114 (N.Y. 2013).

[724] *See* McCarthy v. Wachovia Bank, N.A., 759 F. Supp. 2d 265, 274 (E.D.N.Y. 2011).

[725] *Id.*

[726] *See id.* at 276.

could rely on the facial validity of the restraining notice to freeze the account, noting that "there is no requirement that a garnishee bank be required to investigate the validity of a restraining notice served upon it."[727] The court cited CPLR section 5209 as a safe harbor.[728] According to this provision:

> A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.[729]

One can see that CPLR section 5209 does not literally apply, as a bank that has received a restraining notice has not paid either the sheriff or the judgment creditor. Still, one can imagine that section 5209 embodies the policy that a garnishee should be protected when it follows a court order (even if that order is unconstitutional).

At the sub-constitutional level, a relevant rule for executions naturally carries over to restraining notices. This is the fiction that every branch of a bank is a different entity than every other branch of a bank. The reason for this is as follows:

> Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce . . . .[730]

Under this rule,[731] if it still exists,[732] *McCarthy* was wrongly

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[727] *Id.* at 277–78.

[728] *Id.* at 278 (quoting Yu v. Riggs Nat'l Bank, 670 N.Y.S.2d 187, 187 (1st Dep't 1998)).

[729] N.Y. C.P.L.R. 5209 (McKinney 2014).

[730] Cronan v. Schilling, 100 N.Y.S.2d 474, 476 (Sup. Ct. New York County 1950), *aff'd mem.*, 126 N.Y.S.2d 192 (App. Div. 1st Dep't 1953). The rule is a matter of New York law. Where purely federal law applies—that is, FRCP 69 does *not* apply—there is no separate branch rule. United States v. First Nat'l City Bank, 379 U.S. 378, 384 (1965).

[731] The rule can be traced back to English cases in the 1920s. *See* United States v. First Nat'l City Bank, 321 F.2d 14, 19–20 (2d Cir. 1963), *rev'd*, 379 U.S. 378 (1965); Thomas S. Erickson, Comment, *Garnishment of Branch Banks*, 56 MICH. L. REV. 90, 91–92 (1957). The first New York appearance of the rule seems to be in *Chrzanowska v. Corn Exchange Bank*, 159 N.Y.S. 385, 388 (App. Div. 1st Dep't 1916), *aff'd mem.*, 122 N.E. 877 (1919).

[732] *See generally* Geoffrey Sant, *The Rejection of the Separate Entity Rule Validates the*

decided. *McCarthy* was correctly decided if the branch rule no longer exists.

The separate branch rule was recently upheld in *Global Technology, Inc. v. Royal Bank of Canada*, where an American company had a New York judgment against a Mexican company.[733] The Mexican company had a sizable bank account at a Canadian branch of a Canadian bank.[734] The Canadian bank, however, was jurisdictionally present in New York.[735] The judgment creditor served a restraining notice on the bank in New York, but the bank permitted its client to empty the account at the Canadian branch.[736] The *Global Technology* court refused to hold the bank liable for damages.[737]

The rule now seems to be that if a bank has computerized its records and if the branches are all within the United States, the branch rule serves no purpose; service "on the bank's main office"[738] is service on all the branches.[739] But where a bank is not computerized,[740] or where the branch to be restrained is located

Separate Entity Rule, 65 S.M.U. L. REV. 813, 814–15 (2012) (discussing the conflict between New York State and Federal courts regarding the branch bank rule).

[733] Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 N.Y. Misc. LEXIS 47, at *1–2, *37–39 (Sup. Ct. New York County Jan. 11, 2012); *see also* Shaheen Sports, Inc. v. Asia Ins. Co., No. 98-cv-5951 (LAP), 11-CV-920 (LAP), 2012 U.S. Dist. LEXIS 36720, at *14–20 (S.D.N.Y. Mar. 18, 2012) (reviewing recent New York State court decisions involving the bank branch rule and endorsing the proposition that the rule exists in post-judgment execution proceedings).

[734] *Global Tech*, 2012 N.Y. Misc. LEXIS 47, at *2.

[735] *Id.*

[736] *Id.* at *2, *4.

[737] *Id.* at *43, *49; *see also* Dwight Healy & Marika Maris, *New York Court Determines That Banks Still Have the Protection of the "Separate Entity" Doctrine After Koehler*, 128 BANKING L.J. 668, 671 (2011) (examining a recent New York Supreme Court case that applied the bank branch rule).

[738] Calton v. Pressler & Pressler, LLP, No. 10 Civ. 2117 (LMM), 2011 U.S. Dist. LEXIS 119284, at *6–7 & n.1 (S.D.N.Y. Aug. 22, 2011); John Wiley & Sons, Inc. v. Kirtsaeng, No. 08 Civ. 7834 (GEL) (DCP), 2009 U.S. Dist. LEXIS 86498, at *12, *13 (S.D.N.Y. Sept. 15, 2009), *aff'd*, 654 F.3d 210 (2010), *rev'd on other grounds*, 133 S. Ct. 1351 (2013); Nat'l Union Fire Ins. Co. v. Advanced Emp't Concepts, Inc., 703 N.Y.S.2d 3, 4 (App. Div. 1st Dep't 2000).

[739] Digitrex, Inc. v. Johnson, 491 F. Supp. 66, 69 (S.D.N.Y. 1980) (upholding restraining order served in New York as affecting conduct of the bank outside the state). *But see Nat'l Union*, 703 N.Y.S.2d at 4 (noting that *Digitrex* was subsequently "clarified" and that the separate branch rule only applies when the main branch and the branch where the accounts in question are maintained are in the same jurisdiction). *National Union*, however, seems to rule on the basis that a New York court has no jurisdiction over property located outside New York, even if it has jurisdiction over the person in custody of the property. *Id.* This instinct has been overruled by *Koehler*. Koehler v. Bank of Berm. Ltd., N.E.2d 825, 831 (N.Y. 2009).

[740] Therm-X-Chem. & Oil Corp. v. Extebank, 444 N.Y.S.2d 26, 27 (App. Div. 2d Dep't 1981).

outside the United States,[741] the branch rule still breathes and reigns.[742] Such holdings with regard to foreign banks are based on a fear that, in the foreign country, New York's restraining notice will be given no "full faith and credit," resulting in the bank's double liability. At least one federal court, however, reads *Koehler* to mean that the separate branch rule is dead even in the case of bank accounts at branches outside the United States.[743] Some lower state courts disagree and insist that the rule has merit, at least where the branch is outside the United States.[744] It has been suggested that application of the rule requires "a case-by-case determination based on practicality and fairness, i.e., reasonableness, under the circumstances."[745] The entire matter has recently been certified to the New York Court of Appeals in the context of a restraining notice served on a branch of an international bank.[746]

T. The Effect of a Bankruptcy Petition

Suppose a judgment debtor responds to a restraining notice by filing for bankruptcy. Technically, bankruptcy is a transfer from

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[741] *See* Allied Mar., Inc. v. Descatrade SA, 620 F.3d 70, 74 (2d Cir. 2010); Limonium Mar., S.A. v. Mizushima Marinera, S.A., 961 F. Supp. 600, 607–08 (S.D.N.Y. 1997); McCloskey v. Chase Manhattan Bank, 183 N.E.2d 227, 227 (N.Y. 1962). *But see* Abuhamda v. Abuhamda, 654 N.Y.S.2d 11, 11–12 (App. Div. 1st Dep't 1997) (affirming injunction, per an order of attachment, directing a bank present in New York not to pay out funds from an account in Jordan).

[742] The Court of Appeals' holding in *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce* can be viewed as a version of the single branch rule. The facts involved a bank present in New York and its subsidiary in Canada, which maintained a bank account in favor of tax deadbeats. Northern Mariana Islands v. Canadian Imperial Bank of Commerce, 990 N.E.2d 114, 115–16 (N.Y. 2013). If the bank present in New York had a branch in Canada, the single branch rule would have prevented the turnover order. Obviously, where the foreign branch is separately incorporated, the turnover order is even less justified. The *Mariana Islands* court, however, based its decision on the fact that CPLR section 5225(b) requires a garnishee to have "actual" possession of the debt it owes to the judgment debtor. *Id.* at 119. Actual possession seems to mean that the garnishee owes a vested or contingent debt. *Id.* "[C]onstructive possession" seems to mean that the garnishee controls an entity that owes the debt. *See* People v. Muhammad, 945 N.E.2d 1010, 1011–12 (N.Y. 2011).

[743] *See* JW Oilfield Equip., LLC v. Commerzbank AG, 764 F. Supp. 2d 587, 595–96 (S.D.N.Y. 2011).

[744] *See* Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 N.Y. Misc. LEXIS 2268, at *7–8 (Sup. Ct. New York County May 12, 2011); Parbulk II AS v. Heritage Mar., SA, 935 N.Y.S.2d 829, 832 (Sup. Ct. New York County 2011).

[745] S & S Mach. Corp. v. Mfrs. Hanover Trust Co., 638 N.Y.S.2d 953, 956 (App. Div. 1st Dep't 1996).

[746] Tire Engineering & Distributing LLC v. Bank of China. Ltd., 2014 U.S. App. LEXIS 9256 (2d Cir. February 24, 2014).

the judgment debtor to a bankruptcy estate.[747] As such, a debtor violates the restraining notice when he files for bankruptcy. But this may be swept aside, as federal preemption doctrine surely privileges the bankruptcy petition over the restraining notice.[748]

What if a garnishee has been served with a prepetition restraining notice? Does the restraining notice continue in effect after the debtor files a bankruptcy petition?

A bankruptcy petition typically invokes the automatic stay, which prevents creditors from taking any action to collect a debt (save through the procedures afforded by the Bankruptcy Code).[749] Accordingly, after the bankruptcy petition, a creditor may not serve a new restraining notice, as Bankruptcy Code section 362(a)(1) prohibits "issuance or employment of process."[750]

Does the automatic stay cancel a restraining notice lawfully issued *before* the bankruptcy petition? Before answering, it should be noted that there is a school of thought that any garnishee who owes a debt or holds property of the bankruptcy estate must follow instructions from the bankruptcy trustee and voluntarily hand over property of the estate to the bankruptcy trustee.[751] Independently, it has been suggested that Bankruptcy Code section 542(b) imposes this duty.[752] This duty, if it exists, means that a bankruptcy trustee may require the garnishee or the debtor to violate the restraining notice. Therefore, it is certainly convenient to think that the automatic stay preempts any preexisting restraining notice, as they are in conflict (at least on the above-stated interpretation of the automatic stay).

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[747] *See* 11 U.S.C. §§ 541(a), 544(a) (2012).

[748] *See generally* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ("Our primary function is to determine whether . . . [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

[749] 11 U.S.C. § 362(a) (2012). *But see id.* § 362(c)(4) (identifying an exception which denies the automatic stay to debtors who file multiple bankruptcy petitions in a year).

[750] 11 U.S.C. § 362(a)(1). Additionally § 362(a)(3) appears to prohibit the issuance of a new restraining notice by applying the stay to "any act to . . . exercise control over property of the estate." *Id.*

[751] David Gray Carlson, *Turnover of Collateral in Bankruptcy: Must a Secured Party-in-Possession Volunteer?*, 6 J. BANKR. L. & PRAC. 483, 496 (1997).

[752] 11 U.S.C. § 542(b) (2012) ("Except as provided in subsection (c) and (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 . . . against a claim against the debtor."); Calvin v. Wells Fargo Bank, N.A. (*In re* Calvin), 329 B.R. 589, 596 (Bankr. S.D. Tex. 2005).

This was the result reached in *In re Adomah*,[753] on federal preemption grounds. Because the debtor's bank had received a prepetition restraining notice, the bank refused to honor the debtor's checks for the three weeks following the chapter 7 bankruptcy petition.[754] The failure of the bank to honor checks (under color of the restraining notice) was held to be a violation of the automatic stay.[755]

There are some curious aspects to *In re Adomah*. Chapter 7 implies that the checking account belongs to the bankruptcy trustee, not to the debtor.[756] So any checks the debtor wrote in the first three weeks should not have been honored in any case.[757] The debtor did claim that the funds were exempt under New York's bankruptcy-only exemption under New York Debtor & Creditor Law section 283.[758] But an exempt bank account is initially property of the bankruptcy estate.[759] The debtor must fetch exempt property out of the bankruptcy estate by filing Schedule C.[760] Once the debtor does so, the trustee and creditors have thirty days after the conclusion of the creditors' meeting to file objections to any exemption.[761] If no one objects, the claimed exemption is expelled from the bankruptcy estate.[762] Until then, any claimed exemption is estate property.[763] Accordingly, the debtor had no right to insist that the bank honor checks until at least 30 days after the first creditors' meeting (at least when money in the account is prepetition money).[764]

Furthermore, the Supreme Court, in *Citizens Bank of Maryland*

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753 *In re* Adomah, 340 B.R. 453 (Bankr. S.D.N.Y. 2006).

754 *Id.* at 455.

755 *Id.* at 460.

756 *In re Calvin*, 329 B.R. at 595–96.

757 *Id.* at 601–02 ("The Debtors suffered no injury because at the time the Bank froze the funds, they did not belong to the Debtors despite their claiming the funds as exempt in Schedule C.").

758 *In re Adomah*, 340 B.R. at 457.

759 *In re* Pimental, 142 B.R. 26, 28 (Bankr. D. R.I. 1992).

760 11 U.S.C. § 522(*l*) (2012); *see* David Gray Carlson, *The Role of Valuation in Federal Bankruptcy Exemption Process: The Supreme Court Reads Schedule C*, 18 AM. BANKR. INST. L. REV. 461, 463 (2010).

761 FED. R. BANKR. P. 4003(b)(1).

762 11 U.S.C. § 522(*l*).

763 *See id.* § 522(b)(1).

764 11 U.S.C. § 541(a)(6) (2012); *In re* Adomah, 340 B.R. 453, 459 (Bankr. S.D.N.Y. 2006) (noting that post-petition earnings are the property of the debtor, whereas pre-petition earnings are property of the estate); Calvin v. Wells Fargo Bank, N.A., 329 B.R. 589, 597 & n.8 (Bankr. S.D. Tex. 2005) (holding that any post-petition paychecks deposited in the account are not property of the estate).

v. Strumpf,[765] has held that a bank's refusal to honor checks never violates the automatic stay because the bank's dishonor of checks constitutes a breach of contract, and Bankruptcy Code section 362(a) does not prohibit breaches of contract.[766] The *Adomah* court held that *Strumpf* only condoned a temporary freeze of the checking account.[767] If true, it may be observed that the bank in *Adomah did* rather temporarily freeze the account because it was unsure of the effect of the restraining notice. But temporariness has to do with whether the freeze was the manifestation of a setoff, which is prohibited under section 362(a)(7).[768] Temporariness has nothing to do whether breaches of contract with the debtor violate the automatic stay. The alternative holding in *Strumpf* that breach of contract does not constitute "control over property of the estate" is categorical, not temporal.[769] Therefore, it would seem the bank acted properly because its actions were temporary and in any case its breach of contract is no violation of the automatic stay.[770] On top of that, recall that a garnishee can *choose* to be bound by a restraining notice that is not ultimately effective.[771] Under this principle, it is hard to see how the bank should have been liable for restraining funds. Be that as it may, *Adomah* suggests, plausibly, that the automatic stay cancels the restraining notice.

Some old cases suggest that the restraining notice survives the automatic stay. In *Tompkins County Trust Co. v. Sullivan*,[772] the bankruptcy court suggested that a debtor who wished access to a fund that was exempt would have to receive a bankruptcy court order to negate the restraining notice.[773] The restraining notice was not *per se* void as violating the stay, as the *Adomah* court claimed.[774]

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[765] Citizens Bank v. Strumpf, 516 U.S. 16 (1995).

[766] *See id.* at 21.

[767] *See In re* Adomah, 340 B.R. 453, 458–59 (Bankr. S.D.N.Y. 2006).

[768] 11 U.S.C. § 362(a)(7) (2012).

[769] *See Calvin*, 329 B.R. 589 at 603.

[770] *Strumpf*, 516 U.S. at 21.

[771] *See supra* Part I.M.

[772] Tompkins Cnty. Trust Co. v. Sullivan (*In re* Sullivan), 31 B.R. 125 (Bankr. N.D.N.Y. 1983).

[773] *Id.* at 126–27 & n.1; McMahon v. Norse (*In re* McMahon), 70 B.R. 290, 293 (Bankr. N.D.N.Y. 1987).

[774] *See Sullivan*, 31 B.R. at 127; *see also* Medi-Physics, Inc. v. Cmty. Hosp., 432 N.Y.S.2d 594, 596 (Rockland County Ct. 1980) (holding that the stay provisions of section 362 have no effect upon a retraining notice which merely acts as an injunction). In *Broome v. Citibank*, an undischarged creditor served a restraining notice on a bank holding post-petition funds, after the debtor had received a general discharge from all other claims. Broome v. Citibank, 632

While we are on the subject of bankruptcy, it may be pointed out that judicial liens created within ninety days of bankruptcy are voidable preferences, whenever the debtor is insolvent at the time of lien creation.[775] Therefore, if a garnishee violates a restraining notice within ninety days of bankruptcy, damages are zero, because any judicial lien that the creditor could obtain would have been invalid in the ensuing bankruptcy. Nevertheless, the garnishee's actions can be punished by contempt because the restraining notice was in fact violated. In *Vinos Argentinos Imports USA, Inc. v. Los Andes Imports, Inc.*, a judgment creditor served a restraining notice on the judgment debtor.[776] Thereafter, the president of the corporate debtor caused the debtor to make preferential payments to other creditors.[777] The debtor could have, but did not, file for bankruptcy.[778] The court refused to order these funds transferred to the judgment creditor, because, hypothetically, the debtor could have deprived the judgment creditor of these funds by filing for bankruptcy.[779] But, separately, the corporate debtor was penalized $25,000 and the president was penalized $10,000 for these payments.[780]

II. BANKS AND THE EXEMPT INCOME PROTECTION ACT

A. In General

In 2008, the New York legislature amended section 5222 to address a particular abuse of the elderly.[781] Today, New York, along

N.Y.S.2d 410, 410–11 (Civ. Ct. Queens County 1995). In fact, the automatic stay did not apply to either the debtor or to the post-petition property. *Id.* at 413–14. The bank, however, released the funds. *Id.* at 411. The court held the bank liable to the judgment creditor on the strength of *Medi-Physics*, which held that the restraining notice is consistent with the automatic stay. *Id.* at 413. In truth, the automatic stay was simply over. 11 U.S.C. § 362(c)(2) (2012). The restraining notice was effective on any theory of the automatic stay, and the bank should not have released the funds.

[775] 11 U.S.C. § 547(b)(3) (2012).

[776] Vinos Argentinos Imps. USA, v. Los Andes Imps., No. 91 Civ. 2587 (JSM), 1993 U.S. Dist. LEXIS 15826, at *1 (S.D.N.Y. Nov. 8, 1993).

[777] *Id.* at *4.

[778] *Id.*

[779] *Id.*

[780] *Id.*

[781] Exempt Income Protection Act, ch. 575, sec. 3–4, C.P.L.R. 5222–5222-a, 2008 N.Y. Laws 4085, 4088–93; Memorandum of Assemblymember Helene Weinstein in Support of A.8527-A to Governor David Patterson, July 29, 2008, N.Y. Bill Jacket, 2008 A.B. 8527-A, 231st Leg. Reg. Sess. (2008), ch. 575, at 6–7. This act is modeled upon a similar Connecticut statute. *See* CONN. GEN. STAT. ANN. § 52-367b (West 2013); Memorandum of Assemblymember Helene

with Pennsylvania, Connecticut, and California, are considered the jurisdictions most protective of the exemption rights of senior citizens, insofar as their bank accounts are concerned.[782]

Social security income is exempt property,[783] and the government typically wires these payments directly into the checking accounts of the recipients of this federal largesse.[784] Once the federal wire hits the recipient's checking account, the proceeds of the recipient's social security entitlement remain exempt.[785] According to 42 U.S.C. § 407(a), "none of the moneys paid . . . shall be subject to execution, levy, attachment, garnishment, or other legal process."[786]

Prior to 2008, if social security recipients had suffered a money judgment against them, plaintiffs would serve restraining notices on banks, followed by a sheriff's levy pursuant to an execution.[787] Banks often took no action to protect their customers. If the bank honored the restraining notice (even though the bank account was entirely exempt), it was "the responsibility of the judgment debtor to arrange to release a restrained account."[788] If the bank paid the sheriff pursuant to the levy, the bank was protected from liability by CPLR section 5209, which provides:

> A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.[789]

Weinstein in Support of A.8527-A to Governor David Patterson, July 29, 2008, N.Y. Bill Jacket, 2008 A.B. 8527-A, 231st Leg. Reg. Sess. (2008), ch. 575, at 6–7.

[782] Allen C. Myers, Note, *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment*, 66 WASH. & LEE L. REV. 371, 386–87 (2009).

[783] 42 U.S.C. § 407(a) (2006). Section 407 also applies to Supplemental Security Income benefits. 42 U.S.C. § 1383(d)(1) (2006). Social Security benefits are not exempt from alimony or child support claims. 42 U.S.C. § 659(a) (2006).

[784] In 2012, the percentage of social security recipients receiving wire transfers exceeded 94 percent. *Trend in Direct Deposit Participation*, SOC. SECURITY ADMIN., http://www.ssa.gov/deposit/trendenv.shtml (last visited Oct. 16, 2013).

[785] *See, e.g.*, Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1182 (S.D.N.Y. 1982).

[786] 42 U.S.C. § 407(a).

[787] *See* Johnson v. Chem. Bank, No. 96 Civ. 4262 (SS), 1996 US. Dist. LEXIS 18027, at *11 (S.D.N.Y. Dec. 9, 1996); *see also* Memorandum on Behalf of the New York Public Interest Research Group to Terryl Brown Clemons, Acting Counselt to the Governor, dated Sept. 23, 2008, N.Y. Bill Jacket, 2008 A.B. 8527-A, 231st Leg. Reg. Sess. (2008) L. 2008, ch. 575, at 42 (discussing the negative impacts restraining notices can have when placed on accounts owned by the poor and elderly).

[788] *Johnson*, 1996 US. Dist. LEXIS 18027, at *11.

[789] N.Y. C.P.L.R. 5209 (McKinney 2014).

B. A New Exemption

New CPLR section 5222(h) now provides that, under certain circumstances, the restraining notice does not affect $2,500 in the checking account.[790] These same limitations now also apply to executions.[791]

According to new section 5205(*l*), an exemption arises if a restraining notice is served on a "banking institution" or if the banking institution is levied pursuant to an execution.[792] If either of these events has occurred, the bank must determine: "[i]f 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 date a restraining notice was served on the banking institution."[793]

If all these conditions accrue, then the debtor's bank account is automatically exempt for $2,500. This is so whether or not the money in the account can be traced to an exempt income stream.[794]

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[790] N.Y. C.P.L.R. 5222(h) (McKinney 2014).

[791] According to CPLR section 5230(a) (third sentence):

> Except in cases when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that in those instances the execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony.", an execution notice shall state that, pursuant to subdivision (*l*) of section fifty-two hundred five of this article, two thousand five hundred dollars of an account containing direct deposit or electronic payments reasonably identifiable as statutorily exempt payments, as defined in paragraph two of subdivision (*l*) of section fifty-two hundred five of this article, is exempt from execution and that the garnishee cannot levy upon or restrain two thousand five hundred dollars in such an account.

N.Y. C.P.L.R. 5230(a) (McKinney 2014).

[792] N.Y. C.P.L.R. 5205(*l*)(1). New CPLR section 5205(n) defines "banking institution" as "all banks, trust companies, savings banks, savings and loan associations, credit unions, foreign banking corporations incorporated, chartered, organized or licensed under the laws of this state, foreign banking corporations maintaining a branch in this state, and nationally chartered banks." C.P.L.R. 5205(n).

[793] C.P.L.R. 5205(*l*)(1).

[794] *See* Martinez v. Capital One, N.A., 863 F. Supp. 2d 256, 259 (S.D.N.Y. 2012) ("Section 5222 also prohibits restraint of the first $1,740, regardless of the source of the funds."), *certifying questions to* New York Court of Appeals *sub nom*., Cruz v. TD Bank, N.A., 711 F.3d 261 (2d. Cir. 2013), *and certified questions accepted*, 988 N.E.2d 884; Acevado v. Citibank, N.A., No. 10 Civ. 8030 (PGG), 2012 U.S. Dist. LEXIS 40242, at *14–15 n.4 (S.D.N.Y. Mar. 23, 2012). In fact, funds already exempt under some other provision are not addressed by this amendment. This language creates an exemption in the bank account provided *some* direct deposits were made into the account. In short, the language creates a *new* exemption (at least from the restraining notice and sheriff's levy). *See* Cruz v. TD Bank, N.A., 855 F. Supp.

To be noted is that the exemption is tied to the choice of a debtor to receive exempt electronic funds transfers. Debtors who receive checks in the mail the old-fashioned way lose out on this new exemption.

New CPLR section 5205(*l*) gives a non-exclusive definition of what "statutorily exempt payments" may mean:

> any personal property exempt from application to the satisfaction of a money judgment under any provision of state or federal law. Such term shall include, but not be limited to, payments from any of the following sources: social security, including retirement, survivors' and disability benefits, supplemental security income or child support payments; veterans administration benefits; public assistance; workers' compensation; unemployment insurance; public or private pensions; railroad retirement; and black lung benefits.[795]

Not listed are ordinary wages. In terms of wages, CPLR section 5205(d) makes

> ninety percent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, *an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment* . . . .[796]

What if no income execution or requisite motion has ever been served? If the CPLR is read literally, the new exemption does not apply if wages are wired into a checking account, provided that no income execution has already been served.

Since the exemption presupposes an income execution or motion to secure earnings, a restraining notice absent such preconditions is apparently fully effective, as none of the wages are exempt.[797] Nevertheless, courts often overlook the absence of an income execution and just assume that wages are exempt.[798] On the text of

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2d 157, 167 (S.D.N.Y. 2012), *certifying questions to* New York Court of Appeals, 711 F.3d 261 (2d Cir. 2013), *and certified questions accepted*, 988 N.E.2d 884.

[795] C.P.L.R. 5205(*l*)(2).

[796] C.P.L.R. 5205(d)(2) (emphasis added).

[797] McLoughlin v. Altman, No. 92 Civ. 8106 (KMW)(MHD), 1997 U.S. Dist. LEXIS 11413, at *8 (S.D.N.Y. Aug. 7, 1997) ("[T]he statutory exemption is keyed to the delivery of an income execution to the sheriff or the filing in court of a motion to apply the debtor's income to the judgment . . . .").

[798] *In re* Wrobel, 268 B.R. 342, 344 (Bankr. W.D.N.Y. 2001); *In re* Coolbaugh, 250 B.R. 162, 166–67 (Bankr. W.D.N.Y. 2000) (tracing rule presumed all withdrawals within sixty days of

the CPLR, this is not justified. In any case, this judicial innovation as to the wage exemption at least means that New York is in compliance with federal legislation, which commands that state legislation permit the garnishment of no more than 25 percent of income.[799] If this instinct is followed, a wage earner who receives wire transfers from his employer is entitled to the $2,500. A wage earner who deposits ordinary checks is not so entitled. It is hard to make sense of this distinction based on wire transfers, except that the legislature was thinking of social security recipients, who almost always receive wire transfers.

Returning then to the new limitation on restraining notices, the bank is expressly ordered not to restrain $2,500.[800] If the account has less than $2,500 in it, the restraining notice is "deemed void."[801] It is not clear what happens if the debtor maintains more than one account with the bank. Should the bank aggregate all the accounts together, or does the debtor get $2,500 from each of her several accounts? At least one court requires all the accounts to be aggregated together.[802]

The new rules lead to peculiarities. Suppose a judgment debtor wins the lottery and his account had $2,501 in it at the time the bank received the restraining notice. The lottery winnings are successfully restrained. Suppose, however, the account had only $2,499. The account is not restrained, and the debtor may draw upon the lottery winnings at will. Furthermore, had the garnishee been a nonbank, the judgment creditor would need a court order to permit a second restraining notice to be served on the garnishee.[803] Where the garnishee is a bank, the court may not order that a new restraining notice be served. According to CPLR section 5222(c), "[a] judgment creditor shall not serve more than two restraining notices per year upon a natural person's banking institution account."[804] There is, however, an oddly contradictory third sentence in section 5222(h): "Nothing in this subdivision shall be

bankruptcy are withdrawals of exempt wages; the leftovers are presumed to be non-exempt cash).

[799] 15 U.S.C. § 1673(a)(1) (2012). This act permits garnishment to rise to 65 percent if family support obligations are due and owing. *Id.* § 1673(b)(2)(B).

[800] N.Y. C.P.L.R. 5222(h) (McKinney 2014).

[801] *Id.*

[802] Calton v. Pressler & Pressler, LLP, No. 10 Civ. 2117 (LMM), 2011 U.S. Dist. LEXIS 119284, at *9–10 (S.D.N.Y. Aug. 22, 2011).

[803] C.P.L.R. 5222(c) ("Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order.").

[804] *Id.*

construed to limit a banking institution's . . . obligation to restrain . . . such funds from the judgment debtor's account if required . . . by a court order."[805] It therefore appears to be the case that a second restraining notice against a bank might be issued, but perhaps not within the span of a single year.[806] At moments like these, it is also wise to remember that, according to CPLR section 5240, "[t]he court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."[807] Undoubtedly, it is in the discretion of a court to ignore *any* relevant provision in Article 52 of the CPLR.[808]

Whether or not exempt income streams are wired into a bank account, a restraining notice issued to a bank is ineffective for amounts below $1,740 as of July 24, 2009.[809] This amount is declared to be 240 times the hourly minimum wage.[810] After that time, the minimal exemption must be calculated afresh according to the current minimum wage.[811] As of May 2013, the minimum wage was $7.25.[812] So the $1,740 minimum still holds.[813]

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[805] C.P.L.R. 5222(h).

[806] *See* C.P.L.R. 5222(c). The limit of two restraining notices per year on a bank was added to placate the opposition of the New York Bankers Association to the EIFTA. Infranca, *supra* note 42, at 1158.

[807] N.Y. C.P.L.R. 5240 (McKinney 2014).

[808] For example, in Sec. & Exch. Comm'n v. Pentagon Capital Mgmt. PLC, a restraining notice was served on the debtor, which prevented the debtor from paying attorneys fees. Sec. & Exch. Comm'n v. Pentagon Capital Mgmt. PLC, 08 Civ. 3324(RWS), 2013 U.S. Dist. LEXIS 151298, at *1–2, *10–11 (S.D.N.Y. Oct. 21, 2013). The court acknowledged that CPLR section 5222 provides no exception for debtor payments to attorneys, but, thought the court, this was unfair. *Id.* at 11, 17. It therefore used CPLR section 5240 to legislate that debtors can pay their attorneys in spite of the restraining notice. *Id.* at 17–18.

[809] C.P.L.R. 5222(i). If a debtor has four banking accounts, each under $1,740, the restraining notice nevertheless applies to an amount above $1740 (after the accounts are aggregated). Calton v. Pressler & Pressler, LLP, No. 10 Civ. 2117 (LMM), 2011 U.S. Dist. LEXIS 119284, at *9–10 (S.D.N.Y. Aug. 22, 2011); *see also* Chase Bank U.S., N.A. v. Greene, No. 170519/2008, 2009 N.Y. Misc. LEXIS 2077, at *1–3 (Civ. Ct. Queens County July 21, 2009) (reporting the exemption to be $1,716, for a restraining notice served before July 21, 2009, and denying a turnover order for a lesser amount in an uncontested hearing).

[810] C.P.L.R. 5222(i).

[811] *Id.*

[812] 29 U.S.C. § 206(a) (2006 & Supp. V 2011).

[813] *See* C.P.L.R. 5222(i). A 2009 amendment to section 5230(a) (fourth sentence) requires that an execution served on a bank set forth the rule that it

> shall not apply to an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the

The minimum can be lowered by court order by the amount "a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents."[814] Presumably a judgment creditor may obtain this relief in advance of serving the restraining notice on the bank, and presumably the debtor is entitled to notice with regard to the motion. By the time the hearing occurs, the debtor will have had plenty of time to empty out the exempt part of the bank account. So this opportunity is unlikely to provide much solace to creditors.[815]

The bank may charge a fee for receiving a restraining notice.[816] If the restraining notice has no bite (as where the checking account have less than $1,740 in it), the bank may not charge a fee.[817] This is a change from former law, where banks could charge fees even though a bank account was entirely exempt.[818]

None of these limitations on bank restraints applies when the creditor is the state or a municipality of New York, or if the debt is

> for child support, spousal support, maintenance or alimony, provided that the restraining notice contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of

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> earnings are payable, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents.

N.Y. C.P.L.R. 5230(a) (McKinney 2014). Whereas the restraining notice has a limit at $1,740, the execution's limit is lower—90 percent of $1,740, or $1,566. *Id.* This limit does not apply

> in cases when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that in those instances the execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony." . . . .

Id. For good measure, these restrictions are repeated with respect to levies on banking institutions. N.Y. C.P.L.R. 5232(e) (McKinney 2014). No such limitation appears as to prejudgment attachment, however. *See* N.Y. C.P.L.R. 6214(b) (McKinney 2014).

[814] C.P.L.R. 5222(i).

[815] In *Portfolio Recovery Associates v. Calderia*, 881 N.Y.S.2d 870 (Dist. Ct. Nassau County 2009), although the court noted that the exemption applies to levies and restraining notice, but not to turnover proceedings, the court nevertheless gave a debtor in a turnover proceeding an opportunity to show that the exempt amount was necessary for the reasonable requirements of the judgment debtor. *Id.* at 873. If the debtor defaulted, the court indicated its willingness to order the turnover over the entire account. *Id.* at 874.

[816] *See* McCarthy v. Wachovia Bank, N.A., 759 F. Supp. 2d 265, 270, 273–74 (E.D.N.Y. 2011).

[817] C.P.L.R. 5222(j).

[818] *See generally* McCahey v. L.P. Investors, 774 F.2d 543, 545 (2d Cir. 1985) (noting that judgment debtor was charged a $10 fee by her bank when it received a restraining notice for her account and sent her a letter informing her of the same).

> New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony.".[819]

It may be noted that CPLR section 5222(h) and (i) are not restricted to individuals with bank accounts. But these subsections do require that a bank receive direct deposits of exempt income streams. So corporate entities, indirectly, are not entitled to the minimal exemptions described therein.

C. Notice to the Debtor in the Case of Bank Accounts

New section 5222-a piles extra burdens on the shoulders of creditors who would restrain bank garnishees.[820] These restrictions equally apply to sheriffs levying under executions.[821] The judgment creditor serving the restraining notice must provide the bank an exemption notice that the bank can mail its customer, plus two copies of exemption claim forms for the bank to send to the customer.[822] The content of these forms is precisely set forth in the statute.[823] Failure of a creditor to tender the proper forms renders the restraining notice invalid.[824] The bank is commanded *not* to restrain the account if the proper forms are not received.[825] Earlier, we saw that a garnishee can *choose* to be bound by a restraining notice that is not technically valid.[826] But after 2008, this is no longer true in consumer cases, where a bank is the garnishee into which exempt funds are wired.

As of 2008, the sheriff is similarly burdened when levying a bank under an execution.[827] If the sheriff fails to provide these forms, the entire execution is void.[828] Suppose a sheriff levies on a Monday but

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[819] C.P.L.R. 5222(k).

[820] N.Y. C.P.L.R. 5222-a(a) (McKinney 2014). *See generally* Infranca, *supra* note 42, at 1154–58 (discussing laws that California, Connecticut, New York, and Oregon instituted to protect exempt benefits held in bank accounts).

[821] C.P.L.R. 5222-a(a). The failure of the sheriff to bear the procedural burdens of the EIPA negates the levy. And if the levy is no good, the commencement of a turnover proceeding obviously does not extend it. LR Credit 21, LLC v. Burnett, No. CV-013186-13, 2013 N.Y. Misc. LEXIS 2635, at *4–6 (Dist. Ct. Nassau County June 24, 2013).

[822] C.P.L.R. 5222-a(b)(1).

[823] *See* C.P.L.R.5222-a(b)(4).

[824] C.P.L.R. 5222-a(b)(1).

[825] Jackson v. Bank of Am., N.A., No. 15145/2011, 2013 N.Y. Misc. LEXIS 2465, at *15–16 (Sup. Ct. Kings County 2013).

[826] See supra text accompanying notes 651–74.

[827] C.P.L.R. 5222-a(b)(2).

[828] *Id.*

forgets the required forms. The sheriff corrects the mistake on Tuesday. Too late. The levy was void as of Monday.

D. Bank Duties in the Case of Restraining Notices and Executions

The EIPA imposes new obligations of banks served with restraining notices and executions. Unlike section 5222(d), which was added in 1985 to address constitutional issues, CPLR section 5222-a may not correct constitutional errors, but is based on sub-constitutional notions of fairness.[829]

Under CPLR section 5222-a, the bank, within two business days, must serve the judgment debtor with a copy of the restraining notice, the exemption notice, and the two exemption claim forms.[830] Service must be at the last known address of the judgment debtor.[831]

Although section 5222-a generally applies only to "banking institutions,"[832] there is a sentence that applies to "depository institutions."[833] According to this sentence, "[t]he inadvertent failure by a depository institution to provide the notice required by this subdivision shall not give rise to liability on the part of the depository institution."[834] "Depository institution" is not a defined term,[835] and it may well be that the legislative pen slipped here. I will therefore assume that the legislature intended *banking* institutions to have this immunity.

If inadvertent failure to perform these duties engenders no

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[829] McCahey v. L.P. Investors, 774 F.2d 543, 547–54 (2d Cir. 1985) (holding pre-2009 regime constitutional, though the bank froze an account containing only exempt funds); Mayers v. N.Y. Cmty. Bancorp, Inc., No. CV-03-5837 (CPS), 2005 U.S. Dist. LEXIS 20279, at *26–27, *34–53 (E.D.N.Y. Aug. 31, 2005) (refusing to dismiss a complaint alleging unconstitutionality of the restraining notice procedure, in light of the changed circumstance of wire transfers into bank accounts allowing banks to ascertain whether funds are exempt); Huggins v. Pataki, No. 01 CV 3016 (JG), 2002 U.S. Dist. LEXIS 13664, at *9–12 (E.D.N.Y. July 11, 2002) (following the holding in McCahey); *see also* Granger v. Harris, No. CV-05-3607 (SJF)(ARL), 2007 U.S. Dist. LEXIS 30076, at *22 (E.D.N.Y. Apr. 17, 2007) (refusing to dismiss due process claim where bank paid pursuant to a levy); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1360–63 (2012) (discussing the *Mayers* and *Huggins* decisions); Myers, *supra* note 780, at 397–99 (discussing the *Mayers* and *Granger* decisions).

[830] C.P.L.R. 5222-a(b)(3).

[831] *Id.*

[832] C.P.L.R. 5222-a(a).

[833] C.P.L.R. 5222-a(b)(3).

[834] *Id.*

[835] *But see* N.Y. BANKING LAW § 599-b (McKinney 2014) ("'Depository institution' has the same meaning as in section three of the Federal Deposit Insurance Act, and includes any credit union.").

liability, it certainly would seem fair to conclude that *purposeful* failures do give rise to liability. One New York justice has so held.[836] But the New York Court of Appeals has recently disagreed. *Cruz v. TD Bank, N. Am. (Cruz III)*,[837] involved certified questions from two class actions commenced in federal court claiming that banks were deliberately ignoring their EIPA duties.[838] In one of these cases, plaintiffs alleged that a bank received a restraining notice without the required exemption notices for the bank to forward to their customers.[839] Properly, the restraining notices were invalid.[840] The bank nevertheless improperly restrained the bank accounts and also charged a fee against their customers, which was improper, given the invalidity of the restraining notice.[841]

In the other case, a different bank allegedly failed to forward the required notifications and forms to their customers.[842] Both these class actions were dismissed, and the plaintiffs appealed.

In the certification proceeding, the New York Court of Appeals, in an unconvincing opinion, came down squarely on the side of the banks and against senior retirees. As a result, banks are informed that, if they deliberately ignore the EIPA, they will not owe damages in a plenary action and probably not under any circumstances. To understand the weakness of the court's opinion,

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[836] Jackson v. Bank of Am., N.A., No. 15145/2011, 2013 N.Y. Misc. LEXIS 2465, at *54 (Sup. Ct. Kings County May 21, 2013) ("Moreover, the EIPA provides a protection to banks who 'inadvertently' fail to provide its customers with the restraining notice, exemption notice and exemption claim forms. Why would the legislature make only this specific exclusion of liability for banks if no other causes of action or theories of liability exist?" (emphasis omitted)).

[837] Cruz v. TD Bank, N.A. (*Cruz III*), 2 N.E.3d 221, 230 (N.Y. 2013).

[838] Cruz v. TD Bank, N. Am., 855 F. Supp. 2d 157, 165 (S.D.N.Y. 2012), *certifying question to* 711 F.3d 261 (2d Cir. 2013), *certified question answered by* 979 N.Y.S.2d 257 (N.Y. 2013), *aff'd*, No. 12-1200-cv, 2013 U.S. App. LEXIS 25076 (2d Cir. Dec. 18, 2013); Martinez v. Capital One, N. Am., 863 F. Supp. 2d 256, 261 (S.D.N.Y. 2012), *certifying question to sub. nom.*, Cruz v. TD Bank, N.A., 711 F.3d 261 (2d Cir. 2013), *certified question answered by* 2 N.E.3d 221 (N.Y. 2013).

[839] *Cruz III*, 2 N.E.3d at 261; N.Y. C.P.L.R 5222-a(b)(1) (McKinney 2014).

[840] C.P.L.R. 5222-a(b)(1) (McKinney 2014).

[841] *Cruz III*, 2 N.E.3d at 261; N.Y. C.P.L.R. 5222(j) (McKinney 2014) ("In the event that a banking institution served with a restraining notice cannot lawfully restrain a judgment debtor's banking institution account, or a restraint is placed on the judgment debtor's account in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.").

[842] *Martinez*, 863 F. Supp. 2d at 260–61. The bank disputed the accuracy of the allegation, but given the motion to dismiss for failure to state a cause of action, the appellate courts were obliged to treat the allegations as true. *See id.* at 260 n.4.

however, it is best to consider the state of New York law in 2008, when the EIPA was enacted.

1. Debtor Remedies When the CPLR Is Violated

As we have seen, courts routinely award damages to judgment creditors when a garnishee violates a restraining notice.[843] Indeed, the court of appeals, in *Aspen Industries, Inc. v. Marine Midland Bank*,[844] stated in dictum, "violation of the restraining notice by the party served . . . subjects the garnishee to personal liability *in a separate plenary action* or a special proceeding under CPLR article 52 brought by the aggrieved judgment creditor."[845] A plenary action is one commenceable by formal pleadings sounding in tort[846] or contract[847] (as opposed to summary proceedings connected with enforcement of judgments, which are much less formal).[848]

Plenary actions for damages when a restraining notice is violated suggested to the *Cruz* court that there is a link between *violation of a court order* authorized by the CPLR and the right to damages in a plenary action.[849] Where, however, there is no court order, yet the garnishee violates the law, the violation will not constitute a tort generating a plenary action.

Yet counter-examples exist. According to CPLR 6219, a garnishee is obligated to

> serve upon the sheriff a statement specifying all debts of the garnishee to the defendant, when the debts are due, all property in the possession or custody of the garnishee in which the defendant has an interest, and the amounts and

[843] Sumitomo Shoji N.Y., Inc. v. Chemical Bank N. Y. Trust Co., 263 N.Y.S. 2d 354, 358 (Sup.Ct. New York County. 1965), *aff'd mem.*, 24 A.D.2d 499, 267 (App. Div. 1st Dep't. 1966).

[844] Aspen Indus., Inc. v. Marine Midland Bank, 421 N.E.2d 808 (N.Y. 1981).

[845] *Id.* at 881 (emphasis added). The court tracks the same language found in *Security Trust Co. v. Magar Homes*, 461 N.Y.S.2d 103, 104 (App. Div. 4th Dep't. 1983). In *Magar*, damages were not awarded because an agent of the third party did not forward the restraining notice to the third party, who therefore had no actual knowledge of it. *Id.* Where the underlying money judgment is paid, the cause of action for violating the restraining notice evaporates. Tri-Mar Contractors, Inc. v. Bank of Suffolk Cnty., 440 N.Y.S.2d 556, 556–57 (App. Div. 2d Dept. 1981); Global Tech., Inc. v. Royal Bank of Can., No. 150151(MDS), 2012 N.Y. Misc. LEXIS 47, at 44 (Sup.Ct. New York County. 2012). Attorneys' fees may not be recovered as damages for violating the restraining notice. *Id.* at 44–45.

[846] Oberly v. Bangs Ambulance, Inc., 751 N.E.2d 457, 458 (N.Y. 2001).

[847] White House Manor, Ltd. v. Benjamin, 899 N.E.2d 941, 946 (N.Y. 2008).

[848] Cent. Republic Bank & Trust Co. v. Caldwell, 58 F.2d 721,731–32 (8th Cir. 1932).

[849] Cruz v. TD Bank, N.A. (*Cruz III*), 2 N.E.3d 221, 232 (N.Y. 2013).

value of the debts and property specified.[850]

In *Leber-Krebs, Inc. v. Capitol Records*,[851] a plaintiff had obtained an *ex parte* order of attachment, which must be reaffirmed by a court within five or perhaps ten days of a levy.[852] The levy of an order of attachment restrains the garnishee from paying a debt to the defendant or conveying defendant property and to pay a debt or deliver property to the sheriff.[853] The levy is, however, not a court order. The order of attachment is an order, but it is an order to the *sheriff*, not the garnishee.[854] The garnishee knowingly filed a false report, claiming no debt was owing. As a result of the false report, the court dissolved an order of attachment. The garnishee, then, never did violate a court order. The garnishee's falsehood sustained a plenary action for damages, even though the garnishee never violated a court order.

Here we have at least one example of a case that de-links contempt of court and the right to damages. Of course, *Capitol Records* is an "*Erie* guess" on the content of New York law. In due course, we will consider, then, whether *Cruz III* overrules *Capitol Records*, inviting garnishees to file false reports free of tort liability.

Another example of damages awarded for technical violations of the CPLR in the absence of a court order is *Adinolfi v. Solimine*.[855] In this case, a city marshal had the duty to "forthwith serve a copy of the execution . . . upon the person from whose possession or custody the property was taken."[856] The marshal did not do this, which justified a new action against the marshal in small claims court.[857] In this respect, the marshal can be compared to a

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[850] N.Y. C.P.L.R. 6219 (McKinney 2014).

[851] Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895, 896 (2d Cir. 1985).

[852] *See id.* If the order of attachment is based on the defendant being a nondomiciliary, the plaintiff must move within ten days of the levy for an ordering confirming the order of attachment. N.Y. C.P.L.R. 6211(b) (McKinney 2014). If the order of attachment is based on some other ground, the plaintiff's motion must be made within five days of the levy. *Id.*

[853] N.Y. C.P.L.R. 6214(b) (McKinney 2014).

[854] C.P.L.R. 6211(a). An order of attachment

> shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.

Id.

[855] Adinolfi v. Solimine, 682 N.Y.S.2d 341, 341 (App. Term 2d Dep't 1998).

[856] *Id.* (quoting N.Y. C.P.L.R. 5232(b) (McKinney 2014)).

[857] *See Adinolfi*, 682 N.Y.S.2d at 341. *Cf.* Cais v. Pichler, 473 N.Y.S.2d 719, 721 (Civ. Ct. New York County 1984) (holding that, as per CPLR 5232, the sheriff did not have to serve the

garnishee with duties not stemming from a direct court order. Both cooperate in the levying process and are assigned duties by the CPLR.

For our present purpose, it can be observed that, as of 2008, when the legislature enacted the EIPA, plenary actions were authorized for violation of court orders and for violation of CPLR duties imposed on garnishees or sheriffs, where no court injunction is involved.

Separately, CPLR 5239 provides for a "special proceeding" against garnishees. A special proceeding, governed by Article 4 of the CPLR, greatly accelerates the pace of the litigation.[858] According to CPLR Section 5239:

> Prior 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. . . . The court may . . . direct that *damages be awarded* . . . . If the court determines that any claim asserted was fraudulent, it may require the claimant to pay to any party adversely affected thereby the reasonable expenses incurred by such party in the proceeding, including reasonable attorneys' fees, and any other damages suffered by reason of the claim. The court may permit any interested person to intervene in the proceeding.[859]

By its terms, CPLR section 5239 actions must be commenced before "application of property . . . by a sheriff."[860] Thus, a bank that has somehow misbehaved cannot be reached under CPLR section 5239 if the bank has paid over the bank account to the sheriff and the sheriff has forwarded that money to the judgment creditor. Nevertheless, if this deadline is a problem, a judgment debtor can seek relief under CPLR section 5240, which invites the court "*at any time* . . . [on] the motion of any interested person . . . [to] make an order denying, limiting, conditioning, regulating,

judgment debtor with a notice of execution in Connecticut). A sheriff was sued in a plenary action on the same basis for seizure of a vehicle, but the sheriff won summary judgment on the merits. *Id.* at 722.

[858] *See* N.Y. C.P.L.R. 403(b) (McKinney 2014).

[859] N.Y. C.P.L.R. 5239 (McKinney 2014).

[860] *Id.*; *see* Lincoln Fin. Servs., Inc. v. Miceli, No. 2342/01(AME), 2007 N.Y. Misc. LEXIS 6811, at *6–8 (Dist. Ct. Nassau County Oct. 9, 2007).

extending or modifying the use of any enforcement procedure."[861] It is to be noted that CPLR section 5239 refers directly to the award of damages, whereas CPLR section 5240 does not. Rather, CPLR section 5240 invites the court to extend or limit an enforcement procedure. It is difficult to characterize the award of tort damage as the modification of a procedure authorized by CPLR Article 52.

To summarize, without question debtors prior to EIPA had rights under CPLR sections 5239 and 5240. But they also had the right to bring plenary actions for violations of duties imposed by the CPLR. This was so even if a court order did not generate contempt penalties for violating the order. The point is important in that, according to CPLR section 5222-a(h): "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."[862] If debtors could bring plenary actions prior to 2008, clearly the EIPA did not intend to take that right away.

2. The Immunity For Banks

Against this background of tort liability for violating CPLR duties, the legislature, in enacting the EIPA, provided a limited safe harbor in the EIPA for banks: "The inadvertent failure by a depository institution to provide the notice required by this subdivision shall not give rise to liability on the part of the depository institution."[863] The background liability regime (assuming *Capitol Records* was correctly decided) is that *deliberate* violations of CPLR duties continue to be tortious under New York law. Indeed, the false report in *Capitol Records* was intentional, and it gave rise to tort damages.[864]

The *Cruz* court, however, decided that intentional wrongdoing by garnishee banks is not tortious, in the sense of giving rise to a cause of action for damages. In so ruling, the *Cruz* court ignored the *Erie* guess in *Capitol Records* and assumed that tort damages in plenary actions are available only when linked to contempt of court.

> Plaintiffs seize on the dictum [in *Aspen*] referencing "a

[861] N.Y. C.P.L.R. 5240 (McKinney 2014) (emphasis added).

[862] N.Y. C.P.L.R. 5222-a(h) (McKinney 2014) (emphasis added).

[863] C.P.L.R. 5222-a(b)(3).

[864] *See* Leber-Krebs, Inc., v. Capitol Records, 779 F.2d 895, 900–01 (2d Cir. 1985). The report was "a damaging lie constituting a fraud on plaintiff and on the court." *Id.* at 896.

> separate plenary action" to argue that a judgment debtor should be able to bring a plenary action for money damages 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; 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. 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.[865]

Given this narrow and probably erroneous view of the background enforcement regime, the *Cruz* court was able to characterize the plaintiffs' position as a false application 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."[866] Thus, the plaintiff's theory of liability was a "new" theory, not one previously supplied by the preexisting tort law of New York:

> 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" . . . Put another way, if the Legislature had intended to impose new liability on banks when they act as garnishees of the funds of judgment

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[865] Cruz v. TD Bank (*Cruz III*), N.A., 2 N.E.3d 221, 231–32 (N.Y. 2013) (citations and internal quotation marks omitted). *Capitol Records* involved a violation of a technical duty under Article 62, pertaining to prejudgment attachment, rather than post-judgment execution. *Capitol Records,* 779 F.2d at 896.

[866] *Cruz III*, 2 N.E.3d at 227.

debtors, it would have said so in the statute.[867]

Insisting that the plaintiffs' were claiming a "new" tort theory created only with the enactment of the EIPA (as opposed to an "old" theory that the CPLR gives rise to tort duties), the court was able to tap into the line of cases governing the implicit creation of "new" private causes of action.[868] These cases tend to show that when a statutory regime provides for some limited remedy, the legislature must have intended no private right of action for the victims of wrongdoing.[869] For example, the creation of a power of the Department of Social Services to appoint receivers to operate adult care facilities does not give a private right of action for the patients to seek a receiver, because the Department was intended to have "discretion" in such cases.[870] A statute promoting the monitoring of foster homes for children, coupled with a penalty imposed on local social services districts, did not create a new tort on behalf of children abused by foster parents.[871]

None of these cases are relevant if it is agreed that, in the absence of a court order, the CPLR imposes tort duties on garnishees.[872] If

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[867] *Id.* at 228 (citation omitted) (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[868] *Cruz III*, 2 N.E.3d at 226–27 (citing Schlessinger v. Valspar Corp., 991 N.E.2d 190, 193 (N.Y. 2013); Metz v. New York, 982 N.E.2d 76, 80 (N.Y. 2012); Stray from the Heart, Inc. v. Dep't of Health and Mental Hygiene of N.Y.C., 982 N.E.2d 594, 595 (N.Y. 2012); McLean v. New York, 905 N.E.2d 1167, 1171 (N.Y. 2009); New York v. Smokes-Spirits.Com, Inc., 911 N.E.2d 834, 842–43 (N.Y. 2009); Hammer v. American Kennel Club, 803 N.E.2d 766, 768 (N.Y. 2003); Mark G. v. Sabol, 717 N.E.2d 1067, 1071 (N.Y. 1999); Uhr v. East Greenbush Cent. Sch. Dist., 720 N.E.2d 886, 888 (N.Y. 1999); Carrier v. Salvation Army, 667 N.E.2d 328, 329 (N.Y. 1996); Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18, 20, 22 (N.Y. 1989)).

[869] *E.g.*, *Cruz III*, 2 N.E.3d at 226–27.

[870] *Carrier*, 667 N.E.2d at 330.

[871] *Sabol*, 717 N.E.2d at 1071.

[872] Equally irrelevant is the court's observation that the EIPA was inspired by Connecticut legislation. "Connecticut, however, explicitly imposes liability on banks in its statute." *Cruz III*, 2 N.E.3d at 228. Because New York did not likewise express a rule of liability, the legislature supposedly intended there to be no liability in a plenary action. *Id.* at 231. But if the legislature assumed generally that violation of CPLR duties is tortious, there was no need for the legislature to express what was already the law of New York. In any case, the court is comparing New York apples to Connecticut oranges. The Connecticut law holds that if a financial institution unlawfully "pays exempt moneys from the account of the judgment debtor . . . such financial institution shall be liable in an action therefor to the judgment debtor for any exempt moneys so paid and . . . shall refund or waive any charges of fees . . . ." CONN. GEN. STAT. § 52-367b(n) (2013). The *Cruz* court thought that the "conscious variance with the Connecticut statute suggests that the Legislature did not wish to create the same remedy against banks that Connecticut did." Cruz v. TD Bank, N.A., 855 F. Supp. 2d 157, 173–74 (S.D.N.Y. 2012), *reserved*, 711 F.3d 261 (2d Cir. 2013) (citing *Sabol*, 717 N.E.2d at 1071), *question certified to* 2 N.E.3d 221 (N.Y. 2013), *aff'd*, 12-1200-cv, 12-1342-cv, 2013 U.S. App. LEXIS 25076 (2d Cir. Dec. 18, 2013). In fact, the wrong alleged in *Cruz* did not pertain to the payout of exempt funds. *See Cruz III*, 2 N.E.3d at 225. The wrong involved failure to

so, then the legislature enacted the EIPA with this background in mind. The proposition of the Court of Appeals—that any banks intentionally violating the rights of senior citizens are not liable for doing so—must be viewed as wrong, or at least highly regrettable.

3. The Adequacy of Other Remedies

The "implied right of action" cases typically emphasize that remedies legislatively supplied negate the implication of private rights of action. Thus, enforcement in government officials implies no right of action for ordinary citizens harmed by a statutory violation.[873] These cases inspired the *Cruz III* court to find that the legislature already supplied adequate remedies for judgment debtors wronged by bank indifference.[874] These remedies are the above-quoted CPLR section 5239 and section 5240. CPLR section 5239 and section 5240 were in place long before the EIPA was enacted.[875] Therefore *Cruz III* implies a legislative intent to limit senior citizens unlawfully treated by banks to just these remedies.[876] If, however, these remedies are defective and unable to guard the rights of senior citizens, then the persuasiveness of the court's remarks is certainly undercut.

We have mentioned that section 5239 mentions the award of damages, but, as the *Cruz* court does not acknowledge, actions under section 5239 are temporally limited.[877] The action must be commenced before the sheriff receives and disposes of the funds obtained in a levy.[878]

Suppose a creditor properly supplies the garnishee bank with

send the exemption notice or the restraining notice. *Id.* Therefore, the observation about Connecticut law is useless.

[873] Schlessinger, 991 N.E.2d at 192; Metz, 982 N.E.2d at 79–80 (citing *McLean*, 905 N.E.2d at 1172).

[874] *See Cruz III*, 2 N.E.3d at 231.

[875] *Compare* N.Y. C.P.L.R. 5239 (McKinney 2014) (effective in 1994), *and* N.Y. C.P.L.R. 5240 (McKinney 2014) (effective in 1963), *with* Exempt Income Protection Act of 2008, ch. 575, 2008 N.Y. Sess. Laws 4085, 4085 (codified as amended in scattered sections of N.Y. C.P.L.R.) (ratified in 2008); *see also Cruz III*, 2 N.E.3d at 225 (citing N.Y. C.P.L.R. 5221(a) (McKinney 2014)) (quoting N.Y. C.P.L.R. 5239; N.Y. C.P.L.R. 5240) ("The EIPA did not alter the pre-existing 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, nor did it restrict the power of the court to 'make an order denying, limiting, condition, regulating, extending or modifying the use of any enforcement procedure.'").

[876] *See Cruz III*, 2 N.E.3d at 225.

[877] *See* N.Y. C.P.L.R. 5239.

[878] *Id.*

forms, but the bank does not forward these to the judgment debtor. Instead, the bank simply restrains the account. The debtor, who has not received the proper notice and advice, will have to know that any claim to damages must be filed before the levy. This burden is somewhat mitigated by the fact that, when the creditor serves an execution on the sheriff, the sheriff has an independent duty to supply the bank garnishee with the exemption claim forms.[879] But suppose our bank garnishee does not forward *these* forms either. The bank is enjoined against paying the sheriff for 27 days, giving time for the debtor to make the exemption claim that should have been sent to the debtor (but was not). After 30 days, if no exemption claim is made, the bank can pay the sheriff the entire amount above the $1716 amount that is in all cases reserved for the debtor. Once this payment is made and once the sheriff forwards the funds to the creditor, the opportunity for a section 5239 action terminates.[880]

If it is too late to bring such an action, section 5240 has no time limits,[881] but section 5240 refers only to the modification of

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[879] N.Y. C.P.L.R. 5232(g) (McKinney 2014) ("Where a levy by execution pursuant to this section is made against a natural person's account at a banking institution, the sheriff or support collection unit shall serve the banking institution with the exemption notice and two exemption claim forms prescribed in subdivision (b) of section fifty-two hundred twenty-two-a of this article.").

[880] *See* N.Y. C.P.L.R. 5239.

[881] N.Y. C.P.L.R. 5240; *see also Cruz III*, 2 N.E.3d at 230 ("Comparable relief would be available under CPLR 5240, even after the assets have been transferred to the judgment creditor . . . ."). The *Cruz* court's comment should put to rest the questionable *Erie* guess in *Mikulec v. United States*, 705 F.2d 599 (2d Cir. 1983), *JC* had docketed against *JD*. *JD*'s mother (X) bought *JC*'s lien just before a scheduled execution sale. The judgment in question was for $121,008.44. Then X bid in $50 of her judgment and won the auction. Among the foreclosed parties was a junior federal tax lien.

The Internal Revenue Service ("IRS") has, by federal law, a redemption right after an execution sale. According to 28 U.S.C. § 2410(d):

> In any case in which the United States redeems real property . . . the amount to be paid for such property shall be the sum of -
>
> (1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale) . . . .

The IRS claimed the redemption price was 58$ plus interest. *X* claimed that the redemption price was $121,008.44, because, under *Wandschneider v. Bekeny*, 346 N.Y.S.2d 925 (N.Y. Sup. Ct. 1973), her judgment was reduced by the fair market value of the property (which apparently exceeded the amount of the judgment). The *Mikulec* court ruled for the IRS, on the ground that *Wandschneider* had been limited by *Guardian Loan Co. v. Early*, 392 N.E.2d 1240 (1979). Accoring to the Mikulec court, "[U]nder *Guardian Loan* [section] 5240 cannot be used to invalidate sales or to adjust rights following a transfer of title regardless of the identity of the purchaser." *Mikulec*, 705 F.2d at 602. This was a poor reading of *Guardian Loan*. *See* Carlson, *Critique I, supra* note 1, at 1339–41. The remarks by the *Cruz* court about the lack of time restraints under section 5240 corrects the impaired *Erie* intuition in

"enforcement procedures." Awarding of damages does not seem to be authorized directly. Therefore, *Cruz III* hints that damages against the bank for deliberate violations of the EIPA depend on senior citizens starting a section 5239 action before the bank (who should have ignored the levy) actually paid the sheriff and before the sheriff forwards the funds to the judgment creditor. At best a senior citizen may have a restraint removed or an order that the judgment creditor reimburse the senior citizen for exempt funds wrongfully paid out.

The court goes on to say that "[c]omparable relief would be available under CPLR 5240, even after the assets have been transferred to the judgment creditor."[882] But the examples the courts give come at the expense of the judgment creditor, not from the bank. Unless somehow it is possible to say that a damage award can be characterized as "denying, limiting, condition, regulating, extending or modifying the use of any enforcement procedure,"[883] it appears that the court has imposed a burdensome time limit on senior citizens. They must obtain fee reimbursements or other damages before the sheriff forwards funds to the creditors. Otherwise not at all.

The *Cruz* court specifically mentions that section 5239 would sustain an action against the bank for "reimbursement of any bank fees improperly charged."[884] This remark is well justified by the reference in section 5239 to damage awards. An unlawful fee would appear to be in the nature of a damage award. But does the court mean that bank customers no longer have a cause of action for wrongfully set off fees (when the fee involves a restraining notice)? It would appear that is exactly what the court implies.

Yet the bank's safe harbor immunizes it from "inadvertent" failure to forward exemption claims. Charging an illegal fee would appear to be well beyond this safe harbor. Therefore, it cannot be the case that the safe harbor implies no plenary action for reimbursement of fees. Wrongful fees have nothing whatever to do with inadvertent failure to forward the exemption claim.

The court's reasoning also give rise to a paradox. Wrongful charges for fees is surely a breach of contract giving rise to a plenary cause of action, if the contract is read to be consistent with

Mikulec. No time limit is implicit in section 5240.

[882] *Id.*

[883] N.Y. C.P.L.R. 5240.

[884] *Cruz III*, 2 N.E.3d at 230.

New York law. One would think that breach of contract is the archetypical plenary action. Yet *Cruz III* seems to bar such actions.

One gains the impression that the New York Court of Appeals was dead set against class actions against banks, even to the point of inviting deliberate intentional wrongs against senior citizens. If that was the intent of the Court of Appeals it was in for a surprise. In *Cruz v. T.D. Bank (Cruz V)*,[885] the class action plaintiffs attempted to amend their complaints[886] to change their "plenary" action to a class action under CPLR 5239 and 5240–actions they thought they could bring in federal court, even though the underlying money judgment giving rise to bank misconduct were rendered in state court. The *Cruz V* court denied permission to amend the complaint but it also suggested that a different set of amendments that might successfully plead a cause of action.[887]

The court noted that "[a] 'special,' proceeding, denominated as such, cannot be commenced in a federal court."[888] According to Rule 2 of the Federal Rules of Civil Procedure, "There is one form of action–the civil action."[889] But under CPLR 103(b), "All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized."[890] Nevertheless, the *Cruz III* opinion indicated that CPLR 5239 and 5240 gave rise to substantive causes of action–that could be brought in federal court as plenary actions![891] "While sections 5239 and 5240 may continue to provide a procedural mechanism for relief under state law, the opinion in *Cruz III* makes plain that there is a substantive component to the two sections. Thus . . . the New York Court of Appeals has defined the cause of action under sections 5239 and 5240 and, under *Erie* principles, this court must apply the authoritative pronouncements of New York law in a diversity action."[892] The private right of action (which could not be drawn from EIPA) could nevertheless be drawn from 5239 and 5240 themselves. These causes of action were not limited

[885] Cruz v. TD Bank, N.A. (*Cruz V*), 10 Civ. 8026 (PKC), 2014 U.S. Dist. LEXIS 53916 (S.D.N.Y. Apr. 17, 2014).

[886] *Id.* at *2.

[887] *Id.* at *2–3.

[888] *Id.* at *9.

[889] *Id.* (quoting FED. R. CIV. P. 2).

[890] *Cruz V*, 2014 U.S. Dist. LEXIS 53916, at *9 (quoting N.Y. C.P.L.R. 103(b) (McKinney 2014)).

[891] Cruz v. TD Bank, N.A. (*Cruz III*), 2 N.E.3d 221, 230 (N.Y. 2013).

[892] *Cruz V*, 2014 U.S. Dist. LEXIS 53916, at *13–14.

to the narrow time constraints to be found in CPLR 5239. Rather, they were subject to the general six-year statute of limitations to be found in CPLR 213(1).[893]

This victory for the plaintiff, however, was tempered. *Cruz V* quotes *Cruz III* as stating, "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."[894] Therefore, the plaintiffs could not have damages (even though CPLR 5239 mentions damages). That would be too complicated for a summary proceeding (even though *Cruz V* involved a plenary proceeding, not a summary proceeding). The *Cruz V* court noted an absence of examples under CPLR 5239 of claimants being awarded damages.[895] Of course, *Capital Records* is an example of damages, but in a plenary action, not a special proceeding.[896] Be that as it may, the *Cruz V* court thought that the only thing the plaintiffs could achieve is

> 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. . . . Plaintiff's claims for punitive damages, exemplary damages, and an injunction . . . are precisely the "opportunity for litigation on the back end after an improper restraint was imposed" which the New York Court of Appeals foreclosed as against a garnishee-bank.[897]

Therefore the plaintiffs were limited to release of funds wrongfully retained by the garnishee bank, an injunction against turning funds over to the sheriff and a refund of improper fees (including fees on any wrongfully bounced checks).[898] Furthermore, the *Cruz V* court expected plaintiffs prove that total damage to the class of plaintiffs exceed $5 million, pursuant to the Class Action Fairness Act.[899]

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[893] *Id.* at *15.
[894] *Id.* at *21 (quoting *Cruz III*, 2 N.E.3d at 231).
[895] *Cruz V*, 2014 U.S. Dist. LEXIS 53916, at *24.
[896] Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895, 899, 901 (2d Cir. 1985).
[897] *Cruz V*, 2014 U.S. Dist. LEXIS 53916, at *23.
[898] *Id.* at *26 (citing *Cruz III*, 2 N.E.3d at 230).
[899] *Cruz V*, 2014 U.S. Dist. LEXIS 53916 at *29–30.

4. The Implications for Pre-Judgment Attachment

The *Cruz* court has linked plenary actions for damages to contempt of a court order, as where a bank ignores the restraining notice and distributes funds to the order of a debtor. This puts into question the decision in *Leber-Krebs, Inc. v. Capitol Records*, where no court order was violated, yet damages were awarded for a false garnishee's report required to be filed by CPLR section 6219.[900] Shall we now consider *Capitol Records* as overruled by the *Cruz* decision? If so, the *Cruz* court has visited considerable collateral damage on New York law.

In linking plenary actions to contempt, the *Cruz* court remarks:

> 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.[901]

In proffering this remark, the court assumes that a cause of action for "noncompliance with other technical aspects of CPLR Article 52" is new, when *Capitol Records* establishes such a cause of action for technical aspects of Article 62.[902] So one possibility is that any implication of the EIPA for plenary causes of action apply only to postjudgment matters under Article 52 and never to prejudgment matters under Article 62. If so, violations of Article 62 still give rise to tort causes of action, but violations of Article 52 do not.

Still, this point undermines the court's reasoning. In Article 52, a garnishee's duties are described in CPLR section 5232(a).[903] Prior to the EIPA, those duties were to pay or deliver to the sheriff and to no one else.[904] These are duties imposed by the CPLR, as opposed to in a court order.[905] If violated, the expectation is that the judgment creditor will commence a turnover proceeding against the

[900] Leber-Krebs, Inc., v. Capital Records, 779 F.2d 895 897–98, 900–01 (2d Cir. 1985). (citing Marshall v. Holmes, 141 U.S. 589, 598–99 (1891)).

[901] *Cruz III*, 2 N.E.3d at 232.

[902] *See Capital Records*, 779 F.2d at 900–01.

[903] N.Y. C.P.L.R. 5232(a) (McKinney 2014).

[904] *See id.*

[905] *See id.*

garnishee.[906] Such a proceeding does culminate in a court order against the garnishee and therefore generates the right to damages in a plenary action. It is far from clear that, in the absence of a turnover order, a garnishee's violation of the injunctions in CPLR section 5232(a) (governing levies of property not capable of delivery) is actionable in damages. For example, if a garnishee were to convey away debtor property before the turnover proceeding is concluded, the garnishee would owe no damages because its action, though wrongful, was not in violation of a court order.

Article 62, however, has always imposed the duty on a garnishee to file a report. And the filing of a false report has been found, in *Capitol Records*, to give rise to tort damages. Surely this is a desirable rule. The *Cruz* opinion may have made an unwise point about tort duties arising under Article 52. It would be unfortunate if the *Cruz* reasoning were to be exported into Article 62.

5. The Judgment Creditor's Liability for Bank Failures

Under the EIPA, the judgment creditor must forward exemption claim forms to the bank, and the bank must forward these forms to the debtor. Where the bank fails in its duty to do so, the debtor has received no notice of his rights to claim property as exempt.

Where nonbanks are garnishees, the judgment creditor has the duty, imposed by CPLR section 5222(d), to send notices directly to the debtor.[907] But these duties are suspended "where the provisions of section fifty-two hundred twenty-two-a of this article are applicable."[908] Now section 5222(d) was enacted to correct the constitutional defects of the CPLR as announced in *Deary v. Guardian Loan Co*.[909] Therefore, as the court in *Distressed Holdings, LLC v. Ehrler*,[910] recognized, the bank's failure to do its duty means that the constitutional rights of the judgment debtor have been violated.[911]

In *Distressed Holdings*, the debtor sought to dissolve the creditor's restraining notice for this constitutional violation.[912] Whereas the court affirmed that a constitutional violation had

[906] N.Y. C.P.L.R. 5225(b) (McKinney 2014); N.Y. C.P.L.R. 5227 (McKinney 2014).
[907] N.Y. C.P.L.R. 5222(d) (McKinney 2014).
[908] *Id*.
[909] Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1187 (S.D.N.Y. 1982).
[910] Distressed Holdings, LLC v. Ehrler, 976 N.Y.S.2d 517 (App. Div. 2d Dep't. 2013).
[911] *Id.* at 519.
[912] *Id.*

occurred,[913] it declined to dissolve the restraining notice since the creditor was blameless.[914] Instead the creditor was ordered to send the exemption forms directly to the debtor, thereby bypassing the bank.[915] Therefore, so far, the consequences to creditors, when banks fail their duties to their customers, are not onerous.

6. Bank Liability Under Federal Civil Rights Legislation

According to section 1983 of Title 42:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[916]

The New York Court of Appeals has ruled that there can be no tort damages against a bank that deliberately violates the CPLR to the detriment of its customers, but this can have no bearing on whether a federal cause of action might accrue under section 1983.

One attempt to bring a civil rights action against banks has failed, but in such a way that suggests an action based on a deliberate violation of CPLR section 5222-a(b)(3) might indeed succeed. In *Sykes v. Bank of America*,[917] state agencies served a restraining notice on a bank garnishee for child support past due.[918] The state agencies reasoned that Supplemental Social Security payments were not exempt from child support claim.[919] The court ruled that the exemption was valid, even against a child support claim, meaning that the restraining notice was wrongful as against the debtor.[920] The debtor then sought to bring a section 1983 action against the bank for the wrongful restraint.[921] The court dismissed the complaint, but for reasons that would not apply to a debtor

[913] *Id.* at 523.
[914] *Id.* at 524.
[915] *Id.* at 525.
[916] 42 U.S.C. § 1983 (2006).
[917] Sykes v. Bank of Am., 723 F.3d 399 (2d Cir. 2013).
[918] *Id.* at 402.
[919] *Id.* at 401–02.
[920] *See id.* at 405.
[921] *Id.* at 406.

subjected to deliberate bank violations of section 5222-a(b)(3).[922]

The *Sykes* court cited the fact that the debtor before it was not challenging the constitutionality of New York State's post-judgment procedures generally.[923] But in *Sykes* a constitutional procedure was in fact followed. Where the bank, however, deliberately refuses to forward the exemption notices and claim forms, the system indeed becomes unconstitutional, as was recognized in *Distressed Holdings, LLC v. Ehrler*.[924]

Second, in *Sykes*, the debtor did not allege that the bank garnishee

> was any different from that of the traditional garnishee acting pursuant to New York State's post-judgment garnishment procedures. Bank of America, for all it appears, thus did no more than comply with the restraining notice issued by [the judgment creditor] in the same way it would with a notice from a private attorney on behalf of a private creditor.[925]

But where a bank deliberately violates the CPLR by refusing to forward the required forms, the bank is behaving very differently, presumably, from the way it should behave when it receives a restraining notice from a private attorney.

Third, in *Sykes*, the bank's role was purely ministerial. It exercised no discretion in following New York law.[926] But a bank that deliberately violates its CPLR duties *is* using discretion to violate the law, thus depriving the debtor of the constitutional right to due process. In *Sykes*, state agencies, not the bank, took the decisive action that harmed the debtor. But the bank that refuses to forward the forms in violation of CPLR 5222-a(b)(3) is the one taking the decisive action that causes the harm.

Therefore, even though wronged debtors have no right to bring a plenary action under New York state law, it appears as if the same facts justify a plenary action under section 1983. On that basis, the class action against banks that deliberately ignore the CPLR can proceed.

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[922] *Id.*
[923] *Id.*
[924] *Distressed Holdings*, 976 N.Y.S.2d at 519.
[925] Sykes v. Bank of Am., 723 F.3d 399, 406 (2d Cir. 2013).
[926] *Id*. at 406–07.

E. Claims of Exemption

Having received claim forms from the bank, a judgment debtor is invited to claim that the bank account is exempt.[927] This is done by the debtor's signing the two forms that the bank has sent to him.[928] These forms must be served[929] within twenty days of the postmark on the envelope by which the debtor was "served" by the bank.[930] One copy of the form must be served on the bank, the other on the attorney for the judgment creditor or judgment creditor directly (where there is no attorney).[931]

This twenty day period for claiming exemptions has led one court to invent a new procedural limitation on turnover orders. In *In re North Shore University Hospital at Plainview v. Citibank Legal Service Intake Unit*,[932] a judgment creditor brought a turnover action, but did not plead in its papers that it had complied with CPLR section 5222-a.[933] Since a turnover can conceivably be obtained eight days after notice of the creditor's petition,[934] "a motivated and diligent judgment creditor could commence a turnover proceeding and have it returnable before the court before the time for a judgment debtor to serve an exemption claim form had expired."[935] The court therefore legislated that, where a judgment creditor serves a restraining notice on a bank, the judgment creditor "must plead and prove compliance with CPLR [section] 5222-a as part of its prima facie case in a turnover proceeding."[936]

Earlier courts had imposed less sweeping conditions on turnover proceedings. Such proceedings do not require service of a

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927 N.Y. C.P.L.R. 5222-a(c) (McKinney 2014).

928 C.P.L.R. 5222-a(c)(1).

929 Service may be by first class mail or in person. C.P.L.R. 5222-a(c)(1).

930 *Id.* Failure of the debtor to prove the date of the postmark justifies a court denying a debtor's motion to remove the restraint. Recovery of Judgment, LLC v. Warren, 937 N.Y.S.2d 85, 86 (App. Div. 2d Dep't 2012).

931 C.P.L.R. 5222-a(c)(1). Given that a restraining notice has been served, the absence of an attorney suggests that the attorney who served has resigned or that a judgment creditor without an attorney has obtained a restraining notice signed by a clerk of the court or by a judge.

932 *In re* N. Shore Univ. Hosp. at Plainview v. Citibank Legal Serv. Intake Unit, 883 N.Y.S.2d 898 (Dist. Ct. Nassau County 2009).

933 *Id.* at 900.

934 N.Y. C.P.L.R. 403(b) (McKinney 2014).

935 *N. Shore Univ. Hosp.*, 883 N.Y.S.2d at 902.

936 *Id.* at 903; *accord* LR Credit 21, LLC v. Burnett, No. CV-013186-13, 2013 N.Y. Misc. LEXIS 2635, at *5 (Dist. Ct. Nassau County June 24, 2013).

restraining notice. But where a judgment creditor has chosen to serve a restraining notice on a garnishee and where the judgment creditor has not sent the debtor the notice warning that the debtor has the right to exemptions, some courts have prohibited the creditor's attempt to commence a turnover proceeding until the creditor serves the required notice.[937]

When the debtor serves the exemption claim on the bank, the bank must then release "all funds" (presumably all *exempt* funds)[938] eight days after the postmark on the debtor's claim (or eight days after personal delivery of the claim).[939] The bank must notify the judgment creditor of the release date.[940] Release is canceled if the judgment creditor interposes an objection before the release date.[941]

Thus, where the creditor, the bank, and the debtor timely perform their part in the drama, the bank account should be entirely unfrozen in twenty-eight days.[942] The debtor can shorten this time frame by promptly making the claim of exemption before the twenty-day deadline. In the meantime, $2,500 of the account is

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[937] *E.g.*, Weinstein v. Gitters, 462 N.Y.S.2d 553, 555 (Sup. Ct. Suffolk County 1983); Chem. Bank v. Flaherty, 468 N.Y.S.2d 315, 316 (Civ. Ct. Queens County 1983).

[938] N.Y. C.P.L.R. 5222-a(c)(4) (McKinney 2014) gives instructions to the creditor when the funds are in part exempt and in part non-exempt. This certainly supports the view that "all funds" should be interpreted as meaning "all *exempt* funds."

[939] C.P.L.R. 5222-a(c)(3). Presumably the bank's obligation cannot be waived by contract. In *McCarthy v. Wachovia Bank, N.A.*, 759 F. Supp. 2d 265 (E.D.N.Y. 2011), the debtors sought damages from a bank for honoring a New York restraining notice with respect to a Florida account. *Id.* at 269. The court held that the contract between bank and customer authorized the bank to honor restraining notices. *Id.* at 274. Therefore, there could be no action against the bank for wrongful restraint of the bank account. *Id.* But *McCarthy* did not involve restraint of exempt funds. *Id.* at 270–71. Presumably, waiver of the bank's duties with regard to exempt funds would not be honored, as waivers of exemptions are not honored generally. State v. Avco Fin. Serv., Inc., 406 N.E.2d 1075, 1077 (N.Y. 1980) ("[C]ontractual waivers of a debtor's statutory exemptions are usually held to be void.").

[940] Prior to this time, the restraint is effective, and release of non-exempt funds by the bank justifies the award of damages to the judgment creditor. Jackson v. TD Bank, No. 995/10, 2010 N.Y. Misc. LEXIS 3797, at *4 (Civ. Ct. Kings County Aug. 9, 2010).

[941] C.P.L.R. 5222-a(c)(3).

[942] This remark is justified by the following table:

Action	Time of Performance	Statutory Authority
Creditor serves bank with notice	Day 0	C.P.L.R. 5222-a(b)
Bank sends forms to debtor	Day 2	C.P.L.R. 5222a-(b)(3)
Debtor claims exemptions	Day 20	C.P.L.R. 5222-a(c)(1)
Bank releases funds	Day 28	C.P.L.R. 5222-a(c)(3)

automatically exempt and unfrozen (if exempt wire transfers are in evidence), allowing the debtor to sustain life over that time.[943]

Although the debtor is required to make the claim for exemptions within twenty days of being served, the bank is subject to a twenty-five-day rule.[944] According to this rule, where the bank receives no claim twenty-five days after the bank mails the forms to the debtor, "the funds remain subject to the restraining notice or execution."[945] This balances out if the post office takes exactly five days to deliver the mail. But suppose, by a miracle, the postman delivers to the debtor on the same day as the bank mailed. Then there is this mysterious five-day gap. During this gap, it is too late for the debtor to file her claim. Yet at the end of the gap, the funds are restrained *even if* they are in fact exempt.[946] In that case, the debtor will have to make a motion to the court to have the restraint dissolved. "Failure of the judgment debtor to deliver the executed exemption claim form does not constitute a waiver of any right to an exemption."[947]

If the debtor "demonstrat[es] that all funds in the account are exempt," the creditor, within seven days of the postmark on the debtor's return of the form, must instruct the banking institution to release the account, whereupon the restraining notice is void.[948]

If the debtor's claim shows that only some of the funds in the account are exempt, the creditor is required to "apply the lowest intermediate balance principle of accounting" to determine whether the funds left in the account are exempt or not.[949] The lowest intermediate balance (LIB) test is one of four tests typically applied to separate commingled bank accounts. The LIB is developed from trust law, where the trustee has wrongfully commingled trust funds with personal funds.[950] The accounting problem arises whenever the trustee has ambiguously withdrawn funds without evidence of whether the trustee intended to draw personal or trust funds.[951]

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943 N.Y. C.P.L.R. 5222(h) (McKinney 2014).

944 C.P.L.R. 5222-a(c)(1), (5).

945 C.P.L.R. 5222-a(c)(5).

946 *See id.*

947 *Id.*

948 C.P.L.R. 5222-a(c)(4). Here there is no assumption that the debtor might serve the attorney for the judgment creditor in person. Also CPLR section 5222-a(c)(4) negates the rule in CPLR section 2103(b)(2) that permits a party served by mail to add five days to the deadline for responding. *Id.*

949 *Id.*

950 Infranca, *supra* note 42, at 1182–84.

951 *See* RESTATEMENT (SECOND) OF TRUSTS § 202 cmt. j (1959).

The idea of the LIB is that the trustee subject to the rule is presumed, perhaps against his will, to be honest. Therefore, earlier withdrawals are viewed as being the withdrawal of personal funds, not fiduciary funds.[952] Only if it is logically necessary to recognize that the trustee has embezzled trust funds do we lower our estimate of the trust funds in the account. This dipping into the trust portion of the account is the "lower intermediate balance" to which the name refers.[953] Later, the trustee may make a deposit of personal funds.[954] This deposit is not deemed to reimburse the trust (unless the trustee historically intended it to do so).[955] Therefore the LIB continues to constitute the maximum trust.[956]

The CPLR is strangely silent about how the test is to work. According to section 5222a-(c)(4) (second sentence):

> Where the account contains some funds from exempt sources, and other funds from unknown sources, the judgment creditor shall apply the lowest intermediate balance principle of accounting and, within seven days of the postmark on the envelope containing the exemption claim form and accompanying information, shall instruct the banking institution to release the exempt money in the account.[957]

A key piece of information is left out of this formulation. Shall we

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[952] *See, e.g.*, *id.* § 202 illus. 20.

[953] *Id.*

[954] *Id.*

[955] *See, e.g.*, *id.*

[956] According to RESTATEMENT (SECOND) OF TRUSTS:

> Where the trustee deposits in a single account in a bank trust funds and his individual funds, and makes withdrawals from the deposit and dissipates the money so withdrawn, and subsequently makes additional deposits of his individual funds in the account, the beneficiary cannot ordinarily enforce an equitable lien upon the deposit for a sum greater than the lowest intermediate balance of the deposit. If the amount on deposit at all times after the deposit of the trust funds equalled or exceeded the amount of trust funds deposited, the beneficiary is entitled to a lien upon the deposit for the full amount of the trust funds deposited in the account. If after the deposit of trust funds in the account the deposit was wholly exhausted by withdrawals before subsequent deposits of the trustee's individual funds were made, the beneficiary's lien upon the deposit is extinguished, and if he is unable to trace the money withdrawn, he is relegated to a mere personal claim against the trustee, and is entitled to no priority over other creditors of the trustee.

Id. § 202 cmt. j. The LIB test has been criticized as unduly complex, compared to the FIFO system. Infranca, *supra* note 42, at 1182–84. A pre-EIPA court suggested that New York would follow FIFO with regard to accounts containing exempt and nonexempt funds. Lincoln Fin. Servs., Inc. v. Miceli, No. 2342/01, 2007 N.Y. Misc. LEXIS 6811, at *11 (Dist. Ct. Nassau County Oct. 9, 2007).

[957] N.Y. C.P.L.R. 5222-a(c)(4) (McKinney 2014).

analogize the debtor to a trustee, or shall we analogize the creditor as the trustee? Very different results occur depending on this assumption.

Suppose we say that the debtor is entitled to treat exempt funds as her own, but is a fiduciary for any non-exempt property. These funds properly ought to be paid to the creditor. On this assumption, every withdrawal by the debtor is a withdrawal against exempt funds, leaving (if possible) a positive balance for the creditor.

Such an assumption is supported by the observation that the debtor is expected to live off the exempt funds but to reserve everything else for the creditors. So any withdrawal by the debtor is a withdrawal of the exempt funds, which the debtor then uses to sustain life—the very purpose of the exemption.

The assumption, however, is contradicted by the fact that the debtor is, in fact, not a fiduciary for the creditor. A debtor who spends unencumbered non-exempt funds for purposes other than paying does no wrong to the creditor. Furthermore, according to Gresham's law, any self-interested debtor would obviously spend a non-exempt dollar before spending an exempt one, and since the debtor is no evildoer whose intent should be overridden in the name of equity, we should allow the debtor her honest intent to maximize her own welfare over that of the creditors.[958]

Which assumption is the more appropriate? Analogies are decided by aesthetic (i.e., subjective) criteria, so my opinion is no better than yours. But it can be observed that the legislature-enacted EIPA was designed to protect debtors, and so the pro-debtor interpretation of LIB seems entirely appropriate.[959]

How may the creditor accomplish the formidable task of administering LIB?[960] CPLR section 5222-a(c)(4) (fourth sentence) does indicate that evidence of exemptedness includes "originals or copies of benefit award letters, checks, check stubs or any other

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[958] That is, bad money gets circulated before good money. ROGER LEROY MILLER & ROBERT W. PULSINELLI, MODERN MONEY AND BANKING 27 (2d ed. 1989).

[959] *See* Infranca, *supra* note 42, at 1183.

[960] In *Midland Funding LLC v. Singleton*, 943 N.Y.S.2d 373 (Dist. Ct. Nassau County 2012), the court volunteers some advice:

> Where the judgment debtor claims the funds on deposit in a bank account exempt from execution because the funds are earned income earned within the last 60 days, the judgment creditor could issue subpoenas and/or subpoenas duces tecum to the bank in which the funds are deposited and the defendant/judgment debtor's employer requiring them to appear on the date of the evidentiary hearing with bank statements, deposit records, payroll records and to testify regarding these matters.

Id. at 377. The court also suggests that the creditor could call the debtor as a witness. *Id.*

document that discloses the source of the judgment debtor's income, and bank records showing the last two months of account activity."[961] The form that the bank submits to the judgment debtor urges (but does not require):[962] "If you have any documents, such as an award letter, an annual statement from your pension, pay stubs, copies of checks or bank records showing the last two months of account activity, include copies of the documents with this form. Your account may be released more quickly."[963]

So far, the procedure for restraining notices served on banks does not involve court appearances.[964] The matter changes if the creditor objects to the debtor's claim of exemption. In such a case, the creditor must move for an order sustaining the restraining notice pursuant to CPLR section 5240.[965] This motion must be served on the bank and the debtor within eight days of the postmark on the debtor's claim.[966] The creditor is warned that the creditor's objection must "demonstrate a reasonable belief that such judgment debtor's account contains funds that are not exempt from execution and the amount of such nonexempt funds."[967] No "conclusory" remarks are allowed.[968] A penalty is threatened if the creditor disputes the exemption claim in bad faith.[969] In the court hearing, the debtor's exemption claim (which the creditor must submit to the

[961] C.P.L.R. 5222-a(c)(4).

[962] *Singleton*, 943 N.Y.S.2d at 376.

[963] C.P.L.R. 5222-a(b)(4)(b).

[964] Infranca, *supra* note 42, at 1157 ("The New York law seeks, when possible, to have the matter resolved by the judgment debtor, the judgment creditor, and the bank without requiring a court hearing.").

[965] C.P.L.R. 5222-a(d). According to section 5240, "[t]he court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." N.Y. C.P.L.R. 5240 (McKinney 2014).

[966] C.P.L.R. 5222-a(d). Once again, the CPLR prohibits the creditor from extending this time because service was by mail. *Id.* Ordinarily, a party served by mail can add five days to the deadline for a response. N.Y. C.P.L.R. 2103(b)(2) (McKinney 2014). Service by mail on the debtor means a mailing to the address that the debtor listed on his exemption form, not the address on the original summons, which may be out of date. Midland Funding LLC v. Digonis, 889 N.Y.S.2d 415, 418 (Dist. Ct. Nassau County 2009).

[967] C.P.L.R. 5222-a(d).

[968] *Id.*

[969] C.P.L.R. 5222-a(g). The penalty consists of "costs, reasonable attorney fees, actual damages and an amount not to exceed one thousand dollars." *Id.* In general, "[i]f the judgment creditor fails to act in accordance with this [rule], the judgment creditor shall be deemed to have acted in bad faith and the judgment debtor may seek a court award of the damages, costs, fees and penalties provided for in subdivision (g) of this section." C.P.L.R. 5222-a(c)(4).

court),[970] "shall be prima facie evidence at such hearing that the funds in the account are exempt funds. The burden of proof shall be upon the judgment creditor to establish the amount of funds that are not exempt."[971] Prior to 2009, this burden would have been on the debtor.[972]

The hearing on the debtor's exemption claim must be noticed for seven days after the creditor serves the debtor and the bank with papers.[973] The court must rule within five days of the hearing.[974]

Pending the court's ruling, the bank must retain the exempt funds for twenty-two days.[975] After that the funds must be released unless the court orders the bank otherwise.[976] The creditor or her attorney is expected to serve the court order on the bank within two days of the order being issued.[977]

As usual, none of these rules "apply when the state of New York[] or any of its agencies" is the plaintiff.[978] So, for example, if the judgment creditor is New York's Department of Taxation and Finance, a bank is justified in restraining the account of a senior citizen and charging fees that otherwise could not be charged.[979] It is an ill cook that cannot lick his own fingers.

The exemption form urges but does not require the debtor to

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970 C.P.L.R. 5222-a(d).

971 *Id.*

972 *See* Frasca v. Gen. Motors Corp., 643 N.Y.S.2d 1019, 1020 (App. Div. 2d Dep't 1996) (citing Zadar Constr. & Woodworking, Inc. v. Charter Woodworking Corp., 551 N.Y.S.2d 834, 834, (App. Div. 2d Dep't 1990); Lesiak v. Benefit Commercial Corp., 475 N.Y.S.2d 566, 567 (App. Div. 3d Dep't 1984)).

973 C.P.L.R. 5222-a(d). "[D]ue process requires that a judgment debtor be afforded an opportunity for a hearing on an exemption claim within a matter of days." McCahey v. L.P. Investors, 774 F.2d 543, 552 (2d Cir. 1985) (citing Finberg v. Sullivan, 634 F.2d 50, 59 (3d Cir. 1980) (en banc); Dionne v. Bouley, 757 F.2d 1344, 1353 (1st Cir. 1985)). Prior to 2008, there was no specific rule on when the hearing must take place. *See* Exempt Income Protection Act, ch. 575, sec. 4, C.P.L.R. 5222-a(d), 2008 N.Y. Laws 4085, 4092. The *McCahey* court left open the possibility that the restraining notice procedure (as it still exists for nonbanks) is unconstitutional for its failure to set a time limit for the hearing, but it declined to rule in a case where the debtor, advised by lawyers, did in fact receive a prompt hearing. *McCahey*, 774 F.2d at 552–53. Though the 2008 legislation now provides for a prompt resolution in the case of bank garnishees, it still does not do so for nonbanks. *See* C.P.L.R. 5222-a(a).

974 C.P.L.R. 5222-a(d). In contrast, a section 5239 proceeding is not subject to any such deadline. *See* C.P.L.R. 5239. Whether section 5239 adequately assured a judgment debtor a prompt hearing on the exemption issue was left open, pending "a concrete example of its application by New York Court[s] to a judgment debtor." *McCahey*, 774 F.2d at 553–54.

975 C.P.L.R. 5222-a(e).

976 *Id.*

977 C.P.L.R. 5222-a(d).

978 C.P.L.R. 5222-a(i).

979 Stephens v. Capitol One Fin. Corp., No. 12-CV-00193 (SJF)(ARL), 2012 U.S. Dist. LEXIS 89417, at *13–14 (E.D.N.Y. June 22, 2012).

provide documentary evidence of the exemption.[980] But what if the debtor does not do so and then doesn't show up at the hearing? Meanwhile, the exemption form is prima facie evidence in favor of the debtor and the creditor has no proof at all, as the documents are all in the possession of garnishees or the debtor.

The court in *Midland Funding LLC v. Singleton* felt entitled to rule against the no-show debtor, even though the creditor had no evidence to rebut the presumption.[981] The court complained that:

> Nothing in CPLR 5222-a provides the court with guidance on how to determine the validity of a claim of exemption when the proof submitted by the judgment debtor to the judgment creditor with the Exemption Claim Form is inconclusive or insufficient to establish the exemption, when the judgment creditor objects to the claimed exemption and the judgment debtor . . . fails to appear for the evidentiary hearing set by the court to determine the validity of the claimed exemption.[982]

The court opined:

> The legislature, when [it] enacted EIPA, could not possibly have intended to permit a person to obtain an exemption simply by checking a box on the Exemption Claim Form, signing that form and timely mailing back to the judgment creditor's attorney. Such a determination would permit judgment debtors to obtain an exemption without having any basis for claiming an exemption or presenting any proof supporting the claimed exemption.[983]

Thus, the presumption of exemptedness disappears, according to the *Singleton* court, where the debtor does not show up to defend her claim of exemption.

III. INFORMATION SUBPOENAS

Besides the restraining notice, the other unilateral tool made available to judgment creditors without the need of obtaining a court order is the information subpoena. Unlike the restraining notice, which must be issued by an attorney of the judgment

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[980] *See* C.P.L.R. 5222-a(b)(4)(b).

[981] Midland Funding LLC v. Singleton, 943 N.Y.S.2d 373, 378 (Dist. Ct. Nassau County 2012).

[982] *Id.* at 377.

[983] *Id.* at 378.

creditor as officer of the court,[984] a judgment creditor may issue a subpoena by herself, even though she is not an officer of the court.[985] An ancient appellate opinion says otherwise: a subpoena issued by a judgment creditor must be quashed because creditors are not listed as authorized to issue subpoenas under CPLR section 2302(a).[986] This seems questionable in light of the comparison of CPLR section 5222(a), requiring an attorney to issue a restraining notice, and section 5223, directly authorizing the judgment creditor to issue a subpoena.[987]

A subpoena may be used to force a garnishee to retrieve information from one of its corporate subsidiaries. In comparison, the Court of Appeals in *Northern Mariana Islands v. Canadian Imperial Bank of Commerce*[988] ruled that CPLR section 5225(b) turnover orders require a garnishee to have "actual" possession of the debt it owes to the judgment debtor.[989] Actual possession seems to mean that the garnishee owes a vested or contingent debt or directly possesses debtor property. "Constructive possession" seems to mean that the garnishee controls an entity that owes the debt.[990] That actual possession is required was traced to the absence of the words "or control." This decision may well cause mischief to the law of New York, in that possession by any agent would seem to be "constructive possession," thereby eliminating the possibility of turnover orders against garnishees who relegate possession to agents. Be that as it may, the word "control" appears in CPLR section 5224(4)(a-1),[991] so garnishees served with subpoenas must

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984 N.Y. C.P.L.R. 5222(a) (McKinney 2014).

985 N.Y. C.P.L.R. 5223 (McKinney 2014) ("[T]he judgment creditor may compel disclosure . . . ."). Prior to judgment discovery may be had upon motion of a plaintiff. N.Y. C.P.L.R. 6220 (McKinney 2014).

986 Chopak v. Marcus, 255 N.Y.S.2d 277, 277–78 (App. Div. 2d Dep't 1964).

987 C.P.L.R. 5222(a), 5223. Prejudgment subpoenas are made available under section 5229, but these require a court order and the occurrence of "a verdict or decision." N.Y. C.P.L.R. 5229 (McKinney 2014). Separately, if a prejudgment order of attachment has been issued, a "court may order disclosure by any person of information regarding any property in which the defendant has an interest, or any debts owing to the defendant." C.P.L.R. 6220. A person served with the order of attachment has an automatic obligation, within ten days after service, to provide "the sheriff [with] a statement specifying all debts of the garnishee to the defendant, when the debts are due, all property in the possession or custody of the garnishee in which the defendant has an interest, and the amounts and value of the debts and property specified." N.Y. C.P.L.R. 6219 (McKinney 2014).

988 N. Mariana Islands v. Canadian Imperial Bank of Commerce, 990 N.E.2d 114 (N.Y. 2013).

989 *Id.* at 115.

990 People v. Muhammad, 945 N.E.2d 1010, 1012 (N.Y. 2011).

991 N.Y. C.P.L.R. 5224(4)(a-1) (McKinney 2014).

use their control over their agents to compel disclosure of information.[992]

A subpoena is not a court order, like a restraining notice is. Nevertheless, it is contempt of court for a recipient not to obey it.[993]

A subpoena may require personal attendance at a deposition,[994] the production of documents,[995] and written interrogatories.[996] If the subpoena requires attendance or documents, the subpoena must "be served in the same manner as a summons"[997] and must be accompanied by the required fees.[998] An information subpoena may be served by registered or certified mail.[999] The creditor must, however, supply a return envelope with postage.[1000] The person served or, in the case of a business association, "an officer, director, agent or employee having the information,"[1001] must respond. Written answers must be under oath and are due within seven days of receipt.[1002] Information subpoenas by email or fax require the consent of the person served.[1003]

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[992] Motorola Credit Corp. v. Uzan, 02 Civ. 666 (JSR), 2013 U.S. Dist. LEXIS 165209, at *9 (S.D.N.Y. Nov. 20, 2013).

[993] N.Y. C.P.L.R. 5251 (McKinney 2014); Torah v. Kesher Int'l Trading Corp., 667 N.Y.S.2d 759, 760–61 (App. Div. 2d Dep't 1998). It appears to be unconstitutional to send recipients of a subpoena directly to jail without a hearing, at least where they are not represented by attorneys. *See* Overmyer v. Fidelity & Deposit Co., 554 F.2d 539, 542 (2d Cir. 1977); Vail v. Quinlan, 406 F. Supp. 951, 960 (S.D.N.Y. 1976), *prob. juris. noted sub nom.*, Judice v. Vail, 426 U.S. 946, *and rev'd*, 430 U.S. 327 (1977).

[994] N.Y. C.P.L.R. 5224(a)(1) (McKinney 2014).

[995] C.P.L.R. 5224(a)(2).

[996] C.P.L.R 5224(a)(3), (4).

[997] N.Y. C.P.L.R. 2303(a) (McKinney 2014); *accord* Aquavella v. Equivision, Inc., 694 N.Y.S.2d 547, 548 (Sup. Ct. Monroe County 1999). Court rules govern the form of the subpoena. *E.g.*, N.Y. CITY CIV. CT. ACT § 208.39(f) (McKinney 2014) (requiring that a subpoena put requirement of personal appearance in bold type). Failure to follow such rules makes the subpoena invalid. *See* Neu-Era Lumber & Trim Co. v. Rieves, 465 N.Y.S.2d 119, 120 (Civ. Ct. Queens County 1983).

[998] Judgment debtors are entitled to no expenses or fees. C.P.L.R. 5224(b). Nondebtors are entitled to payment in advance of "authorized traveling expenses and one day's witness fee." *Id.* In federal cases, the witness fee is set by 28 U.S.C. § 1821. GMA Accessories v. Elec. Wonderland, Inc., No. 07 Civ. 3219 (PKC) (DF), 2012 U.S. Dist. LEXIS 72897, at *19 (S.D.N.Y. May 22, 2012). In the case of a subpoena duces tecum, a debtor is not entitled to expenses, but any nondebtor required to produce documents is entitled to payment in advance under CPLR section 5224(b). D'Avenza S.P.A. v. Garrick & Co., No. 96 Civ. 0166 (DLC)(KNF), 1998 U.S. Dist. LEXIS 243, at *5–6 (S.D.N.Y. Jan. 25, 1998). Failure to tender the fees at the time the subpoena is served (or a reasonable time thereafter) renders the subpoena invalid. *Id.* at *6–7.

[999] C.P.L.R. 5224(a)(3).

[1000] *Id.*

[1001] *Id.*

[1002] *Id.*

[1003] C.P.L.R 5224(a)(4). "Electronic means" are defined as "any method of transmission of

As of January 1, 2007,[1004] an information subpoena (in a case where the creditor is not the state of or a municipality in New York) must include the following statement (apparently in capital letters):

> 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[1005] 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.[1006]

A subpoena that fails to set forth this capitalized certification is automatically void.[1007]

Where the certification is set forth, it is a reason to quash the subpoena if the creditor, in fact, has no reason to believe the entity served with a subpoena is relevantly connected to the debtor.[1008] But a common address or telephone number of the third party and

information between computers or other machines designed for the purpose of sending and receiving such transmissions, and which allows the recipient to reproduce the information transmitted in a tangible medium of expression." N.Y. C.P.L.R. 2103(f)(2) (McKinney 2014).

[1004] *See* Act of Aug. 16, 2006, ch. 452, sec. 2, C.P.L.R. 5224(a), 2006 N.Y. Laws 3333, 3334.

[1005] The reference to section 601 of the General Business Law was added in 2011. Act of Aug. 3, 2011, ch. 342, sec. 1, C.P.L.R. 5224(a)(3)(i), 2011 N.Y. Laws 1129, 1129–30. Section 601 is a regulation of those who collect claims against consumers. *See* N.Y. GEN. BUS. LAW §§ 600(3), 601 (McKinney 2014). The provision prohibits a list of practices considered harassing in nature. GEN. BUS. LAW § 601. In 2011, the New York legislature added a provision that governs creditors that send more than fifty information subpoenas per month in consumer cases. C.P.L.R. 5224(a)(3)(i), 2011 N.Y. Laws at 1129. The new provision requires the creditor to keep records and to maintain them for five years. *Id.* The records must show what reasonable belief attends each information subpoena. *Id.* at 1129–30. Oddly, section 602(3) of the General Business Law gives an "entity served with more than fifty information subpoenas per month" a cause of action against the "principal creditor"—that is, a creditor who seeks to enforce a consumer claim. GEN. BUS. LAW § 602(3); *see also* GEN. BUS. LAW § 600(3) (defining principal creditor). Surely, this is a scrivener's error. Undoubtedly the legislature meant to give a cause of action to *any* entity who receives a *single* improper information subpoena from a creditor who serves more than fifty information subpoenas per month.

[1006] C.P.L.R. 5224(a)(3)(i).

[1007] Cohan v. Movtady, No. 2845/11, 2011 N.Y. Misc. LEXIS 3096, at *6–7 (Sup. Ct. Nassau County June 17, 2001).

[1008] Buffalo Laborers Welfare Fund v. Signal Constr. Co., No. 06-CV-400A, 2011 U.S. Dist. LEXIS 122583, at *8–9 (W.D.N.Y. Oct. 24, 2011); Tech. Multi Sources, S.A. v. Stack Global Holdings, Inc., 845 N.Y.S.2d 357, 358 (App. Div. 2d Dep't 2007). This was also the rule prior to the 2011 amendment. *See* Murray v. N.Y.C. Health & Hosps. Corp., 627 N.Y.S.2d 969, 969 (App. Div. 2d Dep't 1995).

the judgment debtor is enough to sustain the subpoena.[1009] So is reason to believe that fraudulent conveyances were received.[1010] Accordingly, a restructuring consultant to corporate affiliates had to answer with regard to its debtor client.[1011]

Pursuant to CPLR section 5240, courts have wide discretion to govern the scope of subpoenas.[1012] "'[T]he judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor.'"[1013] "An application to quash a subpoena should be granted '[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' or where the information sought is 'utterly irrelevant to any proper inquiry.'"[1014] It is not required that the subpoena provide the exact name and address of the debtor.[1015]

A debtor's attorney might resist a subpoena on the basis of the lawyer-client privilege,[1016] but only if the information sought was given to the attorney "for the purpose of obtaining legal advice."[1017]

[1009] *Buffalo Laborers*, 2011 U.S. Dist. LEXIS 122583, at *9–10; *Tech. Multi Sources*, 845 N.Y.S.2d at 358–59.

[1010] *See* Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Mgmt., No. CV-04-2293 (SMG), 2010 U.S. Dist. LEXIS 99771, at *6 (E.D.N.Y. Sept. 22, 2010); Ateni Mar. Corp. v. Great Marine Ltd., 631 N.Y.S.2d 116, 116 (App. Div. 2d Dep't 1996); ICD Grp., Inc. v. Israel Foreign Trade Co., 638 N.Y.S.2d 430, 431 (App. Div. 1st Dep't 1996); Gottesman Co v. Keystone Enters., Inc., No. 603352/03, 2011 N.Y. Misc. LEXIS 2131, at *5 (Sup. Ct. New York County Apr. 21, 2011).

[1011] Gryphon Domestic VI, LLC v. GBR Info. Servs., Inc., 815 N.Y.S.2d 65, 66 (App. Div. 1st Dep't 2006) (citing *ICD*, 638 N.Y.S.2d at 430).

[1012] *See Tech. Multi Sources*, 845 N.Y.S.2d at 358 ("[A court has] broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.' . . . 'An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' . . . or where the information sought is utterly irrelevant to any proper inquiry.'" (second alteration in original) (quoting Paz v. Long Island R.R., 661 N.Y.S.2d 20, 22 (App. Div. 2d Dep't 1997) and Anheuser-Busch, Inc. v. Abrams, 520 N.E.2d 535, 537 (N.Y. 1988)); Liberty Co. v. Rogene Indus., 707 N.Y.S.2d 911, 911–12 (App. Div. 2d Dep't 2000).

[1013] Costamar Shipping Co. v. Kim-Sail, Ltd., No. 95 Civ. 3349 (KTD), 1995 U.S. Dist. LEXIS 18430, at *8 (S.D.N.Y. Dec. 12, 1995) (quoting Caisson Corp. v. County W. Bldg. Corp., 62 F.R.D. 331, 334 (E.D. Pa. 1974)).

[1014] Anheuser-Busch, Inc. v. Abrams, 520 N.E.2d 535, 537 (N.Y. 1988) (quoting *In re* Edge Ho Holding Corp., 176 N.E. 537, 539 (N.Y. 1931) and La Belle Creole Int'l, S.A. v. Att'y Gen. of N.Y., 176 N.E.2d 705, 707 (N.Y. 1961)).

[1015] Niagara Mohawk Power Corp. v. Young, 523 N.Y.S.2d 275, 277 (App. Div. 4th Dep't 1987).

[1016] *See* Boller v. Barulich, 557 N.Y.S.2d 833, 835 (Civ. Ct. New York County 1990).

[1017] Sarfati v. Bertino, No. 2008-1430 S C., 2009 Misc. LEXIS 1644, at *3 (App. Term 2d Dep't June 29, 2009) (quoting *In re* Priest v. Hennessy, 409 N.E.2d 983, 986 (N.Y. 1980)) (internal quotation marks omitted). Legal bills sent by the attorney are not privileged, for example. Bank of Am., N.A. v. Nat'l Fin. Sys., Inc., No. 600350/08, 2009 N.Y. Misc. LEXIS

For instance, the question whether the attorney is holding funds for the debtor is not barred by the privilege, even if it involves the attorney's retainer.[1018] Requesting documents that the debtor has executed (as opposed to drafts of documents not executed) does not invade the privilege.[1019] Questionably, a judgment debtor's address has been held within the privilege, thereby permitting debtors to hide.[1020] Meanwhile, the marital privilege does not seem to apply to hidden assets.[1021] Of course, the constitutional privilege against self-incrimination applies, but a court may grant immunity from prosecution to a witness in order to compel testimony.[1022]

Requests must be relevant to the task at hand—discovering assets that a creditor might reach in satisfaction of a judgment.[1023] Discovery "should be 'limited to a search for the [judgment debtor's] hidden assets.'"[1024] No fishing expeditions are permitted: "[A] judgment creditor should tailor its requests appropriately, in order to foster compliance and to achieve its ultimate goal, to wit, having its judgment satisfied."[1025] Document requests that go too deeply into the past are apt to be limited.[1026] "[U]nreasonable annoyance, disadvantage, and prejudice" require that a subpoena be entirely quashed (rather than pruned).[1027] A subpoena may not aim at evidence to be used in a matter not yet reduced to judgment.[1028]

"[D]isclosure concerning the assets of a non-party is generally not

4186, at *4 (Sup. Ct. New York County Aug. 3, 2009).

[1018] Art Bd., Inc. v. Worldwide Bus. Exch. Corp., 510 N.Y.S.2d 973, 974–75 (Civ. Ct. New York County 1986).

[1019] *Id.* at 975.

[1020] Potamkin Cadillac Corp. v. Karmgard, 420 N.Y.S.2d 104, 106 (Civ. Ct. New York County 1979).

[1021] G-Fours, Inc. v. Miele, 496 F.2d 809, 812 (2d Cir. 1974).

[1022] N.Y. C.P.L.R. 5211 (McKinney 2014). The court must comply with New York Criminal Procedure Law section 50.20, basically requiring that the court must order the witness to provide evidence and must communicate the promise of immunity to the witness. N.Y. CRIM. PROC. LAW § 50.20(2)(b) (McKinney 2014). A court wishing to grant immunity must give twenty four hours written notice of this fact to the relevant district attorney. C.P.L.R. 5211.

[1023] Rossini v. Republic of Arg., 453 F. App'x 22, 24–25 (2d Cir. 2011).

[1024] GMA Accessories v. Electric Wonderland, Inc., No. 07 Civ. 3219 (PKC) (DF), 2012 U.S. Dist. LEXIS 72897, at *14 (S.D.N.Y. May 22, 2012) (alteration in original) (quoting Costamar Shipping Co. v. Kim-Sail, Ltd., No. 95 Civ. 3349 (KTD), 1995 U.S. Dist. LEXIS 18430, at *8 (S.D.N.Y Dec. 12, 1995)).

[1025] D'Avenza S.P.A. v. Garrick & Co., No. 96 Civ. 0166 (DLC)(KNF), 1998 U.S. Dist. LEXIS 243, at *9 (S.D.N.Y. Jan. 15, 1998).

[1026] Robbins v. Nat'l Dev. Corp., 473 N.Y.S.2d 351, 351–52 (App. Div. 2d Dep't 1984); Gorea v. Pinsky, 374 N.Y.S.2d 879, 880–81 (App. Div. 4th Dep't 1975).

[1027] Riverside Capital Advisors, Inc. v. First Secured Capital Corp., 814 N.Y.S.2d 646, 649 (App. Div. 2d Dep't 2006).

[1028] *See* YSL v. SHAL, 809 N.Y.S.2d 387, 391 (Sup. Ct. Nassau County 2005).

contemplated," but it will be permitted "where the relationship between the judgment debtor and the non-party is sufficient to raise a reasonable doubt about the bona fides of the transfer of assets between them."[1029]

Disclosure of tax returns is generally disfavored. "The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources."[1030]

Even if the information sought is relevant, "the obligation of a third party served with a CPLR 5223 information subpoena is to provide information which can *with reasonable effort* be ascertained by means of its presently existing information retrieval system."[1031] There is no need to develop a new computer system just to respond to a subpoena.[1032]

Subpoenas may be issued to third parties without any notice to the judgment debtor.[1033] A debtor has no standing to challenge a subpoena to a third party unless she can show "a sufficient privacy interest in the confidentiality of records pertaining to their personal financial affairs so as to give them standing to challenge [a] subpoena."[1034] Nevertheless, in *EM Ltd. V. Republic of Argentina*,[1035] this fine point of standing was ignored. In *Republic of Argentina*, a plaintiff with a money judgment against Argentina had served subpoenas on third party banks. Argentina moved to quash on the ground that the subpoenas violated the Federal Soverign Immunities Act (FSIA).[1036] One of the banks joined in this motion but later dropped out after the plaintiff agreed to reduce the scope

[1029] Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, 562 (S.D.N.Y. 1977).

[1030] Gordon v. Grossman, 584 N.Y.S.2d 54, 55 (App. Div. 1st Dep't 1992) (citing Lukowsky v. Shalit, 559 N.Y.S.2d 259, 260 (App. Div. 1st Dep't 1990); Matthews Indus. Piping Co. v. Mobil Oil Corp., 495 N.Y.S.2d 35, 36 (App. Div. 1st Dep't 1985); Briton v. Knott Hotels Corp., 489 N.Y.S.2d 186, 187 (App. Div. 1st Dep't 1985)). *But see* Siemens & Halske v. Gres, 354 N.Y.S.2d 762, 763 (Sup. Ct. New York County 1973) (broadly permitting extensive discovery of joint tax returns).

[1031] Carrick Realty Corp. v. Flores, 598 N.Y.S.2d 903, 907 (Sup. Ct. New York County 1993) (emphasis added).

[1032] *Id.*

[1033] Encalada v. CPS1 Realty LP, No. 104782/2007 2014 N.Y. Misc. LEXIS 2572, at *6 (Sup. Ct. New York County June 5, 2014).

[1034] GMA Accessories v. Elec. Wonderland, Inc., No. 07 Civ. 3219 (PKC) (DF), 2012 U.S. Dist LEXIS 72897, at *12 (S.D.N.Y. May 22, 2012) (alterations in original) (quoting *In re* Flag Telecom Holdings, Ltd. Sec. Litig., No. 02 Civ. 3400 (WCC), 2006 U.S. Dist. LEXIS 69140, at *5 (S.D.N.Y. Sept. 13, 2006)).

[1035] EM Ltd. v. Rep. of Arg., 695 F.3d 201 (2d Cir. 2013), *aff'd sub nom* Rep. of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

[1036] *Id.* at 205 (citing 28 U.S.C. §§ 1330, 1602 (2013)).

of the subpoena.[1037] Argentina was permitted to claim on the merits that the FSIA barred the subpoena.[1038] But the District Court decided the FSIA did not bar the subpoena.[1039] The appellate courts agreed–on the merits.[1040] It is possible, however, that the status of Argentina as a sovereign state is relevant to standing, which would otherwise appear to be disallowed as a matter of New York law. For example, in *Peterson v. Islamic Republic of Iran*,[1041] a creditor in a default judgment moved for some sort of declaration under California law that an account receivable in France due to Iran be transferred to the creditors.[1042] The District Court *sua sponte* denied the order under the authority of the FSIA, though Iran had made no appearance in the case.[1043] On appeal, the Ninth Circuit Court of Appeal rejected the notion that sovereign immunity was a mere defense that had to be pleaded.[1044] Rather, the FSIA was conceived to limit the jurisdiction of the court to issue the requested declaration.[1045] If indeed the FSIA is "jurisdictional," then the District Court in the Argentina case could and surely should consider *sua sponte* the merits of Argentina's claim, even though technically Argentina had no standing to quash the subpoena under New York law.

Subpoenas might be vacated or modified if they are abusive or harassing.[1046] A court might issue an order that threatens contempt sanctions if the subpoena is not complied with.[1047] It might hold the recipient of the subpoena in contempt with the proviso that the contempt would be deemed purged if the recipient complied by a stated deadline.[1048]

After some controversy in the courts about whether out-of-state

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[1037] *EM Ltd.*, 695 F.3d at 205.

[1038] *Id.*

[1039] *Id.*

[1040] *Id.* at 210.

[1041] Peterson v. Islamic Rep. of Iran, 627 F.3d 1117 (9th Cir. 2010).

[1042] *Id.* at 1121.

[1043] *Id.* at 1121, 1123–24.

[1044] *Id.* at 1124.

[1045] *Id.* at 1125.

[1046] *Carrick Realty Corp.*, 598 N.Y.S.2d at 904–05.

[1047] Ferrara v. Metro D Excavation & Found., Inc., No. 10 CV 4215 (SLT)(LB), 2012 U.S. Dist. LEXIS 22443, at *3–4 (E.D.N.Y. Feb 22, 2012). The venue rules of section 5221(a) apply to enforcement of subpoenas by contempt orders, though, as always, venue objections are waived if not made, as where the respondent simply defaults. Cornell Fed. Credit Union v. Thorpe, 606 N.Y.S.2d 90, 90–91 (App. Div. 3d Dep't 1993).

[1048] Coldwell Banker Real Estate Servs., Inc. v. Gitlin, No. 002015-09, 2011 N.Y. Misc. LEXIS 4315, at *7 (Sup. Ct. Nassau County Aug. 29, 2011).

entities present in New York had to respond to subpoenas duces tecum,[1049] the legislature in 2006 added CPLR section 5224(a-1) requiring, among others, "a corporation, partnership, limited liability company or sole proprietorship doing business, licensed, qualified, or otherwise entitled to do business in the state" to respond to a subpoena duces tecum, "whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state."[1050] This provision overrules the branch rule for banks insofar as subpoenas are concerned. Thus, the branch rule with regard to *restraining notices* was upheld in *Global Technology, Inc. v. Royal Bank of Canada*, but the court also made clear that any such rule could not apply to *subpoenas*.[1051]

It may be possible for corporations to escape new CPLR section 5224(a-1) even though jurisdictionally present in New York. In *In re Navigator Gas Transport PLC*,[1052] a creditor's committee had a contempt judgment against a former shareholder of the debtor.[1053] Under the plan, the old shareholders were wiped out, and new shares were to be issued to creditors.[1054] A foreign corporation bought up some debt and filed a proof of claim, thereby submitting to jurisdiction in the bankruptcy court in New York City.[1055] The creditor's committee wished to restrain the bankruptcy distribution to the foreign corporation on the ground that it was an alter ego of the contemnor.[1056] The court held that the committee had presented no evidence to justify the alter ego theory.[1057] It also ruled that the

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[1049] *Compare* Eitzen Bulk A/S v. Bank of India, 827 F. Supp. 2d 234, 238 (S.D.N.Y. 2011) (explaining that when a corporation doing business or licensed to do business in New York is served, the subpoena duces tecum reaches "all responsive materials within the corporation's control" regardless of where those materials are located), *with* Walsh v. Bustos, 46 N.Y.S.2d 240, 241 (City Ct. New York County 1943) (quashing subpoena under the Civil Practice Act where account was at a foreign branch, even though foreign bank maintained a branch in New York).

[1050] N.Y. C.P.L.R. 5224(a-1) (McKinney 2014).

[1051] Global Tech., Inc. v. Royal Bank of Can., No. 150151/2011, 2012 N.Y. Misc. LEXIS 47, at *37 & n.12 (Sup. Ct. New York County Jan. 11, 2012); *see* Intercontinental Credit Corp. v. Roth, 578 N.Y.S.2d 955 (Sup. Ct. New York County 1990) (Israeli bank was ordered to respond to subpoena duces tecum).

[1052] *In re* Navigator Gas Transp. PLC, 358 B.R. 80 (Bankr. S.D.N.Y. 2006).

[1053] *Id.* at 83.

[1054] *Id.* at 84.

[1055] *Id.* at 87.

[1056] *Id.* at 84.

[1057] The sole shareholder of the foreign creditor was the "friend . . . and/or . . . father" of the contemnor, but this was held to be insufficient evidence to raise the suspicion of an alter ego theory. *Id.* at 88–89.

corporation did not have to respond to an information subpoena, because, though the corporation was jurisdictionally present in New York, the creditors' committee had not shown that the corporation's bankruptcy dividend was owned by the contemnor.[1058]

It seems odd that the bankruptcy court would have jurisdiction over the foreign corporation and control over the dividend that is alleged to be secretly the property of the contemnor. Yet the court felt it could not sustain a subpoena against the foreign corporation.[1059] Arguably the case could be read to establish a high burden on creditors to establish reason to believe in the alter ego theory. In any case, *Navigator Gas* seems to be a case in which a foreign corporation was subject to jurisdiction in New York yet not doing business in New York and therefore immune from subpoenas.

In federal cases, the FRCPs incorporate by reference all the above-described discovery rules of the CPLR.[1060] Federal subpoenas must also comply with FRCP Rule 45.[1061] In particular, Rule 45(c) has a 100-mile travel rule and also Rule 45(b)(1) requires that the requisite fee and expenses be tendered at the time the subpoena is served.[1062] Failure to follow such rules makes the subpoena invalid.[1063]

IV. CONCLUSION

The restraining notice is a powerful tool but with curious weaknesses. It renders third parties liable for damages if the restraint is violated. But the restraining notice supposedly creates no lien, causing difficulties in the case of advance payment for services not yet rendered. Advance payments are typically payments of contingent debts. Contingent debts are typically leviable as "property," as the court of appeals ruled in the famous case of *ABKCO Industries v. Apple Films, Inc.*[1064] *Verizon New*

[1058] *Id.* 89–90.

[1059] *Id.* at 90.

[1060] FED. R. CIV. P. 69(a)(2) ("In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.").

[1061] GMA Accessories v. Elec. Wonderland, Inc., No. 07 Civ. 3219 (PKC) (DF), 2012 U.S. Dist. LEXIS 72897, at *15–16 (S.D.N.Y. May 22, 2012).

[1062] FED. R. CIV. P. 45(b)(1), (c)(3)(A)(ii).

[1063] Xstrata Can. Corp. v. Advanced Recycling Tech., Inc., No. 08-CV-1366 (LEK/DRH), 2010 U.S. Dist. LEXIS 118110, at * 3 (N.D.N.Y. Nov. 5, 2010).

[1064] ABKCO Indus. v. Apple Films, Inc., 350 N.E.2d 899, 901 (N.Y. 1976); *see* Alliance Bond

England, Inc. v. Transcom Enhanced Services, Inc. is a case in which the relation between a judgment debtor and a garnishee was "too contingent"—the contingent debt therefore did not qualify as property.[1065] Nevertheless, the case illustrates the problem created by New York's expansive setoff rule. Even after a levy arises, the garnishee is invited to set off post-levy debts at the expense of the sheriff. Where a contingent debt is leviable as property, a levy is useless to prevent prepayment. Given that the restraining notice is even less potent than the levy, this result will also be seen in restraining notice cases.

Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 23 (2d Cir. 1999) ("*ABKCO* virtually erases the distinction in [section] 5201 between 'debt' and 'property' by re-characterizing—as 'property against which a money judgment may be enforced'—debts that otherwise are placed out of reach by [section] 5201(a)'s requirement that the debt being pursued be either past due or certain to become due upon demand.").

[1065] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 990 N.E.2d 121, 124–25 (N.Y.2013).