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MEMORANDUM IN OPPOSITION TO

A.9356--AN ACT TO AMEND THE CIVIL PRACTICE LAW AND RULES, IN RELATION TO PAYMENT OR DELIVERY OF PROPERTY OF JUDGMENT DEBTOR

BACKGROUND: A.9356 would amend section 5225(b) of the Civil Practice Law and Rules ("CPLR") to add the words *or control* so that the provision would now read

> (b) *Property not in the possession of judgment debtor*. Upon a special proceeding commenced by the judgment creditor, against a person in possession, custody *or control* of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his or her rights in accordance with section 5239 of this article.

The bill has been proposed to overcome the Court of Appeals' decision in *Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013), which denied a judgment creditor's attempt to force a bank with an office in New York to turn over the balance in the judgment debtor's account at an affiliate of the bank. The Court held that since the account of the judgment debtor was not with the bank but an affiliate, the bank did not have possession or custody of the account as required by § 5225(b). The bill's sponsors state that the purpose of the bill is to

> to facilitate the ability of a judgment creditor to seek the delivery of property in the possession of a person outside the court's jurisdiction by exercising jurisdiction over the judgment debtor or another person within the court's jurisdiction who may "control" the person with possession.

The bill memo also notes that the new language "may come into play in a parent/subsidiary situation, as it did in [*Northern Mariana*]," clearly indicating that the sponsors believe that judgment debtors should be able to obtain property held by a bank outside of New York when that bank's parent company has an office in New York.

DISCUSSION: There are a number of reasons why this bill should not be adopted.

1. The term "control" is so legally and factually vague, the issue of whether an entity controls its foreign affiliates will be subject to boundless litigation.

Although A.9356 clearly appears to be aimed at overturning *Northern Mariana*, the bill's sponsors have hedged their bets, stating that "[w]e express no view as to whether, in the context of a parent/subsidiary or other relationship, the requisite 'control' should be found; that is a matter for judicial development and determination in particular cases."

In fact, there are sound policy reasons for finding that a holding company does not control its subsidiaries or affiliates, and these reasons are especially compelling in the context of banking. For example, the Office of the Comptroller of the Currency, the primary supervisor of federally chartered banks has been especially insistent on maintaining the "sanctity of the bank charter" in the context of larger organizations. This point was driven home by the current Comptroller in a recent speech:

> We want to be sure that national banks and federal thrifts are not just treated as booking entities for the holding company. The federal bank charter is a special corporate franchise that provides a gateway to federal deposit insurance and access to the discount window, and the highest fiduciary duty of management and independent directors is to ensure the safety and soundness of the national bank or federal thrift.[1]

Given and the potential liability for banks that are subject to turnover orders (see the discussion below on the potential for double liability), banks will be very likely to contest these actions. And, given the variety of the ways that banks organize themselves, and the importance of the concept of corporate separateness, it is highly unlikely that the courts will be able to formulate any rules of general applicability—each case will have to be decided individually. The result is bound to be multiple hearings involving detailed factual examinations of corporate organization, foreign laws, and similar questions of the kind courts are faced with when asked to pierce the corporate veil.

Thus besides the burdens on third parties who themselves are not parties to the underlying dispute, the amendment is likely to place significant burdens on the courts of New York.

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[1] Thomas J. Curry, Remarks Before the 49th Annual Conference on Bank Structure and Competition (May 9, 2013).

2. The amendment could subject banks or their overseas affiliates to double liability.

A bank located in a foreign jurisdiction is subject to local law. This means that it must obey all of its host country's laws, including those regarding the privacy of customer financial information, safeguarding of customer assets, and discharge of debts owing to the customer. Allowing a court with jurisdiction over one component of a complex corporate organization to issue orders relating to accounts or property held at affiliates in other jurisdictions raises a host of conflict problems and places international banks in an untenable position, where in order to comply with one jurisdiction's laws they must violate the laws of another.

Moreover, when a bank or other garnishee in New York is ordered by a New York court to turn over to a judgment creditor property it is holding for a customer, the garnishee would be discharged from liability to the judgment debtor. *See* CPLR § 5209. But if the property or debt is held outside of the jurisdiction of the New York courts—especially in jurisdictions in which New York judgments are not entitled to full faith and credit—there is no guarantee that this discharge would be recognized by the other jurisdiction. This raises the real possibility that the judgment debtor could initiate an action in the courts of the foreign jurisdiction to enforce its claims against the bank or its affiliate, with the result that the bank would have to pay twice-—once to the judgment creditor in the New York action, and once to its customer, the judgment debtor. Even providing information on assets or accounts held for the customer could result in civil or criminal penalties for banks or their employees in jurisdictions with strong bank privacy laws.

These concerns are among those that have led the courts of New York to fashion the "separate-entity rule," which holds that even if a bank is subject to personal jurisdiction due to the presence of a New York branch, for certain purposes (e.g., attachments, restraints, and turnover orders) the other branches of the bank will nonetheless be treated as separate and juridically distinct entities. This long-standing doctrine recognizes the unique function and importance of international banks here in New York and the severe practical and legal issues raised should U.S. courts attempt to reach non-U.S. assets belonging to—or deposits owed to—a bank's customer under the laws of another nation.

If another office of the same bank should be considered a separate entity, then there is all the more reason to hold that a separate entity that is affiliated with a bank that has an office in New York should also be considered a separate entity and not simply the alter ego of the New York bank.

3. It raises substantial questions under the U.S. Constitution.

In a long line of cases, the U.S. Supreme Court has held that where a court lacks *in personam* jurisdiction over the judgment debtor and lacks *in rem* jurisdiction over any of the debtor's property, and where there is no connection between the forum state and the underlying dispute, there are not sufficient minimum contacts (indeed, there are no contacts at all) to satisfy traditional notions of fair play and substantial justice that are required to allow a court constitutionally to order a garnishee bank to turn over the judgment debtor's property from outside the state.[2] In the cases contemplated by the amendment, the person subject to the court's jurisdiction is not even the person holding the judgment debtor's property, only an affiliate or parent of the person who will have to comply with the court's order.

If New York courts have limited ability under the Constitution to require a person to turn over out-of-state property that the person is holding for the judgment debtor, how can it be constitutional for the court to order a person to order *another person* to hand over property that that other person is holding for the judgment debtor outside of the court's jurisdiction? The question answers itself—the proposed amendment has serious constitutional defects.

4. The proposed amendment could overburden New York's courts.

The only clear beneficiaries of this amendment would be attorneys representing foreign judgment creditors who would attempt to use New York's status as an international banking center to serve a worldwide clientele as collection agents. Allowing this to happen would clog the courts with burdensome proceedings that have absolutely nothing to do with New York.

For an example of how this amendment could affect New York's courts, one need only look to what happened in the federal courts in New York when the Second Circuit erroneously held that cross-border funds transfers passing through New York banks constituted property that could be subject to federal maritime attachment procedures.[3] In short order, the U.S. District Court for the Southern District of New York was inundated with hundreds of maritime attachment orders—at one point fully one-third of all actions filed in the Southern District were maritime attachment cases. This situation persisted until the Second Circuit reversed its earlier decision.[4]

There is every reason to suppose that the situation would be even worse in the New York courts should this amendment pass. Not only will the judgment creditors flock to New York courts to try to leverage the presence of so many international banks in New York City, but as noted earlier, control is a factual question that will likely be contested by the banks that are subject to the resulting orders. The whole process will mire the trial courts in the city in detailed factual examinations of corporate organization, foreign laws, and similar questions of the kind courts are faced with when asked to pierce the corporate veil. And all of this will be in the service of executions on non-New York judgments that in most cases will have absolutely no connection to New York.

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[2] See, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[3] See, *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002).

[4] See, *Shipping Corp. of India v. Jahldi Oversees Pte, Ltd.*, 585 F.3d 53 (2d Cir. 2009).

For these reasons, the proposed amendment represents bad public policy and should not be adopted.

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If you have any questions on any the issues raised in this memorandum, please contact Joseph R. Alexander at joe.alexander@theclearinghouse.org or (212) 612-9234.