This article was originally published in the Commercial Litigation Advisor *(January 2016)*

ANDERSON KILL
COMMERCIAL LITIGATION ADVISOR

Federal Courts Open a Window on Cuban Assets to Judgment Creditors

By Jeffrey E. Glen

On September 8, 2015, the U.S. Court of Appeals for the Second Circuit strengthened the hand of judgment creditors in the United States, including those with judgments against foreign governments or corporations seeking to locate their debtors' global assets.

In *Aldo Vera Jr. v. The Republic of Cuba*, the Second Circuit denied a motion to dismiss a ruling by the U.S. District Court for the Southern District of New York empowering a judgment creditor to compel a foreign bank with a branch in New York to disclose the assets of its depositor, the judgment debtor, held in any of its branches, including overseas.

According to a 2008 judgment rendered in Florida, Aldo Vera Sr., the first Castro regime chief of police of Havana, was executed in Puerto Rico by Cuban government operatives after he fled Cuba and joined the anti-Castro universe. Under a set of exceptions to sovereign immunity covering acts of terror by certain listed countries (including Cuba until recently), judgments in American courts for certain acts can be enforced against Cuban state assets blocked in 22 banks in New York and one in New Jersey.

In its September 8 decision, the Second Circuit left standing a March 17, 2015, District Court ruling declining to reconsider its prior September 10, 2014, order directing BBVA (Banco Bilbao Vizcaya Argentaria, S.A.) to comply with an information subpoena issued in connection with Aldo Vera Jr.'s attempt to enforce a $49 million default judgment against the Republic of Cuba.

Since the 2008 judgment, the plaintiff has recovered approximately $6 million from Cuban accounts in the New York branches of both domestic and foreign banks. The quest to locate assets globally is a response to constraints on the pursuit of other frozen Cuban assets. Holdings in the Second Circuit and the DC Circuit have limited the plaintiff's enforcement efforts in the United States to accounts where either the deposits were by Cuban state entities and then frozen, or the deposits were actual funds that were to be paid to Cuban state entities and were stopped in transit in U.S. accounts. Electronic funds transfers that were blocked in transit, which is the great bulk of the Cuban assets, have been held to not be Cuban "property" or a "debt" to Cuba in the United States, but rather to remain in the country of origin.

Jeffrey E. Glen, a senior shareholder in Anderson Kill's New York office, has a substantial transnational litigation practice, counseling both plaintiffs and defendants in securities, corporate and general contract law. A former Special Assistant Corporation Counsel in charge of the Tort, Administrative Law, and Affirmative Litigation divisions of the Office of Corporation Counsel of the City of New York, he currently serves on the Advisory Committee on Civil Practice to the Chief Administrative Judge of the State of New York.
jglen@andersonkill.com | 212-278-1009

A Green Light to Discovery of Overseas Assets

At issue in the current case is discovery of assets that can be pursued in other jurisdictions. In *Koehler v. Bank of Bermuda Ltd.* (2009), the New York Court of Appeals held that a judgment creditor who either obtains a New York judgment or domesticates an out-of-state judgment in New York can compel a bank that has a branch in New York to bring specified assets of the judgment debtor held in a branch outside New York into New York for levy. Subsequent cases have held, however, under the separate entity rule, that a judgment creditor cannot levy on out-of-state deposits simply by serving the branch in New York.

What remained open is whether an information subpoena requiring the New York branch of a foreign bank to divulge material on the assets of a foreign judgment debtor held in foreign branches can be enforced. In *Vera*, as cited by the Second Circuit, Southern District of New York, Alvin K. Hellerstein ruled that "broad post-judgment discovery in aid of execution is the norm in federal and New York state courts" and "New York law entitles judgment creditors to discover all matters relevant to the satisfaction of a judgment." Further, "When corporations receive the benefits of operating in this forum, it is critical that regulators and courts continue to have the power to compel information concerning their activities."

In his March 17, 2015, ruling declining to reconsider that opinion, Judge Hellerstein found:

> Foreign banks should not be permitted to promote the legitimacy of their business by registering to do business in New York, and then hide illicit activity by "keeping" information concerning assets related to terrorism in other countries. Such action is akin to a legitimate business storefront which launders money from illegal operations in the back room, and does not comport with the legal system of the United States. The information requested by the Information Subpoena can be found via electronic searches performed in BBVA's New York office, and are within this jurisdiction.
>
> I hold that BBVA consented to the necessary regulatory oversight in return for permission to operate in New York, and is therefore subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas.

The Second Circuit declined jurisdiction on the discovery issue, finding that it would have jurisdiction only over a "final decision" of the district court, and that BBVA's interlocutory appeal was not in response to a final decision. In the current case, only a contempt ruling against BBVA for refusing to comply with the discovery order would constitute a final decision that could be appealed.

The upshot is that any bank that has an office in New York that wants to avoid telling a judgment creditor about foreign assets of a judgment debtor held by that bank will have to subject itself to contempt if it wants to appeal an adverse federal ruling.

It is vital for plaintiffs who obtain judgments against defendants with far-flung assets to be able to discover those assets so they can pursue them wherever they're concentrated. In *Vera*, federal courts have affirmed that New York law enables such discovery with respect to banks that maintain branches in New York. That's good news for plaintiffs with claims against foreign governments, foreign entities, and powerful individuals, wherever they are based.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, Newark, NJ, and Burlington, VT.