



BRING ME THE MONEY:

Obtaining Possession of Foreign Assets

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In *United States v. Schwarzbaum*, the court analyzed whether it had the power to order a defendant to repatriate foreign assets following entry of a civil judgment for remedial penalties. In answering this question in the affirmative, the court observed that “[p]ersonal jurisdiction [gives] the court power to order [the defendant] to transfer property whether that property was within or without the limits of the court’s territorial jurisdiction.”¹

After careful review of the debtor’s schedules and bank statements, you have determined the debtor holds or has transferred valuable assets to a foreign jurisdiction. In light of the volume of pre-petition litigation reflected on the SOFA, it appears the debtor deliberately moved the assets offshore in order to thwart the ability of creditors to use traditional enforcement mechanisms to execute, garnish, or levy assets located in the United States. You have filed a motion for turnover and a motion to compel but, the debtor has persistently failed to comply with the orders. You have also served an avoidance action and obtained a preliminary injunction against the transferee but, are concerned the assets will be further dissipated, transferred, concealed, sold, or encumbered before you obtain a judgment. In order to obtain actual relief, (rather than simply relief on paper), you contemplate whether it will be necessary to file suit in the foreign jurisdiction in order to obtain *in rem* jurisdiction over and actual possession of the assets. Rest assured, these extreme measures are not necessary if the court has personal jurisdiction over the debtor or defendant-transferee.

In *United States v. Schwarzbaum*, the court analyzed whether it had the power to order a defendant to repatriate foreign assets following entry of a civil judgment for remedial penalties. In answering this question in the affirmative, the court observed that “[p]ersonal jurisdiction [gives] the court power to order [the defendant] to transfer property whether that property was within or without the limits of the court’s territorial jurisdiction.”¹ The court also cited the All Writs Act, 28 U.S.C. § 1651(a), which empowers federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* The court determined that “[a]n order to repatriate funds is precisely the kind of order permitted by the All Writs Act.” Based on these authorities and the court’s inherent powers, the court ordered as follows:

Defendant Isac Schwarzbaum is ORDERED to repatriate assets held overseas into a United States bank account in his name over which this Court has jurisdiction in an amount sufficient to satisfy the Outstanding Debt, inform counsel for the United States of the name and address of the bank and the complete bank account number, and notify the Court of his compliance with this Order no later than April 28, 2023. Defendant Isac Schwarzbaum shall maintain the repatriated funds in the U.S. based bank account pending further Order of the Court.²

In the bankruptcy context, the case *Lawrence v. Goldberg* (*In re Lawrence*) is instructive.³ The property at issue in *Lawrence* was an offshore trust settled by the debtor approximately two months before a significant arbitration judgment was entered against him and six years before the petition date. Among other things, the trust instruments gave the debtor the sole power to

appoint Trustees, included a spendthrift provision, prohibited the exercise of the settlor’s powers under duress or coercion, terminated his life interest in the event of his bankruptcy, and prohibited him from becoming a beneficiary.⁴ Initially, the trustee prevailed in a discharge action and the court determined that the trust was property of the estate because the debtor “had control over the trust, through his retained powers to remove and appoint Trustees and to add and exclude beneficiaries, and it rejected [his] impossibility defense.”⁵ When the debtor failed to comply with the bankruptcy court’s turnover order, it held him in civil contempt, ordered his incarceration, and imposed fines of \$10,000 per day until he purged his contempt.⁶ Although the debtor appealed both orders, they were affirmed by the district court and court of appeals. Notably, the circuit court of appeals stated that the bankruptcy order determining the trust was property of the estate put the debtor “under a continuing statutory duty to turn the trust *res* over to the trustee.”⁷ The court also stated that the duress amendment was void as to current and future creditors under Florida law where the settlor creates a trust for his own benefit and inserts a spendthrift clause.⁸

Another bankruptcy case that is instructive is *Advanced Telecommunication Network, Inc. v. Allen* (*In re Advanced Telecommunication Network, Inc.*) (“ATN”).⁹ The ATN case concerned two brothers who owned a corporate debtor and who owed it \$6 million on account of a fraudulent transfer judgment entered against them. The corporate debtor sought to collect the judgment from the brother-owners through proceedings supplementary by requiring them to turnover all funds held in two offshore trusts.¹⁰ Notably, the brother-owners had “liquidated all of their stock accounts in the United States and wired at least \$2.2 million to two self-settled offshore trusts” in anticipation of an injunction prohibiting them from transferring their assets.¹¹ The bankruptcy court ordered the brother-owners to repatriate the funds to the United States. Like the court in *Lawrence*, this court determined that the brother-owners had the power and ability to repatriate assets held in their offshore trusts.¹²

State courts have likewise held that they have authority to order debtors to repatriate foreign assets. In *Shim v. Buechel*, the Florida Supreme Court held that “a trial court may order a defendant over whom it has in personam jurisdiction to act on foreign property pursuant to [the state statute governing pro-
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About the Author

In his bankruptcy practice, **Robert F. Elgidely** regularly represents court-appointed fiduciaries in connection with Chapter 7 and Chapter 11 cases stemming from fraud and financial crimes. He has developed a reputation as a thorough and tenacious litigator who prosecutes fraudulent transfer, preference and professional liability claims with the objective of maximizing distributions to creditors. Robert also regularly represents debtors, creditors, creditors’ committees and liquidating trustees.

As the foregoing cases illustrate, a court that has personal jurisdiction over a party may order that party to relinquish possession or control of foreign assets.¹⁹ A repatriation order should require the debtor to promptly take such steps as are necessary to repatriate to the United States the foreign assets which are held by him or are under his direct or indirect control, jointly or singly. Through diligent effort and swift action, we can stop unsavory debtors from playing their shell game in the United States or abroad.

ceedings supplementary to execution]”.¹³ The property at issue in *Shim* was proceeds of the sale of a judgment debtor’s property. Specifically, proceeds from the sale of an individual judgment debtor’s stock in a corporation which were maintained in a safe at his home in South Korea.¹⁴ On the question whether the trial court had authority to order a party to take action in a foreign jurisdiction, the Florida Supreme Court stated that it is “well-established that a court’s personal jurisdiction over a defendant gives the court the ‘power to require a defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.’”¹⁵ The Florida Supreme Court also noted that a party’s “obedience [with a repatriation order may be] compelled by proceedings in the nature of contempt, attachment, or sequestration.”¹⁶ “Such penalties are imposed against the [recalcitrant party]— not the property—and serve to hold [it] accountable and prevent [it] from relocating assets to avoid execution of a judgment.”¹⁷

Several cases have also held that a party over whom the court has personal jurisdiction may be compelled to re-paper or re-title foreign assets in order to ensure the assets can be subjected to a repatriation order.¹⁸

CONCLUSION

As the foregoing cases illustrate, a court that has personal jurisdiction over a party may order that party to relinquish possession or control of foreign assets.¹⁹ A repatriation order should require the debtor to promptly take such steps as are necessary to repatriate to the United States the foreign assets which are held by him or are under his direct or indirect control, jointly or singly. Through diligent effort and swift action, we can stop unsavory debtors from playing their shell game in the United States or abroad. 🏠

ENDNOTES:

¹ *United States v. Schwarzbaum*, 2021 WL 3540008, at *2 (S.D. Fla. June 30, 2021), *report and recommendation adopted*, 2021 WL 4958307 (S.D. Fla. Oct. 26, 2021) (citing *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1187 (11th Cir. 1991) (quoting *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962)) and *United States v. McNulty*, 446 F. Supp. 90, 92 (N.D. Cal. 1978) (“It is clear, then, that this court, by virtue of its jurisdiction over the defendant, has the power to order him to repatriate the assets located in the foreign bank.”)).

² *United States v. Schwarzbaum*, 2023 WL 2682296, at *5 (S.D. Fla. Mar. 29, 2023).

³ 279 F.3d 1294 (11th Cir. 2002).

⁴ *Id.* at 1296.

⁵ *Id.* at 1297.

⁶ *Id.*

⁷ *Id.* at 1298 (citing 11 U.S.C. § 521(4)).

⁸ *Id.* at 1299 (citation omitted).

⁹ 2011 WL 3585827 (Bankr. M.D. Fla. 2011).

¹⁰ *Id.* at * 1.

¹¹ *Id.*

¹² *Id.* at * 3.

¹³ *Shim v. Buechel*, 339 So. 3d 315, 316 (Fla. 2022). *See also Koehler v. Bank of Bermuda Ltd.*, 911 N.E.2d 825, 831 (N.Y. 2009) (answering certified question of the United States Court of Appeals for the Second Circuit in the affirmative and holding that a New York court with personal jurisdiction over a defendant may order it to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee).

¹⁴ *Id.* at 316.

¹⁵ *Id.* at 317-318 (citing *Fall v. Eastin*, 215 U.S. 1, 8, 30 S. Ct. 3, 54 L. Ed. 65 (1909) (quoting *French v. Hay*, 89 U.S. (22 Wall.) 250, 252-53, 22 L. Ed. 857 (1874))).

¹⁶ *Shim*, *supra* at 318 (citing *Carpenter v. Strange*, 141 U.S. 87, 106, 11 S. Ct. 960, 35 L. Ed. 640 (1891)).

¹⁷ *Id.* *See also Koehler v. Bank of Bermuda Ltd.*, 911 N.E.2d 825, 831 (N.Y. 2009) (answering certified question of the United States Court of Appeals for the Second Circuit in the affirmative and holding that a New York court with personal jurisdiction over a defendant may order it to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee).

¹⁸ *See, e.g., Schanck v. Gayhart*, 245 So. 3d 970, 971-972 (Fla. 1st DCA 2018) (court had authority to order judgment debtor to turnover stock certificates and membership interests located in a foreign jurisdiction but also had authority to order alternative remedy of cancellation and re-issuance of stock certificates and membership interests in the judgment debtor’s name and deliver them to counsel for the judgment creditor) and *Ciungu v. Bulea*, 162 So. 3d 290 (Fla. 1st DCA 2015) (court had authority to direct a party to fulfill her obligation to ensure legal title to Romanian properties were properly vested in persons entitled to receive those properties).

¹⁹ The sources of a court’s authority to order repatriation of foreign assets include its inherent authority, 28 U.S.C. § 1651(a) (the All Writs Act), Bankruptcy Code sections 105(a) and 548(a), Fed. R. Civ. P. 69(a) governing proceedings supplementary to execution (as incorporated into Fed. R. Bankr. P. 7069), and state law analogs of the foregoing statutes and rules.