



INSTITUTE OF INTERNATIONAL BANKERS

December 17, 2009

Memorandum To: Head Office and U.S. Senior Management of Member Institutions

Re: Formation of a Working Group To Address Issues Raised by the Koehler Case, Including Preparation of an Amicus Brief To Assist Member Banks That Are, or Become, Subject To Claims Brought under Koehler and Seeking a Legislative Solution in Albany

As discussed during our December 14th conference call, we are organizing a Working Group of interested member banks to participate in, and fund the outside legal/lobbying costs in connection with, the collective effort to address the issue raised by the decision of the New York Court of Appeals, the highest level court in New York, in the Koehler case (see the link below). Briefly, that issue concerns the authority of New York courts to order a bank with operations in New York to turn over to a person who has obtained a judgment against a third party, in satisfaction of that judgment, property of the third party that is held or controlled by the bank outside New York (including property outside the United States) regardless of whether the person enforcing the judgment, the third party or the underlying dispute between the two has any connection to New York.

This issue is especially serious for international banks that operate in New York through branches or agencies, or even only through representative offices (presumably, Koehler's principles would not apply to banks that operate in New York only through subsidiaries, although we note that the subpoena and restraining notice described below treat separate legal entities outside the United States as within Koehler's reach). **Koehler in effect potentially makes these New York operations a collection agent through which a judgment creditor can seek to recover against property of a judgment debtor held by a bank anywhere in the world.** We are aware that several international banks currently are defending against Koehler-based collection efforts. (The link below provides a copy of the subpoena and restraining notice issued in one of these cases. As noted above, these purport to cover the bank's global operations.) **Koehler provides judgment creditors a powerful means to satisfy their judgments by acting against banks that have no connection to the dispute underlying the judgment, and we think it is only a matter of time until similar claims are brought against other international banks in New York.**

The Institute plans a two-part strategy to help mitigate the impact of Koehler, both parts of which we plan to pursue concurrently:

- First, we plan to prepare an amicus brief that will focus on the comity, potential constitutional and other policy considerations raised by the Koehler decision. Because these considerations are not limited to the facts of any particular case, we



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anticipate that the brief generally could be used in support of efforts by those banks that participate in the Working Group (discussed below) to oppose actions brought against them under Koehler.

- Second, we plan to undertake a lobbying initiative in New York to amend the relevant provisions of New York law to in effect overturn the Koehler decision.

Sullivan & Cromwell prepared the *amicus* brief filed by The Clearing House with the Court of Appeals in the Koehler case, and we plan to retain them to assist with the *amicus* brief described above, as well as preparing the proposed amendment and supporting materials in connection with our efforts in Albany. To assist with the direct lobbying activities themselves, we plan to retain Amy Solomon from the Albany office of McKenna, Long & Aldridge who has worked with us on other matters in Albany.

Because domestic banks are also at risk under Koehler, we think it would make sense to seek a collective solution and accordingly are engaged in discussions with The Clearing House about proceeding jointly on these efforts and sharing equally the outside legal/lobbying expenses, which we estimate will be \$200,000 altogether. As discussed during the conference call, we are organizing a Working Group of interested Institute member banks to contribute in the aggregate \$100,000 toward covering these expenses, with the balance provided by The Clearing House. We will adjust the scope of our efforts according to the amount of available funding.

Those interested in participating in the Working Group are asked to contribute \$5,000 each, with medium and small-size banks contributing half that amount. Please return the contribution form provided in the link below as soon as possible and we will send you an invoice. We ask that you also provide us contact information for the individuals who should be included in future Working Group distributions.

In the meantime, please contact either of the undersigned if we can provide any further information or assistance.

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cc: Board of Trustees
Committees

Bruce Clark (Sullivan & Cromwell)
H. Rodgin Cohen (Sullivan & Cromwell)
Amy Solomon (McKenna Long & Aldridge)



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Link to the New York Court of Appeals' Koehler decision:

<http://www.iib.org/associations/6316/files/20090604KoehlerOpinion.pdf>

Link to the subpoena/restraining notice issued in connection with a current Koehler-based post-judgment enforcement action:

<http://www.iib.org/associations/6316/files/20091217KoehlerDocs.pdf>

Link to the Working Group contribution form:

http://www.iib.org/associations/6316/files/20091216WGForm_Koehler.pdf