Fla. Ruling Opens Door To Foreign Asset Freeze Enforcement

By **Christopher Kercher and Mark Forte** (March 16, 2021, 3:59 PM EDT)

Although receiving little fanfare since its issuance, a recent trial court order in Florida state court has sent a warning shot to American defendants embroiled in litigation abroad.

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In Gorsoan Ltd. v. Bullock, the Eleventh Judicial Circuit of Florida in Miami-Dade County directly enforced an ex parte, worldwide asset freeze — commonly known as a "Mareva" or "freezing" injunction — originally issued by a Cyprus court.[1]

U.S. courts have uniformly repudiated the use of the drastic Mareva remedy. Gorsoan, however, represents the clearest affirmation yet that Mareva injunctions will have full force in the U.S. when entered into by foreign jurisdictions.

Mareva Injunctions: A Brief Background

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A 1975 invention of British courts,[2] the Mareva injunction is a uniquely powerful device for plaintiffs seeking to protect against the risk of asset dissipation before a judgment on the merits.

The Mareva device allows a claimant to move for an injunction — ex parte if the circumstances warrant — freezing all the opposing party's assets up to a specified amount needed to secure any future damages award. To borrow from former Supreme Court Justice Antonin Scalia, the Mareva injunction is the "nuclear weapon of the law."[3]

After notice and an opportunity for the opposing party to be heard, a Mareva injunction can be extended for the duration of the litigation. Because the court's authority to enact such a remedy stems from its jurisdiction over the defendant, i.e., in personam, rather than over the unspecified enjoined properties, i.e., in rem, the injunction can be global in scope.

To secure this relief, litigants need only satisfy two main prerequisites: a genuine risk of asset dissipation and a good arguable case on the merits of the underlying dispute.[4]

The prejudgment remedies available to U.S. plaintiffs are significantly more limited. Preliminary injunctions over an individual's assets are generally restricted to cases seeking equitable relief. The closest American analog is a prejudgment attachment; this remedy, however, is tied to specific property within the court's jurisdiction and generally cabined to discrete types of disputes.

Proponents of the Mareva device point to its ability to stop globetrotting fraudsters from evading accountability. In the Mareva injunction's namesake case, Mareva Compania Naviera SA v. International Bulkcarriers SA, Justice Tom Denning reasoned that it was only natural for the court to have this authority where "there is a danger that the debtor may dispose of his assets so as to defeat it before judgment."[5]

Soon after its conception in England, other common law jurisdictions followed suit, a majority now blessing Mareva orders, including Australia, Canada, New Zealand, Malaysia, Hong Kong, Singapore and Cyprus. Of particular importance has been its availability in the offshore jurisdictions of the Cayman Islands and British Virgin Islands, where multijurisdiction holding company structures prevail.

The device is not without critics, who characterize it as an unnecessary boon for plaintiffs and creditors and an affront to the sovereignty of other nations. Others cite the forum shopping opportunities enabled by the device. Of particular concern is the remedy's potential for abuse, as the issuing forum need only have personal jurisdiction over the party.

Violating the order risks a default judgment in the underlying litigation and other more immediate remedies for contempt of court.

Where the defendant is — as is often the case — a company with its own legal personality, its registered office and sometimes director services are located within the jurisdiction of incorporation, which could allow the court to appoint a receiver with power to control defendant's assets and vote its shares.

Mareva Treatment in the U.S.

Outside the Authority of U.S. Courts

In a break with its fellow common law jurisdictions, the U.S. has rejected the issuance of Mareva injunctions within its courts.

In a 1999 decision, the U.S. Supreme Court in Grupo Mexicano de Desarollo SA v. Alliance Bond Fund Inc. held that a federal district court exceeded its authority when it granted an unsecured noteholder's motion for a preliminary injunction, preventing a Mexican toll road operator from assigning the notes it had issued after defaulting on its obligations.

Writing for a five-justice majority, Justice Scalia interpreted the Judiciary Act of 1789, which conferred jurisdiction to federal courts over "all suits ... in equity," to only empower courts to enact equitable remedies "administered by the English Court of Chancery at the time of the separation of the two countries."

Prior to the Mareva injunction's recognition, prejudgment relief restricting the use of a party's property was not available for damages claims based on the principle that "a general creditor (one without a judgment) had no cognizable interest ... in the property of his debtor."

The Mareva injunction thus represented "a dramatic departure" from Anglo-American jurisprudence and fell outside the limitations of the Judiciary Act.

Further, the court cautioned that "by adding, through judicial fiat, a new and powerful weapon to the creditor's arsenal," a Mareva injunction "could radically alter the balance between debtor's and creditor's rights"; such authority would need to come from Congress.

Although state courts are not similarly restrained in matters of equity, the New York Court of Appeals sided with the Supreme Court the following year in a unanimous opinion, Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, that held Mareva injunctions were beyond New York courts' authority.[6]

The court reasoned that "widespread use of [the Mareva] remedy" would risk not only disrupting creditor-debtor rights but also would "substantially interfere with the sovereignty and debtor/creditor/bankruptcy laws of ... foreign countries." To this day, it appears that no U.S. court has issued a Mareva injunction.

Recognition of Foreign Mareva Decrees

Despite their repudiation of Mareva orders, U.S. courts have proven to be a more hospitable forum for such injunctions when issued abroad. Although not faced directly with whether to enforce a Mareva injunction, courts have recognized judgments in proceedings where a Mareva order was issued, pointing to long-standing precedent demanding due regard for final foreign judgments.[7]

The New York Court of Appeals, for instance, faced this question in 2003. In CIBC Mellon Trust Co. v. Mora Hotel Corp. NV, plaintiffs sought to enforce a British court's $330 million default judgment imposed on Dutch defendants with no assets in England for not complying with the court's worldwide freeze on their assets, namely their Manhattan hotel.

The defendants challenged the award as contrary to New York public policy in light of the Mareva order. On appeal, the court reiterated its "concern regarding the power and potential commercial disruption of Mareva orders."

Nevertheless, New York courts are generally bound by the final judgment of a foreign court with jurisdiction over a defendant unless "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process."[8]

Only the extraordinary circumstance has satisfied this standard, such as a Liberian court judgment in the midst of a civil war.[9]

Accordingly, its concerns with the Mareva order notwithstanding, the court enforced the judgment, concluding that "the use of this device, standing alone, does not render the English system as a whole incompatible with our notions of due process" — especially given that "the overall fairness of England's legal system ... is beyond dispute."

Gorsoan v. Bullock: Florida Enforces a Prejudgment Mareva Order

In Gorsoan, the Eleventh Judicial Circuit of Florida has gone a step further. In the foreign proceeding, Gorsoan — a Cypriot limited liability company and the assignee of a Russian bank's rights to Russian municipal bonds — sued Janna Bullock, the former wife of a now-jailed Russian Minister of Finance, for misappropriation of investments in the bonds and successfully moved for a Mareva order as part of the action.

The order enacted a worldwide freeze of Bullock's assets up to a limit of $26 million, and Gorsoan initiated the Florida court action to directly enforce this injunction, eyeing, in particular, her $7 million condominium on Fisher Island. The court granted Gorsoan's motion ex parte, issuing its own worldwide freeze, which Bullock moved to dissolve.

Thus, in what appears to be a case of first impression in not only Florida but across the country, the circuit court was faced directly with whether to enforce a Mareva decree issued against the defendant in a pending foreign proceeding.

In moving to dissolve the injunction, Bullock alleged that the Cypriot proceeding and the Mareva injunction were all part of a corrupt shakedown by the Russian government and that Gorsoan was a shell corporation formed specifically to pursue litigation against her. For our purposes, she put forth two main arguments as to why enforcing this injunction was problematic.

First, Bullock pointed to the fact that foreign injunctions, particularly nonfinal ones, do not mandate the same level of deference as do final monetary judgments.

Although other jurisdictions may be more likely to align with Bullock's position, the court in Gorsoan dismissed this argument, pointing to a string of recent Florida appellate decisions applying the same strict principles of international comity to foreign preliminary injunctions.

Therefore, Florida precedent required the enforcement of this injunction unless doing so would offend some "paramount public policy."

Second, Bullock claimed that directly enacting a Mareva decree would in fact offend public policy. In issuing its own Mareva decree, the Florida court would, in effect, be providing a workaround to enact precisely the remedy repudiated in Grupo Mexicano.

Although a 2019 Florida appellate decision, Abitbol v. Benarroch, had signaled openness to doing just that,[10] one might expect this argument to have had some resonance. But the court rejected this argument, relying on a January decision, Amezcua v. Cortez,[11] which enforced a preliminary injunction over Florida assets issued in Mexico.

The court interpreted Amezcua as directly on point, dismissing that Mexico's prejudgment regime mirrors the U.S. attachment regime and that the relief in Amezcua, in contrast to a Mareva injunction's indiscriminate nature, applied only to a "specific Florida asset."

While dispositive in Grupo Mexicano, the court viewed this as "an irrelevant distinction for purposes of comity/full faith and credit." According to Gorsoan, Florida public policy requires only that a Mareva decree be issued by an impartial tribunal of competent jurisdiction. With no impropriety alleged, the court maintained its injunction albeit narrowed to Florida.

Conclusion: Ramifications for Future Litigants

Although it remains to be seen whether other jurisdictions will follow in its footsteps, the Gorsoan order could have major ramifications for litigants at home and abroad.

To some, the remedy issued in Gorsoan closes a loophole for defendants with U.S. assets. To others, Gorsoan represents the unwelcome arrival of an over-intrusive foreign remedy. Either way, potential defendants to litigation abroad should take notice of the Florida court's order.

After Gorsoan, a Mareva injunction comes with the prospect of an asset freeze imposed directly in a U.S. defendant's domicile.

If unable to receive sufficient information on defendant's assets via the Mareva order, foreign plaintiffs may be able to seek Section 1782 discovery into the assets, and, once the subject of a Mareva order, defendants need to tread carefully: Violating the order can have grave consequences, and challenging it on the merits risks waiving any defenses to its enforcement at home.

In light of these considerations as well as the daunting threshold laid out by Gorsoan for challenging these injunctions after the fact, defendants' best course of action may be to act proactively, including through the pursuit of measures such as a foreign anti-suit injunction.

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[1] Gorsoan Ltd. v. Bullock, 2020-020803-CA-01 (Fla. Cir. Ct. Feb. 17, 2021), Dkt. No. 44.

[2] Nippon Yusen Kaisha v. Karageorgis, [1975] 2 Lloyd's Rep. 137 (C.A.).

[3] Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 332 (1999).

[4] Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] 1 Q.B. 644, 661 (C.A.); see also Cherney v Neuman [2009] EWHC 1743 (Ch).

[5] Mareva Compania Naviera S.A. v. International Bulkcarriers S.A., [1980] 2 Lloyd's Rep. 509, 510 (C.A.).

[6] Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541 (2000).

[7] See, e.g., CIBC Mellon Tr. Co. v. Mora Hotel Corp. N.V., 100 N.Y.2d 215 (2003); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992).

[8] N.Y. C.P.L.R. 5304(a)(1) (emphasis added).

[9] Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000).

[10] Abitbol v. Benarroch, 273 So. 3d 147 (Fla. Dist. Ct. App. 2019).

[11] 2021 WL 113388 (Fla. Dist. Ct. App. 2021).