

Bancredit and the Application of Bankruptcy Code §108 in Chapter 15 Cases

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Chapter 15 of the Bankruptcy Code continues to provide judges, practitioners, scholars and students opportunities to observe the development of a nascent case law. For example, much has been written about the Southern District of New York's decisions addressing §1516(c)'s *presumption*, in the absence of evidence to the contrary, that a foreign debtor's center of main interest (COMI) is where it has its registered office. The two leading cases thus far, *SPhinX* and *Bear Stearns*, each written by a different Southern District of New York bankruptcy judge, can be read as being at odds with each other on the question of whether the court must make its own independent determination of COMI if the foreign representative seeks to rely on the presumption and no party in the case challenges it. The judge in *SPhinX* suggested that the court need not make independent inquiry; the judge in *Bear Stearns* said that in the absence of an objection, the court must determine COMI for itself.¹



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While *Bear Stearns* is currently on appeal, a third case in the same court before a different judge, *Basis Yield Alpha Fund*, may provide yet another approach to the same issue.² As anyone practicing bankruptcy law in the early 1980s will recall, when the Code was new and courts were writing on a clean or nearly clean slate, different districts and different judges within the same district reached a variety of approaches and conclusions on the same issues, at least until a more consistent body of bankruptcy court and appellate

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case law developed.

This article describes a recent ruling also in the Southern District of New York, that raises what appears to be an issue of first or second impression (read on) under chapter 15 that is likely to recur: Whether foreign representatives are eligible to benefit from rights the Code grants to trustees and debtors-in-possession (DIPs) when those rights are not explicitly provided for in chapter 15. In the case *In re Bancredit Cayman Limited*,³ the precise question was whether the benefit of §108(a) of the Code—extending limitations periods for trustees to commence litigation—applies to foreign

The effect of §108(a) is to extend the time in which a trustee can bring actions against third parties, when the statute of limitations for the action would ordinarily expire in less than two years after the entry of an order for relief in the bankruptcy case. The date of an “order for relief” in a voluntary bankruptcy case is the date the petition is filed.⁴ Chapter 15 refers to an “order granting recognition” of a foreign proceeding, but does not refer to an order for relief.

Request to Apply §108 in Chapter 15

Under §1509(b), a foreign representative “has the capacity to sue and be sued in a court in the United States.” In *Bancredit*, the foreign representatives obtained authorization from the bankruptcy court to take discovery and conduct investigations into, among other things, potential causes of action against third parties.⁵ Apparently, in the course of

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representatives. In *Bancredit*, the foreign representatives obtained an order recognizing *Bancredit's* foreign proceeding in the Cayman Islands as a foreign main proceeding, triggering their rights to request the broad panoply of relief under §1521. Section 108 is not explicitly listed among the §1521 rights. The issue was raised by the foreign representatives in an application to amend the court's recognition order for the purpose of incorporating §108 relief.

Section 108

Specifically, §108(a) states, in pertinent part:

If applicable nonbankruptcy law...fixes a period within which the debtor may commence an action, and such period has not expired before the date of filing the petition, the trustee may commence such action only before the later of—

- (1) the end of such period...or
- (2) two years after the order for relief.

investigating potential claims, the foreign representatives realized that, while they had not yet finally determined to commence certain actions, they were nearing dates on which statutes of limitations would expire if §108(a) was not applicable to extend them. They filed an application “on presentment”⁶ seeking an order supplementing the court's prior recognition order to “clarify” that the relief granted in the recognition order “includes relief available to a trustee or debtor under §108 of the Bankruptcy Code.” In their application, the foreign representatives said that they require this relief (1) to “fix with certainty,” the time they have to complete their investigations and commence actions and (2) in case

⁴ In an involuntary case, the order for relief is entered if the petition is not timely challenged or after a contested involuntary petition is resolved in favor of the petitioning creditors. 11 U.S.C. §303(h).

⁵ The court's original recognition order did not authorize discovery or litigation due to a limited objection filed by an affiliate of the foreign debtor that was subject to litigation. The court subsequently supplemented its recognition order and granted the foreign representatives the right to take discovery and file suit in the United States as provided in §1509.

⁶ The Local Rules for the U.S. Bankruptcy Court, Southern District of New York (“SDNY Local Bankr Rules”) provide that a party may submit orders to the court “if notice and a hearing are not required, and a motion is not mandatory.” A notice of presentment must be filed with the court and served on the debtor, each committee, the U.S. Trustee, all parties who have requested notice and all other parties in interest on not less than three days' notice. Rule 9074-1(b) of the SDNY Local Bankr. Rules.

³ Case No. 06-11026 (SMB) (Bankr. S.D.N.Y.) Memorandum Decision and Order Denying Motion for Reargument (Nov. 2, 2007).

¹ Compare *In re SPhinX Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (finding that in the absence of an objection, the court might be inclined to find the COMI to be where the foreign debtor has its registered office), with *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, Case No. 07-12383 (BRL), Amended Decision and Order Denying Recognition of Foreign Proceeding at p. 14 (Sept. 5, 2007) (“parting company” with the suggestion in *SPhinX* that COMI be where the foreign debtor has its registered office solely on the basis that no party objected and no other proceeding is pending).

² Case No. 07-12762 (REG) (Bankr. S.D.N.Y.).

defendants raise statute of limitations defenses in state courts and other tribunals that may not know what §108 is and that it applies in chapter 15 cases.

Notwithstanding the foreign representatives' application on presentment and because an objection was filed (unrelated to the §108 issue), the court scheduled a hearing on notice to address the request for clarification that §108 applies. At the hearing, the court raised the concern that because there is no "order for relief" in a chapter 15 case, the foreign representatives' application could be read to mean that §108 would extend a statute of limitations indefinitely. Counsel for the foreign representatives quickly responded that what they were hoping is that the court would "construe the order of recognition as the order for relief."

The court then stated what it really viewed as the critical problem with the application—that it sought, as Chief Judge Bernstein put it, to "deprive a party who is not before me of a possible statute of limitations defense." The court saw this as a procedural impediment to granting the requested relief:

I don't see how I can strip someone of a possible defense and not give them the opportunity

to argue that 108 has no application. It's like making a motion to extend the statute of limitations without serving potential defendants.

Counsel argued that the extension of time under §108 arises automatically just like the automatic stay under §362 of the Code, so it doesn't matter that parties are given no notice of it. Chief Judge Bernstein noted, however, that while §362 is explicit in its application in a chapter 7 or chapter 11 case, §108 does not clearly authorize the court to extend statutes of limitations in chapter 15. He also stated that the automatic stay does not affect parties' substantive rights, whereas applying §108 in chapter 15 would strip defendants of a statute of limitations defense when those defendants have not been given an opportunity to argue that §108 doesn't apply. Chief Judge Bernstein was clearly concerned about affecting substantive rights of parties who would be affected by the relief, but were not before him to oppose the application. He suggested that the foreign representatives commence those actions where they are in danger of limitations periods expiring.

The foreign representatives argued that §1521(a)(7) authorizes the court to

apply §108 in chapter 15. Section 1521(a)(7) provides that upon recognition of a foreign proceeding and on request of the foreign representatives, the court may "grant any appropriate relief, including...granting any additional relief that may be available to a trustee." The court did not address the §1521(a)(7) argument, other than to note that §108 refers to an "order for relief" and a "trustee" and that the entry of an order for relief does not occur in chapter 15 cases and a foreign representative is not a "trustee." The court denied the application.⁸

The foreign representatives filed a motion for reargument principally on the bases that (a) at the time of the hearing on the original application, the only opposition that was filed raised issues not related to §108 so the foreign representatives were not aware of the nature of the court's concerns and

⁷ The only exclusions to §1521(a)(7)—relief that the court may not grant to a foreign representative—are provisions of the Code that are not relevant to §108.

⁸ Counsel also noted that Congress referred to §108 as a "tolling protection" in the legislative history of §1520, which addresses the scope of the automatic stay in chapter 15 cases. But the reference in the legislative history, as well as in the foreign representatives' application and oral argument, is unclear, and the most counsel could say is that Congress appears to have assumed it applies.

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didn't have a chance properly to address them and (b) subsequent to the hearing, a bankruptcy court in Mississippi (in a case where a foreign representative was one of the Bancredit foreign representatives) granted an application to apply §108 in a chapter 15 case pursuant to §1521(a)(7)—the precise relief Chief Judge Bernstein denied in *Bancredit*.

In the motion for reargument, the foreign representatives framed the principal issues as (1) is there an order for relief in a chapter 15 case, (2) should a foreign representative be treated as a trustee for purposes of §108 and (3) does the court have discretion and authority to determine whether §108 applies in a chapter 15 case?⁹ In addition, the foreign representatives discussed the Mississippi ruling applying §108 in a chapter 15 case.

Chapter 15 Petition Constitutes an Order for Relief

In the motion for reargument, the foreign representatives in *Bancredit* argued that an order of recognition is an order for relief because (1) under §301 of

the Code, a debtor commencing a voluntary case by the filing of a petition constitutes an order for relief¹⁰ and (2) under §1502, the term “debtor” means an entity that is the subject of a foreign proceeding. Therefore, the voluntary filing of a chapter 15 petition (a “petition” under §301) by a foreign representative (a “debtor” under §301) should constitute an order for relief within the meaning of §108.

A Foreign Representative Should Be Treated as a Trustee

Conceding that §108 by its terms applies only to trustees, the Bancredit foreign representatives cited cases in which §108 was extended to parties who were the “functional equivalents” of a trustee—for example, a state court receiver and a creditor appointed in a case to prosecute an action. They also cite case law authority for the proposition that extending §108 to nontrustees is justified when it helps parties that have fiduciary obligations to all creditors of the estate and where

money recovered from bringing actions will benefit all the creditors. The foreign representatives summarized the argument by stating:

Accordingly, extension of the tolling of section 108(a) to the foreign representatives furthers the statute's purpose of allowing an appointed fiduciary a reasonable opportunity within which to investigate possible causes of action that belonged to the debtor at the time of the bankruptcy filing and to take action on those causes of action.

Court Discretion to Apply §108 in Chapter 15 Cases

Although the foreign representatives took the position that application of §108 in chapter 15 is automatic, they set forth a comprehensive analysis of how chapter 15 also gives the court discretion and flexibility that should be exercised in favor of applying §108. For example, §1507 (Additional Assistance) allows the court to provide assistance to the foreign representatives if recognition has been granted and the form of assistance is not otherwise specifically restricted elsewhere in chapter 15.

⁹ In deference to the court's concern about notice to potential defendants, they also addressed the issue of whether the rights of prospective defendants to object should be a consideration in deciding whether to apply §108 to [a] chapter 15 case.

¹⁰ In the motion, the foreign representatives note that while chapter 15 completely replaces and supersedes former §304 (Ancillary Cases) of the Code, which was repealed when chapter 15 became effective, the definition of “petition” in §101(42) of the Code continues to be defined as a “petition filed under §§301, 302, 303, or 304...as the case may be, commencing a case under this title.” The foreign representatives' argument appears to be that Congress intended, but forgot, to change the reference in §101(42) from §304 to §1515.

Legislative history indicates that Congress adopted §1507 to further the international cooperation that had developed under former §304, but did not want it to form the basis for denying or limiting relief otherwise available under chapter 15. The Bancredit foreign representatives thus argued that it would be inconsistent with this history to deny extending §108 to a foreign representative when a domestic trustee is afforded such relief as a matter of course.

The foreign representatives also relied on §1521(a)(7), which, as noted above, expressly gives authority for the court to grant “any relief that may be available to a trustee” where necessary to, among other things, “protect the assets of the debtor or the interests of the creditors.”

The Condor Decision

Finally, the foreign representatives noted the recent ruling in the case *In re Condor Insurance Limited*,¹¹ in which the U.S. Bankruptcy Court for the Southern District of Mississippi granted the identical relief requested and denied in Bancredit. The *Condor* court held that §108 relief is available to a trustee and therefore can be granted to the foreign representatives under §1521(a)(7) as necessary to protect the assets of the debtor or the interests of the creditors. The *Condor* court also made the relief effective as of the date the order of recognition was granted, treating the recognition order as an “order for relief” within the meaning of §108. In *Condor*, the court found that proper notice had been given and no objections were filed.

Order Denying Reargument

Four days after the motion for reargument was filed, Chief Judge Bernstein issued his memorandum decision and order denying the motion and setting forth his rationale for doing so. In the memorandum decision, Chief Judge Bernstein focuses, as he did at the hearing on the original application, on the absence of notice “to anyone who might controvert” the argument that §108 applies in chapter 15. Describing the motion as “presently unnecessary” and “plainly inappropriate, at least as a procedural matter” because there was no actual case or controversy in which an action

had been commenced and the defendant raised a statute of limitations defense, Chief Judge Bernstein characterized the application as a request for a “comfort” order.

Although Chief Judge Bernstein reiterated that the foreign representatives are not “trustees” and that an order for relief is not entered in a chapter 15 case, he did not otherwise address the foreign representatives’ statutory arguments about why a recognition order is an order for relief and why a foreign representative should be treated as a trustee. Significantly, Chief Judge Bernstein concludes his memorandum decision by stating that:

Nothing in this decision should be read to decide the ultimate issue: whether §108 is available to foreign representatives. Identifying the potential weakness of the Foreign Representatives’ arguments was simply meant to show that the issue is not as uncontroversial as they suppose, and requires that I hear both sides. The Foreign Representatives remain free to make their statutory and other

substantive arguments in the appropriate forum, at the appropriate time and upon appropriate notice.

Conclusion

In view of the *Condor* decision, it cannot be said that *Bancredit* is the “first” ruling on the issue of whether §108 applies in chapter 15 cases, but it is the only written opinion so far. Thus, the first two rulings on the issue stand in complete contradiction to each other, further demonstrating how chapter 15 provides an opportunity to observe early development of emerging precedent. The *Bancredit* foreign representatives have taken an appeal from the order denying their motion for reargument, so we may see yet a different analysis of the issue by another judge. As we all know, district court decisions in bankruptcy are not binding on bankruptcy courts within the district other than in the case at issue, so the field would remain wide open for further interpretation, similar to what we’ve seen thus far in the issue of COMI under §1516(c). ■

¹¹ Case No. 07-51045-ERG (Bankr. S.D. Miss.) Order Granting Motion for Relief Pursuant to 11 U.S.C. §1521(a)(7) for the Application of 11 U.S.C. §108 (Oct. 10, 2007).