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OUTLINE FOR ABI UK PRESENTATION

LEVERAGING THE POWER OF SECTION 157(B)(5) TO RESOLVE MASS TORT LIABILITY POST-*PURDUE*

1. INTRODUCTION

a. Corporate and nonprofit entities have been searching for holistic solutions to fairly and efficiently resolve mass tort liability of their predecessors for the past three decades.

i. Various means have been employed over time, including:

1. Class actions, state attorney general investigations, and multi-district litigation

2. Most recently, the focus has been on resolving such liabilities through the bankruptcy system

a. Chapter 11 plan that addresses and releases all mass tort claims

i. Central component was third party releases for third-party defendants (e.g., non-debtor parent or affiliate)

b. Supreme Court's ruling in *Purdue Pharma*.

i. The Supreme Court recently banned non-consensual third-party releases in chapter 11 plans

ii. This dramatically changes the current bankruptcy approach to resolving mass tort liability

iii. Some view *Purdue* as the death knell to bankruptcy as an option to resolve mass tort liability

c. 28 U.S.C. § 157(b)(5)—a mass tort aggregation mechanism

i. Section 157(b)(5) is a congressionally-created tool to aggregate personal injury cases related to a bankruptcy into one forum—i.e., the district court in the district in which the bankruptcy is pending

ii. Prior to the advent of nonconsensual third-party releases (which offered relief more easily and broadly), section 157(b)(5) played a prominent role in mass-tort cases

iii. Given *Purdue*, it is likely section 157(b)(5) will return to the forefront in mass tort bankruptcies

2. HISTORY OF EFFORTS TO RESOLVE MASS TORTS

a. Historical problems posed by mass tort litigation

i. Bad for defendants

ii. Bad for plaintiffs

iii. Bad for society

iv. Failure to reach policy solution through legislatures has pushed mass torts into the court systems

b. Historical efforts to resolve mass torts in Court

i. Early efforts through class actions

ii. Multidistrict litigations formed as an alternative to class actions

iii. Bankruptcy courts filled gaps with aggregation devices, preliminary injunctions, and third-party releases

c. The Supreme Court's decision in *Purdue*

i. There has been a recent host of mass tort bankruptcies that confirmed chapter 11 plans relying heavily on nonconsensual third-party releases

1. Roman Catholic diocese cases
2. Ear plug manufacturer cases (*3M* case)
3. Boy Scouts cases
4. Asbestos manufacturer cases (*LLT*, *Bestwall*, *DBMP*, etc.)

ii. In mid-2024, the Supreme Court put an abrupt end to the third-party release strategy by

iii. The *Purdue* case:

1. Purdue was an opioid manufacturer—OxyContin, the most widely prescribed opioid pain killer
    a. Purdue was controlled by its founders—the Sacker family
    b. Based on allegations, in the mid-1990's, the Sacker family pushed Purdue to aggressively market OxyContin for broad use as a less-addictive alternative to earlier opioid pain killers
    c. Plaintiffs later alleged these actions led to overprescription and contributed to the opioid epidemic in the U.S.
    d. As litigation increased, members of the Sackler family began withdrawing funds from Purdue, ultimately approx. $11 billion

2. As tort claims against Purdue and the Sacker family increased, Purdue sought refuge by commencing chapter 11 case in 2019
    a. Upon filing, the automatic stay halted litigation against Purdue itself
    b. Purdue also sought and obtained a preliminary injunction of cases against nondebtor third parties who were co-defendants in the opioid litigation (e.g., Sacker family)
    c. After lengthy negotiations, Purdue proposed, and the bankruptcy court confirmed, a chapter 11 plan supported by the vast majority of Purdue's creditor constituencies, including tort claimants and the official committee of unsecured creditors
    d. The plan included nonconsensual third-party releases of all claims against the Sackler family in exchange for the family contributing approximately $6 billion to the bankruptcy estate
3. The U.S. Trustee and a minority of parties who had objected to the plan appealed the confirmation order
    a. They primarily contested the nonconsensual third-party releases against the Sacklers arguing that the Bankruptcy Code does not allow nonconsensual discharge of claims against nondebtors
    b. The district court agreed with the U.S. Trustee, and the Second Circuit reversed
    c. The Supreme Court granted certiorari and took up the case in 2024
4. The Supreme Court ultimately ruled that the Bankruptcy Code does not authorize nonconsensual third-party releases
    a. The Court reasoned that the applicable provisions of the Bankruptcy Code relating to chapter 11 plans all focus on resolution of the debtor-creditor relationship, not relationships between creditors and third parties
    b. Justice Kavanaugh, joined by Chief Justice Roberts and Justices Sotomayor and Kagan, issued a strong dissent arguing that prohibiting nonconsensual third-party releases would make it much more difficult to resolve mass-tort cases in bankruptcy and bankruptcy courts should continue to be able to exercise their discretion to approve such releases in appropriate contexts

3. REDISCOVERING SECTION 157(B)(5)

a. Statutory text: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

i. Section 157(b)(5) is an aggregation device, enabling the district court to transfer cases related to a debtor's estate to a single forum

1. The purpose of § 157(b)(5) is "to centralize the administration of the [bankruptcy] estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.'" *A.H. Robins Company, Inc. v. Piccinin*, 788 F.2d 994, 1011 (4th Cir. 1986) (quoting 130 Cong. Rec. H.7492, June 29, 1984, reprinted in 1984 U.S.C.C.A.N. at 579))

2. By centralizing cases under § 157(b)(5), the court "increases the debtor's odds of developing a reasonable plan of reorganization which will 'work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the ... claims.'" *In re Dow Coming Corp.*, 86 F.3d 482, 496 (6th Cir. 1996) (quoting A. H. Robins Co., 788 F.2d at 1011))

b. Section 157(b)(5) applies broadly and enables transfer of any case "related to" the bankruptcy (*see* 28 U.S.C. § 1334)

i. Courts have defined this "related to" jurisdiction very broadly to cover any case that could conceivably affect the bankruptcy estate

1. For example, cases are "related to" where the defendant may have indemnification or contribution claims against the debtor

2. "Related to" jurisdiction also extends to cases where there may be concerns about *res judicata* that might affect the bankruptcy estate's claims due to shared factual circumstances

ii. Mass torts typically involve circumstances that give rise to "related to" jurisdiction: multiple defendants related to the debtor that may have indemnification rights and common factual nucleus and overlapping legal theories

iii. Moreover, the mandatory terms of section 157(b)(5)—"[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending"—demonstrates Congress' strong preference that personal injury cases be consolidated in the district court in which the bankruptcy is pending

1. The mandatory abstention provision in 28 U.S.C. § 1334(c)(2) does not apply to personal injury tort suits, which also applies to

tort claims against third-party defendants where there are possible claims to indemnity or overlapping liability

2. Courts still have the ability under section 1334© to discretionarily abstain from exercising jurisdiction, although caselaw indicates this discretion is substantially limited

c. Section 157(b)(5) transfers differ from removal and traditional venue transfer provisions

i. The differences from traditional venue transfer provisions:

1. First, unlike 28 U.S.C. § 1404(a), which only authorizes transfer between two federal courts, section 157(b)(5) has been interpreted to permit direct transfer of cases from state to federal court without requiring antecedent removal

2. Second, whereas a section 1404(a) transfer motion is made in the federal court in which the case is then pending, a section 157(b)(5) motion is filed in the federal district court in which the bankruptcy proceeding is pending—i.e., the "bankruptcy home court"

ii. The differences from removal provisions:

1. First, unlike removal, section 157(b)(5) is not automatic; a party must ask the district court where the bankruptcy is pending to transfer the cases

a. Until the district court acts on the section 157(b)(5) motion, the tort cases remain pending and continue to be litigated

2. Second, unlike a notice of removal under 28 U.S.C. § 1452(b) or 28 U.S.C. § 1441, which divest the state court of jurisdiction upon the notice, a section 157(b)(5) motion is just a motion and has no effect on state-litigation unless and until it is granted

a. As such, parties seeking a section 157(b)(5) transfer may be well-advised to also remove the cases at the same time

d. Section 157(b)(5) is a well-tested and proven tool in the mass tort lawyers toolkit

i. It was enacted in 1984 and has been a longstanding feature in bankruptcy law

ii. Indeed, many of the early mass tort bankruptcy cases utilized section 157(b)(5) to aggregate all mass tort cases

1. *A.H. Robbins* – This chapter 11 case involved claims related to the Dalkon Shield—a intrauterine contraceptive device alleged to cause birth defects—against the debtor, related companies, doctors, and hospitals; all tort cases were successfully transferred to the

district court where the bankruptcy was pending under section 157(b)(5); the Fourth Circuit upheld the section 157(b)(5) transfers on appeal

2. *Dow Corning* – This chapter 11 case involved claims related to silicon breast implants against the debtor and many third parties, including cases where the debtor was not itself named; all tort cases were transferred to the district court under section 157(b)(5) and such transfers were upheld by the Sixth Circuit on appeal

iii. Early mass tort bankruptcies like *A.H. Robbins* and *Dow Corning* established at least three tools in the bankruptcy toolbox for resolving mass torts:

1. preliminary injunctions of related cases
2. section 157(b)(5) transfers of those cases to a single forum for consolidated treatment, and
3. third party releases and channeling injunctions through a confirmed plan

iv. Overtime, section 157(b)(5) fell to the wayside and the prevailing strategy shifted to obtaining a preliminary injunction and then transitioning immediately to third-party releases and channeling injunctions through a confirmed chapter 11 plan

v. After the Supreme Court's ruling in *Purdue*, the utility of section 157(b)(5) is now at the forefront again

4. USING SECTION 157(B)(5) TO CREATE A SUPER-MDL IN COORDINATION WITH A BANKRUPTCY CASE

a. To date, the MDL has been the most effective procedural mechanism to resolve mass torts outside bankruptcy

i. 97% of cases given to MDLs result in a successful settlement

ii. MDLs avoid protracted litigation

iii. Some commentators are concerned MDLs are too effective in that the judges are too focused on settlement and do not fulfill the MDL's purpose to aggregate claims for pretrial purposes while leaving the trial for the home jurisdiction

b. But there are still at least two limitations that prevent MDLs from being a holistic solution.

i. First limitation: MDLs are exclusively federal

1. Cases pending in state court cannot be consolidated within an MDL, including

a. private-plaintiffs tort claims where federal diversity jurisdiction is lacking

b. state-attorney general investigation and civil actions

2. This limitation essentially ensures there will be parallel litigation in multiple fora, rather than comprehensive consolidation in the MDL

a. This causes a race to the courthouse

b. It also prevents an MDL from being a one-stop shop for resolving all mass torts

c. Given the MDL court is unable to bring all stakeholders together to achieve a global solution, a settlement in the MDL is less likely

i. This is one of the primary reasons mass tort defendants look to bankruptcy

d. Because of the race-to-the-courthouse dynamic, MDL parties often attempt to race through pretrial proceedings

i. Again, bankruptcy is precisely designed to curb the race-to-the-courthouse risk

e. In cases involving defendants with limited resources, this amplifies the risk state court plaintiffs may obtain more favorable judgments and, thus, potentially compels MDL plaintiffs to agree to a rushed global settlement that may be less equitable

ii. Second limitation: MDLs consolidate cases for pretrial purposes only

1. MDL jurisdiction is limited to pretrial proceedings, and MDL courts may not hold trials or enter final judgments

a. Pretrial proceedings still have enormous influence over the ability of plaintiffs to actually establish liability (e.g., discovery, Daubert motions, or other preliminary determinations)

b. At bottom, an MDL court's role is to determine whether a case should move forward and then transfer the case back to the home court for trial

2. The lack of authority to try cases may make MDL judges more hesitant to release cases back to their home jurisdiction, which may cause harmful effects

a. It prevents development of precedent in mass tort cases

b. It prevents the parties from gaining valuable information about the value of their claims, which could inform settlements

c. It deprives mass tort victims of their day in court and defendants their opportunity to present their defense to the public

3. Thus, the inability to try cases forces MDL courts to choose between keeping cases at the pretrial state to foster a global resolution, or ceding control over the cases by transferring them back to the home court

c. Section 157(b)(5) can create a super MDL

i. Section 157(b)(5) empowers the district court to address the two MDL limitations previously discussed, thus enabling the district court to achieve the benefits of an MDL without the limitations

1. The power to transfer both federal and state cases eliminates the parallel litigation risk and focuses everyone's efforts in one forum

2. After a section 157(b)(5) transfer the district court can hold trials

ii. Thus, a section 157(b)(5) transfer creates what could be called a Super-MDL that brings all cases (state and federal) to one forum with power to finally resolve the cases, all in a way that facilitates close coordination between the district court and the bankruptcy court administering the mass tort debtor's estate

1. The district court and bankruptcy court can coordinate to resolve cases through a global settlement

2. Bankruptcy courts tend to be (given the need to exit chapter 11 expeditiously) more focused and efficient with fact discovery and trials, leading to expedited rulings on issues most critical to a negotiated resolution of controversies

3. Relatedly, the more flexible appellate finality rules in bankruptcy cases can allow for more effective appellate review of discrete issues pertinent to the resolution of the mass tort situation

a. To the contrary, since MDL courts only address pretrial (i.e., non-appealable) issues, such rulings are never tested on appeal

b. Even without an appeal, the coordinated review of two courts (district and bankruptcy) increases the likelihood of improved outcomes

4. Also, standing orders and applicable federal Bankruptcy Rules allow the district court to efficiently withdraw the reference to

move issues out of the bankruptcy court and back to the district court

5. These factors facilitate close coordination between the bankruptcy court (i.e., the court adjudicating claims against the debtor through the claims resolution process) and the district court (i.e., the court adjudicating claims against related non-debtor third parties)

    a. This avoids the risk of inconsistent judgments, piecemeal adjudication, race-to-the-courthouse dynamic, selective naming of parties, and pressure tactics that interfere with a fair, efficient, and comprehensive resolution of the individual claims

d. Section 157(b)(5) can facilitate bringing insurers to the table and collecting insurance claims in connection with a global settlement

i. Insurance coverage is a significant aspect of mass tort cases, and insurers that are unwilling to engage in the bankruptcy process or refuse coverage add to the list of challenges to reaching a global settlement of mass tort liability

ii. Using section 157(b)(5) to aggregate all mass tort cases into the district court and facilitate close coordination between the district court and bankruptcy court could help address this issue

1. In many mass tort cases, there are coverage actions against insurers of the debtor(s) that are withdrawn to the district court

iii. The bankruptcy court will determine the amount that the debtor (the insured) is legally obligated to pay—i.e. an allowed claim for purposes of the chapter 11 plan

1. An allowed claim in bankruptcy is a judicial determination of an insured's obligation to pay

2. A judicial determination (annexing a list of claim allowances) may be useful to chase reluctant insurers

3. *See Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Cap., LLC)*, No. 12-12020 (MG), 2022 WL 17836560, at *79 (Bankr. S.D.N.Y. Dec. 21, 2022), *reconsideration denied*, No. 12-12020 (MG), 2023 WL 2978894 (Bankr. S.D.N.Y. Apr. 17, 2023)

    a. In that case, the S.D.N.Y. bankruptcy court (Judge Jones) held that the face amount of an allowed claim against the debtor constituted a legal obligation to pay which triggered insurers' indemnity obligations to pay (potentially) the full amount

        i. Cased background:

a. Debtor Residential Funding Company, LLC ("RFC"), an indirect subsidiary of General Motors Corporation, operated as a financial services company that, among other things, purchased second mortgage loans issued by several originating lenders, then securitized those loans and sold the resulting mortgage-backed securities to investors. Class plaintiffs brought claims against RFC alleging that RFC purchased loans that violated various state and federal laws by including certain unlawful fees.

b. In the bankruptcy proceedings, class plaintiffs, in addition to other parties, entered into a settlement with debtor RFC providing for a $300 million allowed claim against RFC, of which no more than $27 million was to be paid by the bankruptcy estate through distributions, and the assignment of RFC's rights under certain insurance policies to the plaintiff class, in exchange for RFC's release from any other recovery with respect to the class claims. The bankruptcy court approved the settlement under section 9019 of the Bankruptcy Code and in connection with the confirmed chapter 11 plan, subject to the insurers expressly preserving all defenses related to coverage of the claims.

ii. Parties' arguments:

a. The insurers argued that the they were only obligated to indemnify RFC for the losses RFC was actually legally obligated to pay—i.e., the $27 million cash distribution as provided in the chapter 11 plan—not the full face value of the allowed $300 million claim.

b. The plaintiff class argued that the settlement agreement, plan, and other related documents preserved the claims against the insurers in the full $300 million allowed claim amount; such controlling documents did not effect a release of RFC's or the insurers' liability and obligations; and the allowed claim amount was a legal obligation to pay.

iii. Court's reasoning:

a. The bankruptcy court looked to non-binding precedent for the proposition that an allowed claim is a judicial determination of a debtor's liability without qualification and fixes a debtor's legal liability even though, as is the case in nearly every bankruptcy, the debtor is incapable of satisfying the full amount of its liability and the debtor's ability to pay only a portion of an allowed claim does not alter or otherwise diminish the full amount of liability the debtor is judicially determined to owe. Such precedent also supported the proposition that reducing an insurer's obligation by correlating it with a debtor's payment percentage would be a form of releasing the insurer from liability on account of the insolvency of the insured.

iv. Holding:

a. Because the settlement and chapter 11 plan contained repeated expressions of the intent that the plaintiff class should be allowed to pursue the insurers for the full claim amount, the $300 million allowed claim amount constituted the "legal obligation to pay" for which the insurers were obligated to indemnify RFC.

4. This precedent combined with the section 157(b)(5) power to consolidated all tort actions in the district court could help force insurers to participate and fulfill indemnity obligations—all critical steps to achieving a global resolution of mass tort liability

e. Aggregating all mass tort cases in the district court via section 157(b)(5) may help simplify complexities relating to MDL leadership structure and allocation of MDL professional fees

i. Due to the various lead counsel and committee roles that are established in MDL cases, determining the appropriate leadership structure and professional fee arrangements can be extremely complex and, in fact, disruptive to achieving a global settlement

1. MDL courts have established common benefit funds to help address these issues, but even then, determining which plaintiff professionals are entitled to what can be very contentious

2. Moreover, there is the issue of determining what the MDL court must do to address the common benefit work that benefits parties in parallel state litigation (recall, MDLs only apply to federal cases, not state cases)

ii. Aggregating all mass tort cases in the district court through section 157(b)(5) would help simplify the leadership and common benefit fund structure and more easily resolve disputes related thereto given that all parties (state and federal plaintiffs) would be consolidated into one forum

1. In addition, a common benefit award established through a global settlement can be implemented via a chapter 11 plan, much like provisions related to payment of professional fees for official committees and ad hoc committees are routinely implemented in chapter 11 plans

f. Limitations of section 157(b)(5) based super MDLs

i. One major limitation that has impaired the effectiveness of MDLs is the "futures problem"—the fact that civil litigation generally (and an MDL specifically) can only resolve claims of parties that are actually before the court, not future claims

1. Class actions, on the other hand, do provide a mechanism to resolve claims not actually before the court, but this is typically narrowly applied

ii. Similarly, section 157(b)(5) allows only for an aggregation of existing cases and does not itself provide a mechanism for resolving future claims

iii. Even so, using the aggregation device of section 157(b)(5) in conjunction with the bankruptcy court's power to bind non-consenting claimants in certain circumstances can be a valuable strategy to address some of the issues raised by the futures problem

1. Somewhat similar to class actions, the Bankruptcy Code provides for the appointment of representatives for current and future claimants

a. Official committees:

i. While official committees cannot ultimately bind members of their class, they can represent their legal interests in the bankruptcy case and recommend settlements for vote by the claimants

ii. And the Bankruptcy Code's voting mechanisms allow for the vote of a class to override the dissenting votes of other class members, binding them to a chapter 11 plan

b. Future claims representative:

i. A person appointed by the court with a fiduciary duty to represent the interests of future claim holders

ii. Many courts go so far as to allow future claims representatives to agree to a settlement that would bind future claimants

5. SECTION 157(B)(5) TRANSFER ALSO ADDRESSES CONCERNS WITH BANKRUPTCY-BASED RESOLUTION OF MASS TORTS

a. Some commentators have been critical of the use of bankruptcy courts to resolve mass torts

b. These critiques, however, have generally focused on the use of third-party releases to resolve claims against non-debtors, and have not generally discussed the merits of a section 157(b)(5) transfer

c. Section 157(b)(5) dismisses many of the criticisms due to, as discussed above, the district court's involvement to achieve final resolution through an efficient use of litigation and settlement tools

6. CONCLUSION

a. As discussed above, in the wake of the Supreme Court's decision in *Purdue* prohibiting nonconsensual third-party releases in chapter 11 plans, parties will look to new solutions to resolve mass tort situations

b. Section 157(b)(5)'s aggregation device should be one of the key tools for mass tort lawyers moving forward

i. Section 157(b)(5) is Congress's chosen method for dealing with mass torts related to a bankruptcy

ii. Section 157(b)(5) presents an opportunity to capture many of the benefits of an MDL without some of its limitations

c. While section 157(b)(5) cannot solve all the issues opened up by Purdue, it can be used in conjunction with other strategies to move mass torts more effectively toward global peace.

d. As a result, we should expect to see section 157(b)(5) transfers make a comeback

ABI London Outline

I. Third Party Releases

A. The Supreme Court (5-4 majority) in *Purdue* ruled that the Bankruptcy Code does not allow nonconsensual third-party releases in chapter 11, although the Supreme Court did not opine on consensual releases (or what might constitute consent) or releases in full pay chapter 11 cases. *Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071 (2024).

1. The Supreme Court reasoned that the provisions of the Bankruptcy Code which set forth what may be included in a chapter 11 plan—namely, the subsections of 11 U.S.C. § 1123(b)—are all focused on a resolution of the debtor-creditor relationship, and not the relationships between creditors and third parties.

2. Thus, applying the canon of *ejusdem generis* to the catch-all provision of the statute, 11 U.S.C. § 1123(b)(6), the court reasoned that the Bankruptcy Code only permitted chapter 11 plans to include provisions likewise affecting the debtor-creditor relationship.

3. The Supreme Court recognized that non-consensual third-party releases are only expressly provided for in section 524(g) of the Bankruptcy Code, with respect to asbestos cases.

B. Third Party releases, however, are still appropriate in the chapter 15 context.

1. If a multinational company or enterprise has the option of filing a restructuring proceeding in a foreign tribunal that approves a restructuring plan (such as a "scheme of arrangement" under UK or Singapore law or a *wet homologatie onderhands akkoord* (or WHOA) in the Netherlands) containing third-party releases, the debtor's foreign representative can file a chapter 15 case in the U.S.—provided it has U.S. assets—seeking recognition of the foreign restructuring proceeding and enforcement of the debtor's restructuring plan in the U.S.

2. Section 1521(a) of the Bankruptcy Code gives bankruptcy courts broad powers to grant *any appropriate relief* necessary to protect creditor interests, protect a debtor's assets, and to effectuate the purposes of Chapter 15. And under section 1507(b), bankruptcy courts can provide *additional assistance* to a foreign debtor to reasonably ensure, consistent with the principles of comity, the just treatment of all stakeholders, the protection of domestic creditors against prejudice and inconvenience, the prevention of preferential or fraudulent dispositions of property, the distribution of proceeds from a debtor's property substantially in accordance with the code, and a debtor's entitlement to a fresh start.

3. Given the Supreme Court's disinclination in *Purdue* to weigh in on the litigants' public policy arguments, it seems unlikely that a U.S. bankruptcy court

would conclude—at least based on *Purdue*—that enforcement in the U.S. of third-party releases in a foreign restructuring plan would be "manifestly contrary" to U.S. public policy within the meaning of section 1506 of the Bankruptcy Code.[1]

4. And, prior to *Purdue*, U.S. bankruptcy courts recognized and enforced foreign restructuring plans with third-party releases.

a) *In re Avanti Communications Group PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018) (third-party non-consensual releases can be appropriate under chapter 15 when recognized by the foreign judgment).

(1) *See also In re Syncreon Automotive (UK) Ltd.*, No. 19-11702 (Bankr. D. Del. Sept. 11, 2019) (same); *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018) (same); *In re Sino-Forest Corp.*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013); *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

b) *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1062 (5th Cir. 2012) ("We conclude that, although our court has firmly pronounced its opposition to [nondebtor] releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law.")

c) *But see In re PT Bakrie Telecom TBK*, 628 B.R. 859 (Bankr. S.D.N.Y 2021) (third party releases may not be appropriate if the foreign proceeding did not abide by fundamental standards of procedural fairness as demonstrated by a clear and formal record)

II. Eligibility of Debtors (Application of Section 109 in Chapter 15)

A. The language making section 109 of the Bankruptcy Code applicable in chapter 15 cases has led to a disagreement among U.S. bankruptcy courts as to whether a chapter 15 debtor must satisfy the eligibility requirements of both chapter 15 and section 109, particularly section 109(a)'s requirement that a debtor reside, have a domicile, a place of business, or property in the U.S.

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[1] The U.S. Trustee recently objected to chapter 15 recognition for nonconsensual nondebtor releases in a Hong Kong scheme of arrangement, arguing that, among other things, such releases are manifestly contrary to public policy and beyond the relief available under sections 1507 and 1521. Limited Objection of United States Trustee to the Verified Petition under Chapter 15 for Recognition of a Foreign Main Proceeding and Related Relief, *In re Yuzhou Grp. Holdings Co. Ltd.*, No. 24-11441 (Bankr. S.D.N.Y. Sept. 25, 2024).

B. Circuits, primarily the Second Circuit, have recognized that the eligibility requirements set forth in section 109 of the Bankruptcy Code apply to debtors in chapter 15 cases.

1. *See In re Barnet*, 737 F.3d 238 (2d Cir. 2013) (rejecting the argument that a chapter 15 debtor need satisfy only the chapter 15-specific definition of "debtor" in section 1502(1) and ruling that the section 109(a) applies in chapter 15 cases as well as cases filed under other chapters); *In re Forge Grp. Power Pty Ltd.*, No. 17-CV-02045, 2018 WL 827913, at *13 (N.D. Cal. Feb. 12, 2018) (vacating a bankruptcy court order denying chapter 15 recognition on the basis of *Barnet* but noting that "the debtor eligibility requirements of 11 U.S.C. § 109(a) apply in Chapter 15 cases").

2. And, generally, the requirements of section 109 can easily be met by a debtor with the showing of an attorney retainer, a litigation claim, or contract rights in the U.S. *See, e.g.*, *In re Agro Santino, OOD*, 653 B.R. 79 (Bankr. S.D.N.Y. 2023) (unused attorney retainers deposited by the debtor in a New York bank account and a $1.5 million counterclaim in pending N.Y. litigation); *In re Olinda Star Ltd.*, 614 B.R. 28 (Bankr. S.D.N.Y. 2020) (small retainer and rights under New York law debt instruments); *In re Ascot Fund Ltd.*, 603 B.R. 271 (Bankr. S.D.N.Y. 2019) (retainer, interest in a New York partnership, and contract rights); *In re B.C.I. Fins. Pty Ltd.*, 583 B.R. 288 (Bankr. S.D.N.Y. 2018) (attorney retainers deposited by foreign debtors in the United States for the sole purpose of satisfying section 109(a) and obtaining discovery adequate).

3. One of the most recent Second Circuit examples followed this precedent. *In re Silicon Valley Bank (Cayman Islands Branch*, 658 B.R. 75 (Bankr. S.D.N.Y. 2024).

a) Debtor Silicon Valley Bank ("SVB") was a California-incorporated, FDIC-insured bank that was placed into receivership and whose parent filed for chapter 11 protection after a bank run.

b) The debtor had a branch licensed in the Cayman Islands that was not placed into receivership nor was part of the subsequent sale of SVB's assets.

c) The FDIC denied insurance coverage for certain of the Cayman Islands branch depositors, and those depositors filed for a winding-up proceeding of the branch under Cayman Islands law.

d) The Cayman Islands court granted the application and appointed liquidators who then sought chapter 15 recognition, in part to obtain provisional relief in the form of discovery, including regarding the books and records of the branch that were held in the U.S.

e) The FDIC opposed the liquidator's requested relief, arguing in part that the Cayman Islands branch was not eligible for chapter 15 relief because it was merely a branch of the SVB ineligible to be a debtor under section 109(b)(2) of the Bankruptcy Code.

f) The bankruptcy court denied the petition for chapter 15 recognition, ruling that the branch bank was not eligible for chapter 15 relief because "[i]t possessed no separate legal existence outside of the [U.S. bank], which was indisputably U.S.-incorporated and ineligible for bankruptcy relief … as a domestic [Federal Deposit Insurance Corporation ("FDIC")]-insured bank." The court also held that the U.S. bank's closure and the commencement of an FDIC receivership for it did not result in the "transmogrification" of the U.S. bank or the branch bank into an entity eligible for bankruptcy.

C. Splitting from other circuits, however, the Eleventh Circuit recently held that foreign representatives do not need to demonstrate that a foreign debtor meets the eligibility requirements of section 109 to obtain recognition, noting that section 1502 of the Bankruptcy Code includes its own definition of debtor. *In re Al Zawawi,* 97 F.4th 1244 (11th Cir. 2024).

1. In that case, the debtor (Al Zawawi), who did not reside in the U.S. but did have indirect ownership interests in U.S. companies that owned U.S. real estate, filed for bankruptcy in a UK court.

a) The UK court appointed a trustee that filed a petition for chapter 15 recognition of the UK bankruptcy case as a foreign main proceeding with the purpose of investigating the debtor's affairs and recovering assets.

b) The debtor opposed recognition, arguing that he did not meet the domicile or property requirements to be a debtor under section 109(a) of the Bankruptcy Code.

2. The Eleventh Circuit affirmed recognition, holding that chapter 15 has its own eligibility requirements, and that the eligibility requirements for debtors in cases under other chapters of the Bankruptcy Code do not apply in chapter 15 cases. The Eleventh Circuit distanced itself from *Barnet* based on Eleventh Circuit precedent pre-dating the enactment of chapter 15.

III. Foreign Representative Issues

A. **Appointment**: The status of a foreign representative is rarely contested where it is appointed by a foreign court. However, nothing in the Bankruptcy Code mandates court appointment, and other courts have previously recognized that such appointment is not necessary.

1. The U.S. Bankruptcy Court for the Southern District of New York recently confirmed that a debtor may appoint a foreign representative for purposes of seeking chapter 15 relief when it overruled a creditor's objection to recognition of a Bulgarian bankruptcy proceeding. *In re Agro Santino, OOD*, 653 B.R. 79 (Bankr. S.D.N.Y. 2023).

2. There, debtor Agro Santino OOD was a LLC formed under Bulgarian law and subject to certain litigation in the U.S.

a) After bankruptcy proceedings were initiated, the Bulgarian court appointed a trustee to supervise the debtor. Under Bulgarian law, Agro was generally allowed to continue to operate under the trustee's supervision, although it had to obtain prior consent from the trustee before concluding "new transactions."

b) Agro, by its sole manager, appointed a different person from the trustee to serve as its foreign representative. Agro informed the trustee of such appointment, but never obtained the trustee's consent.

c) The foreign representative then filed a petition seeking chapter 15 recognition and a determination that she was the foreign representative within the meaning of section 101(24) of the U.S. Bankruptcy Code.

d) Agro's largest creditor (and the plaintiff in the U.S. litigation), StoneX Markets LLC, objected to chapter 15 recognition, arguing that Agro had not shown that the foreign representative had been properly approved to serve in that position under Bulgarian law.

3. The bankruptcy court granted recognition, finding that the appointment of a foreign representative is not governed by foreign law but is instead governed by section 101(24) of the Bankruptcy Code.

a) That section does not require that a foreign representative be appointed in accordance with foreign law or by a foreign court. According to the bankruptcy court, that section authorizes the appointment of a foreign representative by a debtor in certain circumstances and should be interpreted broadly to facilitate the purposes of chapter 15.

b) Here, Agro was functioning like a traditional "debtor in possession" and was generally in control of its affairs. Because Agro was authorized to manage its affairs, it could (as it did) appoint the foreign representative.

4. Other courts have come to a similar conclusion. *E.g.*, *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1047 (5th Cir. 2012) (affirming recognition of non-judicially appointed foreign representatives and noting that section 109 is "wholly devoid of any statement that a foreign representative must be judicially appointed.").

Although *Agro* does not represent a large change regarding the requirements for the appointment of a foreign representative in a chapter 15 case, the ruling is significant for a number of reasons.

a) Clarifies that a foreign representative need not be appointed by the foreign court overseeing a foreign debtor's bankruptcy or insolvency proceeding, and that a U.S. bankruptcy court, in assessing whether recognition of a foreign bankruptcy case is warranted under chapter 15, may rely on "any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative."

(1) According to *Agro* (and other similar rulings), such evidence can include evidence demonstrating that the foreign debtor is the "functional equivalent" of a DIP, and therefore has the authority to direct its affairs, including the power to appoint a foreign representative.

b) Clarifies that U.S. law, rather than the law governing a foreign debtor's bankruptcy or insolvency case, determines whether the debtor's representative qualifies as a "foreign representative" for purposes of chapter 15 eligibility and recognition.

c) Reduces barriers to chapter 15 access, particularly in cases involving foreign jurisdictions that have adopted restructuring frameworks that do not contemplate courts or other administrative bodies formally appointing foreign representatives (*e.g.*, the German Corporate Stabilization and Restructuring Act, the Singapore Insolvency, Restructuring and Dissolution Act 2018, and the Dutch Act on Confirmation of Extrajudicial Plans (*Wet Homologatie Onderhands Akkoord*)).

B. **Obligation to Keep Court Informed**: Like debtors, bankruptcy trustees, official committees, examiners, and estate-compensated professionals, foreign representatives in chapter 15 cases have statutory reporting obligations to the bankruptcy court and other stakeholders as required by the plain language of the Bankruptcy Code. Such duties include the obligation to keep the U.S. bankruptcy court promptly informed of changes in either the status of the debtor's foreign bankruptcy case or the status of the foreign representative's appointment in that case.

1. In *In re Ace Track Co., Ltd.*, 647 B.R. 919 (Bankr. N.D. Ill. 2023), faced with a foreign representative who failed for nearly five years to notify the bankruptcy court (or his own counsel) of changed circumstances, including the closure of the debtor's Korean rehabilitation case, the court, after directly communicating with the foreign court, ordered that the debtor's chapter 15 case be closed because it had been fully administered, permitted the foreign

representative's counsel to withdraw, and banned the foreign representative from acting in such a capacity in other chapter 15 cases in the U.S. Bankruptcy Court for the Northern District of Illinois without express permission.

2. As demonstrated by *Ace Track*, the ability of a U.S. bankruptcy court, on its own initiative, to initiate communications with a foreign court under section 1525(b) of the Bankruptcy Code—and, more specifically, investigate whether significant changes in circumstances have occurred—promotes the objectives of chapter 15, including the "fair and efficient administration of cross-border insolvencies."

IV. Recognition Issues

A. Type of Proceeding: "Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as: [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

1. *Global Cord* is instructive concerning the kinds of foreign proceedings that a U.S. bankruptcy court can and cannot recognize under chapter 15, and that true insolvency is not required. *In re Global Cord Blood Corp*., No. 22-11347, 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022).

a) Debtor Global Cord Blood Corp was a Cayman Islands biotech company headquartered in Hong Kong over which two entities asserted conflicting claims of ownership. The debtor agreed to a transaction to transfer millions of dollars and millions of shares of stock to a startup company.

a) One of the entities claiming ownership of the debtor, Blue Ocean Structure Investment (BVI) Co. Ltd. ("Blue Ocean"), filed a winding-up petition in a Cayman Islands court, alleging fraud and seeking to stop the transaction.

(1) Blue Ocean sought orders preventing the transfer of stock and money as well as limiting changes to controls in the company, among other things. In the alternative, it sought winding up of the company and the appointment of liquidators.

(2) Neither the request for winding-up nor the request for liquidators was based on Cayman Islands law that mentioned or required insolvency. Instead, they were related to actions the court could take where equitable or needed to prevent spoliation.

(3) The Cayman Islands court enjoined the challenged transfer of money and stock from the debtor, but lifted the injunction shortly afterwards based on the debtor's (false) representation that the transaction had already been partially completed.

b) Blue Ocean filed an amended winding-up petition alleging that the completed transaction was fraudulent.

c) The Cayman Islands court appointed liquidators that were authorized to, among other things, preserve and prevent asset dissipation, investigate the debtor's affairs, and commence winding-up or insolvency proceedings. Although authorized to do so, the joint provisional liquidators never commenced winding-up or insolvency proceedings for the debtor and took the position that the company was solvent.

d) A month later, the joint provisional liquidators filed a petition seeking chapter 15 recognition of the Cayman Islands proceeding along with discretionary relief under section 1521 of the Bankruptcy Code. The other entity claiming ownership, Golden Med, opposed recognition arguing that the Cayman Islands Proceeding did not qualify as a "foreign proceeding" eligible for chapter 15 recognition because the Cayman Islands Proceeding was brought under the CCA's "just and equitable" provisions, rather than its provisions relating to the adjustment or satisfaction of GCBC's debts, the liquidation or winding up of the company, or the implementation of a scheme of arrangement to resolve its debts.

2. The bankruptcy court denied recognition and, in doing so, hewed close to the express language and purpose of chapter 15 (*i.e.*, a means for U.S. courts to cooperate with foreign tribunals presiding over foreign bankruptcy, insolvency, and restructuring proceedings that address the rights and objectives of creditors).

a) The bankruptcy court concluded that, because the winding-up proceeding filed by a controlling shareholder against the company was not commenced for such a purpose, but instead as a vehicle to investigate possible fraud and breach of fiduciary duty, and to prevent the fraudulent dissipation of company assets, the proceeding was not eligible for chapter 15 recognition.

b) The bankruptcy court also rejected the idea that a foreign debtor must be insolvent to be eligible for chapter 15 recognition. Instead, according to the court, the inquiry focuses on whether the foreign proceeding is collective because, among other things, it involves creditor participation in a process designed to resolve creditor claims.

B. **Modification of Recognition Order and Relief**: Chapter 15 of the Bankruptcy Code expressly contemplates that the status of a recognized foreign proceeding may change, and that a U.S. bankruptcy court presiding over a chapter 15 case has the power and flexibility to modify relief granted to a foreign representative as part of a chapter 15 case to account for such changed circumstances.

1. In *In re Comair Ltd.*, No. 21-10298, 2023 WL 1971618 (Bankr. S.D.N.Y. Feb. 12, 2023), a debtor's South African "rescue proceeding" was converted to a liquidation, after a U.S. bankruptcy court had granted chapter 15 recognition of the rescue proceeding and permitted the rescue practitioners to seek discovery regarding certain claims and causes of action. The debtor's "rescue practitioners" were replaced with provisional liquidators.

2. The liquidators then petitioned the U.S. bankruptcy court that had previously recognized the rescue proceeding under chapter 15 to amend the recognition order to recognize the liquidation, and to substitute them as the debtor's foreign representatives.

3. The bankruptcy court granted the motion, ruling that: (i) no new chapter 15 case was necessary because the liquidation and the terminated rescue proceeding were "parts of one foreign proceeding" for purposes of chapter 15; and (ii) the provisional liquidators could be substituted for the rescue practitioners as the debtor's foreign representatives in the chapter 15 case. The court also noted that interruption of the discovery process would only add to the cost and duration of the action and found no merit in the argument that discovery was predicated on interests in reorganization rather than liquidation.

a) The bankruptcy court highlighted how the UNCITRAL Guide specifically contemplates modification or termination of a recognition order "where 'a reorganization might be converted into a liquidation proceeding,' or where 'the status of the foreign representative's appointment has changed.'" *(*quoting UNCITRAL Guide § 165).

b) And the bankruptcy court cited two other bankruptcy judges in SDNY that had previously modified chapter 15 recognition orders under section 1522(c) due to changes in circumstances, including the conversion of the debtors' "moratorium proceedings" to liquidations and an amendment to applicable foreign law requiring a change in the debtors' foreign representatives. *In re Glitnir Banki HF*, No. 08-14757 (Bankr. S.D.N.Y. Mar. 18, 2011); *In re Landsbanki Islands HF*, No. 08-14921 (Bankr. S.D.N.Y. Jan. 14, 2011).

c) Fundamentally, the bankruptcy court in *Comair* deemed the argument that a new chapter 15 petition was required to obtain recognition of what amounted to a converted restructuring case a waste of resources—

for both the debtors and the courts—that would have been inconsistent with chapter 15's purpose in facilitating cross-border bankruptcy cases.

(1) The court also appeared to be skeptical of the efforts to ward off or delay the foreign representatives' efforts to obtain discovery in the pending litigation.

V. Automatic Stay Issues

A. Upon recognition of a foreign main proceeding, section 1520(a) of the Bankruptcy Code provides that certain provisions of the Bankruptcy Code automatically come into force, including the automatic stay, which prevents creditor collection efforts with respect to the debtor or its U.S. assets. Under section 362(d), however, the stay may be lifted or modified by the court "for cause," with courts finding that a bad faith filing is sufficient cause.

1. *In re Culligan Ltd.* illustrates that courts employ the concept of a bad faith filing "sparingly," and will not lift the stay even where the debtor uses chapter 15 as part of an explicit strategy to enjoin and dismiss an action if the action is obstructing an orderly liquidation. 2023 WL 5942498 (Bankr. S.D.N.Y. Sept. 12, 2023).

a) Debtor Culligan Ltd. was a Bermuda-incorporated holding company formed in the wake of a leveraged buyout that, in 2006-07, borrowed $850 million to refinance existing debt, repaid $200 million to an investor, and paid a $375 million dividend to shareholders.

b) Certain minority shareholders commenced a derivative action related to the 2006-07 transactions against the debtor's directors, controlling shareholders, and certain other defendants in New York state court ("NY Litigation").

c) The majority shareholders began a voluntary liquidation of the debtor under Bermuda law, and the court appointed liquidators to distribute its assets. After the assets dwindled from the distributions, and in the face of the NY Litigation, the liquidators determined the debtor was insolvent and the court issued a compulsory winding-up order.

d) The liquidators sought and obtained, over the objection of the minority shareholders, chapter 15 recognition of the liquidation, resulting in a stay of the NY Litigation.

e) The plaintiff minority shareholders filed a motion for relief from the stay in order to permit the continuation of the NY Litigation, arguing in part that the stay should be lifted because the chapter 15 case was commenced in "bad faith" as a litigation tactic.

2. The bankruptcy court denied the motion to lift the stay. The court relied on precedent that described lifting the stay as "an extraordinary remedy," one that requires "careful analysis" by the judge on a "case-by-case basis." (quoting *In re 234-6 W. 22nd St. Corp.*, 214 B.R. 751, 757 (Bankr. S.D.N.Y. 1997)).

a) The court acknowledged that the "Foreign Representatives have admitted that the purpose of the chapter 15 is to take control" of the NY Litigation. But, relying on recent precedent that handled similar arguments, the court concluded that "a bankruptcy filing cannot be said to be in bad faith where the debtor reasonably seeks the benefit of the automatic stay to effectuate an orderly liquidation."

b) Importantly for the court, chapter 15 recognition was obtained not so much as a tactic to combat a negative outcome in the NY Litigation as it was a tactic to bring the NY Litigation to a conclusion in furtherance of its orderly wind-down.

B. In *Int'l Petroleum Prod. & Additives Co., Inc. v. Black Gold S.A.R.L.*, the Ninth Circuit considered questions as to timing of when the automatic stay is in effect if an order denying recognition is reversed on appeal and the scope of the stay. Ultimately, the Ninth Circuit held that the automatic stay: (i) is not retroactive to the date of the order denying recognition if that order is later reversed and (ii) does not encompass a creditor's alter ego claim against the debtor's sole owner. No. 22-15109, 2024 WL 4195335 (9th Cir. Sept. 16, 2024).

a) The debtor, Black Gold S.A.R.L., a limited liability company headquartered in Monaco, was accused of breaching nondisclosure and noncompete provisions of agreements it had with the International Petroleum Products and Additives Company (IPAC). In arbitration, IPAC won an award and it sought to enforce the award in a U.S. district court, which confirmed the award and entered a judgment against the debtor.

b) The debtor resisted enforcement efforts and largely ignored discovery requests. Days before certain depositions were to take place, the debtor filed for bankruptcy in Monaco and sought chapter 15 recognition of those proceedings.

c) The bankruptcy court denied chapter 15 recognition of the Monegasque proceedings, finding that the filing was in bad faith. Although the debtor appealed the denial of recognition to the Bankruptcy Appellate Panel (BAP), it did not seek to stay the bankruptcy court's order denying recognition pending appeal.

d) With no stay in place, IPAC moved in the district court to add the debtor's owners as judgment debtors on the theory that they were the debtor's alter ego. IPAC separately moved the court to infer the facts

necessary for that conclusion as sanctions for the debtor's discovery misconduct. The district court granted both motions and added the owners as judgment debtors to the arbitration award.

e) The BAP subsequently reversed the bankruptcy court, finding that bad faith alone was insufficient to deny recognition, and granted recognition of the proceedings in Monaco. As a result, actions against the debtor were stayed. The debtor's owners, in response to a motion from IPAC seeking attorneys' fees from them, argued that the alter ego claims were similarly subject to the automatic stay. The district court rejected the owners' arguments, and the owners appealed.

(1) The debtor's owners argued that the stay took effect on the date the bankruptcy court denied the debtor's petition for recognition (which denial was reversed on appeal), and that the district court's subsequent adverse inferences therefore violated the stay and that the court's alter ego determination was void. They also argued that the alter ego claim was a "general" alter ego claim subject to the automatic stay as property of the estate or because "unusual circumstances" existed to extend the stay as the owners were for purposes of the stay the "debtors."

f) The Ninth Circuit rejected the owners' arguments.

(1) The Ninth Circuit stated that section 1520(a) provides that the automatic stay begins once a foreign proceeding is recognized, an event that under section 1502(7) occurs with an order "granting recognition." It concluded that only an order granting a petition for recognition, and not one denying it, even if reversed, could trigger the stay. It therefore denied retroactive application of the stay.

(a) Importantly, the Ninth Circuit stated that equitable relief was foreclosed on this point because the debtor's owners did not move to stay the order denying recognition pending appeal.

(2) The Ninth Circuit found that, to the extent that an "alter ego claim," which the court described as a purely procedural claim, belongs to anyone, it belonged to IPAC under California law. Moreover, IPAC's substantive causes of actions, the Court found, all alleged injury to IPAC and not to the debtor and thus were not subject to the stay. The Ninth Circuit also refused to adopt the Fourth Circuit's "unusual circumstances" exception that permits the automatic stay to extend to non-debtors. It declined to do so in this case because the unusual situation exception is rooted in a

court's injunctive powers under section 105, a question not raised in the bankruptcy court and therefore not properly before the Circuit Court.

g) *Black Gold* primarily focused on a timing question of first impression, and on a party's failure to seek stay pending appeal to preserve their rights. However, the Circuit's analysis of the automatic stay and its potential extension to non-debtors mirrors issues commonly addressed in mass-tort chapter 11 bankruptcy cases in the U.S. Notably, in those cases, U.S. bankruptcy courts have often (although not always) extended the stay to non-debtors.

VI. Discovery Issues

A. Creditors May Obtain Discovery: Chapter 15 provides in section 1521(a)(4) that a foreign representative may obtain discovery "concerning a debtor's assets, affairs, rights, obligations, or liabilities." Chapter 15 is silent, however, as to the ability of a creditor or other party to obtain discovery in a chapter 15 case. While foreign representatives routinely argue that creditors are not entitled to discovery under chapter 15, some courts have held that creditors are entitled to discovery in certain circumstances.

1. Although the court in *In re Golden Sphinx Ltd.*, No. 2:22-BK-14320-NB, 2023 WL 2823391 (Bankr. C.D. Cal. Mar. 31, 2023) denied a discovery request, it laid out the somewhat narrow circumstances in which discovery would be available.

a) There, debtor Golden Sphinx Limited, a passive-investment holding company organized under the laws of the Bailiwick of Jersey, commenced a winding-up process to liquidate its assets. The Jersey court appointed liquidators who filed a petition for chapter 15 recognition in a California bankruptcy court, which the bankruptcy court granted.

(1) The debtor brought suit against a creditor in California state court, and the creditor sought to enforce a default judgment from a Jersey court against the debtor in a California federal district court.

(2) The bankruptcy court denied the creditor's request for relief from the automatic stay to permit the California state and federal litigation to go forward.

(3) The creditor then filed a motion for discovery under Bankruptcy Rule 2004 for discovery from the bank of an affiliate of the debtor. The foreign representative opposed the motion.

b) The bankruptcy court denied the discovery requests, describing them as a "fishing expedition."

(1) Nevertheless, the court found that Bankruptcy Rule 2004, which generally authorizes a court to order discovery upon the request of any party in interest, applies in chapter 15 cases, including for creditors.

(2) The court observed that there were certain situations in which it might be appropriate for a creditor to seek discovery in a chapter 15 proceeding (although the Bankruptcy Rule 7000 series discovery rules probably would apply rather than Bankruptcy Rule 2004), such as:

(a) if a court overseeing the foreign main proceeding were to request that this Court oversee a discovery dispute or enforce one of its discovery orders;

(b) if it were relevant to a pending contested matter involving the elements of the chapter 15 petition; or

(c) if a creditor were defending against a motion or adversary proceeding brought by the foreign representatives against it.

(3) The bankruptcy court also suggested a creditor could be allowed to pursue discovery if such discovery would further the court's assistance of the foreign main proceeding, such as if a creditor were to present sufficient grounds to suspect the existence of a fraudulent transfer claim that the foreign representatives were wrongfully refusing to pursue.

2. And, the court in *In re Ascentra Holdings, Inc.*, 657 B.R. 339 (Bankr. S.D.N.Y. 2023), held that a party that asserted an interest in U.S. assets was entitled to discovery in a chapter 15 case.

a) There, the bankruptcy court had recognized the foreign proceeding and included a provision in its order restricting the transfer of certain funds. A party claiming an interest in such funds, however, requested that the court vacate its recognition order and also sought discovery from individuals that had submitted declarations in support of recognition. The foreign representatives opposed the requests.

b) The court noted that Bankruptcy Rule 1018 provides that certain discovery rules apply in chapter 15 matters, including "all proceedings contesting ... a chapter 15 petition for recognition, and to all proceedings to vacate an order for relief" and Bankruptcy Rule 9014 makes discovery available "[i]n a contested matter not otherwise governed by these rules."

c) The court found that the foreign representative's opposition to the requests gave rise to a "contested matter," thereby triggering discovery rights. While the court conceded comity might require limiting the scope of the requested discovery, it refused to entirely preclude the discovery request.

3. These cases demonstrate that even though creditors face an uphill battle in being granted discovery, such relief is not impossible if tied directly to an issue before the U.S. bankruptcy court (such as recognition).

B. **Court May Limit Use of Discovery**: Section 1522 provides that in granting relief under section 1521, including discovery, a court must ensure that "the interests of the creditors and other interested including the debtor, are sufficiently protected." Importantly, at least in SDNY, it appears that section 1522 can be the basis for imposing a protective or confidentiality order on discovery authorized under 1521.

1. In *In re Historic & Trophy Buildings Fund FCP-SIF*, Case No. 22-11461, 2023 WL 5525044 (Bankr. S.D.N.Y. Aug. 25, 2023), the U.S. bankruptcy court recognized a Luxemburg liquidation proceeding, and the liquidator sought discovery from several U.S. affiliates of the debtor.

a) The U.S. affiliates consented to the discovery order, subject to an agreement with the liquidator on the form of a protective order that would preserve the confidentiality of commercially sensitive information.

b) Failing to reach agreement, the U.S. affiliates filed a motion for a protective order that included demands to (i) limit access to confidential information to the liquidator's counsel, and (ii) preclude the transmittal of confidential information to the liquidator, the Luxembourg court, or Luxembourg prosecutors.

2. The bankruptcy court acknowledged that the U.S. affiliates were entitled to a protective order to prevent the public disclosure of their information, but it granted their motion only in part and would not limit sharing of discovery with the Luxembourg court or prosecutors.

a) The court found that the Luxembourg liquidator had a "clear and substantial need for the information," in order to develop claims that could result in recoveries for creditors. On the other hand, the court found that the U.S. affiliates failed to demonstrate "any significant risk" of public disclosure if access to the information were not limited to liquidator's counsel.

b) Court also took issue with the limitation on sharing the discovery with the Luxembourg court as contravening one of the purposes of chapter 15, which is to facilitate cooperation between U.S. courts and foreign courts.

Faculty

Jay M. Goffman is co-founder and CEO of Smith Goffman Partners in New York. In this role, he works to preserve and enhance the equity value of companies in or nearing distress. Prior to co-founding the firm, he was with Teneo and was vice chair of Global Advisory at Rothschild & Co., a large international investment bank, where he advised clients across Rothschild's Restructuring, Debt Advisory and M&A practices. Before Rothschild, he spent 36 years as a lawyer focused on restructuring, debt advisory and distressed M&A. For the last 24 years of his legal career, he practiced at Skadden Arps, where he was the global head of its Corporate Restructuring Department. Over the course of his career, Mr. Goffman has consistently been recognized as one of the leading and most innovative restructuring advisors in the world. He was named a "Dealmaker of the Year" by *The American Lawyer* and one of the "Most Influential Lawyers of the Decade" by *The National Law Journal*. He has also received several Lifetime Achievement and Hall of Fame honors, in addition to numerous philanthropic awards. Mr. Goffman is best known for having devised and pioneered the "prepackaged" restructuring, now the predominant method for most major restructurings — which revolutionized the field and has been used to reorganize hundreds of companies in a quick, efficient and cost-effective manner. As a result of his efforts, prepacks are now the predominant method used in major restructurings. Mr. Goffman has successfully reorganized businesses out of court and in court across multiple industries and geographies, including some of the largest, most high-profile and most complex cases in history. Many of his deals and accomplishments have been profiled in various publications, including *The Wall Street Journal*. Mr. Goffman has received numerous honors, including "Most Influential Lawyers of the Decade," Dealmaker of the Year and several Hall of Fame and Lifetime Achievement Awards, in addition to numerous philanthropic honors from AJC, Catholic Renewal and Tina's Wish. He is an ABI Board member and a member of the board of trustees of the China Institute. Mr. Goffman received his B.S. in 1980 in chemical psychobiology from the State University of New York at Binghamton and his J.D. in 1983 with honors from the University of North Carolina at Chapel Hill, where he was a member of the *University of North Carolina Law Review*. In 2018, the University of North Carolina School of Law presented him with its Distinguished Alumni Award.

Hon. David S. Jones is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 19, 2021. He handles a varied docket that has included numerous chapter 15 matters, as well as the Revlon bankruptcy and several cases involving aviation and aircraft financing. Judge Jones previously clerked for Hon. Morris E. Lasker, U.S. District Judge for the Southern District of New York, from 1990-92, and was in private practice in New York from 1992-96. From 1996 until he was appointed to the bench, he served as an Assistant U.S. Attorney for the Southern District of New York, and at different times served as the chief of the U.S. Attorney's Office's Tax and Bankruptcy Unit, the Office's chief civil appellate attorney and as deputy chief of the Civil Division. Judge Jones was awarded the Justice Department's Director's Award and the New York City Bar Association's Henry L. Stimson Medal, among other awards. He also served as an instructor at the National Advocacy Center, and as an evaluator of U.S. Attorney's Offices throughout the nation. Judge Jones received his A.B. *magna cum laude* from Brown University in 1985 and his J.D. *cum laude* from Harvard Law School in 1990.

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Jamie O'Connell is a partner in the Restructuring and Special Situations Group at PJT Partners, based in New York. He started working in corporate restructuring in 1996 and joined the group in 2004, when it was part of Blackstone. He was a senior managing director at Blackstone prior to the group's spin-off to PJT in 2015. Mr. O'Connell has advised on debt restructurings involving more than $100 billion of liabilities and special-situation financings involving more than $20 billion of new capital. His representative corporate clients have included AIG, CEC Entertainment, Chemical Tankers, Delta Air Lines, Dow Corning, Encore Global, Foresight Energy, Frontera Generation, Genco Shipping, ILFC, Stearns Lending, Winn-Dixie Stores and W. R. Grace & Co. Since 2013, Mr. O'Connell has served as a guest lecturer at both Columbia Law School and Harvard Business School. He received his undergraduate degree *magna cum laude* from Notre Dame and his M.B.A. with honors from the Wharton School of the University of Pennsylvania.

Albert J. Togut is the founder of Togut, Segal & Segal, LLP in New York, where he pioneered the use of conflicts counsel in mega-cases, and co-chaired ABI's Commission to Study the Reform of Chapter 11. For the past nearly 50 years, he has specialized in bankruptcy law to the exclusion of all other areas of practice. Since Mr. Togut formed the firm in 1980, he has served as counsel to the debtor, official committee, or principal owner in some of the largest and highest-profile chapter 11 cases, including LATAM Airlines, McClatchy Newspapers, Pacific Drilling, Westinghouse, American Airlines, Kodak, Lehman Brothers Aurora, General Motors, Chrysler Automotive, Enron, Toisa Shipping, Dewey & LeBeouf, Relativity Media, Avaya, Nautilus, Ambac Financial, SunEdison, Aeropostale, A&P, Delphi Automotive, Collins & Aikman, St. Vincent's Hospitals, Charter Communications, Loehman's, Frontier Airlines, Tower Automotive, Winn-Dixie, Ames Department Stores, Loew's Cineplex, SK Global, Daewoo International (America) Corp. (which together with its Korean parent underwent the largest non-sovereign debt restructuring in history with aggregate liabilities exceeding $70 billion), Allegiance Telecom, OnSite Access, Joan and David Helpern Inc., and ContiFinancial Corp. Mr. Togut was lead counsel to Toshiba Nuclear Energy (UK) Holdings, the parent of the international operations of Westinghouse; Aurora, a mortgage origination company and subsidiary of Lehman Brothers; Rockefeller Center Properties; and Olympia & York Tower B Company, better known as the World Financial Center, which involved a $1 billion restructuring of a 43-story commercial office building located at Two World Financial Center at Battery Park in Manhattan. Since 1981, Mr. Togut has been an active member of the trustee panel maintained by

the Department of Justice in the Southern District of New York and has served as trustee in several thousand bankruptcy cases under chapter 11 and chapter 7 of the Bankruptcy Code, including Refco, LLC, Anthracite Capital, Inc., Kingston Square and Axona International Credit & Commerce Limited. He is registered as a mediator in the Southern District of New York and was appointed mediator for a dispute with the noteholders of Solutia that was settled for $220.5 million. He is a Fellow of the American College of Bankruptcy, a Fellow of the International Insolvency institute, co-chair of ABI's Commission to Study the Reform of Chapter 11, and a former ABI director and chair of its New York City Bankruptcy Conference. He also served on the ABI's fee-study commission, which has provided the most comprehensive, independent look at professional fees in chapter 11 cases to date. Mr. Togut was twice a member of the Committee on Bankruptcy and Reorganization of the Association of the Bar of the City of New York, a member of the International Bar Association, and a past president of the Bankruptcy Lawyers Bar Association of New York. For six years, he chaired a Task Force of the Business Bankruptcy Committee of the American Bar Association Section of Business Law that analyzed disclosure statement requirements and confirmation practices in chapter 11 cases. He has written and lectured on many topics under the former Bankruptcy Act and current Bankruptcy Code and has particular expertise in conflicts of interest and ethics. In 2019, he was honored by the Lincoln Center Corporate Council for his leadership in corporate reorganizations, and he recently received the prestigious Who's Who Albert Nelson Marquis Lifetime Achievement Award for his prominence in bankruptcy law. Mr. Togut received his B.S. from New York University in 1971 and his J.D. from St. John's University School of Law in 1974.