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New York Bankruptcy Court Holds That Bankruptcy Code's Two-Year Extension of Time to Bring Actions Applies to Foreign Representatives in Chapter 15 Cases

Section 108 of the Bankruptcy Code grants a two-year extension of time for a trustee in bankruptcy (or a debtor in possession) to bring law suits, provided that the applicable period to sue didn't expire before the petition date. It also gives a short extension to the trustee for filing pleadings, curing defaults, and performing other acts on behalf of the debtor. These provisions afford a trustee and debtor in possession valuable time to discover and evaluate potential causes of action and to perform other acts to preserve the debtor's rights. But did Congress intend to grant a foreign representative of a foreign insolvency estate the same respite? In the first written opinion to squarely address the issue, the Bankruptcy Court for the Southern District of New York held in *In re Fairfield Sentry Ltd.*¹ that the tolling provisions of Section 108 are self-executing in a Chapter 15 case and that the order granting recognition of the foreign proceeding constitutes the "order for relief" for purposes of determining the commencement of the tolling period.

First, a word about Chapter 15. Chapter 15 of the bankruptcy Code permits a foreign representative of a foreign insolvency proceeding to seek the assistance of a United States bankruptcy court in a separate ancillary proceeding here, upon recognition of the foreign proceeding. Chapter 15 empowers a bankruptcy court to grant broad relief to a foreign representative to protect the assets of the debtor or the interests of its creditors in the United States. That said, a Chapter 15 petition does not provide the full range of relief available in a plenary Chapter 7 or Chapter 11 case. Congress, for example, specifically denied a foreign representative the ability to use the Bankruptcy Code's avoidance powers in a Chapter 15 case, absent a plenary case under Chapter 7 or 11 involving the same debtor. Until now, no written opinion has dealt directly with whether Section 108's tolling period applies in a Chapter 15 case. An earlier bankruptcy court opinion suggested that a foreign representative is not a "trustee" within the meaning of Section 108, that "an order for relief" is not entered in a Chapter 15 case, and that Chapter 15 does not otherwise expressly authorize an extension of Section 108 to such cases.²

Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited (the "Funds") were the largest so-called "feeder funds" that invested with Bernard L. Madoff Investment Securities LLC ("BLMIS"). After Madoff's fraud was exposed, the Funds entered liquidation proceedings in the British Virgin Islands ("BVI"). On June 14, 2010, the BVI court-appointed liquidators of the Funds filed petitions under Chapter 15 of the Bankruptcy Code seeking

¹ *In re Fairfield Sentry Ltd., et al.*, 2011 WL 1998376 (Bankr. S.D.N.Y. May 23, 2011).

² *In re Bancredit Cayman Ltd*, 2007 WL 3254369, at *2 (Bankr. S.D.N.Y. Nov. 2, 2007).

recognition in the United States of each of the Funds' insolvency proceedings in the BVI and of themselves as foreign representatives of those proceedings. On July 22, 2010, the Bankruptcy Court recognized the Funds' BVI proceedings as foreign main proceedings.

In April 2010, with the BVI court's approval, the Foreign Representatives filed numerous, substantially similar lawsuits against parties that had redeemed shares of the Funds before the Madoff fraud was exposed (the "Redeemer Actions"). These suits consisted of more than 200 Redeemer Actions seeking over \$5.79 billion in aggregate recoveries based on equitable and restitutionary common law claims, as well as avoidance actions under BVI law for "unfair preferences" and "undervalue transactions." The Foreign Representatives also sued their former investment advisors in New York state court to recover in excess of \$919 million in investment management and performance fees.

In addition to these actions, the Foreign Representatives continued to investigate potential claims against parties that might be responsible for the Funds' massive losses arising from their BLMIS investments. To preserve the Funds' rights in connection with potential claims against such parties and to prevent their extinction due to statutes of limitation or other similar time bars, the Foreign Representatives moved the Bankruptcy Court for an order applying Section 108 to their Chapter 15 cases, and setting July 22, 2010 as the date of the "order for relief" for purposes of calculating the two year tolling period. Various defendants in the Redeemer Actions objected, arguing that Section 108 on its face only applies in plenary bankruptcy cases, like Chapter 7 and Chapter 11, not in Chapter 15 cases.

Relying on the plain language of the statute, the Bankruptcy Court readily concluded that the Bankruptcy Code expressly incorporates Section 108 into Chapter 15.³ Specifically, Section

³ Section 108 provides in full:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108.

103(a) of the Bankruptcy Code, which governs whether particular provisions of the Bankruptcy Code apply in a case under a particular chapter of the Bankruptcy Code, states in relevant part that “*this chapter [i.e., chapter 1]... appl[ies] in a case under Chapter 15.*”⁴ The Bankruptcy Court accordingly found that Section 103(a) unambiguously rendered the entirety of Chapter 1 – including Section 108 – applicable to Chapter 15. As a result, it concluded that the tolling provision of Section 108(a) was self-executing and applicable in all Chapter 15 cases.

The Bankruptcy Court rejected the objectors’ argument that Section 108 by its terms only applies where a trustee exists and that a foreign representative is not a trustee. It agreed that Section 1520(a) of the Bankruptcy Code endowed a foreign representative with specific rights and powers, such as the right to sell assets under Section 363 and operate the debtor’s business.⁵ The Bankruptcy Court disagreed, however, that these specific rights operated to the exclusion of the general relief Section 103(a) otherwise incorporated into Chapter 15 cases, including Section 108. The Bankruptcy Court concluded that the Foreign Representatives, who were liquidators of the Funds’ assets, were indistinguishable from bankruptcy trustees with respect to the purpose of Section 108, which was to provide the entity stepping into the shoes of the debtor additional time to evaluate and preserve a debtor’s rights.

The Bankruptcy Court next concluded that the date it entered the order recognizing the foreign proceeding constituted the “order for relief” for purposes of calculating the tolling period under Section 108. It found that the recognition order allowed the Foreign Representatives to avail themselves of the rights and remedies under the Bankruptcy Code and that it therefore was an order for “relief.” In reaching its conclusion, the Bankruptcy Court rejected contentions that no “order of relief” exists in a Chapter 15 case, or that the order granting the Foreign Representatives’ motion enforcing Section 108 should govern.

Finally, the Bankruptcy Court concluded that even if Section 108 were not self-executing with respect to Chapter 15 cases, Chapter 15 independently provided the Bankruptcy Court with discretion to extend the tolling provisions to the Funds’ cases. Specifically, Section 1521(a)(7) empowers the ancillary court to grant “any additional relief that may be available to a trustee, except for relief available under section 522, 544, 545, 547, 548, 550 and 724(a)” where such relief is “necessary to effectuate the purpose of [Chapter 15] and protect the assets of the debtor or the interests of creditors.”⁶ Section 1507(a) also grants the Bankruptcy Court authority to “provide additional assistance to a foreign representative under [the Bankruptcy Code] or under other laws of the United States.”⁷ Finding that the Foreign Representatives were charged with pursuing the Redeemer Actions and other lawsuits, as well as investigating potential claims against other parties bearing responsibility for the Funds’ massive losses in connection with the Funds’ Madoff investments, the Bankruptcy Court held that granting the

⁴ Section 103(a) provides in relevant part: “...chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(n), 555 through 557, and 559 through 562 apply in a case under chapter 15.” 11 U.S.C. § 103(a).

⁵ 11 U.S.C. § 1520(a).

⁶ 11 U.S.C. § 1521(a)(7).

⁷ 11 U.S.C. § 1507(a).

Foreign Representatives additional time to allow them to effectively investigate the complex financial transfers, and commence actions within applicable statute of limitations periods, was necessary for the fair and efficient administration of the cross-border insolvency and the effective protection and maximization of the value of the Funds' principle assets (*i.e.*, their causes of action).

Unless overturned on appeal, the Bankruptcy Court's ruling opens the door to foreign representatives in foreign insolvency cases to bring claims in the United States through a Chapter 15 case that may otherwise become time barred under United States or foreign law. Its broad characterization of the foreign representative's function as comparable to that of a trustee in bankruptcy also provides a rationale for expanding the rights of a foreign representative under other provisions of the Bankruptcy Code. The decision marks an additional milestone in the continued expansion of Chapter 15 jurisprudence, and creates yet another tool for administrators of foreign proceedings to preserve a foreign debtor's assets in the United States.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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