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EDITOR'S NOTE: MUCH ADO ABOUT CRYPTO

Victoria Prussen Spears

WHAT HAPPENS IN THE EVENT OF THE INSOLVENCY OF A CRYPTOCURRENCY BUSINESS CONDUCTED THROUGH A "BANK"?

Lawrence D. Fruchtmann

CELSIUS NETWORKS' PRE-BANKRUPTCY WARNINGS HIGHLIGHTED CRYPTO BANKRUPTCY RISKS

Richard J. Lee, Frederick (Rick) Hyman and Gregory Gennady Plotko

CRYPTOCURRENCY PLATFORMS THREE ARROWS CAPITAL AND VOYAGER DIGITAL RESORT TO BANKRUPTCY FOR RELIEF

Frederick (Rick) Hyman and Richard J. Lee

STATUTE OF LIMITATIONS, RES JUDICATA, AND COLLATERAL ESTOPPEL—OH MY! ASSERTING AFFIRMATIVE DEFENSES IN DELAWARE BANKRUPTCY COURT

Ronit J. Berkovich and Rebecca Richardson

INTERCREDITOR AGREEMENTS AND THE BANKRUPTCY CODE

Michael H. Goldstein, Howard Steel, Kizzy L. Jarashow and Artem Skorostensky

U.S. SUPREME COURT RESOLVES SPLIT ON U.S. TRUSTEE FEES

Garrett Fail, Candace Arthur, Zack Tripp and Alexander P. Cohen

NEED TO FORECLOSE ON A MORTGAGE? WHERE CAN YOU BRING YOUR ACTION?

Keith M. Brandofino and David V. Mignardi

MUST FOREIGN DEBTORS HAVE U.S. PROPERTY TO BE ELIGIBLE FOR RELIEF UNDER CHAPTER 15?

Rick Antonoff and Evan Jason Zucker

PROFIT MOTIVE? NOT REQUIRED FOR SUBCHAPTER V ELIGIBILITY

Dania Slim and Melissa Pettit

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VOLUME 18

NUMBER 6

September 2022

Editor's Note: Much Ado About Crypto Victoria Prussen Spears	251
What Happens in the Event of the Insolvency of a Cryptocurrency Business Conducted Through a "Bank"? Lawrence D. Fruchtman	254
Celsius Networks' Pre-Bankruptcy Warnings Highlighted Crypto Bankruptcy Risks Richard J. Lee, Frederick (Rick) Hyman and Gregory Gennady Plotko	263
Cryptocurrency Platforms Three Arrows Capital and Voyager Digital Resort to Bankruptcy for Relief Frederick (Rick) Hyman and Richard J. Lee	267
Statute of Limitations, Res Judicata, and Collateral Estoppel— Oh My! Asserting Affirmative Defenses in Delaware Bankruptcy Court Ronit J. Berkovich and Rebecca Richardson	270
Intercreditor Agreements and the Bankruptcy Code Michael H. Goldstein, Howard Steel, Kizzy L. Jarashow and Artem Skorostensky	278
U.S. Supreme Court Resolves Split on U.S. Trustee Fees Garrett Fail, Candace Arthur, Zack Tripp and Alexander P. Cohen	285
Need to Foreclose on a Mortgage? Where Can You Bring Your Action? Keith M. Brandofino and David V. Mignardi	289
Must Foreign Debtors Have U.S. Property to be Eligible for Relief Under Chapter 15? Rick Antonoff and Evan Jason Zucker	294
Profit Motive? Not Required for Subchapter V Eligibility Dania Slim and Melissa Pettit	299

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Must Foreign Debtors Have U.S. Property to be Eligible for Relief Under Chapter 15?

*By Rick Antonoff and Evan Jason Zucker**

The authors discuss a recent decision that they say represents an important appellate step in aligning Chapter 15 policy with its clear statutory requirements: that a foreign debtor under Chapter 15 need not have a property-based nexus with the United States to enable its representative to pursue a foreign collective remedy in the United States, pursue voidable transactions and consolidation theories and otherwise optimize the impact of an international insolvency proceeding.

Chapter 15 of the U.S. Bankruptcy Code provides a streamlined process for recognition (a form of comity) of a foreign insolvency proceeding. However, courts are divided as to whether a foreign debtor must satisfy the general definition of “debtor” as that term is used in Section 109(a) of the Bankruptcy Code, which requires a debtor seeking bankruptcy relief to reside or have a domicile, a place of business, or property in the United States.

The U.S. District Court for the Middle District of Florida (the “Florida District Court”), in *Talas Qais Abulmunem Al Zawawi v. Diss, et al.*,¹ recently ruled that Section 109(a) does not apply in Chapter 15 cases. The court relied on a straightforward interpretation of Section 1517(a)’s mandatory criteria, finding that Chapter 15 “provides the sole requirements for recognition” and that recognition is not premised upon a foreign debtor meeting Section 109(a) requirements for eligibility.

The Florida District Court’s opinion conflicts with an opinion rendered in 2013 by the U.S. Court of Appeals for the Second Circuit (the “Second Circuit”) in *Drawbridge Special Opportunities Fund L.P. v. Barnet (In re Barnet)*,² which held that Section 109(a) is applicable in Chapter 15. *Al Zawawi* is the latest in a string of judicial opinions and scholarly articles disagreeing with the Second Circuit’s decision in *Barnet*.³

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¹ *Talas Qais Abulmunem Al Zawawi v. Diss, et al. (In re Talas Qais Abdulmunem Al Zawawi)*, No. 21-894-GAP (M.D. Fla. Feb. 28, 2022).

² *Drawbridge Special Opportunities Fund L.P. v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir 2013).

³ See *In re Bemarmara Consulting a.s.*, No. 13-13037 (Bankr. D. Del. Dec. 17, 2013); Daniel M. Glosband and Jay Lawrence Westbrook, Chapter 15 Recognition in the United States: Is a

THE *AL ZAWAWI* CASE

Al Zawawi is a citizen of Oman and resides in Oman. In March 2020, as a result of Al Zawawi's failure to satisfy a U.K. judgment, a U.K. court adjudged Al Zawawi bankrupt and appointed joint trustees (bankruptcy professionals entirely independent of and adverse to Al Zawawi) to investigate, collect, and distribute Al Zawawi's assets.

Al Zawawi had no domicile, residence, or place of business and, arguably, no property in the United States prior to the commencement of the U.K. insolvency proceeding. His only interests relating to the United States were indirect ownership of several companies that, in turn, owned property in Florida. Al Zawawi was listed as a director of each company. Additionally, prior to 2020, Al Zawawi had a 60 percent ownership interest in a Florida corporation. In February 2020, Al Zawawi sold his interest in the corporation to his brother—the only other shareholder—but continued to be listed as a director.

On March 24, 2021, the joint trustees sought recognition of the U.K. proceeding in the U.S. Bankruptcy Court for the Middle District of Florida in order to investigate Al Zawawi's financial affairs, determine whether his assets were used to acquire other assets in the United States, and potentially assert claims against third parties, including fraudulent transfer claims. Relying primarily on *Barnet*, Al Zawawi opposed recognition on the grounds that he did not have property in the United States. The joint trustees argued that *Barnet* was wrongly decided.

The bankruptcy court, over Al Zawawi's objection, found that there is no requirement of having property in the United States for recognition of a foreign proceeding under Chapter 15, and even if there was, Al Zawawi had property within the United States.

Al Zawawi appealed to the Florida District Court.

THE ELIGIBILITY DISPUTE

The *Barnet* Position: The Plain Language of the Bankruptcy Code Dictates That Section 109(a) Applies in Chapter 15 Cases

In requiring a debtor to have U.S. property in Chapter 15 cases, the Second Circuit in *Barnet* interpreted Sections 109(a) and 103(a) (part of Chapter 1 of

Debtor "Presence" Required?, 24 Int'l Insolv. Rev. 28 (2015). See also, Douglas G. Baird, Revisions to Chapter 15 of the Bankruptcy Code, at 4–7 (letter from National Bankruptcy Conference to Congress proposing Bankruptcy Code revision to clarify that Section 109(a) does not apply in Chapter 15 cases).

the Bankruptcy Code). Section 103(a) provides “. . . this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.” Because Section 109 is within Chapter 1, the Second Circuit reasoned that “by the plain terms of the statute,” Section 109 applies to a case under Chapter 15.

The Second Circuit found that while Section 1502 provides a separate definition for “debtor,” that definition does not replace the definition of “debtor” in Section 109—doing so, it held, is not “reconcilable with the explicit instruction in Section 103(a) to apply Chapter 1 to Chapter 15.”⁴ And even if Section 1502 did replace Section 109(a) in defining a foreign debtor for the purposes of Chapter 15, it would not render Section 109 inapplicable in Chapter 15 cases because the scope of Section 1502 is expressly limited to “this chapter” (i.e., Chapter 15) and thus does not affect the definitions contained within Chapter 1. For example, the definitions of “foreign proceeding” and “foreign representative,” which are both found in Chapter 1 and not in Chapter 15, would not be affected by applying the Section 109(a) definition of “debtor” in Chapter 15.

Finally, *Barnet* rejected the argument that applying Section 109(a) to Chapter 15 would be inconsistent with the venue provision for Chapter 15 cases. Under 28 U.S.C. § 1410, a Chapter 15 case may be commenced in a venue where “the debtor does not have a place of business or assets in the United States.”⁵ The Second Circuit found this statute to be purely procedural in nature stating that “given the unambiguous nature of the substantive and restrictive language used in Sections 103 and 109 of Chapter 15 [sic], to allow the venue statute to control the outcome would be to allow the tail to wag the dog.”⁶

The *Al Zawawi* Position: The Textual Language of, and Purpose of, Chapter 15 Confirms Recognition Is Not Predicated on Section 109(a)

Like *Barnet*, the Florida District Court focused on the plain language of the Bankruptcy Code. Unlike *Barnet*, the Florida District Court found that requiring property in the United States for recognition misconstrues Chapter 15. Specifically, that Section 1517 unambiguously provides the sole requirements for recognition. Any references to a “debtor” in Chapter 15 must apply the alternative definition of a “debtor” found in Section 1502(1). The Florida

⁴ *In re Barnet*, 737 F.3d at 249.

⁵ 28 U.S.C. § 1410(2).

⁶ *In re Barnet*, 737 F.3d at 250.

District Court found that the legislative history for Chapter 15 supports this position.⁷

Further, the Florida District Court adopted the bankruptcy court's reasoning that other statutory provisions confirm that Congress did not intend Section 109 to apply to Chapter 15. For example, it found that, if Section 109 applied, Section 1528 of the Bankruptcy Code would be rendered duplicative and superfluous because it provides that after recognition a case under another chapter of the Bankruptcy Code may be commenced "only if the debtor has assets in the United States." Thus, to give effect to the plain language of Section 1528 of the Bankruptcy Code, the Florida District Court found that there is no property requirement at the recognition phase of a Chapter 15 case; property in the United States is only required, after recognition, if a Chapter 11 or Chapter 7 case is commenced.

Similarly, the Florida District Court found that the venue statute governing Chapter 15 cases specifically provides venue for cases when the foreign debtor lacks "a place of business or assets in the United States."⁸ Unlike *Barnet*, the Florida District Court's interpretation of Section 1410 makes no distinction between "procedural" and "substantive" statutes (a distinction not made in the U.S. Code itself). Rather, the Florida District Court noted that Section 1410 conflicts with the language of Section 109 of the Bankruptcy Code, further supporting the idea that the generally drawn Section 109(a) was not meant to be an eligibility requirement for recognition.

Finally, the Florida District Court found that the U.S. Court of Appeals for the Eleventh Circuit would likely disagree with *Barnet*. The Eleventh Circuit in a decision examining the predecessor statute to Chapter 15, former Section 304 of the Bankruptcy Code, construed that statute not in isolation but in the context and purpose of what the statute was seeking to accomplish.⁹

Ultimately, the Eleventh Circuit held that "[b]ecause the focus is on making United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject

⁷ See H.R. Rep. No. 109-31, pt. 1, at 107, reprinted in 2005 U.S.C.C.A.N. 88, 170 (2005) (noting that the term "debtor" takes on a "special definition" in Chapter 15—provided in Section 1502—and such "[wa]s necessary to eliminate the need to refer repeatedly to 'the same debtor as in the foreign proceeding'").

⁸ See 28 U.S.C. § 1410 (2), (3).

⁹ *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988).

of the foreign proceeding qualify as a 'debtor' under United States bankruptcy law."¹⁰

IMPLICATIONS

Al Zawawi is not the only case to reject the Second Circuit's holding in *Barnet*. Indeed, bankruptcy courts in the District of Delaware and the Southern District of Florida have also declined to follow *Barnet*. Bankruptcy courts in the Second Circuit have managed to align the *Barnet* ruling with specific case requirements and the policy behind by Chapter 15 by permitting nominal U.S.-based property rights (retainers for 15 professionals, deemed situs for books and records under bond indentures, deemed provenance for intangibles and causes of action) to establish the Section 109 nexus.

Al Zawawi represents an important appellate step in aligning Chapter 15 policy with its clear statutory requirements—that a foreign debtor under Chapter 15 need not have a property-based nexus with the United States to enable its representative to pursue a foreign collective remedy in the United States, pursue voidable transactions and consolidation theories and otherwise optimize the impact of an international insolvency proceeding.

¹⁰ *Id.*