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Practice Update

SVB Cayman Branch Denied Chapter 15 Recognition

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By R. Adam Swick and Laura Taveras

According to a February 22 ruling by the Bankruptcy Court for the Southern District of New York, foreign banks with a U.S. branch or agency are ineligible for Chapter 15 recognition.

The case before Chief Judge Glenn, *In re Silicon Valley Bank Cayman Branch*, involves the Cayman branch of Silicon Valley Bank (SVB), the second largest bank failure in U.S. history, after Washington Mutual in 2008.[1] The branch at issue was not incorporated separately from SVB, but was licensed to operate in the Cayman Islands.

The court provided a straightforward analysis, relying on the plain language of Bankruptcy Code section 1501(c)(1), which states Chapter 15 "does not apply to a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b)." Section 109(b)(3)(B), in turn, explicitly excludes "a foreign bank... that has a branch or agency... in the U.S."

Arguing for Chapter 15 recognition, the Joint Official Liquidators (JOLs) in the case argued that under Cayman law, immediately upon SVB's collapse "an estate was created" for the branch and the "JOLs [began] presiding over a statutory trust" and not a foreign bank with a U.S. branch.[2] This argument did not persuade the court, however. The court

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explained that nothing about SVB's closing or the branch's Cayman proceeding resulted in the "transmogrification" of the entities to confer bankruptcy eligibility.[3]

The *raison d'etre* for the branch's Cayman proceeding and Chapter 15 petition stemmed from the Federal Deposit Insurance Company's denial of hundreds of millions of dollars in insurance claims from depositors. Those depositors hoped the Cayman proceeding and subsequent recognition would help obtain a different result from the FDIC. Nonetheless, it did not work.

Despite denying recognition, the court explained that the "JOLs are not without remedy" since they can bring an action under section 1509(f), which provides that the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor." [4]

Section 1509(f)'s exception to recognition, however, is not straightforward for three reasons. First, Section 1509(b) gives a foreign representative the capacity to sue and be sued only "upon recognition." This begs the question: Why would section 1509(f) allow foreign representatives to do precisely what the earlier section disallows?

Second, the legislative history limits the exception: "Subsection (f) provides a limited exception to the prior recognition requirement so that collection of a claim which is property of the debtor, for example an account receivable, by a foreign representative may proceed without commencement of a case or recognition...."[5] The use of an "account receivable" as an example suggests that the exception is for everyday transactions, not necessarily for bringing insurance claims for hundreds of millions of dollars.

Third, the case law is littered with inconsistent opinions as to section 1509(f)'s scope. For example, in *Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l Ltd.*, a New York Southern District Court found that the court-appointed liquidators of a British Virgin Islands fund could not appear in the action, seek a stay, or intervene on behalf of the fund, in an interpleader without Chapter 15 recognition.[6] In *Iiada v. Kitahara*, United States Bankruptcy Appellate Court for the Ninth Circuit found that a foreign representative must obtain recognition to have standing to appear as a party litigant.[7]

Despite ultimately appealing Judge Glenn's decision, the day after the court denied recognition, the JOLs sued the FDIC in district court. Depending on what happens on appeal, the bankruptcy court's order could provide support for the position that section 1509(f) allows the JOLs the ability to bring a case without Chapter 15 recognition.

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[1] No. 24-10076, 2024 Bankr. Lexis 427 (Feb. 22, 2024 S.D.N.Y. 2024).

[2] *In re Silicon Valley Bank*, No. 24-10076, 024 Bankr. Lexis 427 (Feb. 22, 2024 S.D.N.Y. 2024), Reply Memo. of Law in Further Support of Verified Petition for Recognition of Foreign Insolvency Proceeding Pursuant to Sections 1504, 1509, 1515, 1517, 1520 and 1521 of the Bankruptcy Code, Filed Feb. 12, 2024 (ECF No. 38).

[3] *In re Silicon Valley Bank Cayman Branch*, 2024 Bankr. Lexis 427 at *33.

[4] *In re Silicon Valley Bank Cayman Branch*, 2024 Bankr. Lexis 427 * 39.

[5] *See* H. Rep. 109–31(I) at 110–11 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 173.

[6] No. 09-9021, 2010, LEXIS 42216, at *9 (S.D.N.Y. Apr. 29, 2010).

[7] 377 B.R. 243, 257-259 (BAP 9thCir. 2007)
