Chapter 15 News: Delaware District Court rejects lawsuit against foreign representatives

David H. Conaway advises any administrators or liquidators outside the US to read on before they become concerned about liability for serving as foreign representatives in Chapter 15 cases

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THERE WAS SIGNIFICANT CONTROVERSY, LITIGATION, AND CRIMINAL CONVICTIONS REGARDING THE LEGALITY OF ANGLO'S TAKE OUT OF THE TOXIC SHAREHOLDER

In a Chapter 15 procedure in Delaware, a disgruntled "creditor" sued the Chapter 15 UK-based "foreign representatives" in their individual capacities. The case is McKillen v. Wallace (In re IBRC), No. 18-1797, 2019 U.S. Dist. LEXIS 166153 (D. Del. Sept. 27, 2019). Before administrators or liquidators outside the US become concerned about liability for serving as foreign representatives in Chapter 15 cases, read on.

The saga ultimately arises from the Great Recession, specifically the meltdown and nationalisation of Anglo Irish Bank PLC ("Anglo") in 2008-2009. In response, pursuant to the Credit Institutions (Stabilisation) Act 2010, Ireland created the Ireland Bank Resolution Corporation Limited ("IBRC") as the successor of Anglo. In 2013, pursuant to a Special Liquidation Order of the Irish government, Kieran Wallace and Eamonn Richardson were appointed as Special Liquidators for IBRC ("Special Liquidators"). Their charge was to maximise the IBRC estate for the benefit of its stakeholders. As part of their charge, the Special Liquidators filed a Chapter 15 petition for the recognition of the IBRC liquidation proceedings pending in Ireland as foreign main proceedings, and also appointed themselves as the "foreign representatives" under the Bankruptcy Code in the Chapter 15 proceedings, in order to insure an orderly and uniform administration of IBRC's assets and liabilities. Their Chapter 15 petition for recognition indicated

assistance in the US was necessary to bind IBRC's US creditors in the U.S. and to protect US assets from claims or actions.

Rewind the clock back to 2008-2009. Certain individuals and their companies (Paddy McKillen, Anthony Leonard and Clarendon Properties Limited, the "Anglo Borrowers") were substantial customers of Anglo, with outstanding borrowings in 2008 of about 2 billion euros, related primarily to real estate interests in California and Massachusetts.

Allegedly, Anglo desired to rid itself of a toxic shareholder who owned 29% of Anglo. To this end, Anglo approached its largest borrowers to borrow additional funds from Anglo in order to collectively take out the toxic shareholder. The Anglo Borrowers were part of the group, and borrowed an additional 45 million euros from Anglo. The plan was to accumulate the proceeds of the borrower loans to purchase the 29%, and later sell it for a gain to repay the loans and a profit to boot. When Ireland nationalised Anglo, the stock value plummeted to zero.

In the aftermath, there was significant controversy, litigation, criminal convictions and adverse publicity regarding the legality of Anglo's take out of the toxic shareholder using additional loans from borrowers. The Anglo Borrowers assert that they suffered significant economic, reputational and personal harm as a result of these transactions. In the liquidation proceedings of IBRC in Ireland, the Special Liquidators initiated collection actions against the Anglo Borrowers in order to maximise the IBRC estate, including with respect to the additional 45 million euro loans.

In 2018, Anglo Borrowers filed adversary proceedings in the

IBRC Chapter 15 case against the Special Liquidators as foreign representatives, but in their individual capacities. The asserted claims included breach of fiduciary duty, breach of duty of case, fraud and negligence. The Anglo Borrowers did NOT file a complaint against IBRC, presumably due to the automatic stay (and its penalties for violation), arising from the Chapter 15 petition for recognition. The Anglo Borrowers also filed a cautionary Motion for Relief from Stay "for cause" in the Chapter 15 case, arguing they did not need relief from stay because the adversary proceedings were not against the Chapter 15 debtor, IBRC. Apparently, the Anglo Borrowers also did not assert any of their claims of the Chapter 15 adversary proceedings in defense or counterclaim to any of the proceedings in Ireland.

The Delaware Bankruptcy Court had to decide whether it should grant relief from stay to the Anglo Borrowers and allow the adversary proceedings against the individual foreign representatives to proceed.

For the following reasons, the Bankruptcy Court and the affirming Federal District Court ruled against the Anglo Borrowers and in favour of the foreign representatives:

1. The Barton Doctrine

Though it did not decide this issue, the District Court noted that the application of the Barton Doctrine in a Chapter 15 case was a matter of first impression.

The Barton Doctrine arises from an 1881 US Supreme Court decision barring suits against court-appointed fiduciaries in any venue except in the appointing court, and only with prior court permission. US Circuit Courts of Appeal including the 3rd Circuit (which includes Delaware) have extended the Barton Doctrine to bankruptcy trustees.

The District Court also noted that under the Barton Doctrine, the Special Liquidators were appointed as the Chapter 15 foreign representatives in the Irish liquidation proceedings, not in the Chapter 15 proceedings. The Chapter 15 court merely recognised that appointment. If applicable, the Barton Doctrine would require any action against the foreign representatives to occur in the Irish liquidation proceedings, with prior permission. The Court noted that:

> *Bankruptcy Code Section 101(24) defines foreign representative as ". . . a person or body . . . authorized in foreign proceedings to administer . . . the assets or affairs or to act as a representative of such foreign proceedings . . .." Moreover, Section 1515(a) of the Bankruptcy Code provides that "a foreign representative applies to the court for recognition of foreign proceedings in which the foreign representative has been appointed . . .."*

Whether the Barton Doctrine applies to foreign representatives in a Chapter 15 case remains an open question, though it seems clear where the Delaware courts are leaning.

2. Extension of the automatic stay to non-debtors

The automatic stay of Section 362 of the Bankruptcy Code is applicable upon the recognition of foreign main proceedings. The automatic stay normally applies only to protect debtors, but in limited circumstances can be extended to protect non-debtors as well. Here, the courts expanded automatic stay to cover the foreign representatives as non-debtors, as they have a significant identity of interest with the Chapter 15 debtor, IBRC. Thus, the Anglo Borrowers were required to obtain relief from stay before their adversary proceedings may continue.

3. Relief from stay denied

The Anglo Borrowers sought relief from stay "for cause." The District Court acknowledged that "for cause" is a somewhat amorphous legal standard, but certainly requires a prima facie showing based on an evidentiary record, that the balance of hardships from not obtaining relief is significantly in favour of the Anglo Borrowers. Here, the adversary complaint was not verified and the Anglo Borrowers submitted no evidence to establish "for cause." Accordingly, the Bankruptcy and District Courts denied the motion for relief from stay, effectively terminating the adversary proceedings.

Takeaways

It is no surprise that the Bankruptcy Court and the affirming Federal District Court extended the automatic stay and denied relief from stay, under these circumstances.

The attack on the foreign representatives seems misplaced, particularly when the Anglo Borrowers were Irish nationals, borrowing money from an Irish bank and under loan agreements entered into in and governed by the laws of Ireland. Perhaps they wanted to avoid appearing in Irish courts due to prior adverse publicity in Ireland, but presumably their defenses and claims could be asserted in the Irish collection action or the Irish Liquidation Proceedings of IBRC.

The interesting automatic stay takeaway is that while extension of the automatic stay to non-debtors generally has limited application in the US, Chapter 15 may be a circumstance where extension is more frequently appropriate.

The other takeaway of interest is the potential application of the Barton Doctrine, which was not decided in this case. When another opportunity arises to address the Barton Doctrine in the Chapter 15 context, my money is on that courts will pick up on the dicta of the District Court opinion and rule the Barton Doctrine does apply. It is logical and serves the purposes of Chapter 15 comity among countries and the orderly and uniform administration of assets and claims in cross-border insolvency cases. ■

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