

The Importance Of In Re Condor

Law360, New York (May 14, 2010) -- On March 17, the U.S. Court of Appeals for the Fifth Circuit decided the case of *Fogerty v. Petroquest Resources Inc. (In re Condor Ins. Ltd.)*, 2010 WL 961613 (5th Cir. March 17, 2010).

In an issue of first impression, the court held that Section 1521(a)(7) of the Bankruptcy Code does not prohibit a foreign representative in a Chapter 15 proceeding from commencing an avoidance action that is based on the substantive laws of the jurisdiction where the “foreign main proceeding” is located.

The Fifth Circuit relied on principles of statutory construction, as well as the legislative intent of Chapter 15 deferring to the laws of the foreign insolvency proceeding, to rule that Section 1521(a)(7) was intended only to limit a foreign representative’s ability to avoid transfers in a Chapter 15 case under U.S. avoidance laws.

The Condor Decision

Condor Insurance Ltd. was in the insurance and surety bond business. A creditor filed a “winding up petition” against Condor in Nevis, where Condor was incorporated. (A “winding up petition” is similar to a Chapter 7 petition under the U.S. Bankruptcy Code.) The Nevis insolvency court granted the petition and appointed two joint official liquidators.

The joint official liquidators, as foreign representatives, commenced a proceeding under Chapter 15 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Mississippi. The foreign representatives requested recognition of the Nevis proceeding as a “foreign main proceeding,” which is defined as, “a foreign proceeding pending in the country where the debtor has the center of its main interests.” 11 U.S.C. § 1502(4). The Bankruptcy Court granted the request and entered an order recognizing the Nevis proceeding as a “foreign main proceeding.”

Thereafter, the foreign representatives initiated an adversary proceeding in the Chapter 15 case, seeking to avoid over \$300 million in transfers Condor allegedly made to a newly formed entity — Condor Guaranty Inc. — during the Nevis proceeding to shield those assets from the reach of creditors.

The lawsuit sought relief under various Nevis legal theories, including a Nevis fraudulent transfer statute, which permits the avoidance of fraudulent transfers “which have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors ...”

The defendant moved to dismiss the adversary proceeding on the grounds that the Bankruptcy Court lacked jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted, as avoidance actions were available only through a Chapter 7 or 11 proceeding. (A foreign representative has standing to prosecute avoidance actions under U.S. laws in Chapter 7 or Chapter 11 proceedings, pursuant to Section 1523(a) of the

Bankruptcy Code(a).) As a foreign insurance company, however, Condor was not eligible to file for Chapter 7 or Chapter 11 relief.

At the heart of defendant's motion to dismiss was the application of Section 1521(a)(7) of the Bankruptcy Code. Section 1521(a) sets forth certain types of relief a bankruptcy court may grant to the foreign representative upon recognition of a proceeding as a "foreign main proceeding" or "foreign nonmain proceeding." Section 1507(a)(7) is a catch-all provision that permits a bankruptcy court to grant the foreign representative "any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)."

The defense argued that because Section 1521(a)(7) prohibits the bankruptcy court from permitting the foreign representatives from commencing avoidance actions, the foreign representatives could not institute an avoidance action in the Chapter 15 case. The Bankruptcy Court agreed and dismissed the adversary proceeding, and the district court affirmed.

On appeal, the Fifth Circuit reversed the decision, and in doing so, the court relied first on principles of statutory construction. Specifically, the court found that, "generally, where there are enumerated exceptions 'additional exceptions are not to be implied, in the absence of a contrary legislative intent.'"

Additionally, Section 1521(a)(7) states that the foreign representative can be granted "any relief," with the exception only of actions under Sections 522, 544, 545, 547, 548, 550, and 724(a). In the court's view, if Congress wanted to preclude all avoidance actions, regardless of their source, it would have said so.

The court then noted that Chapter 15's "stated purpose and overall structure ... reflects its international original ...," as articulated, for example, in Section 1501.

That statute provides that the purpose of Chapter 15 is to further cooperation between the U.S. courts, parties in U.S. bankruptcy proceedings and foreign insolvency courts and authorities involved in cross-border insolvency cases, as well as to promote "greater legal certainty," "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors," "protection and maximization of the value of the debtor's assets," and facilitation of the rescue of financially troubled businesses."

From a public policy standpoint, the court also found that application of foreign avoidance law in a Chapter 15 adversary proceeding would not lead to forum shopping as a result of foreign representatives using Chapter 15 when they seek to apply foreign law and Chapter 11 when they seek to apply U.S. law.

The court also reasoned that under Chapter 15's predecessor statute, Section 304, avoidance actions under foreign law were permitted when foreign law applied and would provide for such relief.

Lastly, the court concluded that application of foreign law under Chapter 15 does not implicate any of the important concerns "driving reliance by United States Courts upon the law of foreign nations in defending domestic norms." To that end, the court noted that providing access to U.S. courts to foreign insolvency proceedings was intended to protect domestic businesses and their creditors as they develop foreign markets.

An important element to achieving this objective, according to the court, is to provide domestic entities with "settled expectations" of the rules that will apply in dealing with foreign companies. Chapter 15, the court continued, reflects Congress' "implementation of efforts to achieve the cooperative relationship with other countries essential to this objection."

The Condor decision is the latest example of a U.S. court's sound recognition and deference to the substantive laws of a foreign nation where the main insolvency proceeding is pending. In light of this case, foreign

representatives may commence avoidance actions, in the Chapter 15 case they are administering, grounded in the substantive avoidance laws of the foreign insolvency proceeding.

--By Ilana Volkov and G. David Dean, Cole Schotz Meisel Forman & Leonard PA

Ilana Volkov is a member of Cole Schotz Meisel Forman & Leonard in Hackensack, N.J., and David Dean is an associate in the firm's Baltimore office. Both practice in the firm's bankruptcy and corporate restructuring group, focusing on debtor side restructuring and litigation arising from bankruptcy cases.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.