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Jurisdictional limits on recognition of foreign non-debtor releases

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Introduction

One of the major benefits of reorganisation is the discharge of debts, which allows the reorganised debtor a fresh start, unencumbered by pre-petition liabilities. US courts are wary of providing similar relief to non-debtors by enjoining claims against them as part of a bankruptcy plan. Indeed, it can be argued that a court does not have the authority to do so under the Bankruptcy Code.

Courts in some other countries are more willing to release non-debtors from liabilities in bankruptcy proceedings. This update addresses the jurisdictional questions that arise when a party asks a US bankruptcy court to recognise and enforce non-debtor releases issued by a foreign court.

In *In re Sino-Forest Corp*, the Bankruptcy Court for the Southern District of New York held that it would recognise and enforce an injunction issued in a Canadian bankruptcy case, which extended to independent, non-derivative claims against non-debtors.(1) Relying on its decision three years earlier in *In re Metcalfe*,(2) the court reasoned that – regardless of whether such an injunction was beyond the limits of bankruptcy jurisdiction and thus could not have been entered by the court in a plenary Chapter 11 case – recognition and enforcement of the foreign injunction was proper in the exercise of comity in a case under Chapter 15.(3) In both *Metcalfe* and *Sino-Forest*, the court enforced the foreign orders by issuing injunctions that mirrored the injunctions entered by the court in the primary Canadian proceeding.

A significant number of Chapter 15 filings are made in New York, and the decisions in *Metcalfe* and *Sino-Forest* may make the Southern District of New York an even more attractive venue. However, in both cases, the requests for enforcement of the foreign non-debtor releases were unopposed, and the jurisdictional issues raised by such requests were not thoroughly briefed for the court. As the bankruptcy court recognised, there is a serious question as to whether the injunctions in *Sino-Forest* and *Metcalfe* are beyond the scope of federal bankruptcy jurisdiction. Even if they are within bankruptcy jurisdiction, there is a serious question as well as to whether a bankruptcy court, rather than an Article III district court, could issue such injunctions. In *Stern v Marshall*,(4) the Supreme Court instructed that the Constitution imposes limits on the matters that may be delegated to non-Article III bankruptcy courts: non-debtor releases and injunctions, such as those issued in *Sino-Forest* and *Metcalfe*, may be beyond those limits.

Background

Chapter 15 of Bankruptcy Code

Chapter 15 of the Bankruptcy Code was enacted in 2005 with the goal of "provid[ing] effective mechanisms for dealing with cases of cross-border insolvency".(5) It "provides for the 'recognition' of a 'foreign proceeding'(6) and an ancillary U.S. proceeding to assist the foreign proceedings".(7) A case under Chapter 15 is commenced when a foreign representative,(8) appointed in a bankruptcy proceeding in a foreign country, petitions a US bankruptcy court for recognition of the foreign proceeding.(9) Chapter 15 sets out a broad range of relief that may be granted once the foreign proceeding is recognised. If it is recognised as a foreign main proceeding,(10) Section 1520 provides for certain

automatic relief, including an automatic stay of lawsuits against the debtor and the power to prevent transfers of the debtor's property.(11)

On recognition of the foreign proceeding, the court also has discretionary authority to grant additional relief under Sections 1521 and 1507.(12) Section 1521 provides that, "where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors", the court may, at the request of the foreign representative, "grant any appropriate relief", and sets out a non-inclusive list of relief similar to that available to a trustee in plenary case under the code. The types of relief include:

- staying actions that concern the debtor's assets, rights, obligations or liabilities;
- providing for the examination of witnesses or taking of evidence concerning the debtor's affairs; and
- entrusting the administration of the debtor's assets to the foreign representative.(13)

Section 1521(a)(6) provides that the court may grant "any additional relief that may be available to a trustee", other than avoidance powers granted to trustees by the Bankruptcy Code.(14) The court may not grant relief under Section 1521 unless "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected".(15)

Section 1507 further provides that the court may provide additional assistance under the Bankruptcy Code and any other laws of the United States.(16) The court may grant such additional assistance "consistent with the principles of comity" and on determining that it:

> "*will reasonably assure—(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns*."(17)

Release of non-debtors in US bankruptcy proceedings

Ordinarily, in US bankruptcy proceedings, only the debts of the debtor will be discharged after confirmation of a reorganisation plan. The code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt".(18) Thus, for example, the discharge will not affect a creditor's right to pursue a successor liability claim against the debtor's corporate affiliate or a direct action against the debtor's insurer.

There is no provision in the Bankruptcy Code expressly authorising the discharge or release of claims against non-debtors. Section 524(g) authorises the functional equivalent in asbestos-driven bankruptcies: a court confirming a plan may issue an injunction "to supplement the injunctive effect of a discharge" by enjoining asbestos-related claims against certain non-debtors alleged to be directly or indirectly liable for the debtor's conduct, or for claims against the debtor, on grounds set out in the statute.(19) Section 524(g) however, applies only to bankruptcies in which the debtor faces pending and future claims for asbestos-related injuries and authorises the court to enjoin claims against non-debtors only on the satisfaction of certain conditions, including the requirements that:

- the plan have the vote of 75% of the present asbestos claimants;
- all asbestos-related claims be channeled to a trust for post-confirmation resolution; and
- the non-debtor contribute to the trust an amount that the court finds "fair and equitable" to future claimants.(20)

Several circuit courts of appeal have held that, other than under Section 524(g), Section 524(e) forecloses release of, or enjoining claims against, non-debtors.(21) Several other circuit courts of appeal have held that non-debtor releases are not categorically prohibited, but will be granted only in rare or unique cases.(22) As the Second Circuit has explained, "[a]t least two considerations justify the reluctance to approve nondebtor releases".(23) The first is that the Bankruptcy Code does not provide for non-debtor releases, other than the Section 524(g) provision for a channelling injunction in asbestos-driven bankruptcies.(24) The second is that "a nondebtor release is a device that lends itself to abuse", because it effectively operates as a discharge of debts without a bankruptcy filing and the safeguards of the code.(25) Courts that have issued injunctions prohibiting creditors from suing third parties have done so only in unusual circumstances, focusing on considerations such as whether:

- the injunction plays an important part in the debtor's reorganisation plan;
- the released non-debtors contribute assets to the reorganisation;
- a fund is established to compensate the creditors whose claims were enjoined; and
- the impacted class or classes of creditors voted overwhelmingly in favour of the plan. (26)

Moreover, the injunction must fall within the scope of the court's subject-matter jurisdiction. In 28 US Code (USC) Section 1334, Congress provided that federal courts have jurisdiction over cases under Title 11, and over "civil proceedings arising under Title 11, or arising in or related to cases under Title 11". While there is general agreement on the scope of 'arising under' and 'arising in' bankruptcy jurisdiction – the former including any cause of action that is created by Title 11 and the latter encompassing administrative matters in the bankrupty case, among other things(27) – the scope of 'related to' bankruptcy jurisdiction is more often the subject of dispute. The most-often cited case is *Pacor, Inc v Higgins*, in which the Third Circuit held that a civil proceeding is 'related to' a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy".(28)

Interpreted broadly, the *Pacor* 'conceivable effect' test could encompass any matter that could have any indirect effect on the debtor's estate.(29) However, as the Supreme Court in *Celotex* emphasised, while Congress intended bankruptcy jurisdiction to be comprehensive, so that the bankruptcy courts could "deal efficiently and expeditiously with all matters connected with the bankruptcy estate,… 'related to' jurisdiction cannot be limitless".(30)

While the precise limits of 'related to' jurisdiction have not been established, it is clear that it does impose limits on the court's jurisdiction to impose non-debtor releases in bankruptcy cases. Thus, in *Combustion Engineering*, the Third Circuit held that an injunction affecting claims against non-debtors must be limited to claims that directly affect the estate *res*, such as derivative claims – that is, claims that the non-debtor is responsible for the actions of the debtors because, for example, it is the debtor's successor in interest or insurer. Claims that do not directly affect the estate are not related to the debtor's bankruptcy case and are not within the scope of bankruptcy jurisdiction set out in 28 USC Section 1334.(31) Moreover, if the injunction is outside the scope of the bankruptcy jurisdiction, it cannot be issued even if the affected creditors agree. The parties cannot confer subject matter on the court by wiaver or consent(32) and the court has an independent obligation to ensure it has subject-matter jurisdiction. (33)

Recognition and enforcement of foreign non-debtor releases

In some countries, non-debtor releases are more commonly granted in bankruptcy cases and may be broader than the releases permitted under US bankruptcy law. The question arises as to whether a non-debtor release that is beyond the scope of bankruptcy jurisdiction, and thus could not be entered by a court in a US bankruptcy proceeding, may be recognised and enforced in a Chapter 15 case. The bankruptcy court for the Southern District of New York recently addressed that issue in *Sino-Forest*, and enforced the foreign non-debtor release and injunction.

Sino-Forest *decision*

The debtor in *Sino-Forest,* Sino-Forest Corporation, had filed for bankruptcy in Ontario under Canada's Companies' Creditors Arrangement Act. At that time, securities class action litigations had been filed in Canada and the United States on behalf of purchasers of Sino-Forest securities, asserting claims based on alleged misrepresentation in Sino-Forest's financial statements against Sino-Forest, certain of its former officers and directors, and others, including Ernst &Young (EY), Sino-Forest's external auditor. The parties negotiated a settlement of the class action claims against EY and an order was entered in the Canadian bankruptcy proceedings approving the settlement, which was incorporated into the reorganisation plan.

The settlement order provided that EY would pay $117 million into a settlement trust for the benefit of the claimants in the Canadian and US class actions, and that the Sino-Forest reorganisation plan would grant EY a global release and the benefit of injunctions in the plan, which would enjoin any claims against EY-related to the alleged securities fraud, including independent, non-derivative claims. EY also agreed to release all claims, including claims for indemnification, that it had against Sino-Forest and affiliated parties, and relinquished any rights for distribution under the plan. When approving the settlement, the Ontario court noted that such third-party releases are permissible under Canadian law, and found that the settlement was fair and reasonable and provided substantial benefits to the relevant stakeholders.

Sino-Forest's foreign representative sought and was granted recognition of the Canadian proceeding under Chapter 15. EY then moved in the Chapter 15 proceeding for an order recognising and enforcing the Canadian settlement order. Both the foreign representative and a representative of the plaintiffs in the US class action, who had filed

a class claim in the Canadian bankruptcy case and had appeared at that court's hearings on the settlement order, joined EY's motion. No objections to the motion were filed.

The bankruptcy court ruled that it would recognise and enforce the settlement order. The court noted that it had faced and granted "an almost identical request for relief"(34) three years earlier, in *In re Metcalfe*.(35) In that case the court had held that:

> "*the correct inquiry in a chapter 15 case was not whether the Canadian orders could be enforced under U.S. law in a plenary chapter 11 case, but whether recognition of the Canadian courts' decision was proper in the exercise of comity in a case under chapter 15*".(36)

In *Metcalfe*, the court was asked to enforce a non-debtor release and injunction that had been issued by the Ontario court in a restructuring of all non-bank sponsored asset-backed commercial paper (ABCP) obligations, valued at more than C$32 billion.(37) The ABCP market had suffered a crisis in the aftermath of the sub-prime mortgage crisis in the United States, and representatives of the largest investors and asset providers negotiated a restructuring deal which included an order releasing all participants in the ACBP market from liability for any past, present or future claims related to the ABCP market, and enjoining proceedings against the released parties.(38) According to the foreign representative, it was "the largest restructuring in Canadian history, and without such restructuring, the entire Canadian financial system would have been in peril".(39) As in *Sino-Forest*, there were no objections to the motion seeking enforcement of the injunction.(40)

The court in *Metcalfe* noted that while no ABCP-related claims had yet been asserted in the United States against any of the non-debtor parties to be released, the release and injunction would bar claims against non-debtors based solely on the non-debtors' conduct, which "would not appear to affect the *res* of the bankruptcy estate",(41) and thus were outside the scope of bankruptcy jurisdiction. However, the court reasoned, it was not being asked to approve the injunction in a plenary case under Chapter 11, but to enforce an injunction approved by a Canadian court. Thus, the court concluded, the limits on 'related to' bankruptcy jurisdiction under 28 USC Section 1334 were not relevant: the "correct inquiry . . . is whether the foreign orders should be enforced" in a Chapter 15 case.(42) The court held that the orders could be enforced under principles of comity, even if they could not have been entered in a plenary Chapter 15 case. The court then found that the Canadian order met "our fundamental standards of fairness", in that it displayed the "sensitivity" to protecting the interests of creditors that US courts would,(43) and that the general comity principles set out in the Supreme Court's decision of *Hilton v Guyot*(44) and its progeny counselled recognition and enforcement of the Canadian order.(45) The court emphasised that the Canadian court had jurisdiction to issue the injunction, and had done so after affording creditors a full and fair opportunity to be heard consistent with US standards of due process.(46)

As in *Metcalfe*, the court in *Sino-Forest* held that the fairness considerations of Section 1507 were satisfied by the *Sino-Forest* plan and that enforcing the Canadian injunction was proper as "additional assistance".(47) Again citing *Metcalfe*, the court noted that "the relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical".(48) As third-party releases are not categorically prohibited in the Second Circuit, the court held that "it cannot be argued that the issuance of such releases is manifestly contrary to public policy".(49)

The *Sino-Forest* court also considered the 2012 Fifth Circuit decision in *In re Vitro SAB*,(50) in which the Fifth Circuit upheld a bankruptcy court's decision denying comity under Chapter 15 to a Mexican court order that included third-party non-debtor releases. The plan in that case – which extinguished not only the debtor's liabilities, but also the debts of its non-debtor affiliates – had been approved by a majority of the debtors' unsecured creditors. Under Mexican law, however, all unsecured creditors, including insiders, are counted as a single class, and more than 50% of the unsecured creditors were Vitro's subsidiaries, which held intercompany debt.(51) The *Vitro* court declined to enforce the injunction because it did not satisfy the fairness factors of Section 1507: it did not reasonably assure that "distribution of proceeds of the debtors property substantially in accordance with the order prescribed"(52) by Title 11. The *Vitro* court had distinguished the plan from that in *Metcalfe* on the grounds, among others, that the Metcalfe plan had near-unanimous support of creditors, while approval of the *Vitro* plan depended on the votes of insiders, and on the grounds that the Mexican court's decision to issue the release and injunction had not reflected "'similar sensitivity to the circumstances justifying approving such provisions' as those considered by the U.S. Courts".(53) For the same reason, the *Sino-Forest* court held, the *Vitro* injunction could be distinguished from the injunction that the court was being asked to enforce in *Sino-Forest*.(54)

However, the court in *Sino-Forest* and *Metcalfe* did not adequately address the question of how the court had authority to issue the injunction if, as the court recognised, it was outside the scope of bankruptcy power. Furthermore, it did not consider whether, even if the injunction were within the scope of the bankruptcy jurisdiction, a non-Article III bankruptcy court could constitutionally be delegated the adjudicatory authority to issue

such an injunction under the Supreme Court's decision in *Stern v Marshall*.(55)

Limits on bankruptcy jurisdiction

As noted above, the *Sino-Forest* court acknowledged that, in *Manville*, the Second Circuit had ruled that a court in a plenary Chapter 11 case does not have bankruptcy jurisdiction under 28 USC Section 1334 to approve non-debtor releases that do not affect the *res* of the estate. Nevertheless, the court held that the limits on bankruptcy jurisdiction did not prohibit the court from enforcing such a broad non-debtor release and injunction issued by a foreign court. However, the court did not merely recognise the Canadian court's order; rather, it also "domesticate[d]" the order,(56) and, as it had in *Metcalfe*, issued an injunction that mirrored the injunction issued by the Canadian court. (57) While the court did not expressly say so, it appears to have assumed that it had jurisdiction to do so under Section 1507. However, neither Section 1507's 'additional assistance' provision, nor Section 1521's 'additional relief' provisions is a 'clear legislative mandate' expanding the scope of bankruptcy jurisdiction.(58) Section 1507 does provide that the court "may provide additional assistance" under the Bankruptcy Code or "under other laws of the United States". However, there is no comprehensive federal law on enforcement of foreign judgments(59) and no general federal common law. Thus, whether a foreign judgment is entitled to enforcement will generally be governed by state law(60) and will arise under state law.

While the claims against EY in the US class action were beyond the scope of bankruptcy jurisdiction, the securities claims were within the scope of federal question jurisdiction, and a federal district court could assert supplemental jurisdiction under 28 USC Section 1367 over the related state law claims. The US class action was pending in a federal district court in New York, where it had been stayed during the Canadian insolvency proceedings. However, only the district court before which the action was pending had the authority to approve the settlement of that action and to issue an injunction to enforce the Canadian settlement order: the bankruptcy court certainly has no authority to enjoin an action in a district court. The parties in *Sino-Forest* themselves recognised that the district court retained jurisdiction over the class action; after the bankruptcy court issued its injunction, the parties moved the district court to dismiss EY from the class action with prejudice.(61)

In *Metcalfe*, no claims had yet been asserted in any US court – the injunction was to preclude assertion of such claims. At least some of the claims to be enjoined were common law claims, such as claims that fund managers or advisers negligently or recklessly purchased ABCPs to their clients.(62) As there is no federal law governing such claims, a federal district court would have no independent ground of jurisdiction; and as no claims were pending, there were no claims over which the court could assert supplemental jurisdiction.(63)

It is understandable that, in *Metcalfe*, the bankruptcy court did not want to imperil a restructuring that was so important to the Canadian economy by refusing to recognise and enforce the Canadian court's injunction in that case, particularly as there was no objection to the court's doing so. However, the court need not have been concerned that the Canadian injunction could not be enforced. The Canadian court has the power to impose sanctions on anyone that violates its orders, assuming that the court has personal jurisdiction over such persons.(64) And if an action were commenced in a US court against a non-debtor that had been released by the Canadian court's order, the defendant could ask that court to recognise the Canadian injunction and dismiss the action. Regardless of whether the action were in state court or in federal court in diversity, state law would govern recognition of the Canadian injunction.(65) Most states apply comity considerations similar to those articulated by the Supreme Court in *Hilton*, (66) which the bankruptcy court applied in *Metcalfe,* and thus would likely come to the same conclusion that the injunction should be recognised and enforced. However, the bankruptcy court cannot itself issue an injunction to enforce the order in the absence of subject-matter jurisdiction.

Limits on matters delegated to bankruptcy courts

As the court acknowledged in both *Sino-Forest* and *Metcalfe*, the pending and potential claims that were enjoined by the court's orders in those cases were outside the scope of 'related to' bankruptcy jurisdiction under the Second Circuit's decision in *Manville*. Thus, they were outside the scope of matters that can be referred to the bankruptcy court by the district court under 28 USC Section 157. Even if the claims were within the scope of 'related to' bankruptcy jurisdiction, under the Supreme Court's decision in *Stern v Marshall*,(67) they were outside the scope of matters that constitutionally can be delegated to a non-Article III bankruptcy court for final determination.

Unlike the judges of the federal district courts, bankruptcy judges are not appointed under Article III of the Constitution and do not exercise the judicial power of the United States.(68) Rather, they are legislative courts appointed pursuant to Congress's power under Article I of the Constitution, and they function as adjuncts of the district courts, which refer bankruptcy cases to them pursuant to 28 USC Section 157 (a). In 28 USC Section 157(b), Congress set out a list of "core proceedings" in bankruptcy cases that

may be heard and determined by bankruptcy judges. However, in *Stern v Marshall,* the Supreme Court instructed that, regardless of whether Congress had stated that a matter was a core proceeding, it could not be adjudicated by a bankrupty judge if, under the Constitution, it was a matter that had to be determined by an Article III court. The test set out by the Supreme Court for determining which matters Congress can constitutionally assign to non-Article III, or legislative, court for resolution is whether the matter falls within the category of cases involving public rights. However, the concept of 'public rights' is amorphous and has not been clearly defined by the Supreme Court.(69)

Under 28 USC Section 157(b), the "recognition of foreign proceedings and other matters under Chapter 15 of Title 11" is a 'core proceeding'.(70) There is a serious question as to whether issuing an injunction to prevent claims against non-debtors falls within the scope of "other matters under Chapter 15" simply because it mirrors an injunction issued by a foreign court. Assuming that it does, the question arises as to whether the securities fraud and related state law claims in *Sino-Forest* and the potential unasserted state law claims at issue in *Metcalfe* – claims that were enjoined by the court's orders in those cases – fall within the public rights exception. They involve private rights; and while the claims could arguably be encompassed by the essential bankruptcy function of adjusting debtor-creditor relations, that argument is more attenuated for claims against the non-debtors that are not derivative of claims against the debtors. Thus, in issuing the injunctions, it appears that the court may have acted outside the scope of adjudicatory authority that may constitutionally be exercised by a non-Article III bankruptcy court.

Comment

The court in *Sino-Forest* and *Metcalfe* was presented with unopposed requests to enforce non-debtor releases issued by the Canadian court and did not adequately consider the serious jurisdictional issues raised by those requests. Courts asked to enforce foreign orders releasing and enjoining non-debtors are being asked to domesticate the foreign injunction and make it their own. To ensure the validity of any such injunction issued in a Chapter 15 case, parties should ask the court to consider whether the injunction is within the scope of bankruptcy jurisdiction and whether it is a matter that is within the scope of the bankruptcy court's adjudicatory authority or rather must be addressed by the district court.

For further information on this topic please contact Leslie M Kelleher at Caplin & Drysdale, Chartered by telephone (+1 202 862 5000), fax (+1 202 429 3301) or email (lkelleher@capdale.com). The Caplin & Drysdale website can be accessed at www.caplindrysdale.com.

Endnotes

(1) *In re Sino-Forest Corp*, 501 BR 655 (Bankr SDNY 2013).

(2) *In re Metcalfe & Mansfield Alt Invs*, 421 BR 685 (Bankr SDNY 2010).

(3) *Sino-Forest*, 501 BR at 662.

(4) 131 S Ct 2594 (2011).

(5) Chapter 15 replaces former 11 USC Section 304, "Cases Ancillary to Foreign Proceedings," and incorporates the Model Law on Crossborder Insolvency published by the United Nations Commission on International Trade Law (UNCITRAL). *See* 11 USC Section 1501(a). 11 USC Section 1501(a).

(6) A 'foreign proceeding' is defined as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation". 11 USC Section 101(23).

(7) *In re Condor Ins Ltd,* 601 F3d 319, 322 (5th Cir 2010). Because the Chapter 15 case is ancillary, the court does not assert jurisdiction over a debtor's worldwide assets, but only the assets located in the United States. *See In re JSC BTA Bank*, 434 BR at 334, 341 (Bankr SDNY 2010).

(8) A 'foreign representative' is defined as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding". 11 USC Section 101(24).

(9) A 'foreign proceeding' is defined as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation". 11 USC Section 101(23). 11 USC Sections 1504 and 1515.

(10) A 'foreign main proceeding' is one that is "pending in the country where the debtor

has the center of its main interests." 11 USC Section 1502(4). The concept of 'centre of its main interests' is taken from the UNCITRAL Model Law and is not defined by the code; it has been interpreted as "generally equat[ing] with the concept of a 'principal place of business' in United States law". See *In re Tri-Continental Exch Ltd*, 349 BR 627, 634 (Bankr ED Cal 2006). A 'foreign non-main proceeding' is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment". 11 USC Section 1502(5).

(11) Chapter 15 also provides, among other things, that the foreign representative may:

- sue and be sued in US courts (11 USC Section 1509(b)(1));
- apply directly to a US court for relief (11 USC Section 1509(b)(2));
- commence a non-Chapter 15 case (11 USC Section 1511);
- participate in any US bankruptcy case in which the debtor is a party (11 USC Section 1512); and
- intervene in any other case in which the debtor is a party (11 USC Section 1524).

(12) *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd,* 389 BR 325, 333 (SDNY 2008) (in contrast to recognition, which turns on strict application of objective criteria , post-recognition relief is "largely discretionary and turns on subjective factors that embody principles of comity").

(13) 11 USC Section 1521(a).

(14) 11 USC Section 1521(a)(6). If the foreign representative wishes to exercise avoidance powers under the code, it must commence a full case under Section 301, 302 or 303. See 11 USC Section 1523(a) and 1528.

(15) 11 USC Section 1522(a).

(16) 11 USC Section 1507.

(17) 11 USC Section 1507(b).

(18) 11 USC Section 524(e).

(19) 11 USC Section 524(g)(4)(A)(ii).

(20) See 11 USC Section 524(g)(2)(B)(ii)(IV)(bb); 524(g)(2)(B)(i)(I); 524(g)(4)(B)(ii).

(21) See, for example, *In re Pacific Lumber Co*, 584 F3d 229, 251 (5th Cir 2009) (denying non-debtor release and permanent injunction); *In re Zale Corp*, 62 F3d 746, 760 (5th Cir 1995) ("Section 524 prohibits the discharge of debts of nondebtors"); *In re Lowenschuss*, 67 F3d 1394, 1401 (9th Cir 1995) ("without exception . . . § 524(e) precludes bankruptcy courts from discharging the liabilities of nondebtors"); *In re W Real Estate Fund, Inc,* 922 F2d 592, 600-02 (10th Cir 1990); *In re Jet Fla Sys, Inc*, 883 F2d 970, 972-73 (11th Cir 1989).

(22) *In re Metromedia Fiber Network, Inc*, 416 F3d 136, 142 (2d Circ 2005). See also *In re AH Robins Co*, 880 F2d 694 (4th Cir 1989), *In re Johns-Manville Corp*, 600 F3d 135 (2d Cir 2010); *In re Dow Corning Corp*, 280 F3d 648, 658-61 (6th Cir 2002); *In re Specialty Equip Cos*, 3 F3d 1043, 1044-49 (7th Cir 1993). See also *In re Combustion Eng'g, Inc*, 391 F3d 190, 230 (3d Cir 2004).

(23) *Metromedia*, 416 F3d at 142.

(24) *Id.*

(25) *Id.*

(26) See *Metromedia*, 416 F3d at 142-43; *In re Drexel Burnham Lambert Grp*, 960 F2d 285, 293 (2d Cir 1992); *AH Robins Co*, 880 F2d at 701; *Manville*, 600 F3d at 146; *Dow Corning*, 280 F3d at 658-61; *Specialty Equip*, 3 F3d at 1044-49 (release could be granted to third parties if it was consensual and non-coercive and would bind only those creditors voting in favour of the plan).

(27) See generally *1 Collier on Bankruptcy* Section 3.01[3][e][i] and 3.01[3][e][iv] (Lawrence P King ed, 15th ed 1993).

(28) *Pacor, Inc v Higgins,* 743 F2d 984, [] (3d Cir 1985).

(29) See, for example *In re Holland Indus, Inc*, 103 BR 461, 466 (Bankr SDNY 1989):

> "*The desires of every Chapter 11 debtor are affected by a myriad of external indirect effects created by the circumstances in which it operates. Whether they arise from the ebbs and flows of commerce, the effects of governmental action or the acts of third parties with respect to property of nondebtors, their impact on*

a debtor's attempt to reorganize does not afford the bankruptcy courts with jurisdiction to determine the dispute merely because of that impact. "

(30) *Celotex Corp v Edwards,* 514 US 300, 308 (1995), citing *Pacor,* 743 F2d at 994.

(31) See *Combustion Eng'g, Inc*, 391 F3d 190 at 230. See *In re Quigley Co*, 676 F3d 45, 53 (2d Circ 2012), (whether bankruptcy court has jurisdiction under 28 USC Section 1334 to enjoin non-debtor third party claims depends on whether such claims "directly affect the *res* of the bankruptcy estate") (internal citation omitted); *Manville,* 600 F3d at 146, 158 (bankruptcy jurisdiction is *in rem*, and court has no jurisdiction to enjoin in personam claims against an insurer that were predicated, as a matter of state law, on the insurer's own alleged misconduct).

(32) See *Ins Corp of Ireland,* 456 US at 702 (noting that "a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings").

(33) See *Arbaugh v Y & H Corp*, 126 S Ct 1235, 1244 (2006) ("[All federal courts] have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party"); *Pac Towboat & Salvage Co v Interstate Commerce Comm'n,* 620 F2d 727, 729 (9th Cir 1980) (noting that "jurisdiction... under Article III is always open to inquiry upon the court's own motion").

(34) *Sino-Forest*, 501 BR at 661.

(35) *In re Metcalfe & Mansfield Alt Invs*, 421 BR 685 (Bankr SDNY 2010).

(36) *Sino-Forest,* 501 BR at 662*,* citing *In re Metcalfe*, 421 BR at 696*.*

(37) *In re Metcalfe*, 421 BR at 687.

(38) *In re Metcalfe*, 421 BR at 692-93.

(39) Supplemental Memorandum of Law in Support of Chapter 15 Petitions for Recognition of Foreign Proceedings and Related Relief at 2, *In re Metcalfe & Mansfield Alt Invs*, No 09-16709 (Bankr SDNY Dec 17, 2009) [Dkt No 24].

(40) *In re Metcalfe*, 421 BR at 687-88. The court noted that one submission that had been filed out of time, but that the objector "apparently supported" the plan.

(41) *In re Metcalfe*, 421 BR at 696 n3.

(42) *In re Metcalfe*, 421 BR at 696.

(43) *In re Metcalfe*, 421 BR at 697-98.

(44) 159 US 113 (1895).

(45) *In re Metcalfe*, 421 BR at 698.

(46) *In re Metcalfe*, 421 BR at 698-700.

(47) *In re Sino-Forest*, 501 BR at 666.

(48) *In re Sino-Forest*, 501 BR at 665 (internal citation omitted).

(49) *Id.*

(50) *In re Vitro SAB de CV*, 701 F3d 1031 (5th Cir 2012).

(51) *In re Vitro,* 701 F3d at 1039.

(52) *Id* citing 11 USC 1507.

(53) *Sino-Forest*, 501 BR at 666, citing *In re Vitro*, 701 F3d at 1068.

(54) *Sino-Forest*, 501 BR at 666.

(55) 131 S Ct 2594 (2011).

(56) See *Pilkington Bros PLC v AFG Indus Inc*, 581 F Supp 1039, 1045 (D Del 1984) (noting, in an action to recognise and enforce a preliminary injunction, that the "[p]laintiff does not ask this Court to give preclusive effect to a foreign judgment in the traditional sense of barring certain claims or issues from relitigation; rather, it asks the Court to domesticate an interim foreign order and give it the imprimatur of an American court").

(57) Order Granting Recognition and Enforcement of Order of Ontario Court Approving Ernst & Young Settlement, *In re Sino-Forest Corp*, No 13-10361 (Bankr SDNY Nov 11, 2013) [Dkt No 32]; Order Granting Recognition, Enforcement of Canadian Orders and Related Relief, *In re Metcalfe & Mansfield Alt Invs*, No 09-16709 (Bankr SDNY Jan 5, 2010) [Dkt No 28].

(58) "[O]nly Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and . . . courts are not to infer a grant of jurisdiction absent a clear legislative mandate." *Coleman v Champion Int'l Corp/Champion Forest Prods,* 992 F2d 530, 534 (5th Cir1993) citing *Pressroom Unions-Printer League Income Sec Fund Cont'l Assur Co*, 700 F2d 889, 892 (2d Cir 1983). See also *Middlesex Cnty Sewerage Auth v Nat'l Sea Clammers Assoc,* 453 US 1, 13–18 (1981) (same).

(59) Federal law, rather than state law, governs in a few areas, including the recognition and enforcement of foreign defamation judgments, which is governed by the federal SPEECH Act. See Securing the Protection of our Enduring and Established Constitutional Heritage Act, 28 USC Sections 4101 to 4105. Federal law is also relevant to recognition and enforcement of judgments of foreign admiralty courts. Restatement (Third) of Foreign Relations Law of the United States § 481 cmt a (1987).

(60) See, for example *McCord v Jet Spray Int'l Corp*, 874 F Supp 436, 437-38 (D Mass 1994); *Somportex, Ltd v Phila Chewing Gum Corp*, 453 F2d 435, 440 (3d Cir 1971) ("[B] ecause our jurisdiction is based solely on diversity, 'the law to be applied . . . is the law of the state'") (internal citation omitted).

(61) See Joint Stipulation to Dismiss Ernst & Young With Prejudice, *Leapard v Chan,* No 1:12-cv-01726 (SDNY Dec 17, 2013) [Dkt No 44].

(62) See *In re Metcalfe,* 421 BR at 696 n3.

(63) See 28 USC § 1367. Moreover , the extent to which supplemental jurisdiction may be asserted in bankruptcy case is the subject of debate. See, for example Ralph Brubaker, "Supplemental Bankruptcy Jurisdiction", 27 No 3 Bankruptcy Law Letter 1 (2007); Susan Block-Lieb, "The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis", 62 *Fordham L Rev* 721 (1994).

(64) Moreover, if a court did not have personal jurisdiction over such parties, its order generally will not be recognised as valid in a US court. See, for example *Mercandino v Devoe & Raynolds, Inc*, 436 A2d 942, 943 (NJ Super Ct App Div 1981); *Hager v Hager*, 1 Ill App 3d 1047, 1052-53, 274 NE2d 157, 160-61 (1971); *Cherun v Frishman*, 236 F Supp 292, 295-96 (DDC 1964).

(65) See, for example *Domingo v States Marine Lines*, 340 F Supp 811, 816 n5 (SDNY 1972) ("In a diversity suit on a foreign judgment brought or removed to federal court, state law would plainly apply").

(66) *Hilton v Guyot*, 159 US 113 (1895).

(67) 131 S Ct 2594 (2011)

(68) Article III of the US Constitution vests "the judicial power" of the United States in the Supreme Court and inferior courts established by Congress. The independence of Article III is ensured by a grant of tenure: they "hold their offices during good behavior", and their compensation cannot be diminished while in office. Bankruptcy judges do not have tenure and are not protected from a diminution in their compensation.

The question of whether parties can consent to having a bankruptcy court enter a final judgment on a matter that is constitutionally assigned to an Article III court is currently before the Supreme Court in *Executive Benefits Insurance Agency v Arkison,* No 12-1200 (SCt petition for cert granted June 24, 2013).

(69) *Stern*, 131 S Ct at 2610 (for further details please see "Supreme court to rule on adjudicatory authority of bankruptcy judges").

(70) 28 USC Section 157(b)(2)(P).

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