By George W. Shuster, Jr. and Benjamin W. Loveland

# Keeping Chapter 15 Ancillary

## Standalone Litigation in the Cross-Border Context

**George W. Shuster, Jr.**
*WilmerHale*
*Boston and New York*

**Benjamin W. Loveland**
*WilmerHale*
*Boston and New York*

*George Shuster and Benjamin Loveland are partners in WilmerHale's Boston and New York offices.*

The commencement and continuation of standalone litigation in U.S. courts in the context of chapter 15 insolvency cases raises important issues of cross-border insolvency policy and practice. Two recent decisions from different courts — the U.S. District Court for the District of Delaware and the U.S. Bankruptcy Court for the Western District of North Carolina — demonstrate how the plaintiff's identity and the nature of the action can influence whether and where a standalone complaint will be able to proceed in U.S. courts while a chapter 15 action involving one of the parties is also pending.

### Abstention Doctrines Require Courts to Defer to Chapter 15 Debtor-Side Plaintiff's Choice of Forum

In *Principal Growth Strategies LLC v. AGH Parent LLC*,[1] the district court was faced with the question of whether to remand to the Delaware Chancery Court a lawsuit filed by joint official liquidators (JOLs) of a Cayman Islands debtor whose chapter 15 case was pending in the U.S. Platinum Partners Value Arbitrage Fund LP (PPVA), a Cayman Islands investment fund, commenced a Cayman Islands liquidation proceeding in August 2016. In November 2016, the U.S. Bankruptcy Court for the Southern District of New York recognized PPVA's Cayman Islands liquidation proceeding as a "foreign main proceeding" on the basis that PPVA's "center of main interests" was located there.

The New York Bankruptcy Court also recognized PPVA's JOLs as "foreign representatives" in the U.S. chapter 15 case and granted them authority to bring claims on behalf of PPVA in the U.S. against parties subject to jurisdiction in the U.S. The JOLs then filed a lawsuit in Delaware Chancery Court against a group of defendants, alleging that the defendants deprived PPVA and its nondebtor affiliate of an interest in a promissory note issued by a nonparty. The JOLs' claims were based on both Delaware state law and Cayman Islands law.

The defendants removed the Delaware Chancery Court lawsuit to the Delaware District Court, arguing (among other things) that the federal court had bankruptcy jurisdiction over the action because it was filed by chapter 15 foreign representatives and was therefore brought under the auspices of chapter 15 and the New York Bankruptcy Court's order recognizing PPVA's Cayman Islands insolvency proceeding. Specifically, the defendants claimed that the Delaware District Court had both "related to" and "arising under" jurisdiction.[2]

The JOLs moved to remand on the basis of mandatory abstention, which *requires* a court to abstain from a case that, among other things, is (1) based only on state law claims and (2) only "related to" a bankruptcy case (but does not "arise under" the Bankruptcy Code or "arise in" a bankruptcy case).[3] The Delaware District Court rejected the defendants' argument that 28 U.S.C. § 1334(c)(2)'s reference to a proceeding "based upon a State law claim" means that the claims asserted in the action must be exclusively state law claims to qualify for abstention. The court instead interpreted the statute to mean that an action must be "based at least in part on" state law claims to qualify for mandatory abstention. Because the JOLs' lawsuit included both Cayman Islands and Delaware law claims, it satisfied this requirement for abstention.

Next, the Delaware District Court concluded that the JOLs' claims did not "arise under" title 11 or "arise in" a case under title 11. The JOLs' authority to bring the claims was not dependent upon the pendency of the chapter 15 case or the recognition order; filing a chapter 15 case or obtaining recognition is not a prerequisite to a foreign representative's filing a lawsuit in a U.S. court. Even if the JOLs' authority did depend in some way on the bankruptcy court's orders, the JOLs' claims themselves "were not created by the Bankruptcy Code and could exist outside the context of a bankruptcy proceeding."[4]

The Delaware District Court also used the opportunity to decide that equitable remand, a doctrine that some courts will not apply in the chapter 15 context, might be available in some instances in chapter 15 cases.[5] The defendants argued that even if the requirements for mandatory abstention were satisfied, equitable remand was not permitted. The defendants' argument relied on a Fifth Circuit case, *Firefighters' Retirement System v. Citco Group*

1 615 B.R. 529 (D. Del. 2020).

2 28 U.S.C. § 1334(b) bestows on federal courts original bankruptcy jurisdiction in cases "arising under title 11, or arising in or related to cases under title 11."

3 28 U.S.C. § 1334(c)(2) contains other requirements, but the parties' dispute focused primarily on these two.

4 615 B.R. at 536-37.

5 28 U.S.C. § 1452(b) provides that a federal court to which a lawsuit is removed "may remand such claim or cause of action on any equitable ground."

*Ltd*.,[6] which held that because permissive abstention under 28 U.S.C. § 1334(c)(1) is not available in the context of a chapter 15 case, neither can it constitute an "equitable ground" for remand under 28 U.S.C. § 1452(b). The Fifth Circuit based its holding on the text of the permissive abstention statute, which expressly states that a court may not permissively abstain from hearing a case "under chapter 15."[7] According to the Fifth Circuit, if a court cannot permissively abstain from hearing a case "under chapter 15," then neither should it be permitted to equitably remand such a case on that basis.

The Delaware District Court rejected this argument primarily because the question before it related to the *mandatory* abstention statute and not the *permissive* abstention statute. For this reason, the prohibition on permissive abstention in a case "under chapter 15" was not applicable. Indeed, the Third Circuit had previously made it clear that mandatory abstention itself constitutes an equitable ground sufficient to justify remand under 28 U.S.C. § 1452(b).

Incidentally, the Delaware District Court's conclusion that equitable remand is available for actions in the chapter 15 context (in circumstances where the requirements for mandatory abstention are satisfied) is consistent with the view — held by many prominent judges, practitioners and academics — that despite the Fifth Circuit's ruling in *Firefighters'*, the exception to permissive abstention for cases "under chapter 15" is actually quite narrow and intended only to apply to applications for recognition.[8]

## Automatic Stay Hinders Nondebtor Plaintiffs' Attempt to Bootstrap Chapter 15 Jurisdiction

The decision in *In re Sibaham Ltd*.[9] sets a marked contrast to the decision in *Principal Growth*, but the two decisions can be reconciled. In *Sibaham*, a group of putative class-action plaintiffs sought permission to file a class action lawsuit against a U.K. debtor as an adversary proceeding in the debtor's U.S. chapter 15 case.

The plaintiffs sought to rely on the chapter 15 recognition order's reservation of jurisdiction over adversary proceedings as an independent grant of authority to commence an adversary proceeding against the debtor. The court rejected this argument, holding that a separate provision of the recognition order expressly prohibiting the commencement of any legal proceeding against the debtor controlled over the more general jurisdictional mandate.

The bankruptcy court ignored the form of the putative class-action plaintiff's request and treated the attempt as a motion for relief from the automatic stay, which arises automatically upon the entry of a recognition order in a chapter 15 case. Without addressing in detail what might constitute "cause" to lift the stay in the chapter 15 context, the court concluded that there was no "cause" to grant relief to the plaintiff in this case. Critically, the court concluded that the U.K. debtor and its creditors around the world would suffer prejudice if the plaintiffs were permitted to file a class action in the U.S. rather than in the forum (the U.K.) where the debtor's main insolvency proceeding was pending.

The court concluded that to permit the plaintiffs to file a suit in the U.S. simply because U.S. law offered certain class-action mechanisms unavailable under U.K. law would undermine the policy rationale for chapter 15 in the first place: to focus all disputes and claims against the debtor into a single proceeding where they can be administered and resolved in an orderly way. The court noted that its holding was consistent with principles of comity underpinning chapter 15.

Finally, the court noted that its refusal to allow the class action to proceed in the U.S. would not be "manifestly contrary" to U.S. public policy, especially where, even in wholly domestic U.S. bankruptcy cases, class-action representatives do not have an absolute right to file class proofs of claim. Moreover, while the relief available to the class plaintiffs in the U.K. proceeding might not be identical to the relief available in the U.S., that alone did not render the U.K. proceeding unfair.

## Conclusion

The contrast of these two decisions highlights several important principles of general application in the administration of "standalone" litigation in the cross-border insolvency environment. First, as in other types of U.S. bankruptcy proceedings, U.S. courts are more likely to allow standalone actions filed by the foreign representatives for a chapter 15 foreign debtor than to allow stand-alone actions filed *against* a chapter 15 foreign debtor. Second, actions that are effectively claims-determination proceedings will most likely be pushed to the claims-allowance process in the chapter 15 foreign debtor's foreign main insolvency proceeding and will not be permitted as stand-alone actions in the U.S. Third, it will be difficult for nondebtor parties to convince a U.S. court that the existence of a chapter 15 case, or the recognition of the foreign debtor's foreign main proceeding by the chapter 15 court, is itself a sufficient basis for permitting a standalone action to be filed or to continue in U.S. federal court.

Chapter 15 remains an ancillary tool most successfully used by foreign representatives in furtherance of a foreign main proceeding. In most cases, U.S. courts remain hesitant to allow nondebtors to use chapter 15 as a tool in their own standalone litigation strategies. abi

6 796 F.3d 520 (5th Cir. 2015).
7 28 U.S.C. § 1334(c)(1).
8 For a more detailed discussion of this view and principles of abstention in chapter 15 cases, *see* Daniel M. Glosband, "Abstention and Chapter 15," XXXIX *ABI Journal* 10, 18-19, 59, October 2020, *available at* abi.org/abi-journal.
9 Case No. 19-31537, 2020 WL 2731870 (Bankr. W.D.N.C. May 4, 2020).