

Are Preference Lawsuits Permitted in Chapter 15 Cases? A Tale of Two Decisions

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The issue of whether avoidance actions may be pursued by foreign representatives in a case under chapter 15 of the Bankruptcy Code has become a contested litigation issue in some recent chapter 15 cases. This article will examine two cases where courts left the door open for such relief beyond the plain language of the Bankruptcy Code and the chapter 15 legislative history.

In re Condor Insurance Ltd. (Condor)¹ District Court Decision



Hon. Francis G. Conrad

In *Condor*, the joint official liquidators of Condor Insurance Ltd. appealed the bankruptcy court's dismissal of an adversary proceeding on the basis that the bankruptcy court lacked subject-matter jurisdiction over the proceeding.² The liquidators argued that the bankruptcy court incorrectly interpreted §§1521(a)(7) and 1523 of the Bankruptcy Code to mean that a foreign representative cannot bring an avoidance action under foreign law without first filing a case under chapter 7 or 11 of the Bankruptcy Code. The district court affirmed the bankruptcy court decision.

Facts

Condor was a Caribbean corporation located on the island of Nevis that operated an insurance and surety bond business.³ One of Condor's creditors, Infineon Technologies AG, was granted permission to initiate a wind-up proceeding (similar to a chapter 7 proceeding under the U.S. Bankruptcy Code) under Nevis law in November 2006, which the U.S. Bankruptcy Court

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for the Southern District of Mississippi subsequently recognized as a foreign main proceeding under chapter 15 of the Code.⁴ The liquidators alleged that more than \$313 million in assets that belonged to Condor were fraudulently transferred by Condor Guaranty Inc. (CGI) and that the assets were now located in the U.S.⁵ The liquidators also alleged that the assets were transferred in an attempt to prevent creditors from

1521 of the Bankruptcy Code carves out relief that is available under preference and fraudulent-conveyance sections of the Bankruptcy Code, notably §§522, 544, 545, 547, 548, 550 and 724(a) (avoidance actions).¹¹ Section 1523 of the Bankruptcy Code, however, provides the foreign representative with standing to initiate lawsuits under §§522, 544, 545, 547, 548, 550, 553 and 724(a) in a chapter 7 or 11 bankruptcy proceeding.¹²

The district court noted that the parties did not dispute that the provisions listed in §§1521(a)(7) and 1523(a) are avoidance actions that are excepted from chapter 15.¹³ The liquidators argued, however, that they were seeking to use avoidance action relief under Caribbean law, not U.S. law, and therefore, because §§1521(a)(7) and 1523(a) do not make a distinction between whether

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recovering debts owed by Condor in the Caribbean winding-up proceeding.⁶ The liquidators filed an adversary proceeding against CGI to recover the assets that were allegedly fraudulently transferred to the U.S.⁷ Condor responded by filing a motion to dismiss the complaint, which the bankruptcy court granted on the basis of a lack of subject-matter jurisdiction.⁸

Analysis

The district court began its analysis by explaining that chapter 15 was enacted to promote cooperation between U.S. courts and foreign courts during international insolvency proceedings and to promote greater legal certainty for trade and investment.⁹ Sections 1521 and 1523 were the sections at issue in the case. Section 1521 of the Bankruptcy Code provides bankruptcy courts with the discretion to grant any appropriate relief that is necessary to effectuate the purposes of chapter 15 and to protect the assets of the debtor or the interests of creditors.¹⁰ Section

the sections only pertain to avoidance actions under the U.S. Bankruptcy Code or also avoidance actions under foreign law, they should be entitled to avoid the transfers to CGI.¹⁴

First, the district court examined the plain language of §§1521 and 1523.¹⁵ Section 1521 of the Bankruptcy Code describes the relief a bankruptcy court may grant to promote comity, including the powers available to a trustee, except the avoidance powers that are available under specific sections of the Bankruptcy Code.¹⁶ Section 1523 of the Bankruptcy Code, however, allows a foreign representative to initiate avoidance actions governed by the Bankruptcy Code excluded from §1521 in a chapter 7 or 11 case.¹⁷ The district court proceeded to examine the legislative history of §§1521 and 1523 because the plain language of both §§1521 and 1523 do not address the use of avoidance powers under foreign law.¹⁸

¹¹ Condor, 2009 U.S. Dist. LEXIS 9126 at *5 (citing 11 U.S.C. §1521(a)(7) (2006)).
¹² Condor, 2009 U.S. Dist. LEXIS 9126 at *9 (citing 11 U.S.C. §1523(a) (2006)).
¹³ Condor, 2009 U.S. Dist. LEXIS 9126 at *5.
¹⁴ Condor, 2009 U.S. Dist. LEXIS 9126 at *6-8.
¹⁵ Condor, 2009 U.S. Dist. LEXIS 9126 at *6.
¹⁶ Condor, 2009 U.S. Dist. LEXIS 9126 at *7.
¹⁷ Condor, 2009 U.S. Dist. LEXIS 9126 at *7.
¹⁸ Condor, 2009 U.S. Dist. LEXIS 9126 at *8-9.

¹ No. 08-CY-439; 2009 U.S. Dist. LEXIS 9126 (S.D. Miss. Feb. 9, 2009), *rev'd*, *remanded by*, *Tison v. Petroquest Res. Inc. (In re Condor Ins. Ltd.)*, 2010 U.S. App. LEXIS 5835 (5th Cir. Miss., Mar. 17, 2010).

² Condor, 2009 U.S. Dist. LEXIS 9126 at *1.

³ Condor, 2009 U.S. Dist. LEXIS 9126 at *2.

⁴ Condor, 2009 U.S. Dist. LEXIS 9126 at *3.

⁵ Condor, 2009 U.S. Dist. LEXIS 9126 at *3.

⁶ Condor, 2009 U.S. Dist. LEXIS 9126 at *3.

⁷ Condor, 2009 U.S. Dist. LEXIS 9126 at *3.

⁸ Condor, 2009 U.S. Dist. LEXIS 9126 at *4.

⁹ Condor, 2009 U.S. Dist. LEXIS 9126 at 4 (citing 11 U.S.C. §1501(a) (2006)).

¹⁰ Condor, 2009 U.S. Dist. LEXIS 9126 at *4.

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