Bankruptcy Practice Update

12/15/2010

New York Bankruptcy Court Restricts Scope of Automatic Stay in Chapter 15 Cases: On August 23, 2010, the Bankruptcy Court for the Southern District of New York held that in an ancillary proceeding commenced under chapter 15 of the Bankruptcy Code, the automatic stay of actions against a debtor and its property applies only to proceedings in the United States unless the foreign proceeding to be stayed would affect property in the United States. *See In re JSC BTA Bank*, No. 10-10638 (JMP) (Bankr. S.D.N.Y. Aug. 23, 2010) [Docket No. 34].

Typically, the filing of a bankruptcy case under the United States Bankruptcy Code results in the application of an "automatic stay" under section 362 of, among other things, actions against the debtor and its property. Case law considering the extraterritorial application of the stay generally holds that it applies to any proceeding worldwide that would affect the debtor or the debtor's assets, irrespective of the location of the assets or the proceeding.

Chapter 15 of the Bankruptcy Code enables recognized foreign representatives who have commenced foreign proceedings outside the United States to commence an ancillary chapter 15 case in the United States to aid or assist the administration of the foreign proceeding. Once the foreign representative establishes that recognition of its status (and the status of the foreign proceeding) is warranted, certain provisions of the Bankruptcy Code, such as the automatic stay, are available with respect to assets, property and persons in the United States.

In *In re JSC BTA Bank*, the court denied a motion for sanctions brought by BTA Bank, a Kazakhstan bank, against BIC-BRED, the Swiss branch of a French bank, based on BIC-BRED's refusal to stay an arbitration proceeding pending against BTA Bank in Switzerland. The sanctions motion was premised on BTA Bank's assertion that the court's prior entry of an order recognizing BTA Bank's foreign proceeding as a "foreign main proceeding" under chapter 15 gave rise to a stay against any proceeding in the world that would impact on BTA Bank or its assets. In denying the motion, the court concluded that the automatic stay does not have extraterritorial application in a chapter 15 case. It reasoned that although the section 362 stay ordinarily freezes proceedings against the debtor worldwide, a broad application of the stay would ignore chapter 15's territorial limitation to the protection of assets within the United States. The court noted that it "would be contrary to the essential purposes and structure of a chapter 15 case for recognition of a foreign main proceeding to stay a commercial arbitration proceeding as remote as this one . . . that has no connection to the United States or to any property of the chapter 15 debtor 'that is within the territorial jurisdiction of the United States.'" The court concluded that damages awarded in the Swiss arbitration would have no effect on BTA's assets in the U.S. and, accordingly, that there was no basis to stay the Swiss arbitration.

New York Bankruptcy Court Grants Rule 12(b) Motion to Dismiss Fraudulent Transfer Claims: In a ruling issued July 27, 2010, the United States Bankruptcy Court for the Southern District of New York dismissed fraudulent transfer claims brought by the liquidating trust (the "Trust") established in the Chrysler LLC bankruptcy case. The court granted the defendants' motion, brought pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, before the commencement of discovery. The defendant argued that the facts alleged failed to state claims upon which relief could be granted, and the court agreed. *See The Liquidation Trust v. Daimler, AG, (In re Old Carco LLC (f/k/a Chrysler LLC)*), 2010 WL 2925997 (Bankr. S.D.N.Y. 2010).

In a complaint filed in August 2009, the Trust asserted that Daimler AG and certain of its affiliates (collectively, "Daimler"), which were the prior owners of the Chrysler assets, had "orchestrated a scheme to strip valuable assets away" from Chrysler before the car company was sold to Cerberus Capital Management, LP ("Cerberus"). The Trust further alleged that corporate restructuring activities undertaken by Daimler immediately prior to the sale to Cerberus should be viewed separately from the sale, such that the consideration received through these restructuring transactions could not constitute reasonably equivalent value for the sale.

Daimler argued in response that the restructuring transactions and the sale had to be viewed together as part of a single, integrated, transaction for purposes of analyzing the fraudulent transfer claims. The significance of analyzing the transaction in its entirety, according to Daimler, was that it showed that Chrysler did, in fact, receive reasonably equivalent value in the sale. Specifically, Daimler argued that the consideration had to be reviewed by examining all parts of the transaction, not just

individual transfers. It argued that the complaint's allegations showed that Chrysler ultimately received reasonably equivalent value for the assets.

The bankruptcy court noted that the complaint had alleged that the transaction, viewed in its entirety, involved a $7 billion cash infusion by Cerberus, repayment of a $920 million intercompany loan owed to Chrysler, cancellation of approximately $3 billion in intercompany debt, and other significant consideration. Agreeing with Daimler, the bankruptcy court held that the complaint itself had acknowledged that the pre-sale restructuring and the sale itself "were parts of a single integrated transaction," and reflected on its face reasonably equivalent value for the transfers. Concluding that the Trust had failed to present particularized facts to show actual fraud, the court also dismissed the Trust's actual fraudulent transfer claims.