

Chapter 15 Does Not Prohibit Foreign Representatives From Pursuing State And Foreign Law Avoidance Actions

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Last month Bankruptcy Judge Isacoff in the Southern District of *Florida* held that a foreign representative may bring state law and foreign law avoidance actions notwithstanding section 1521(a)(7) of the Bankruptcy Code.

The case, [*Laspro Consulores LTDA v. Alinia Corp. \(In re Massa Falida Do Banco Cruzeiro Do Sul S.A.\)*](#), deals with the fraudulent activity of the owners and managers of the Brazilian Bank, Banco Cruzeiro Do Sul S.A. (“BCSUL”). In 1993, the Indio da Costa family took ownership of BCSUL. Luis Octavio Indio da Costa and Luis Felipe Indio da Costa (together, the “Indio da Costas”) were primarily responsible for the bank’s management. The Central Bank of Brazil seized control of BCSUL in 2012 and placed it into extra-judicial liquidation. In 2014, the liquidator obtained recognition of the Brazilian insolvency proceeding as a foreign main proceeding in the Bankruptcy Court for the Southern District of Florida. In August 2015, the Brazilian Bankruptcy Court decreed the bankruptcy of BCSUL and in January 2016, Laspro Consulores LTDA was appointed trustee and presently serves as the foreign representative of BCSUL (the “Foreign Representative”).

In July 2016, the Foreign Representative filed an adversary complaint against two BVI companies controlled by the Indio da Costas (the “Defendants”), alleging that the Indio da Costas diverted funds from BCSUL to the Defendants and that the Defendants used the funds to purchase prime New York apartments and furnish them with valuable works of art. The complaint asserts thirty-six counts against the Defendants including counts to set aside and disregard the transfers of the apartments and art pursuant to New York fraudulent transfer law.

In their motion to dismiss, the Defendants contended that section 1521(a)(7) of the Bankruptcy Code precludes the Foreign Representative from pursuing avoidance claims and that therefore the Foreign Representative lacks standing to bring this avoidance action. Section 1521(a)(7) states that the court may grant relief requested by the foreign representative *except* for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a) of the Bankruptcy Code. The Defendants argued that because the ability of a bankruptcy trustee to bring avoidance actions, even those based only on state law, rests solely through the authority granted in the chapter 5 sections enumerated in section 1521(a)(7), the avoidance counts should be dismissed.

The court was unpersuaded. Looking to the precise language of chapter 15, the court found that

section 1521(a)(7) “does not modify a foreign representative’s right to seek relief in the form of avoidance actions if the basis of such relief is non-bankruptcy law and the foreign representative, under non-bankruptcy law, has standing to seek the relief.” The Court noted that while a bankruptcy trustee may only have authority to pursue avoidance actions pursuant chapter 5, once recognition is granted, a foreign representative has, pursuant to section 1509(b), the capacity to sue and be sued in the U.S. and to apply directly to a court in the U.S. for appropriate relief in that court. Additionally, section 1509(f) states that “the failure of a foreign representative to commence a case or to obtain recognition ... does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is property of the debtor.”

The Court held that the appropriate inquiry is into the Foreign Representative’s capacity as the Brazilian bankruptcy judicial administrator and its rights and powers under Brazilian law, including its “duty to collect assets and documents of the debtor,” not the fact that it is a recognized foreign representative under chapter 15. Section 544 of the Bankruptcy Code gives a bankruptcy trustee the standing of a hypothetical creditor, without which it would not have standing to pursue avoidance actions, but section 1509 allows the foreign representative to bring claims for which it has actual standing. “There is absolutely nothing in any part of chapter 15 that remotely suggests that a foreign representative may never bring an avoidance claim that the foreign representative has the direct right to bring in his or her capacity as the foreign representative (or as section 1509(f) makes clear—in his or her independent capacity otherwise).” Simply, if the foreign representative has a cause of action that is not dependent on claims that only a bankruptcy trustee may assert, the foreign representative may pursue those actions.

The *Laspro Consulores* opinion is important in that it adds to the very limited body of statutory analysis on this topic and assists in clarifying the standing of foreign representatives to bring avoidance action. This clarification may well serve to embolden foreign representatives. We are all accustomed to seeing avoidance complaints from trustees that seek to avoid transfers pursuant to both the Bankruptcy Code and state law. Perhaps we may see an increase in avoidance actions from foreign representatives seeking to avoid transfers only on state law and perhaps foreign law grounds.

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