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Chapter 15 Foreign Representatives Granted Extension to Sue

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A U.S. bankruptcy court has held that the tolling provisions in the U.S. Bankruptcy Code allowing for extensions of the time to file actions are automatically available to foreign representatives trying to marshal assets for distribution to creditors in cross-border cases. In *In re Fairfield Sentry Limited*,¹ the foreign representatives of the liquidation proceedings of Fairfield Sentry Limited and certain affiliated debtors (the largest “feeder funds” to invest in Bernard Madoff’s Ponzi scheme) commenced proceedings against subscribers for the return of redemption payments withdrawn from the debtors’ account (“Redeemer Actions”) and a direct action against the debtors’ former investment advisers (the “Direct Action”). At issue was whether the foreign representatives would receive extensions of the time to bring claims and meet procedural deadlines.

In a decision delivered on May 23, 2011, Bankruptcy Judge Lifland of the U.S. Bankruptcy Court for the Southern District of New York applied the federal bankruptcy tolling statute to the Chapter 15 cases of the debtors, thereby allowing the foreign representatives to proceed with 209 Redeemer Actions and the Direct Action, and to investigate claims against additional parties to achieve a multibillion dollar recovery for the benefit of stakeholders of the fund.

The debtors’ liquidation proceedings are pending before a court in the British Virgin Islands and were recognized by the Bankruptcy Court on July 22, 2010, in the Chapter 15 cases commenced by the foreign representatives of the debtors. Application of the tolling provisions of Section 108 of the Bankruptcy Code would allow the foreign representatives extensions of time from the date on which they stepped into the debtors’ shoes in the Chapter 15 cases to bring claims and meet applicable deadlines for the Redeemer Actions in seeking over \$5.79 billion. The foreign representatives are also investigating other claims, and hundreds more suits may be commenced. The Direct Action seeks over \$919 million in investment management and performance fees. Defendants to the Redeemer Actions opposed the application of the tolling provisions under Section 108.

The tolling provisions of Section 108 allow for a (i) two-year extension for a trustee in bankruptcy to commence actions provided that the applicable time period had not expired before the petition was filed, and (ii) for a shorter extension for filing pleadings, curing defaults and performing other acts on behalf of the debtor. This case addressed whether foreign representatives in a Chapter 15 case may avail themselves of this section. On the basis of principles of statutory interpretation, the Bankruptcy Court held that the plain language of the Bankruptcy Code allows for all of Chapter 1 of

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¹ Case No. 10-13164(BRL), United States Bankruptcy Court for the Southern District of New York.

the Bankruptcy Code, which includes the tolling provisions of Section 108, to automatically apply to Chapter 15 cases. In the absence of reported decisions on the issue, the Bankruptcy Court's decision was also supported by the legislative history of Chapter 15 and by orders directing the application of Section 108 in other Chapter 15 cases. Finally, the Bankruptcy Court held that the relief was proper under Bankruptcy Code Sections 1507 and 1521(a)(7), which empower a court to provide additional assistance to foreign representatives and grant additional relief necessary to implement the purpose of Chapter 15 and to protect the assets of the debtor or the interests of the creditor. Granting the foreign representatives additional time would facilitate their duties and help them to "untangle the web created by the Madoff fraud without the looming expiration of statute of limitation periods."²

This decision, along with others that have allowed foreign representatives to apply foreign avoidance laws,³ strengthens the assistance given to foreign representatives to recover assets in Chapter 15 cases. **T**

² Id. at 19.

³ See, e.g., *In re Condor Ins. Ltd.* 601 F.3d 319 (5th Cir. 2010).