



A Bird's-Eye View of Chapter 15



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Since 2005, Chapter 15 of the U.S. Bankruptcy Code has been an indispensable tool for foreign debtors seeking relief in the U.S. Since its inception, Chapter 15 has gone from a little known chapter of the Bankruptcy Code to the subject of significant jurisprudence. From 2005 through the end of 2013, 783 Chapter 15 cases were filed and over 100 published opinions were issued by courts in such cases or related matters. Although these opinions concern a variety of Chapter 15 issues, such published jurisprudence is not yet sufficient to cover the myriad of issues that may arise in a Chapter 15 case. Fortunately, the thousands of pleadings, orders, and other papers filed in the hundreds of pending and closed Chapter 15 cases in the U.S. provide a wealth of information to fill the gap. Below is an overview of some statistical data gleaned from such sources.

Corporate groups

Many Chapter 15 cases involve multiple affiliated debtors, each of which file a Chapter 15 petition with a motion to consolidate the various cases solely for administrative purposes. Of the 783 Chapter 15 cases filed from the chapter's enactment in 2005 through December 2013, approximately 320 involve a distinct entity or corporate group.¹ The statistical references below are based on these 320 distinct entities or corporate groups.

Country of origin

In the 320 cases, foreign proceedings were most commonly located in Canada (103), the United Kingdom (49), Germany (15), Japan (14), the Cayman Islands (14), Australia (12), Mexico (10), Brazil (9), Bermuda (9), South Korea (9), the British Virgin Islands (7), and Denmark (7).²

Provisional relief

Unlike debtors under other chapters of the U.S. Bankruptcy Code, a Chapter 15 debtor is not automatically entitled to a stay halting actions by creditors to collect on debts that may be owed by the debtor. A Chapter 15 debtor must first obtain recognition of its foreign proceeding, a process that can take several weeks to several months, if contested. If the Chapter 15 debtor requires relief earlier than this, it can file a request for provisional relief, which can protect the debtor from

creditor actions until the U.S. court issues an order recognizing the foreign proceeding or denying the debtor's recognition request. In the 320 cases mentioned above, approximately 170 involved requests for provisional relief. Although at least 19% of such requests were challenged, only 2% were denied by the relevant courts.

The effect of *Bear Stearns*

In the first few years of Chapter 15's existence, many published opinions concerned challenges to foreign debtors' requests for recognition of their foreign proceedings, primarily whether the jurisdiction in which the foreign proceeding was pending qualified as the debtor's center of main interests. This issue was considerably clarified by Judge Burton Lifland's landmark 2007 decision in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, in which he denied recognition of the Cayman Islands proceedings of two Bear Stearns hedge funds because the funds' center of main interests were in New York, rather than in the Caymans (and thus did not qualify for foreign main recognition), and because the funds did not maintain a transitory place of business in the Caymans (and thus did not qualify for foreign nonmain recognition).³ The *Bear Stearns* decision reoriented views on Chapter 15 and what constitutes a proper evidentiary showing in recognition requests.

Prior to *Bear Stearns*, briefs in support of Chapter 15 petitions contained a limited description of the debtor's contacts with the jurisdiction in which its foreign proceeding was pending. After *Bear Stearns*, however, far more detail regarding the debtor's contacts with the relevant jurisdiction is included in such papers.

In the wake of *Bear Stearns*, commentators also expressed concern that the decision effectively disqualified hedge funds and similar entities for relief under Chapter 15. Although the availability of relief may have narrowed, it has not disappeared. For example, in 2010 Sextant Strategic Hybrid Hedge Resources Fund Offshore Ltd. and an affiliate received foreign main recognition in Florida,⁴ in 2011 Millennium Global Emerging Credit Master Funds Ltd. and an affiliate received foreign main recognition in New York,⁵ and in 2013 ICP Strategic Credit Income Fund Ltd. and an affiliate received foreign main recognition in New York.⁶ The data also demonstrate that outright denials of recognition, such as in *Bear Stearns*, are a rare event.

Outcome of recognition requests

During the relevant period, approximately 88% of Chapter 15 debtors were granted foreign main recognition and approximately 5% of Chapter 15 debtors were granted foreign nonmain recognition. Only in approximately 3% of cases were debtors' petitions dismissed or their requests for recognition denied. As to the remaining outcomes,

¹ Certain cases in which facially deficient chapter 15 petitions or related papers were filed and summarily dismissed or withdrawn, are not included among the 320 distinct entities or corporate groups.

² Notably, on at least one occasion a corporate group requested recognition of foreign proceedings pending in multiple jurisdictions.

³ 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

⁴ See *In re Sextant Strategic Hybrid2Hedge Fund Ltd.*, Case No. 10-44713-AJC, Order Granting Recognition of Foreign Main Proceeding Pursuant to §§ 1515 and 1517 of the Bankruptcy Code and Granting Related Relief (Bankr. S.D. Fla. Jan. 13, 2011).

⁵ See *Millennium Global Emerging Credit Master Fund Ltd.*, Case No. 11-13171 (ALG), Order Granting Recognition of a Foreign Main Proceeding (Bankr. S.D.N.Y. Sept. 19, 2011).

⁶ See *ICP Strategic Credit Income Fund Ltd.*, Case No. 13-12116 (REG), Order Granting Recognition of Foreign Main Proceedings (Bankr. S.D.N.Y. Aug. 8, 2013).

approximately 4% of debtors withdrew their petitions following a settlement or for other reasons, and several cases were pending as of the writing of this article.⁷

A possible explanation for the low denial or dismissal rate is that following *Bear Stearns*, debtors that did not qualify for relief avoided Chapter 15 entirely. Another possible explanation is that because *Bear Stearns* was decided in the Bankruptcy Court for the Southern District of New York, certain debtors subsequently filed in other jurisdictions. Although this may have occurred, the data do not suggest a drastic move away from New York filings.

Chapter 15 cases – venues

The Southern District of New York is the most common jurisdiction for Chapter 15 cases, with 39% of all cases filed there. The number of cases in this district has remained fairly consistent over the years, with 16 in 2006, 16 in 2007, 15 in 2008, 21 in 2009, 12 in 2010, 13 in 2011, 18 in 2012 and 14 in 2013. Accordingly, there has not been a drop in filings in the Southern District of New York since the *Bear Stearns* decision in 2008. However, this could potentially change in light of the decision in *Drawbridge Special Opportunities Funds LP v. Barnett* by the U.S. Court of Appeals for the Second Circuit, which hears appeals from the Southern District of New York.⁸ In *Barnett*, the Second Circuit held that a foreign representative is precluded from obtaining Chapter 15 recognition if the relevant foreign debtor does not have a residence, place of business, or property in the U.S.⁹ It remains to be seen whether other districts will follow suit.

As to other common jurisdictions for Chapter 15 filings, these

are the District of Delaware (11%), the Southern District of Florida (6%), the Central District of California (4%), the Western District of Washington (3%), the Middle District of Florida (2%), and the Southern District of Texas (2%).

Number of yearly Chapter 15 filings

The total number of Chapter 15 cases filed annually has also remained stable, except for a brief spike in 2009 and 2010. In 2006, the first full year following Chapter 15's enactment, 33 cases were filed. This was followed by 32 cases in 2007, 33 cases in 2008, 67 cases in 2009, 43 cases in 2010, 36 cases in 2011, 38 cases in 2012 and 38 cases in 2013. Interestingly, although the number of Chapter 15 cases filed each year from 2011 through 2013 has remained stable, the same is not true for U.S. chapter 11 filings, which have declined 22% over the same period.

Bankruptcy judges and significant changes to the bench

The U.S. bankruptcy judges that have presided over the most Chapter 15 cases are former Judge James Peck (23), Judge Stuart Bernstein (19), Judge Robert Gerber (18), Judge Robert Drain (14), and Judge Allan Gropper (14).¹⁰ Not surprisingly, these five bankruptcy judges are or were from the Southern District of New York. Judge Burton Lifland, the author of the *Bear Stearns* decision who died suddenly in January 2014, was the presiding judge in ten Chapter 15 cases.

In light of the *Barnett* decision and the changes in the composition of the Bankruptcy Court for the Southern District of New York, it remains to be seen whether the Chapter 15 trends described above continue. 🇺🇸

⁷ Notably, in a handful of corporate groups, some members requested and received main recognition while other members requested and received nonmain recognition.

⁸ *Drawbridge Special Opportunities Fund LP v. Barnett (In re Barnett)*, 737 F.3d 238 (2d Cir. 2013).

⁹ Id.

¹⁰ Notably, Judge Peck retired on January 31, 2014 and Judge Gropper is scheduled to retire on October 3, 2014.



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