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Feature

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Could You Be a Debtor?

SDNY Renders Decision in Chapter 15 Proceeding for SVB Cayman Branch



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The failure of Silicon Valley Bank (SVB), the second-largest bank failure in U.S. history, in March 2023 rocked the financial world.² The takeover by the Federal Deposit Insurance Corp. (FDIC) and ensuing bankruptcy filing by SVB's parent company, SVB Financial Group, have proven to be equally meaningful and have been closely watched.³

One area in which court-watchers might not have expected to see development is the contours of chapter 15 recognition proceedings by foreign debtors. Nonetheless, a spat between depositors with SVB's Cayman Islands Branch (SVB Cayman) and the FDIC, which denied hundreds of millions of dollars in insurance claims by SVB Cayman depositors, has resulted in an important decision delving into how foreign debtors can qualify for chapter 15 relief, and how to read chapter 15 together with other Bankruptcy Code provisions.

Background

Although SVB was insured by the FDIC, certain SVB account-holders made deposits into branches that were not insured by the FDIC.⁴ At issue in this case are the depositors of SVB Cayman, who filed claims with the FDIC notwithstanding that their accounts were not FDIC-insured.⁵ The FDIC denied insurance coverage to the SVB Cayman deposi-

tors,⁶ treating the depositors as unsecured creditors of SVB.⁷ The FDIC's explanation was that the claim was "not proved to the satisfaction of the receiver."⁸

Following this denial, the SVB Cayman depositors filed a winding-up application in the Grand Court of the Cayman Islands, Financial Services Divisions (hereinafter, the "Cayman Court").⁹ The Cayman Court granted the winding-up application and appointed three joint official liquidators (JOLs). To obtain recognition of the Cayman winding-up proceeding and seek discovery into the basis of the FDIC's denial of the depositors' claims, the JOLs sought recognition under chapter 15 of the Bankruptcy Code.¹⁰ In response, the FDIC argued that SVB Cayman is not eligible to be a debtor in a chapter 15 case pursuant to § 109(b) of the Bankruptcy Code.¹¹

On Feb. 22, 2024, Hon. **Martin Glenn** of the U.S. Bankruptcy Court for the Southern District of New York issued a decision denying the JOL's motion for recognition, finding that SVB Cayman was ineligible for chapter 15 relief. The court's opinion centers on a straightforward reading of § 1501(c)(1), which provides that chapter 15 does not apply to "a proceeding concerning an entity, other than a foreign insurance company, identified by exclusions in section 109(b)."¹²

Exclusions under § 109(b) include domestic banks and foreign banks that have a branch or agency in the U.S.¹³ The court thus recognized that "[t]he

¹ The views expressed are the views of the authors and do not reflect views of Cleary Gottlieb Steen & Hamilton LLP.

² "The Silicon Valley Bank Collapse Explained," Univ. of Washington School of Law (March 24, 2023), available at law.uw.edu/news-events/news/2023/svb-collapse (last visited April 29, 2024).

³ *In re Silicon Valley Bank (Cayman Islands Branch)*, No. 24-10076 (MG), 2024 WL 734735, at *1 (Bankr. S.D.N.Y. Feb. 22, 2024). Although FDIC deposit insurance is ordinarily limited to \$250,000, the chair of the FDIC used the "systemic risk exception" to guarantee the full amount of deposits. *Id.*

⁴ *See id.*

⁵ *See id.*

⁶ Aside from SVB Cayman depositors whose accounts were swept into parallel deposit accounts in the SVB California office, *see id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See id.* at *2.

¹⁰ *See id.*

¹¹ *See id.* at *3.

¹² *See id.*

¹³ *See id.* (citations omitted).

effect of these exclusions is that foreign representatives of foreign banks [that] are subject to foreign proceedings will not be eligible for Chapter 15 recognition if the foreign banks have a branch or agency in the [U.S.],¹⁴ and held that “SVB Cayman is prohibited from being in Chapter 15.”¹⁵

Discussion

A Potentially Simpler Path

One interesting aspect of *In re Silicon Valley Bank Cayman Branch* is the path *not* taken. The bankruptcy court found that SVB Cayman “possessed no separate legal existence outside of [SVB], which was indisputably U.S.-incorporated.”¹⁶ This alone may have been enough to deny chapter 15 recognition given that if SVB Cayman is not a separate entity, it lacks standing to petition for its own chapter 15 recognition.¹⁷

The fact that the court did not rest solely on this basis for denial of recognition is particularly surprising given that it is well-established that, except in certain circumstances, bank branches are not generally independent juridical entities with independent legal personhood.¹⁸ However, the court instead focused on § 109(b) as an exclusionary provision that carves out certain entities for chapter 15 eligibility. While this analysis worked equally well to show why SVB Cayman was prohibited from chapter 15 recognition, the analysis has farther-reaching implications than SVB Cayman’s instant request, and raises the possibility that other foreign entities will be denied chapter 15 recognition due to the exclusions of § 109(b).

Scope of § 1501(c)’s Invocation of § 109(b) Exclusions

One implication of the decision that remains unclear is the extent to which § 1501(c)(1)’s invocation of § 109(b) as an exclusionary provision should be read to apply to every provision of chapter 15. As earlier explained, the court found that § 109(b) acted to exclude certain entities from chapter 15 eligibility because § 1501(c)(1) specifically references the entities identified in § 109(b) as entities to which chapter 15 does not apply.¹⁹

With this reading in mind, the court nonetheless found that the JOLs were “not without remedy” under chapter 15.²⁰ In recognizing that § 1509(f) of

the Bankruptcy Code provides that, “[n]otwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the [U.S.] to collect or recover a claim which is the property of the debtor,” the court reasoned that whether or not SVB Cayman can be in chapter 15, the JOLs are likely “foreign representatives” that can recover a claim on behalf of SVB Cayman.²¹

When applying this reading of chapter 15, the court implicitly suggested that the JOLs’ ineligibility to receive recognition does not affect their ability to use other chapter 15 provisions.²² While § 1501(c)(1) does not provide that entities identified by exclusion in § 109(b) are merely ineligible for chapter 15 recognition, it does provide that chapter 15 *does not apply to a proceeding concerning an entity* that is identified by exclusion in § 109(b). While this means that the JOLs of SVB Cayman are ineligible for chapter 15 recognition, that rationale could easily (and, some might suggest, more naturally) be read to mean that the JOLs are barred from relying on any chapter 15 provision, including §§ 1517 and 1509, which gives foreign representatives the capacity to sue and be sued in a U.S. court.²³ Although the court did not squarely consider this argument, future foreign representatives and adversarial litigants are likely to spar over this potential discrepancy.²⁴

Who Is a Debtor?

Another interesting implication of the decision is how it impacts how a “debtor” is defined. Under § 1502(1), a debtor “means an entity that is the subject of a foreign proceeding.” Under § 101(15), an “entity” includes “person, estate, trust, governmental unit, and [U.S. T]rustee.” This expansive definition contrasts against eligibility for chapter 11 relief, which, under § 109(a), is limited to “a person that resides or has a domicile, a place of business or property in the [U.S.], or a municipality” — in particular where a “person” is defined by the Bankruptcy Code to exclude governmental units.²⁵

While the Second Circuit in *In re Barnett* established that § 109(a)’s definition of “debt-

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14 See *id.* (citations omitted).

15 See *id.* at *13.

16 See *id.* at *11.

17 *Cf.*, *In re Valley Media Inc.*, 279 B.R. 105, 127 (Bankr. D. Del. 2002) (“An entity must have a legal identity apart from its members,” and it “follows that it must also have a legal identity apart from its owner”); *In re Milby*, No. 02-64360, 2003 WL 25963298, at *5 (Bankr. N.D.N.Y. July 25, 2003) (finding that as there must be some existence in law and in fact, “trade name has no separate legal existence and is without procedural capacity or status to sue or be sued”).

18 *Commerzbank AG v. U.S. Bank Nat’l Ass’n*, 457 F. Supp. 3d 233, 243 (S.D.N.Y. 2020) (“Indeed, courts in this district have rejected the concept that branches of a bank are separate entities.”).

19 11 U.S.C. § 1501(c)(1); *In re Silicon Valley Bank (Cayman Islands Branch)*, 2024 WL at *10.

20 See *id.* at *13.

21 See *id.* at *13–*14.

22 See *id.* at *10.

23 See 11 U.S.C. § 1507(b).

24 This decision adds to the uncertainty in interpreting § 1509(f). For example, in *Reserve Int’l Liquidity Fund Ltd. v. Caxton Int’l Ltd.*, the court pointed to the legislative history of § 1509(f), which indicated that the exception “is to be narrowly applied.” See *Rsrv. Int’l Liquidity Fund Ltd. v. Caxton Int’l Ltd.*, No. 09 Civ. 9021 (PGG), 2010 WL 1779282, at *15 (S.D.N.Y. April 29, 2010). The court suggested that actions under § 1509(f) should be limited to collection claims, such as claims for an accounts receivable. See *id.* In contrast, in *In re Fairfield Sentry Ltd. Litig.*, the court recognized no such limitation on § 1509(f) and found that even if foreign representatives declined to file a chapter 15 case, because of § 1509(f) “that choice also would not have limited the foreign representatives’ ability to pursue their claims” in the U.S. See *In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 684 (S.D.N.Y. 2011).

25 See 11 U.S.C. § 101(41).

or” applies to chapter 15 for the purposes of establishing venue, relatively little has been written about how the use of “entity” in § 1502(1) contrasts with the use of “person” in § 109(a).²⁶ In *In re Silicon Valley Bank Cayman Branch*, the Court specifically acknowledges that the Bankruptcy Code defines a “person” under § 109(a) to exclude a “governmental unit”²⁷ and suggests that this means that a governmental unit cannot be a debtor under chapter 15. This “governmental unit” exception is never explicitly addressed in *In re Barnet*, and its court even acknowledged that while § 109(a) “adds a requirement for the kinds of ‘person’ that ‘may be a debtor,’” it “does not say that the term ‘debtor’ means anything.”²⁸ *In re Barnet* added that this shows that § 1502 supplants § 101’s definition of “debtor” within the context of chapter 15.²⁹

In contrast, the approach taken by the court in *In re Silicon Valley Bank Cayman Branch* by natural extension would read the “governmental unit” exception into chapter 15 as if a debtor can only be a “person,” without addressing that § 1502(1) provides that a debtor is an “entity,” which includes a “governmental unit.” Although not the main focus of the decision, this raises potential questions for foreign governmental entities or instrumentalities seeking chapter 15 recognition.³⁰

Conclusion

For chapter 15 practitioners, *In re Silicon Valley Bank Cayman Branch* is likely to have raised as many questions as it answers. The decision is now on appeal, and more clarity may come from a district or circuit court decision. Beyond the appeal, it will be interesting to see whether and how other bankruptcy courts address these open questions as they continue to parse how chapter 15 fits into the larger context of the Bankruptcy Code. **abi**

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²⁶ See *Drawbridge Special Opportunities Master Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247-51 (2d Cir. 2013).

²⁷ See *In re Silicon Valley Bank Cayman Branch* at *10.

²⁸ See *In re Barnet*, 737 F.3d at 249.

²⁹ See *id.*

³⁰ Notably, *In re Barnet* is not without its critics. In April 2024, the Eleventh Circuit held that § 109(a)’s property requirement does *not* apply to chapter 15, rejecting the Second Circuit’s reasoning in *Barnet*. See *In re Al Zawawi*, 97 F.4th 1244, 1252 (11th Cir. 2024).