

# The International Scene

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## Abstention and Chapter 15

As chapter 15 cases proliferate, litigation in and related to those cases grows apace. Either the plaintiff or defendant may wish, for its particular reasons, to have the bankruptcy court abstain from the litigation. When abstention is statutorily mandated, the bankruptcy court can and must abstain. However, when abstention is permissive, the bankruptcy court's ability to abstain is uncertain because some courts have limited the applicability of permissive abstention in chapter 15 cases.

Bankruptcy jurisdiction in the U.S. derives from title 28 of the U.S. Code, Judiciary and Judicial Procedure (the "Judicial Code"). Specifically, 28 U.S.C. § 1334(a) grants "the district court ... original and exclusive jurisdiction of all cases under title 11," while 28 U.S.C. § 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."<sup>2</sup> That jurisdiction is limited by provisions dealing with permissive abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2).

The introductory language of § 1334(c)(1) complicates the application of the abstention provisions to a chapter 15 case: "Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court ... from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." This language has been held by some courts — incorrectly, in this author's opinion — to prohibit permissive abstention from any proceedings arising in or related to a chapter 15 case.

### Conflicting Views on Permissive Abstention

When three Louisiana state pension funds sued Cayman Island hedge funds and others in Louisiana state court, the defendants removed the case to federal district court under 28 U.S.C. § 1452 as related to a chapter 11 case of a master fund to which the Cayman Islands funds were related.<sup>3</sup> The plaintiffs

sought remand back to state court, where they presumably preferred their chances of success. The Fifth Circuit, in *Firefighters' Retirement System v. Citco Group Ltd.*, ruled that 28 U.S.C. § 1334(c)(1) bars abstention from any proceeding in a chapter 15 case and therefore bars remand:

We have not previously addressed the extent to which this provision [28 U.S.C. § 1334(c)(1)] bars permissive abstention in Chapter 15 bankruptcy cases. There are two possible interpretations of the subsection. First, the phrase "[e]xcept with respect to a case under chapter 15 of title 11" could mean that § 1334(c)(1) only excepts the Chapter 15 bankruptcy itself. *See, e.g., Abrams v. Gen. Nutrition Cos.*, 2006 U.S. Dist. LEXIS 68574 (D.N.J. Sept. 25, 2006) (unpublished) (adopting this interpretation). Second, the phrase could mean that both the Chapter 15 case itself and cases "arising in or related to" Chapter 15 cases are excluded. *See, e.g., British Am. Ins. Co. v. Fullerton (In re British Am. Ins. Co.)*, 488 B.R. 205, 238-39 (Bankr. S.D. Fla. 2013) (adopting the latter interpretation); *Fairfield Sentry Ltd. v. Amsterdam (In re Fairfield Sentry Ltd.)*, 452 B.R. 64, 83 (Bankr. S.D.N.Y. 2011) (same), *rev'd on other grounds*, 458 B.R. 665 (S.D.N.Y. 2011).

We hold that the latter interpretation is more consistent with the plain language and purpose of the statute. If one reads the rest of the subsection after the initial clause, the subsection clearly distinguishes between a "case" and a "proceeding."<sup>4</sup>

The "case" vs. "proceeding" distinction should have led to the opposite conclusion: abstention from a proceeding is permitted. By definition, a "petition" under § 1504 (as under §§ 301, 302 and 303) "commences a case under this title [11]."<sup>5</sup> Similarly, chapter 15 is titled, "Ancillary and Other Cross-Border Cases." It is the bankruptcy case itself — here, the chapter 15 ancillary case — that is the case.

Conversely, matters within or related to the case that may be litigated, as adversary proceedings or contested matters, are proceedings. Nothing in the exception to Judicial Code § 1334(c)(1) mentions "a particular proceeding arising under title 11 or arising in or related to a case under



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<sup>2</sup> 28 U.S.C. § 157(a) provides that the district court may refer any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 to the bankruptcy court for the district.

<sup>3</sup> The master fund in chapter 11 in the Southern District of New York (SDNY) was *Fletcher Int'l Ltd.*, Case No. 1:12-bk-12796; the defendant in the *Firefighters'* case, feeder fund FIA Leveraged Fund and its affiliated feeder fund, Fletcher Income Arbitrage Fund Ltd. were in liquidation in the Cayman Islands and their foreign representatives obtained chapter 15 recognition in the SDNY cases No. 14- 10093 and 14-10094.

<sup>4</sup> 796 F.3d 520, 526-27 (5th Cir. 2015).

<sup>5</sup> 11 U.S.C. § 101(42).

title 11” or limits post-recognition abstention or dismissal of proceedings in chapter 15 cases that arise under, in or are related to title 11.

The National Bankruptcy Conference (NBC) consists of approximately 60 judges, lawyers and academics who have consulted with Congress on bankruptcy legislation since the 1930s and whose conferees include the primary draftsmen of chapter 15. They view the Judicial Code exception to permissive abstention as limited to preventing abstention from hearing an application for recognition of a foreign proceeding (*i.e.*, from deciding the “case under chapter 15”).<sup>6</sup>

## Sections 305 and 1529 Allow Permissive Abstention in Chapter 15

*Firefighters’* neither noted nor discussed two other statutory provisions, §§ 305 and 1529 of the Bankruptcy Code, which support permissive abstention from proceedings in chapter 15 cases. Section 1529(a)(4), within chapter 15, states: “In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.”<sup>7</sup> In turn, § 305 provides:

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if— ...

(2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.<sup>8</sup>

The *Firefighters’* interpretation of 28 U.S.C. § 1334(c)(1) results in rendering §§ 305(a)(2) and 1529(4) unworkable. This violates the basic rule of statutory construction that one part of a statute or of related statutes should not be read to negate other parts of the statute(s).<sup>9</sup>

Surprisingly, none of the *Firefighters’* or *British American* and *Fairfield Sentry* decisions it cited acknowledged the existence of § 1529(4), which authorizes the bankruptcy court to employ § 305. The *British American* court stated that “Congress required that if the district courts (and the bankruptcy courts by referral) have related-to jurisdiction, and the matter is not subject to mandatory abstention under section 1334(c)(2), then the court must hear the matter.”<sup>10</sup> However, Congress said just the opposite in § 1529(4).

## Mandatory Abstention Remains Clearly Applicable in Chapter 15

Unlike the confusion over permissive abstention, mandatory abstention is indisputably applicable to chapter 15 cases. Section 1334(c)(2) states:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.<sup>11</sup>

**[T]he combination of §§ 1529(4) and 305 permit a bankruptcy court to abstain from a proceeding arising in, arising under or related to a case under chapter 15.**

In *Principal Growth Strategies LLC, et al. v. AGH Parent LLC*, the joint liquidators of Platinum Partners Value Arbitrage Fund LP (PPVA), and Principal Growth Strategies LLC (PGS), an entity formed by PPVA to hold a promissory note (together, the “plaintiffs”), claimed that parties stripped the note from PGS to the detriment of the plaintiffs.<sup>12</sup> The complaint included three counts under Delaware law and three under Cayman Islands law.<sup>13</sup> Filed in the Delaware Chancery Court, the suit was removed to the district court pursuant to 28 U.S.C. § 1452(a).<sup>14</sup>

The removing defendants argued that removal was appropriate because the district court had original bankruptcy jurisdiction under 28 U.S.C. § 1334(b), asserting that the chancery action arises under title 11 since the plaintiffs brought the action pursuant to powers granted under chapter 15. The plaintiffs moved to remand the case back to the chancery court, and several defendants objected on *Firefighters’* grounds. The plaintiffs asserted that the district court must abstain from hearing the case under 28 U.S.C. § 1334(c)(2) and must remand the case to the chancery court under 28 U.S.C. § 1452(b), which provides, “The court to which such

6 The NBC proposed that Congress revise 28 U.S.C. § 1334(c)(1) as follows: “(c)(1) Except with respect to a determination of an application for recognition of a foreign proceeding in a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.” See the NBC Letter of Nov. 13, 2019, available at nbconf.org/our-work (last visited Aug. 24, 2020).

7 Section 1528 applies to title 11 cases commenced after recognition under chapter 15 of a foreign main proceeding, while § 1529 applies to coordination of cases under other chapters of title 11 with foreign proceedings involving the same debtor.

8 11 U.S.C. § 305.

9 It is an “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 684, 58 L. Ed. 2d 596 (1979). See also *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 520, 99 L. Ed. 615 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” *Montclair v. Ramsdell*, 107 U.S. 147, 152 [2 S. Ct. 391, 394, 27 L. Ed. 431], rather than to emasculate an entire section.”).

10 488 B.R. 205, 240. The *British American* court did try to distinguish § 305 but ignored § 1529(4): “Section 305 is the sole statutory authority for abstention from a title 11 case. However, section 305 is not applicable in a case under chapter 15. 11 U.S.C. § 103(a). There is no provision in federal law allowing a federal court to abstain from an entire chapter 15 case.” The NBC would also make a complementary change to § 103(a) to eliminate any possible doubt: 11 U.S.C. § 103. Applicability of chapters:

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this. This chapter, sections 305, 306, 307, 362(o), 555, 556, through 557, and 559, 560, 561, and through 562 of this title, and any section of this title specifically made applicable by a section of chapter 15 apply in a case under chapter 15.

11 See *In re Fairfield Sentry Ltd.*, 458 B.R. 665 (S.D.N.Y. 2011) (remanding removed claims to state court for determination of whether they could be timely adjudicated).

12 *Principal Growth Strategies LLC, et al. v. AGH Parent LLC, et al.*, 2020 WL 1677088 (D. Del. April 6, 2020). In November 2016, the joint liquidators had obtained recognition of PPVA’s Cayman Islands liquidation proceeding in the Southern District of New York. *Id.* at \*1.

13 *Principal Growth v. AGH*, Case No. 1:19-cv-01319, Doc. No. 10 (D. Del. Aug. 5, 2019).

14 See *supra* n.3.

continued on page 59

# The International Scene: Abstention and Chapter 15

from page 19

claim or cause of action is removed may remand such claim or cause of action on any equitable ground.”

The defendants countered that remand on equitable grounds was prohibited by the *Firefighters*’ decision because the chancery action was related to the PPVA chapter 15 case. The district court rejected that argument:

I will not apply *Firefighters*’ rationale or holding to this case for three reasons. First, as the Court acknowledged in *Firefighters*’, “§ 1452 does not explicitly exclude Chapter 15 cases.” Second, *Firefighters*’ addressed permissive abstention under § 1334(c)(1), but this case involves mandatory abstention under § 1334(c)(2) and there is no language in § 1334(c)(2) that suggests in any way that it does not apply to proceedings related to Chapter 15 cases. Third, the Third Circuit held in *Stoe* that “mandatory abstention [under § 1334(c)(2)] is not in conflict with 28 U.S.C. § 1452....” As the Court explained:

[S]ection 1334(c)(2) does not purport to interfere with a court’s authority to remand under § 1452(b). Rather, § 1334(c)(2) governs only whether a district court must abstain from hearing a case. Once a district court determines that it ... must abstain from hearing a removed case pursuant to [§] 1334(c)(2) ... it can consider whether there is reason for the suit to proceed

in state court. If so, there will be an equitable ground justifying remand under § 1452(b).<sup>15</sup>

## Some Things Are Clear, Others Not So Much

Even absent the statutory fix suggested by the NBC,<sup>16</sup> the combination of §§ 1529(4) and 305 permit a bankruptcy court to abstain from a proceeding arising in, arising under or related to a case under chapter 15. Section 1334(c)(1) only prevents abstention from deciding the chapter 15 case (*i.e.*, the application for recognition). Nonetheless, there will likely be additional questionable decisions on permissive abstention in chapter 15 cases until the NBC’s recommendation is actually adopted. Parties thwarted by a *Firefighters*’ prohibition against permissive abstention might try an alternative approach in the appropriate cases, presenting a *forum non conveniens* argument or seeking modification or termination of recognition under § 1517(d).<sup>17</sup> As to mandatory abstention, the *Principal Growth*, *British American* and *Fairfield Sentry* courts agree that mandatory abstention under 28 U.S.C. § 1334(c)(2) applied regardless of the muddle over permissive abstention. **abi**

<sup>15</sup> *Stoe v. Flaherty*, 436 F.3d 209, 214-15 (3d Cir. 2006) (internal citations omitted).

<sup>16</sup> See *supra* n.7.

<sup>17</sup> Concerning the *forum non conveniens* approach, see *In re Hellas Telecommunications (Luxembourg) II SCA*, 555 B.R. 323 (2016). Section 1517(d) provides: “The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition.”

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