Business Case Law Updates

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LET THEM EAT (AND BAKE) CAKE! *INTERSTATE BAKERIES* AND *CRUMBS* SERVE UP VICTORIES FOR TRADEMARK LICENSEES IN 2014

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In 2014 there were two important rulings involving the intersection between trademark licenses and bankruptcy law, namely *In re Interstate Bakeries Corp.,* 751 F.3d 955 (8th Cir. 2014) and *In re Crumbs Bake Shop, Inc.,* 522 B.R. 766 (Bankr. D. N.J. 2014). Both cases involved disputes over the rights of trademark licensees after the debtor's assets had been sold. Because issues surrounding trademark licenses and asset sales often collide in Chapter 11 cases, these two cases provide valuable insights.

I. The Rights of Trademark Licensees Have Been Controversial for Decades

A. Thirty years ago in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.,* 756 F.2d 1043 (4th Cir. 1985) the Fourth Circuit Court of Appeals held that the debtor/licensor's rejection of an intellectual property license deprives the licensee of rights previously granted under the licensing agreement.

B. *Lubrizol* was a frightening ruling, especially in the mid-1980s when computers had so recently become part of everyday business activities, and large sums were being spent to license intellectual property embodied in computer software. Licensees were terrified that any licensor could file bankruptcy, reject the intellectual property license, and thereby *cut off* the licensee's right to use the intellectual property that was necessary for the licensee's business and computers. That result could paralyze the licensee's business.

C. Consequently, in 1988, Congress enacted § 365(n),[1] and also added § 101(35A) to the Bankruptcy Code. Section 101(35A) defines "intellectual property" to mean trade secret,

[1] Section 365(n) states, in relevant part:

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including the right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

invention, process, design or plant protected under title 35, patent application, plant variety, work of authorship protected under title 17 or mask work protected under chapter 9 of title 17, all to the extent protected by applicable nonbankruptcy law. Trademarks, tradenames and service marks are conspicuously absent from the Bankruptcy Code's definition of "intellectual property".

D. The Senate Committee's 1988 Report on the bill for § 365(n) indicates that, while the Senate was concerned about the impact of *Lubrizol*, trademarks, trade names and service marks raised issues that were beyond the scope of that legislation

1. Unlike the licensing of patents, for example, the licensing of trademarks, trade names and service marks depends on control of the quality of the products or services sold by the licensee.

2. The Senate Committee Report indicates that Congress simply intended to *postpone* action regarding trademarks, trade names and service marks to allow the bankruptcy courts to develop a way to equitably handle the treatment of executory contracts and/or licenses regarding them.

E. In the past five years, case law has shifted away from *Lubrizol.*

1. In *In re Exide Technologies,* 607 F.3d 957, 965 (3d Cir. 2010), *cert. denied,* 131 S. Ct. 1470 (2011), Circuit Judge Ambro wrote a concurring opinion that observed that rejection under § 365 has no effect on the continued existence of the contract: it is *not* tantamount to a rescission or voiding of the contract. Instead, rejection merely frees the bankruptcy estate from the obligation to perform under the contract. *Id* at 967. Consequently, Judge Ambro observed that a trademark licensor's rejection of a trademark license agreement under § 365 does not necessarily deprive the licensee of its rights in the licensed mark stating that:

> Courts may use § 365 to free a bankruptcy trademark licensor from burdensome duties that hinder its reorganization. They should not-as occurred in this case-use it to let a licensor take back trademark rights it bargained away. This makes bankruptcy more a sword than a shield,

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(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract: and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

putting debtor-licensors in a catbird seat they often do not deserve." *Id.* at 967-968.

2. In *Sunbeam Products, Inc., v. Chicago. Am. Mfg., LLC,* 686 F.3d 372, 376-378 (7th Cir. 2012), *cert. denied,* 133 S. Ct. 790 (2012), Chief Judge Easterbrook noted that, pursuant to § 365(g), rejection of a license to use intellectual property constitutes a pre-petition breach, rather than a termination of the licensee's right of rights to use the intellectual property, stating: "…nothing about this process implies that any rights of the other contracting party have been vaporized." *Id.* at 377.

F. In 2014, *Interstate Bakeries* and *Crumbs* (both cases involving baked goods!) protected the rights of trademark licensees, but for *very* different reasons.

II. *In re Interstate Bakeries Corp.*, 751 F.3d 955 (8th Cir. 2014).

A. The 2014 opinion in *Interstate Bakeries* emanates from an *en banc* rehearing. Judge Colloton wrote the majority opinion, and Judge Bye (joined by Judges Smith and Kelly) filed a separate opinion concurring in part, and dissenting in part. The 2014 decision in *Interstate Bakeries* held that the license agreement was not executory and, therefore, it could not be rejected. While the decision had the effect of protecting the trademark licensee, it is based on principles of contract integration and "substantial performance", rather than § 365(n).

B. Facts and Procedural History:

1. In 1995, Interstate Bakeries announced its acquisition of Continental Baking Company. The Department of Justice challenged the acquisition as inconsistent with antitrust law.

2. In 1996 the US District Court in Illinois issued a judgment requiring Interstate bakeries to divest itself of at least one of its labels in each of four territories.

3. In order to comply with the Judgment, in December of 1996, Interstate Bakeries entered into an Asset Purchase Agreement and a License Agreement with Lewis Brothers Bakeries, Inc. ("LBB"). The Asset Purchase Agreement ("APA") provided for the transfer of LBB of certain assets *and* a perpetual and royalty-free license to use the trademarks pursuant to the License Agreement.

4. In 2004, Interstate Bakeries (and eight affiliates) filed Chapter 11.

5. In November 2008, the debtor filed an amended plan of reorganization that identified the License Agreement as an executory contract that the debtor wanted to assume.

6. In December, 2008, LBB filed an adversary proceeding seeking a declaratory judgment that the License Agreement was *not* executory and was, therefore, ineligible for assumption or rejection pursuant to 11 U.S.C. § 365. The debtor countered

by filing a motion to reject the License Agreement and seeking a declaration that the License Agreement was executory.

7. The parties filed cross-motions for summary judgment. Before the court ruled on the summary judgment motions, the debtor reinstated its request to assume the License Agreement and reiterated its request that the License Agreement be declared to be executory.

8. The bankruptcy court focused solely on the License Agreement and held that it was executory because both the debtor and LBB had material outstanding obligations. *See* 2010 WL 2332142 (Bankr. W.D. Mo. 2010). LBB appealed and the District Court affirmed the bankruptcy court. *See* 447 B.R. 879 (W.D. Mo. 2011).

9. LBB appealed to the Eighth Circuit Court of Appeals and, while that appeal was pending, changed its name to Hostess Brands, Inc. ("Hostess"). In January, 2012, Hostess filed bankruptcy in New York.

10. In August, 2012, a divided panel of the Eighth Circuit affirmed the District Court and held that the License Agreement was executory. *In re Interstate Bakeries Corp.,* 690 F.3d 1069 (8th Cir. 2012).

11. In June of 2013, after receiving the views of the FTC and of the Antitrust Division of the Department of Justice[2], the Eighth Circuit granted LBB's petition for rehearing *en banc*.

C. 2014 Ruling on Rehearing *en banc*: After concluding that the appeal was not moot, the Eighth Circuit *reversed* and held that:

1. Although the lower courts focused solely on the License Agreement in determining what constitutes the contract, the License Agreement and the APA were an integrated agreement and should be considered together to determine whether the contract is executory.

2. The Countryman definition of "executory" applies in the Eighth Circuit and it requires a comparison of the performed obligations with the unperformed obligations—not just a look at remaining obligations to be performed. 751 F.3d at 963.

3. The Court applied the "substantial performance" doctrine to determine whether the integrated contract (*i.e.,* the License Agreement and the APA) was executory.

a. Substantial performance is the antithesis of material breach; if the contract is found to be "substantially performed," then it is not executory.

[2] The Eighth Circuit invited the Antitrust Division of the Department of Justice and the FTC to express their views as *amici curiae.* Those agencies asserted that if Interstate was permitted to reject the License Agreement as an executory contract, that ruling would undermine the remedial purpose of the 1996 Judgment that required Interstate Bakeries to enter into the License Agreement as part of the court-ordered divestiture.

b. If, however, a breach is material or goes to the root or essence of the contract, then substantial performance has not been rendered the contract is executory. 751 F.3d at 962.

4. The essence of the integrated agreement in *Interstate Bakeries* was the sale of the bread business in certain territories, not just the licensing of trademarks. The court concluded that Interstate Bakeries had substantially performed and held that the contract was not executory—so it could not be rejected.

5. However, three of the circuit court judges dissented on the issue of "executoriness", concluding that *both* parties to the License Agreement have material ongoing obligations that were important to the integrated License Agreement and APA, and that would result in material breaches if not performed, and that there had not been substantial performance.

D. Lessons Learned from *Interstate Bakeries*:

1. Trademark license agreements contain provisions regarding quality of the goods or services, because that's how the licensor protects the mark. Bankruptcy lawyers often presume that these "quality control" provisions render a trademark license executory, because there are material obligations unperformed on both sides: the licensee must comport with the quality requirements and the licensor must comply with forbearance requirements.

2. *Interstate Bakeries* teaches bankruptcy lawyers to: (i) watch out for integration clauses that "link" the trademark license to another agreement (*e.g.*, an asset purchase agreement), and (ii) understand the "substantial performance" doctrine and how it works when the trademark license is integrated with another agreement.

3. *Interstate Bakeries* also teaches us that the *context* in which the license agreement arises is very important. In *Interstate Bakeries,* the License Agreement and the APA were both signed in December, 1996 to effect a divestiture in certain markets, so that Interstate Bakeries could comply with the 1996 judgment. Recognizing that context, the Eighth Circuit Court of Appeals framed the issue as whether the License Agreement was *separate* from the APA. Once it concluded that the License Agreement and the APA should be considered together as an integrated agreement, it was easier for the court to conclude that one side or the other had substantially performed so that the contract was not executory and, therefore, could not be rejected (or assumed).

III. *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (Bankr. D. N.J. 2014).

A. *Crumbs* follows the anti-*Lubrizol* trend that the Third Circuit started in *In re Exide Technologies,* 607 F.3d 957, 965 (3d Cir. 2010), *cert. denied,* 131 S. Ct. 1470 (2011) and the Seventh Circuit continued in *Sunbeam Products, Inc. v. Chicago. Am. Mfg., LLC,* 686 F.3d 372, 376-378 (7th Cir. 2012), *cert. denied,* 133 S. Ct. 790 (2012). *Crumbs* holds that trademark

licensees are entitled to protection under § 365(n) and that a § 363 sale does *not* extinguish a licensee's § 365(n) rights absent consent by the licensee. Although there was an appeal in *Crumbs,* as of February 12, 2015 it appears that appeal has been settled.

B. Facts:

1. Pre-petition, Crumbs entered into various license agreements that allowed third parties to use the Crumbs trademark and trade secrets, and to sell products using the Crumbs brand (the "Trademark Licenses"). Crumbs used Brand 2 Squared Licensing ("BSL") to provide brand licensing services.

2. Crumbs ceased operations on July 7, 2014 then filed Chapter 11 on July 11, 2014. On the Petition Date, Crumbs entered into a credit bid asset purchase agreement with Lemonis Fischer Acquisition Company, LLC ("LFAC") for a sale of substantially all of Crumbs' assets.

3. Crumbs filed a motion seeking approval of sale procedures, approval of the APA, and authority to sell substantially all assets free and clear of all liens, claims, encumbrances and interests. A proposed Sale Order was attached to this motion.

4. On July 25, 2014, the court approved the sale procedures, which called for an auction process.

5. No higher or better offers were received. On August 27, 2014 the court entered the Sale Order that approved the sale of substantially all assets to LFAC, "free and clear" of liens, claims, encumbrances and interests.

6. On August 28, 2014, Crumbs filed a motion to reject certain executory contracts, including the Trademark Licenses.

7. BSL responded to the rejection motion, claiming that the trademark licensees could use § 365(n) to retain their respective rights under the License Agreements. BSL also claimed that it is entitled to receive the royalties if the licensees elected to use § 365(n) to retain their rights under the Trademark Licenses. The parties sought a determination of their respective rights.

C. Court's Rulings:

1. Trademark licensees whose licenses have been rejected by the debtor/licensor fall within the protection of 11 U.S.C. § 365(n), even though 11 U.S.C. § 101(35A) excludes "trademarks" from the definition of intellectual property.

a. § 365(n) represents Congressional intent to make it clear that the licensee's rights to use the intellectual property cannot be unilaterally cut off as a result of the debtor/licensor's rejection of the license.

b. It is inappropriate to draw a negative inference from § 101(35A)'s exclusion of trademarks from the definition of "intellectual property", because the legislative history of § 365(n) indicates that Congress didn't intend to exclude trademarks but, instead, "…intended the bankruptcy courts to exercise their equitable powers to decide, on a case by case basis, whether trademark licensee may retain the rights listed under § 365(n)." 522 B.R. at 772.

c. The Innovation Act of 2013, H.R. 3309, 113th Cong. § 6(d) (2013) constitutes pending legislation that would amend 11 USC § 101(35A) to specifically include trademarks, trade names and service marks within the Bankruptcy Code's definition of "intellectual property". Although this pending legislation wasn't dispositive, the court concluded that it suggests Congress' awareness of the problem, and its willingness to change the law to protect trademark licensees. 522 B.R. at 773-774.

2. In the absence of the licensee's consent, a sale under § 363 does not "trump" the rights granted to licensees under § 365(n). 522 B.R. at 774. Consequently, a trademark licensee is entitled to the protections of § 365(n) even when the debtor's assets are being sold in a § 363 sale.

a. It would be inequitable to strip the trademark licensees of their rights upon a debtor/licensor's rejection of the trademark license: the debtor/licensor had *already* bargained away trademark rights by granting the trademark license in the first place and cannot use bankruptcy's rejection process to "take back" rights that it previously bargained away.

b. Lenders and administrative claimants tend to be the primary recipients of the proceeds of any asset sale, and unsecured creditors generally get only minimal distributions. It is unlikely that Congress intended to force trademark licensees to sacrifice their rights so that the secured lender could get paid.

3. The trademark licensees' failure to object to the § 363 sale did *not* constitute their implied consent to a sale "free and clear" of their rights because the licensees were *not* provided with adequate notice that their rights would be stripped away by the sale. The Asset Purchase Agreement did not clearly indicate what was being sold; the descriptions of "Purchased Assets" and "Excluded Assets" were murky, and the reference to third-party licenses consisted of ten words buried in a long document.

4. If a trademark licensee uses the protections of § 365(n), the purchaser of the debtor's assets is not suddenly "thrust against its will" into the position of being a licensor to these trademark licensees.

a. In *Crumbs,* the stalking horse bidder was the purchaser. Consequently, the court reasoned that it came into the transaction with its eyes

wide open, and that due diligence enabled the purchaser to adjust the purchase price due to the trademark licenses.

b. Although the Asset Purchase Agreement sold trademarks and other intellectual property to LFAC, it *excluded* the License Agreements from the sale. Consequently, the purchaser (as owner of the trademarks) was the only entity that could perform the licensor's obligations under the License Agreements, and the debtor (which sold the trademarks and, therefore, could not perform the licensor's obligations) would have to reject the trademark licenses. If the debtor rejects the trademark licenses and the trademark licensees elect the protections in § 365(n), the debtor is entitled to receive the royalties due.

D. Lessons Learned from *Crumbs*

1. By clearly ruling that trademark licensees are entitled to protection under § 363(n), and that (absent a licensee's consent) a § 363 sale does *not* trump the rights granted under §365(n), *Crumbs* is a big victory for trademark licensees, and provides much-needed analytic clarity on how to handle trademark licensing issues in the context of a § 363 sale.

2. *If a licensee consents,* then (pursuant to § 363(f)(2)) the sale *could* be "free and clear" of the licensee's rights under § 365(n). The discussion of implied consent in Crumbs indicates that a licensee could impliedly consent *if* it was provided with adequate notice that its rights were at risk of being stripped away in the debtor/licensor's § 363 sale and the licensee failed to object to the sale. Even though *Crumbs* was a victory for the licensees in that case, the decision also indicates that licensees of *any* type of intellectual property should object to a § 363 sale if they have notice that it proposes to wipe out or adversely impact their rights.

3. In *Crumbs,* the licensees (who failed to object to the § 363 sale) *benefitted* from the murkiness of the Asset Purchase Agreement and from the debtor's failure to provide adequate notice that the licensees' rights would be wiped out in the sale. The Court found that it would be inequitable to strip the licensees of rights under § 365(n) without adequate notice. So, *Crumbs* serves as a warning to debtor's counsel to make sure that the notice of the §363 sale clearly alerts intellectual property licensees that their rights may be extinguished or adversely affected, so that those licensees are on notice that they should object to the § 363 sale in order to preserve their rights under § 365(n).

The Octaviar Saga: The Chapter 15 Door Opens, Closes, and then Reopens on the Foreign Representatives

Howard Seife and Francisco Vazquez[*]

In considering an appeal of an order granting recognition to the Australian liquidation of Octaviar Administration Pty Ltd. ("*Octaviar*"), the United States Court of Appeals for the Second Circuit in In re Barnet, 737 F.3d 238, 58 Bankr. Ct. Dec. (CRR) 251, 70 Collier Bankr. Cas. 2d (MB) 1203, Bankr. L. Rep. (CCH) P 82554 (2d Cir. 2013), held that a foreign debtor must satisfy section 109(a) of Title 11 of the United States Code (the "Bankruptcy Code")[1] before a foreign proceeding can be recognized under Chapter 15.[2] While there is no question that the eligibility requirements of section 109(a) apply to a debtor that is the subject of a plenary bankruptcy case, until the Second Circuit's ruling no court had imposed that requirement on a foreign debtor in a Chapter 15 case. After ruling that section 109(a) applies to a foreign debtor in a Chapter 15 case, the Second Circuit found that the foreign representatives of Octaviar had not made any attempt to demonstrate that Octaviar satisfied that requirement. Therefore, the Second Circuit vacated the bankruptcy court's order granting recognition to Octaviar's liquidation and remanded the matter to the bankruptcy court.

A good deal has been written criticizing the Second Circuit's *Barnet* decision and its conclusion that section 109(a) applies in Chapter 15 cases.[3] Very little, however, has been written about the Second Circuit's procedural holding in its decision that allowed it to reach the merits of the appeal in the first place. This article examines the events leading up to the request for recognition of Octaviar's liquidation (the "*Australian Liquidation*"), analyzes the Second Circuit's controversial procedural and substantive rulings, and describes the steps taken by Octaviar's liquidators to satisfy section 109(a)'s eligibility requirements following the Second Circuit's decision.

Octaviar's Business Operations

Prior to its liquidation, Octaviar was a member of a group of companies known as the "Octaviar Group" that operated a broad range of enterprises,

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including: (i) a travel and tourism business conducted through a collection of companies known as the "Stella Group"; (ii) a corporate and investment banking division; (iii) a funds management division; and (iv) a structured finance and advisory division. Octaviar's primary function was to operate the Octaviar Group's bank accounts, employ staff for the Octaviar Group and act as the Octaviar Group's treasury.

The Demise of the Octaviar Group

In January 2008, the Octaviar Group announced its intention to separate its financial services businesses from its travel and tourism business (i.e., the Stella Group). Following this announcement, the share price of Octaviar Limited ("*OL*")—the publicly traded ultimate parent company of the Octaviar Group—rapidly fell from AUD$3.18 to AUD$0.99. Shortly thereafter, trading of OL's shares was suspended by the Australian Stock Exchange. That suspension was never lifted.

The collapse in OL's share price triggered an event of default under a AUD$150,000,000 bridge facility (the "*Facility*") provided by Fortress Credit Corporation (Australia) II Pty Limited ("*Fortress*"), an affiliate of Drawbridge Special Opportunities Fund LP ("*Drawbridge*"). In an attempt to enable the Octaviar Group to raise sufficient funds to repay the Facility, Fortress waived the event of default and extended the term of the Facility until the earlier of March 30, 2008 or the sale of the Stella Group.

In February 2008, the Octaviar Group sold 65% of the Stella Group to Global Voyager Pty Limited ("*Global*") for AUD$400,000,000 plus Global's assumption of approximately AUD$900,000,000 of debt owed by the Stella Group. The proceeds of the sale were used to repay the Fortress Facility in full.

On June 4, 2008, the Public Trustee of Queensland, in its capacity as the trustee of certain note and bond issuances by Octaviar Investment Notes Limited ("*OIN*") and Octaviar Bonds Limited ("*OIB*"), each an Octaviar Group subsidiary, filed an application in the Supreme Court of Queensland, Australia (the "*Australian Court*") seeking orders to wind up OL, OIN, OIB and another subsidiary, Octaviar Financial Services Pty Limited. Thereafter, on October 3, 2008, the directors of Octaviar resolved to place Octaviar into external administration in Australia. Pursuant to Australian law, Octaviar was deemed to have passed a special resolution that it be wound up, and on September 9, 2009, the Australian Court appointed Katherine Elizabeth Barnet and William John Fletcher as the liquidators of Octaviar (the "*Liquidators*").

The Liquidators Pursue Claims Against Fortress in Australia

Under Australian law, a liquidator is entrusted with, among other things, managing a debtor, investigating potential causes of action, prosecuting, settling or otherwise resolving such causes of action, and making distributions to creditors. Following their appointment, the Liquidators commenced litigation in Australia to recover approximately AUD$210,000,000 from

Fortress and certain affiliates. Neither Drawbridge nor Fortress's other U.S. affiliates were named as defendants in that litigation. The Australian litigation remains pending.

The Liquidators Seek Recognition of the Australian Liquidation

During the course of their investigation into the claims against Fortress and its affiliates, the Liquidators became aware of potential claims against Drawbridge and other Fortress affiliates in the United States. To facilitate the investigation and prosecution of such claims, the Liquidators commenced a Chapter 15 case in the United States Bankruptcy Court for the Southern District of New York (the "*Bankruptcy Court*") seeking recognition of the Australian Liquidation as a foreign main proceeding (the "*Initial Chapter 15 Case*"). Chapter 15 recognition of the Australian Liquidation would, in turn, allow the Liquidators to seek Bankruptcy Court authority to obtain discovery in the United States.[4] Moreover, upon recognition of the Australian Liquidation, the Liquidators would be empowered to sue in any court in the United States.[5]

Drawbridge objected to Chapter 15 recognition, claiming that Octaviar was not eligible to be a debtor under the Bankruptcy Code and therefore the Australian Liquidation could not be recognized in the United States.

Although the Bankruptcy Code provides relatively easy access for foreign companies to reorganize or liquidate under its plenary Chapters (i.e., Chapter 7 or 11), it does impose certain requirements. Under section 109(a) of the Bankruptcy Code, a company cannot be a debtor in a bankruptcy case, unless it has property, a residence, a domicile or a place of business in the United States. Although these requirements apply to both foreign and domestic entities, they were generally understood to apply solely to debtors seeking protection under the Bankruptcy Code's plenary Chapters.[6] They had never been applied to a foreign debtor whose foreign proceeding was the subject of a Chapter 15 petition.[7]

Drawbridge asserted that section 109(a)'s eligibility requirements also apply to debtors in Chapter 15 cases. In support of its position, Drawbridge relied on section 103 of the Bankruptcy Code, which provides that Chapter 1 of the Bankruptcy Code (which includes section 109) applies in a case under Chapter 15. Because Octaviar did not have a residence, domicile or place of business in the United States, Drawbridge argued that Octaviar could only be eligible to be a debtor if it had property in the United States. Further, according to Drawbridge, Octaviar was required to show that it had that property in the United States as of the date on which the Chapter 15 case was commenced.[8]

At the hearing to consider the Liquidators' petition for recognition of the Australian Liquidation, the Bankruptcy Court rejected Drawbridge's argument and noted that there were at least two instances in which a court previously determined that a foreign debtor need not have assets in the United States for its foreign proceeding to be granted recognition under Chapter 15. The Bankruptcy Court highlighted Judge Alan Gropper's analysis in In re

Toft, 453 B.R. 186, 55 Bankr. Ct. Dec. (CRR) 61, 66 Collier Bankr. Cas. 2d (MB) 323 (Bankr. S.D. N.Y. 2011) wherein he explicitly concluded that section 109 did not apply to foreign debtors under Chapter 15.[9] As the Bankruptcy Court and Judge Gropper recognized, this conclusion was consistent with practice and case law under former section 304 of the Bankruptcy Code, the predecessor to Chapter 15.[10] The Bankruptcy Court further noted that Judge Burton Lifland had similarly concluded in *Fairfield Sentry* that an ancillary proceeding is "not premised on the presence of property within the United States."[11] Relying on the analysis set forth in the *Toft* and *Fairfield Sentry* cases, and given the lack of any contrary legal authority, the Bankruptcy Court issued an order granting recognition to the Australian Liquidation under Chapter 15 (the "Recognition Order").[12] Drawbridge thereafter appealed the Recognition Order.

The Second Circuit Agreed to Directly Hear the Appeal and Stayed Proceedings in the Initial Chapter 15 Case

In general, an appeal from a bankruptcy court's order is heard by a district court or, in those circuits where one has been created, by a bankruptcy appellate panel.[13] A bankruptcy court order, however, may be appealed directly to a court of appeals (thereby bypassing district court or bankruptcy appellate panel review) if certain requirements are met.[14]

Although the Liquidators and Drawbridge did not agree on whether section 109(a)'s eligibility requirements applied to a debtor under Chapter 15, they did agree that the appeal should be heard, if possible, directly by the Second Circuit. Upon the request of the Liquidators and Drawbridge, the Bankruptcy Court certified a direct appeal to the Second Circuit after concluding (1) there was no controlling precedent in the Second Circuit, (2) the issue raised an issue of public importance, and (3) the appeal directly to the Second Circuit would materially advance the progress of the Initial Chapter 15 Case.[15] Following the Bankruptcy Court's certification and upon a joint request by the Liquidators and Drawbridge, the Second Circuit agreed to consider the appeal. In addition, the Second Circuit, upon Drawbridge's request, stayed all proceedings in the Initial Chapter 15 Case pending resolution of the appeal.

The Liquidators' Efforts to Obtain Discovery from Drawbridge in the United States

After Drawbridge filed its notice of appeal, but before the Second Circuit stayed the Initial Chapter 15 Case, the Liquidators filed a request with the Bankruptcy Court for authority to take discovery from Drawbridge and certain directors of entities related to Fortress that reside in the United States.[16] In particular, the Liquidators sought information concerning Octaviar's failure and possible claims and causes of action against Drawbridge and other entities in the United States arising from transactions with Octaviar. Many of these transactions were the subject of the litigation being

pursued by the Liquidators in Australia against Fortress and certain of its non-U.S. affiliates.

Drawbridge objected to discovery under Chapter 15 based on the "pending proceeding rule," which precludes using certain generalized discovery tools available in a bankruptcy case to aid an already pending litigation proceeding.[17] According to Drawbridge, the Liquidators were inappropriately seeking discovery from Drawbridge and others in the United States to circumvent the discovery procedures in the Australia litigation pending against Fortress and its affiliates. Moreover, Drawbridge alleged that the scope of the Liquidators' discovery was broader than what is permissible under Chapter 15 and, to the extent applicable, Federal Rule of Bankruptcy Procedure 2004.

After several hearings, the Bankruptcy Court entered an order permitting the Liquidators to take discovery from Drawbridge (the "Chapter 15 Discovery Order"). Because the Second Circuit thereafter stayed the Initial Chapter 15 Case, the Liquidators were not able to pursue discovery under the Chapter 15 Discovery Order. The Liquidators, however, were able to seek discovery outside of the Bankruptcy Court through an alternative procedure: section 1782 of title 28 of the United States Code ("Section 1782").[18]

Section 1782, which is entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," is designed to assist applicants in obtaining discovery from persons in the United States for use in foreign jurisdictions.[19] Because a request for such discovery would proceed in a district court and outside of the Bankruptcy Court assigned to the Initial Chapter 15 Case, the Liquidators were not stayed from seeking discovery under Section 1782. Indeed, Drawbridge asserted on several occasions that the Liquidators should have sought discovery under Section 1782, instead of Chapter 15. Nevertheless, Drawbridge initially objected to the Liquidators' request for discovery under Section 1782. Ultimately, the Liquidators agreed not to pursue discovery under the Chapter 15 Discovery Order and in exchange Drawbridge agreed to provide discovery under Section 1782.

The Second Circuit's Ruling

The Second Circuit Holds that Section 109(a)'s Eligibility Requirements Apply to a Foreign Debtor Under Chapter 15

While the parties addressed discovery issues before the district court, the appeal of the Recognition Order progressed to the Second Circuit and was ultimately heard on October 15, 2013. Drawbridge again argued that a literal reading of the Bankruptcy Code requires that section 109(a)'s eligibility requirements be imposed on a foreign debtor in a Chapter 15 case. In response, the Liquidators raised several arguments focussing on the differences between Chapter 15 cases and cases under Chapter 7 and 11 of the Bankruptcy Code and the inappropriateness of applying section 109(a) in Chapter 15.

The Liquidators first argued that section 109(a) set forth the requirements for becoming a debtor in a case under the Bankruptcy Code, and because Octaviar, a debtor in an Australian proceeding, was not petitioning to be a debtor under the Bankruptcy Code, section 109(a)'s requirements were not applicable. Indeed, the Liquidators were seeking only recognition of the Australian Liquidation under Chapter 15, a distinction previously noted by other courts.[20] The Second Circuit, however, was not persuaded by this argument, "because the presence of a debtor is inextricably intertwined with the very nature of a chapter 15 proceeding, both in terms of how such a proceeding is defined and in terms of the relief that can be granted."[21]

The Liquidators further argued that any limitations imposed on a "debtor" by section 109(a) did not apply to a "foreign debtor" in a Chapter 15 case, because Chapter 15 has its own unique definition for a debtor that differs from the definition of debtor used in the Bankruptcy Code's other Chapters, including Chapter 1 (and, by extension, section 109).[22] The Second Circuit rejected that argument, concluding that Chapter 15's definition of a debtor did not "block" application of section 109(a)'s eligibility requirements.[23] Specifically, the Second Circuit found that while section 1502 may trump the definition of a debtor contained in section 101 of the Bankruptcy Code, which defines terms used throughout the Bankruptcy Code, it did not supplant the eligibility requirements set forth in section 109(a).[24]

Finally, the Liquidators argued that the imposition of section 109(a)'s eligibility requirements in a Chapter 15 case would be inconsistent with section 1528 of the Bankruptcy Code and the federal venue statute applicable to Chapter 15 cases. Section 1528 states, in pertinent part, that "[a]fter recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States."[25] By implication, Chapter 15 therefore provides for the recognition of foreign proceedings in which the debtor does not have assets in the United States. The Second Circuit noted that property, however, is not the only way to satisfy section 109(a)'s eligibility requirements. The court reasoned that an entity that does not have property in the United States could nevertheless be eligible to be a debtor if it has a domicile or place of business in the United States. Therefore, the Second Circuit rejected the Liquidators' contention that section 1528 precludes the application of section 109(a) in Chapter 15 finding that "there is nothing contradictory or disharmonious about applying Section 109(a) to Chapter 15."[26]

The Second Circuit noted that the Liquidators "come closer to the mark" with their Chapter 15 venue argument. Under section 1410 of title 28 of the United States Code, a Chapter 15 case may be brought "even when the debtor does not have a place of business or assets in the United States."[27] This procedural rule, however, could not negate section 109(a)'s eligibility requirements, because, according to the Second Circuit, "to allow the venue statute to control the outcome would be to allow the tail to wag the dog."[28]

Ultimately, the Second Circuit held that because section 109(a) was contained in Chapter 1 of the Bankruptcy Code and section 103(a) made all

of Chapter 1 applicable to Chapter 15 cases, a foreign debtor must satisfy section 109(a)'s eligibility requirements before Chapter 15 recognition may be granted to that debtor's foreign proceeding.[29] The Second Circuit, however, did not address whether Octaviar was eligible to be a debtor. Instead, despite the Liquidators' assertion that Octaviar held property in the United States in the form of claims and causes of action against Drawbridge, the Second Circuit found that the Liquidators had made no attempt to demonstrate that Octaviar satisfied the eligibly requirements. Accordingly, the Second Circuit vacated the Recognition Order and remanded the case to the Bankruptcy Court.

The Second Circuit Concluded that the Recognition Order was not Final, but Nevertheless Considered the Substance of the Appeal

Much has been written about the Second Circuit's holding that section 109(a) applies to a foreign debtor in a Chapter 15 case. Much less attention has been given to the Second Circuit's procedural ruling that allowed it to reach the merits of the appeal at all.

In briefing to the Second Circuit, the Liquidators argued that Drawbridge lacked standing to pursue the appeal of the Recognition Order because it was not "directly and pecuniarily harmed" by the Recognition Order. The Second Circuit agreed,[30] holding that Drawbridge did not have standing to appeal the Recognition Order because the Recognition Order did not grant any relief against Drawbridge.[31] That finding should have, but did not end the Second Circuit's analysis.

Instead, the Second Circuit concluded that Drawbridge was aggrieved by and could have appealed the Chapter 15 Discovery Order (despite a general rule prohibiting the appeal of orders authorizing discovery).[32] Drawbridge, however, had not appealed the Chapter 15 Discovery Order. Indeed, by the time the Second Circuit heard Drawbridge's appeal of the Recognition Order, the Liquidators had already agreed not to pursue discovery through the Chapter 15 Discovery Order. Nevertheless, the Second Circuit concluded that the Recognition Order was "non-final" and merged with the Chapter 15 Discovery Order because entry of the Chapter 15 Discovery Order was premised on entry of the Recognition Order. Accordingly, the Second Circuit held that the appeal of the Recognition Order could be treated as a premature appeal of the Chapter 15 Discovery Order.[33] Thus, the Second Circuit held that it could consider the Recognition Order (as merged with the Chapter 15 Discovery Order) despite not being able to consider Drawbridge's appeal of the Recognition Order on a stand-alone basis.[34]

In sum, the Second Circuit concluded that:

- Drawbridge lacked standing to appeal the Recognition Order;
- Drawbridge could have appealed the Chapter 15 Discovery Order, but did not;
- Because the Recognition Order was "non-final" (itself a novel holding that could prohibit the immediate appeal of a Chapter 15 recognition

order by any party), Drawbridge's appeal of the Recognition Order could be treated as an appeal of the Chapter 15 Discovery Order; and

- the Second Circuit could then evaluate the propriety of the Recognition Order, despite having just concluded that Drawbridge was not entitled to appeal the Recognition Order.

It remains to be seen whether other courts will follow the Second Circuit's procedural gymnastics in future appeals from Chapter 15 recognition orders. All that is certain is that appellate rights in Chapter 15 cases are now murkier than they were prior to the *Barnet* decision.

Liquidators Commence a New Chapter 15 Case

Significantly, the Second Circuit did not hold that Octaviar's liquidation was not entitled to recognition in the United States under Chapter 15 of the Bankruptcy Code. Rather, the Second Circuit held that recognition of the Australian Liquidation would depend on whether the Liquidators could demonstrate that Octaviar satisfied section 109(a)'s debtor eligibility requirements. Thus, on remand, the Liquidators could have pursued recognition by relying solely on the theory that Octaviar's claims against Drawbridge and its affiliates constituted property in the United States.[35] Although the Liquidators had always asserted that Octaviar's claims against Drawbridge were sufficient to satisfy section 109(a)'s eligibility requirements, they instead took remand as an opportunity to augment Octaviar's property in the United States. To that end, they transferred funds to the United States, to be held in escrow as retainers by their United States counsel. The Liquidators then commenced a new Chapter 15 case. This strategy ensured that, as of the date of the Liquidators' second Chapter 15 petition, there was no doubt that Octaviar had property in the United States.

Drawbridge again objected to recognition on the grounds that Octaviar did not meet section 109(a)'s debtor eligibility requirements. Faced with the fact that Octaviar unquestionably had tangible cash in the United States, Drawbridge argued that the Bankruptcy Court should look to the commencement of the Initial Chapter 15 Case as the appropriate date for determining Octaviar's eligibility to be a debtor and that the Liquidators' transfer of funds to the United States demonstrated bad faith and should thus disqualify such funds from consideration as property. Drawbridge also argued that Octaviar's intangible claims and causes of action against Drawbridge were located in Australia. Ultimately, the Bankruptcy Court was not persuaded by Drawbridge's arguments and concluded that Octaviar had both tangible and intangible property in the United States, either of which would independently satisfy section 109(a)'s requirements, as of the filing of the second Chapter 15 case.[36]

Octaviar's Causes of Action are Located in the United States and Satisfy Section 109(a)'s Eligibility Requirements

As an initial matter, the Bankruptcy Court came to the uncontroversial conclusion that claims and causes of action are, as a matter of New York

law, "property."[37] Thus, claims and causes of action may satisfy section 109(a)'s eligibility requirements as long as they are located in the United States.[38] It was therefore incumbent on the Bankruptcy Court to determine whether the claims and causes of action held by Octaviar, an Australian company, against Drawbridge, a United States entity, were "located in" the United States for purposes of section 109(a).[39]

Relying principally on In re Fairfield Sentry Ltd., 484 B.R. 615, 57 Bankr. Ct. Dec. (CRR) 116, 68 Collier Bankr. Cas. 2d (MB) 1645 (Bankr. S.D. N.Y. 2013), Drawbridge argued that the claims against it were not located in the United States. Specifically, Drawbridge asserted that *Fairfield Sentry* stands for the proposition that causes of action are invariably located where the plaintiff is domiciled. According to Drawbridge, all of Octaviar's claims, regardless of their nature, who they were against, or where they were being prosecuted, were, as a matter of law, located in Australia, where Octaviar is incorporated.

The Bankruptcy Court rejected Drawbridge's analysis and noted that the court in *Fairfield Sentry* concluded that "the situs of intangibles [including claims] depends upon a 'common sense appraisal of the requirements of justice and convenience' in the particular circumstances at issue."[40] Thus, the location of a claim may differ depending on the issue before a court.[41] In *Fairfield Sentry*, the bankruptcy court was asked to exercise its jurisdiction over SIPA claims asserted in the BVI. Because of the overwhelming nexus to the BVI, the *Fairfield Sentry* court held that the claims were located outside the United States.[42] In Octaviar's case, however, the claims were United States-centric. Many of the claims were based on U.S. law, all of the claims were asserted against defendants located in the United States, and the claims involved allegations of wrongful transfers of funds to the United States. Moreover, while the U.S. claims relied on many of the same underlying facts as the claims against Fortress and its Australian affiliates, none of the defendants in the New York litigation were defendants in the Australian litigation.[43] Indeed, the defendants in the New York litigation generally asserted that they were not even subject to jurisdiction in Australia. Additionally, the Bankruptcy Court concluded that a claim may be located wherever a court has both subject matter of the claim and personal jurisdiction over the defendants.[44] In the case of Octaviar's claims against Drawbridge and its U.S. affiliates, courts located in New York had both. Accordingly, the Bankruptcy Court concluded that the claims were located in New York. As such, Octaviar was eligible to be a debtor under section 109(a), because it had property in the United States in the form of claims and causes of action.[45]

Minimal Funds in the United States Satisfy Section 109(a)'s Eligibility Requirements

In addition to Octaviar's claims and causes of action against Drawbridge and related entities, the Bankruptcy Court concluded that Octaviar also had property in the United States in the form of a retainer held by its United States counsel. Drawbridge did not contest that a retainer can be used to

satisfy section 109(a)'s eligibility requirements.[46] Instead, Drawbridge argued that the Liquidators transferred Octaviar's funds to the United States in bad faith and in an improper attempt to evade the consequences of *Barnet* and to "manufacture eligibility."[47]

The Bankruptcy Court rejected this argument, finding no evidence of bad faith. Indeed, the Liquidators' steps to bolster Octaviar's assets in the United States on the eve of the second Chapter 15 filing was consistent with the actions taken by other debtors in plenary bankruptcy cases.[48] Moreover, the Bankruptcy Court noted that the Second Circuit used a "plain meaning" approach in construing section 109(a) in the *Barnet* decision. Invoking that same plain meaning approach, the Bankruptcy Court found that it need not inquire into the amount of property in the United States or the circumstances resulting in such property being found in the United States.[49] Because Octaviar had property in the United States, regardless of amount or form, as of the filing of the second Chapter 15 case, the Bankruptcy Court concluded that Octaviar was eligible to be a debtor under section 109(a).[50]

Chapter 15 Continues to be Available to Assist in the Administration of Foreign Proceedings

The Second Circuit's conclusion that section 109(a) applies in Chapter 15 cases has been criticized by commentators and has not, to date, been adopted by any court outside the Second Circuit.[51] Indeed, merely six days after the *Barnet* decision, the United States Bankruptcy Court for the District of Delaware rejected the Second Circuit's analysis and conclusion and stated that the Court of Appeals for the Third Circuit would likely reject *Barnet*.[52]

Recognizing the importance of its decision and its implication on future Chapter 15 cases, the Second Circuit took the unusual step of directing that a copy of the *Barnet* opinion be transmitted to Congress.[53] Until Congress amends the Bankruptcy Code or the Supreme Court addresses the issue, *Barnet* will remain binding in the Second Circuit. In the interim, the lower courts in the Second Circuit (and courts in other jurisdictions) will face a number of issues resulting from, but not answered by, *Barnet*.[54]

First, the Second Circuit did not address whether section 109(a)'s eligibility requirements can be satisfied solely by intangible assets, such as inchoate claims. Second, if lower courts follow the lead of the Bankruptcy Court by answering the first question in the affirmative, there will likely be further litigation regarding where intangible property is located for purposes of a section 109(a). Third, courts may continue to face questions regarding the date as to which section 109(a)'s requirements must be met and allegations of foreign representatives artificially manufacturing eligibility.

The Bankruptcy Court's most recent decision in *Octaviar* provides helpful answers to all three questions that are well-grounded in both the text of the Bankruptcy Code as a whole and the policy objectives of Chapter 15. Nevertheless, it remains to be seen whether other courts will follow the *Octaviar* court's lead in ensuring that the door to Chapter 15 remains open.

NOTES:

[1]Under section 109(a) of the Bankruptcy Code, only a person that resides or has a domicile, place of business or property in the United States is eligible to be a debtor in a bankruptcy case. See 11 U.S.C.A. § 109(a).

[2]Under section 1517 of the Bankruptcy Code, a "foreign proceeding," which would generally include a foreign insolvency, liquidation, bankruptcy or debt restructuring, shall be recognized if (1) the foreign proceeding is a foreign main or foreign nonmain proceeding, (2) a petition for recognition is filed by a foreign representative, and (3) the petition satisfies certain procedural requirements set forth in section 1517. See 11 U.S.C.A. § 1517; In re Fairfield Sentry Ltd., 714 F.3d 127, 132-33, 57 Bankr. Ct. Dec. (CRR) 232, 69 Collier Bankr. Cas. 2d (MB) 612, Bankr. L. Rep. (CCH) P 82472 (2d Cir. 2013). Assuming all three requirements are satisfied, courts have held that recognition should only be denied if it would be "manifestly contrary to the public policy of the United States." In re Ephedra Products Liability Litigation, 349 B.R. 333, 335, 56 Collier Bankr. Cas. 2d (MB) 734 (S.D. N.Y. 2006).

[3]See, e.g., 8 Collier on Bankruptcy ¶ 1501.03[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (noting that because "the intent of chapter 15 and the Model Law on which it was based was to determine eligibility based on the attributes of the foreign proceeding, not of the debtor," "[t]he *Barnet* decision should not be followed outside of the Second Circuit"); R. Adam Swick, Section 109(a)'s Jurisdictional Requirements Applied to Chapter 15, 33 Am. Bankr. Inst. J. 30, 92 (Mar. 2014) (noting that the *Barnet* holding "is ill-suited for deciding the jurisdictional requirements for a chapter 15 case"); see also Transcript of Hearing Before Honorable Kevin Gross United States Bankruptcy Judge at 8, In re Bemarmara Consulting A.S., No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013) (noting that "this Court does not agree with the [*Barnet*] decision").

[4]See 11 U.S.C.A. § 1521.

[5]See 11 U.S.C.A. § 1509. "To deny recognition might be to deny the Foreign Representatives of their common law rights as trustees to bring an action in order to assert claims on behalf of beneficiaries." In re Octaviar Administration Pty Ltd, 511 B.R. 361, 374, 59 Bankr. Ct. Dec. (CRR) 175 (Bankr. S.D. N.Y. 2014) (citation and footnote omitted).

[6]See In re Aerovias Nacionales de Colombia S.A., 303 B.R. 1, 9-10 (Bankr. S.D. N.Y. 2003) (citing Chapter 11 cases).

[7]See In re Toft, 453 B.R. 186, 192-93, 55 Bankr. Ct. Dec. (CRR) 61, 66 Collier Bankr. Cas. 2d (MB) 323 (Bankr. S.D. N.Y. 2011) ("The eligibility standards in § 109 for filings under the various chapters of the Bankruptcy Code do not require that a debtor in a foreign proceeding have a place of business or property in the United States."); In re Tri-Continental Exchange Ltd., 349 B.R. 627, 632, 47 Bankr. Ct. Dec. (CRR) 31 (Bankr. E.D. Cal. 2006) ("The possibility that an entity that is ineligible to be a debtor under the Bankruptcy Code could be the subject of a chapter 15 proceeding necessitated a special definition of 'debtor.' ").

[8]It was undisputed that Octaviar lacked any tangible property in the United States at that time. Moreover, Drawbridge argued that any intangible property that Octaviar possessed—such as claims and causes of action against Drawbridge and its affiliates—were as a matter of law located where Octaviar was incorporated (i.e., Australia) rather than the United States.

[9]The court in *Toft* stated:

> The eligibility standards in § 109 for filings under the various Chapters of the Bankruptcy Code do not require that a debtor in a foreign proceeding have a place of business or property in the United States. See also § 1502(1), defining debtor in a Chapter 15 case as "the subject of a foreign proceeding." There is no authority that the adoption of Chapter 15 was intended to abrogate the availability of the tools of discovery to foreign representatives, whether or not the foreign debtor has assets in the United States.

In re Toft, 453 B.R. at 193.

[10]As Judge Gropper noted, "[p]rior to the adoption of chapter 15, it was also held that the bankruptcy courts had jurisdiction under § 304 of the Bankruptcy Code to order the examination of witnesses for the purpose of investigating the affairs of a foreign debtor, even where the foreign debtor had no business or assets in the United States." In re Toft, 453 B.R. at 192 (footnote omitted).

[11]See Transcript of September 6, 2012 Recognition Hearing at 19-20, Initial Chapter 15 Case, (Bankr. S.D.N.Y. Sept. 6, 2012), Docket No. 20. The bankruptcy court was also persuaded by a subsequent decision of the district court in In re Fairfield Sentry Ltd. Litigation, 458 B.R. 665 (S.D. N.Y. 2011) in which the court concluded that a debtor need not have assets in the United States for Chapter 15 relief to be granted. In re Fairfield Sentry Ltd. Litig., 458 B.R. 665, 679 n.5 (S.D.N.Y. 2011) ("This is not to say that all Chapter 15 cases require assets of the debtor in the United States. To the contrary, section 1521(a)(4), for example, allows for discovery in the United States whether or not a debtor has assets here.") (emphasis in original).

[12]See Transcript of September 6, 2012 Recognition Hearing at 29-31, Initial Chapter 15 Case, (Bankr. S.D.N.Y. Sept. 6, 2012), Docket No. 20; Order Granting Recognition of a Foreign Main Proceeding, Initial Chapter 15 Case, (Bankr. S.D.N.Y. Sept. 6, 2012), Docket No. 18. Following entry of the Recognition Order, another court held that "[i]t is not necessary that the debtor have any assets in the United States for there to be a chapter 15 case." In re British American Ins. Co. Ltd., 488 B.R. 205, 225, 57 Bankr. Ct. Dec. (CRR) 187 (Bankr. S.D. Fla. 2013).

[13]See 1 Collier on Bankruptcy ¶ 5.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) ("Decisions of bankruptcy courts are appealed to the district courts or, if they have been created, to bankruptcy appellate panels.").

[14]Section 158(d)(2) of title 28 of the United States Code provides that the courts of appeals may authorize the direct appeal of a bankruptcy judgment or order if the bankruptcy court or that appellants and appellees acting jointly certify that "(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or the Supreme Court of the United States, or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C.A. § 158(d)(2)(A).

[15]See Memorandum Opinion in Support of Certification of Direct Appeal to the Court of Appeals for the Second Circuit, Initial Chapter 15 Case, (Bankr. S.D.N.Y. Nov. 28, 2012), Docket No. 47.

[16]Upon recognition of a foreign proceeding, a foreign representative may seek any "appropriate relief," including discovery. See 11 U.S.C.A. § 1521(a)(4). Specifically, a foreign representative may seek an order "providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities." 11 U.S.C.A. § 1521(a)(4). Moreover, Federal Rule of Bankruptcy Procedure 2004, which has been described as a "fishing expedition," permits broad discovery regarding "the acts, conduct, or property or to liabilities and financial condition of the debtor, or to any matters which may affect the administration of the debtor's estate." Fed R. Bankr. P. 2004(a).

[17]See In re Millennium Global Emerging Credit Master Fund Ltd., 471 B.R. 342, 347, 56 Bankr. Ct. Dec. (CRR) 146 (Bankr. S.D. N.Y. 2012) ("The pending proceeding rule provides that once a formal legal case is commenced, 'discovery should be pursued pursuant to [that case's rules] and not by Rule 2004.' '') (citing In re Enron Corp., 281 B.R. 836, 841 (Bankr. S.D. N.Y. 2002)).

[18]Section 1782(a) provides, in pertinent part, that:

> The district court of the district in which a person resides or is found may order him to give his

> testimony or statement or to produce a document or other thing for use in a foreign or international tribunal. . . .

28 U.S.C.A. § 1782(a).

[19]See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355, 71 U.S.P.Q.2d 1001, 2004-1 Trade Cas. (CCH) ¶ 74453, 64 Fed. R. Evid. Serv. 742, 58 Fed. R. Serv. 3d 696 (2004).

[20]As noted by the court in Petition of Brierley, 145 B.R. 151, 159, 23 Bankr. Ct. Dec. (CRR) 429, 27 Collier Bankr. Cas. 2d (MB) 828 (Bankr. S.D. N.Y. 1992):

> there is . . . little reason to exclude an entity ineligible to be a debtor under our laws from being the subject of an ancillary proceeding so long as that foreign debtor is eligible to be the subject of a foreign proceeding under its own laws. The language of section 109(a) itself suggests the propriety of this conclusion, for it declares that its requirements pertain to someone wishing to be a debtor "under this title." But the foreign debtor in an ancillary proceeding is not a debtor in a case under title 11; it is a debtor only under foreign law.

Petition of Brierley, 145 B.R. 151, 159, 23 Bankr. Ct. Dec. (CRR) 429, 27 Collier Bankr. Cas. 2d (MB) 828 (Bankr. S.D. N.Y. 1992).

[21]In re Barnet, 737 F.3d 238, 248, 58 Bankr. Ct. Dec. (CRR) 251, 70 Collier Bankr. Cas. 2d (MB) 1203, Bankr. L. Rep. (CCH) P 82554 (2d Cir. 2013). The Second Circuit noted that the definition of terms critical to recognition located in both Chapter 1 (foreign proceeding and foreign representative) and Chapter 15 (foreign main proceeding and debtor) referred to debtor. "It stretches credulity to argue that the ubiquitous references to a debtor in both Chapter 15 and the relevant definitions of Chapter 1 do not refer to a debtor under the title that contains both chapters." In re Barnet, 737 F.3d 238, 248, 58 Bankr. Ct. Dec. (CRR) 251, 70 Collier Bankr. Cas. 2d (MB) 1203, Bankr. L. Rep. (CCH) P 82554 (2d Cir. 2013).

[22]See 11 U.S.C.A. § 1502 (defining a "debtor" as "any entity that is the subject of a foreign proceeding").

[23]In re Barnet, 737 F.3d at 249.

[24]In re Barnet, 737 F.3d at 249.(noting that "linguistic parallelism makes clear that Section 1502 supplants Section 101 — i.e., it supplants the definition of debtor within the context of Chapter 15 — but it does not supplant requirements for 'a debtor under this title' not included in the definition").

[25]11 U.S.C.A. § 1528.

[26]In re Barnet, 737 F.3d at 250.

[27]In re Barnet, 737 F.3d at 250.

[28]In re Barnet, 737 F.3d at 250. The Second Circuit was also not persuaded by the Liquidators' assertion that the imposition of section 109(a)'s eligibility requirements on Chapter 15 would be inconsistent with its international origins. In re Barnet, 737 F.3d at 251 (noting that "the omission of Section 109(a), or its equivalent, from the Model Law does not suffice to outweigh the express language Congress used in adopting Sections 109(a) and 103(a)").

[29]In particular, the Second Circuit stated:

> The straightforward nature of our statutory interpretation bears emphasis. Section 103(a) makes all of Chapter 1 applicable to Chapter 15. Section 109(a)—within Chapter 1—creates a requirement that must be met by any debtor. Chapter 15 governs the recognition of foreign proceedings, which are defined as proceedings in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court." 11 U.S.C.A. § 101(23). The debtor that is the subject of the foreign proceeding, therefore, must meet the requirements of Section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.

In re Barnet, 737 F.3d at 247.

[30]"[I]n order to have standing to appeal from a bankruptcy court ruling, an appellant

must be a person aggrieved — a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court." In re Barnet, 737 F.3d at 242 (citing In re DBSD North America, Inc., 634 F.3d 79, 88, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011). An appellant must be both a "party in interest" and an "aggrieved person." See In re Bernard L. Madoff Inv. Securities LLC, 2012 WL 2497270 (S.D. N.Y. 2012) (citations omitted). The Second Circuit did not address the Liquidators' contention that Drawbridge was not a party in interest.

[31]As the Second Circuit noted, "[t]he Recognition Order neither names Drawbridge nor directs any relief against Drawbridge." In re Barnet, 737 F.3d at 242. The Recognition Order merely provided for the recognition of the Australian Liquidation as a foreign main proceeding. Pursuant to section 1520, certain relief, including the imposition of the automatic stay, resulted upon recognition. In re Barnet, 737 F.3d at 243; 11 U.S.C.A. § 1520. Moreover, the Liquidators were granted the capacity to sue in the United States upon entry of the Recognition Order. See 11 U.S.C.A. § 1509.

[32]The Second Circuit noted that a discovery order is generally not appealable until the target of discovery refuses to comply and is held in contempt. See In re Barnet, 737 F.3d at 243. Because discovery under Section 1782 is generally to be used in a foreign tribunal, the Second Circuit has concluded that an order providing for such discovery is a "final resolution" and therefore appealable. In re Barnet, 737 F.3d 238, 58 Bankr. Ct. Dec. (CRR) 251, 70 Collier Bankr. Cas. 2d (MB) 1203, Bankr. L. Rep. (CCH) P 82554 (2d Cir. 2013) (citing Chevron Corp. v. Berlinger, 629 F.3d 297, 39 Media L. Rep. (BNA) 1129 (2d Cir. 2011). Because discovery under Chapter 15 is similar to discovery under Section 1782 in that it is to be used in a foreign tribunal, the Second Circuit, held that the Chapter 15 Discovery Order was appealable. Despite the Second Circuit's conclusion, there is nothing in Chapter 15 that would limit the use of any discovery obtained thereunder to a foreign tribunal.

[33]In re Barnet, 737 F.3d at 245 ("Our precedents are in accord. Invoking Rule 3(c)(4), we interpreted a notice of appeal from a final judgment entered 'on the 25th day of April, 2012, and from each part thereof' as also appealing from orders entered on five other days ranging from June 3, 2008 to April 24, 2012.") (citing L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Com'n of Nassau County, Inc., 710 F.3d 57, 63 n.3, 55 Employee Benefits Cas. (BNA) 2699 (2d Cir. 2013).

[34]To a certain extent, the Second Circuit's decision is internally inconsistent and contradicts prior court rulings. As an initial matter, it concluded that the Recognition Order was a non-final order. Thereafter, it noted that the order granting recognition to the Fairfield Sentry liquidation, an order substantially similar to the Recognition Order, was a final order subject to appeal. See In re Barnet, 737 F.3d at 242–243 (citing In re Fairfield Sentry Ltd., 714 F.3d 127, 57 Bankr. Ct. Dec. (CRR) 232, 69 Collier Bankr. Cas. 2d (MB) 612, Bankr. L. Rep. (CCH) P 82472 (2d Cir. 2013). This dichotomy may ultimately become the subject of future analysis by courts and litigants alike.

[35]Any effort by the Liquidators to transfer tangible property to the United States to bolster the argument that Octaviar was eligible to be a debtor in the Initial Chapter 15 Case would have likely been attacked by the Drawbridge on the basis that such property was not in the United States as of the filing of the Initial Chapter 15 Case. Indeed, in its initial objection to recognition, Drawbridge had argued that a debtor must meet section 109(a)'s debtor eligibility requirements as of the commencement of its bankruptcy case.

[36]In re Octaviar Administration Pty Ltd, 511 B.R. 361, 370-371, 59 Bankr. Ct. Dec. (CRR) 175 (Bankr. S.D. N.Y. 2014).

[37]In re Octaviar Administration Pty Ltd, 511 B.R. at 369–370 ("It is well established that claims and causes of action, though intangible, constitute 'property.' ").

[38]Drawbridge argued that the court's decision in In re Head, 223 B.R. 648, 32 Bankr. Ct. Dec. (CRR) 1222 (Bankr. W.D. N.Y. 1998) supported its position that claims are not property that can satisfy section 109(a)'s eligibility requirements. The court, however, concluded that

in that instance the alleged claims were "too tenuous, too inchoate and too contrived" to satisfy section 109(a)'s eligibility requirements. In re Octaviar Administration Pty Ltd., 511 B.R. at 371. Here, on the other hand, the Liquidators had sufficiently identified the claims.

[39]The Liquidators filed complaints in both the United States District Court for the Southern District of New York and the Supreme Court of the State of New York that asserted, among other things, New York state law claims against Drawbridge and related entities in the United States. None of the defendants named in the New York litigation are defendants in, or parties to, the Australian litigation.

[40]In re Octaviar Administration Pty Ltd, 511 B.R. at 371–372 (citing Fairfield Sentry, 484 B.R. at 624).

[41]In re Fairfield Sentry, 484 B.R. at 624 (noting that '' 'determination of situs for one purpose has no necessary bearing on its determination for another purpose' and the corresponding analysis is highly contextual.") (internal citations omitted).

[42]In re Octaviar Administration Pty Ltd, 511 B.R. at 371–72 (noting that "the BVI Court held the paramount interest" in the SIPA claim at issue and "there were no interests unique to the U.S. parties involved").

[43]In re Octaviar Administration Pty Ltd, 511 B.R. at 372 (footnote omitted).

[44]"As a general matter, where a court has both subject matter and personal jurisdiction, the claim subject to the litigation is present in that court." In re Octaviar Administration Pty Ltd, 511 B.R. at 372 (citing In re British American Ins. Co. Ltd., 488 B.R. 205, 231–32, 57 Bankr. Ct. Dec. (CRR) 187 (Bankr. S.D. Fla. 2013); In re Iglesias, 226 B.R. 721, 723 (Bankr. S.D. Fla. 1998)).

[45]The bankruptcy court also expressed concern that a contrary result could prevent the Liquidators from pursuing legitimate claims in the United States. As the bankruptcy court explained, "[t]o deny recognition might be to deny the [Liquidators] of their common law rights as trustees to bring an action in order to assert claims on behalf of beneficiaries." In re Octaviar Administration Pty Ltd, 511 B.R. at 374 (citing Clarkson Co. Ltd. v. Shaheen, 716 F.2d 126 (2d Cir. 1983)).

[46]In re Octaviar Administration Pty Ltd, 511 B.R. at 373-74 ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply 'property' sufficient to make a foreign debtor eligible to file in the United States.") (citing In re Taylor, 249 B.R. 571, 603, 36 Bankr. Ct. Dec. (CRR) 68 (Bankr. N.D. Ga. 2000); In re Yukos Oil Co., 321 B.R. 396, 401-03, 53 Collier Bankr. Cas. 2d (MB) 1366 (Bankr. S.D. Tex. 2005); In re Global Ocean Carriers Ltd., 251 B.R. 31, 39 (Bankr. D. Del. 2000)).

[47]In re Octaviar Administration Pty Ltd, 511 B.R. at at 372.

[48]Specifically, the Bankruptcy Court noted that Yukos Oil satisfied section 109(a)'s eligibility requirements by transferring funds to a newly created entity in the United States hours before it filed for relief under Chapter 11. See In re Octaviar, 511 B.R. at 372. (citing In re Yukos Oil Co., 321 B.R. at 411). In addition, Global Ocean carriers satisfied the eligibility requirement by maintaining bank accounts in the United States. See In re Octaviar, 511 B.R. at 373 (citing In re Global Ocean Carrier, Ltd., 251 B.R. at 37-46).

[49]The Bankruptcy Court concluded that "[s]ection 109(a) says, simply, that the debtor must have property; it says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property and is thus consistent with other provision of the Code that reject lengthy and contentious examination of the grounds for a bankruptcy filing." See In re Octaviar, 511 B.R. at 372. (footnote omitted).

[50]The mere fact that an entity is eligible to be a debtor under the Bankruptcy Code does not necessarily mean that a bankruptcy court will grant relief under the applicable Chapter. For example, a bankruptcy court may, under section 305 of the Bankruptcy Code, dismiss or abstain from a case. In re Octaviar, 511 B.R. at 373.

[51]See supra note 4.

[52]See Transcript of Hearing Before Honorable Kevin Gross United States Bankruptcy Judge, at 8-9, In re Bemarmara Consulting A.S., No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013). "[T]his Court does not agree with the decision of the Second Circuit. And it is the Court's belief that there is a strong likelihood that the Third Circuit, likewise, would not agree with that decision." Transcript of Hearing Before Honorable Kevin Gross United States Bankruptcy Judge, at 8-9, In re Bemarmara Consulting A.S., No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013).

[53]See In re Barnet, 737 F.3d 238, 251, 58 Bankr. Ct. Dec. (CRR) 251, 70 Collier Bankr. Cas. 2d (MB) 1203, Bankr. L. Rep. (CCH) P 82554 (2d Cir. 2013). According to the Judicial Conference, the courts of appeals are encouraged to inform Congress of any "technical deficiencies" in statutes. Report of the Proceedings of the Judicial Conference of the United States 62 (Sept. 19, 1995), available at http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1995-09.pdf.

[54]A discussion of all of the implications of this obligation on current and future Chapter 15 cases, including who has standing to appeal a "non-final" recognition order and the availability of discovery under Section 1782 absent recognition, is beyond the scope of this Article. However, those issues continue to develop. See In re Soundview Elite, Ltd., 503 B.R. 571, 592, 59 Bankr. Ct. Dec. (CRR) 16 (Bankr. S.D. N.Y. 2014), appeal dismissed, 512 B.R. 155 (S.D. N.Y. 2014) (noting, in a case decided after *Barnet*, that Section 1782 discovery, which entails a request before a district court, may not be available absent recognition, because section 1509 of the Bankruptcy Code "requires chapter 15 recognition in order to commence litigation in the U.S.").