

The Chapter 15 Two-Step: Shall We Dance?

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Chapter 15 provides for the recognition of foreign insolvency proceedings, allowing foreign representatives to gain assistance from U.S. bankruptcy courts to administer and protect a debtor's assets and business. Although a foreign representative commences a chapter 15 case by filing a "petition for recognition of a foreign proceeding under section 1515,"¹ the foreign representative cannot take advantage of the vast majority of rights, benefits and protections provided by chapter 15 until the bankruptcy court enters an order granting recognition of the foreign insolvency proceeding.² Because the court may only grant recognition of the foreign proceeding "after notice and hearing," despite chapter 15's provision requiring the court to decide a petition for recognition "at the earliest possible time," the soonest that the court can grant recognition is 21 days after the request is made.³



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Recognizing that this timeframe may interfere with one of the five articulated objectives of chapter 15—the "protection and maximization of the value of the debtor's assets"⁴—it includes a provision that allows a bankruptcy court to grant provisional relief if the requested relief "is urgently needed to protect the assets of the debtor or the interests of the creditors."⁵ The provisional relief that a court may grant includes many of the key safeguards and rights provided by or available to a foreign representative upon recognition of the foreign insolvency proceeding, such as the adequate-protection requirements of § 361, the automatic stay of § 362, the inapplicability of *ipso facto* clauses of contracts and leases pursuant to § 365

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and the power of the foreign representative to administer the debtor's assets and affairs in the United States.⁶

This article discusses the most expedient method to secure provisional relief and recognition. Prior to the effective date of chapter 15,⁷ foreign representatives routinely sought relief and recognition via three steps: a motion for (1) a temporary restraining order (TRO); (2) a preliminary injunction (sometimes stylized as for provisional relief); and (3) recognition of a foreign proceeding. Foreign representatives in chapter 15

entry of (1) a TRO, (2) an order scheduling a hearing on the foreign representative's request for a preliminary injunction and (3) after notice and hearing, an order granting the requested preliminary injunction.

Among the relief that the foreign representative routinely requested in its TRO motion was the operation of the automatic stay and the power of the foreign representative to be the sole administrator of the debtor's assets and affairs in the United States. If necessary, the foreign representative also requested approval to incur the portion of its contemplated post-petition indebtedness necessary to avoid immediate and irreparable harm to the debtor. In its request for a preliminary injunction, the foreign representative would ask for the same relief requested in its TRO motion and, if nec-

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proceedings continued to use this three-step process for injunctive relief during the first filings that occurred after the passage of chapter 15. However, some foreign representatives have recently condensed these three steps to two: a motion for provisional relief and for recognition of a foreign proceeding. This revised two-step process provides much of the same relief, eliminates a hearing, reduces the risk of objections and additional hearings, and may result in recognition earlier.

The Traditional Three-Step

A bankruptcy court may grant provisional relief subject to the "standards, procedures and limitations applicable to an injunction."⁸ This statement initially led foreign representatives to ask for provisional relief by filing a motion requesting a TRO and a preliminary injunction hearing at the same time as it filed its chapter 15 petition. Specifically, the foreign representative would seek

essary, to borrow the remainder of its post-petition indebtedness.⁹

A bankruptcy court's order granting the TRO would state that the court would hold a hearing on the request for a preliminary injunction if any objections to the requested relief were filed. In some instances, the court's order allowed objections to be made at the hearing.¹⁰ The bankruptcy court would hear the TRO request within a day or two of the chapter 15 petition filing and would hear the preliminary injunction request within approximately 10 days of its order granting the TRO. Generally, the court granted recognition of the foreign proceeding approximately 20 days after its order establishing the preliminary injunction.¹¹ Thus, pursuant to this three-step procedure, a bankruptcy court scheduled at least three hearings, giving creditors and other interested parties at least three opportunities to object, and the foreign

¹ 11 U.S.C. § 1504.

² *Id.* at § 1520.

³ *Id.* at § 1517. Fed. R. Bankr. P. 2002(q) requires that at least 21 days' notice by mail be given of the hearing on the petition for recognition.

⁴ 11 U.S.C. § 1501.

⁵ *Id.* at § 1519.

⁶ *Id.*

⁷ Chapter 15 was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

⁸ 11 U.S.C. § 1519(e).

⁹ See, e.g., *In re Saad Invs. Fin. Co. (No. 5) Ltd.*, No. 09-13985 (Bankr. D. Del. Nov. 11, 2009), ECF No. 5; *In re Destinator Techs. Inc.*, No. 08-11003 (Bankr. D. Del. May 20, 2008), ECF No. 28; *In re Hollinger Inc.*, No. 07-11029 (Bankr. D. Del. Aug. 1, 2007), ECF No. 5.

¹⁰ See, e.g., *In re Saad*, ECF No. 11; *In re Destinator*, ECF No. 19; *In re Hollinger*, ECF No. 12.

¹¹ See generally *In re Saad*, *In re Destinator* and *In re Hollinger*.

representative had to wait approximately 30 days to receive recognition of the foreign proceeding.

The Revised Two-Step

Although the Bankruptcy Code states that provisional relief may only be granted subject to the considerations applicable to an injunction, it does not provide that a foreign representative must seek a preliminary injunction to obtain provisional relief. Rather, the Code affords foreign representatives access to certain relief on a temporary basis to ensure that the foreign representative can preserve the debtor's assets and value as a going-concern while it waits for the court to be able to grant it recognition of its foreign proceeding. Upon recognition, all of this and more relief becomes available. Accordingly, pursuant to chapter 15's wording, a foreign representative theoretically need only ask for provisional relief.

Based on this possibility, certain innovative foreign representatives (and their counsel) have simply filed a motion for provisional relief along with their chapter 15 petitions, and their venture paid off. For example, recently in *In re Angiotech Pharmaceuticals Inc.*, at the same time as it filed its chapter 15 petition, the foreign representative filed a "motion for provisional and final relief," which sought entry of a provisional order applying §§ 362 and 365(e) of the Code, and a final order granting recognition of the foreign proceeding, extending the provisional relief and authorizing the debtors to enter into post-petition indebtedness.¹² In granting the provisional relief, the bankruptcy court set a hearing on the foreign representative's motion for recognition and final relief for 22 days later.¹³ Twenty-two days after the foreign representative filed its chapter 15 petition, without the need for any intermediate hearings, its foreign proceeding was recognized, and it received the full relief and protections afforded by chapter 15, including authorization to enter into post-petition indebtedness.¹⁴

Similarly, in *In re Chemokine Therapeutics Corp.*, the foreign representative contemplated executing a sale of substantially all of the debtor's assets upon receiving recognition of its foreign proceeding. At the same time that it filed its chapter 15 petition, the

foreign representative filed a motion requesting an interim stay and an order recognizing its foreign proceeding, extending the interim stay on a permanent basis and approving the sale. The bankruptcy court granted the interim stay during the first-day hearings. It then recognized the foreign proceeding, extended the stay and approved the sale 25 days later.¹⁵

Other foreign representatives have obtained interim stays, application of the Bankruptcy Code's adequate-protection requirements, authorization to use cash collateral and protection against contract and lease termination under *ipso facto* clauses simply by asking for provisional relief.¹⁶ Overall, in simplifying and shortening the recognition process, the revised two-step aligns better with the impetus behind chapter 15's enactment: to provide a more straightforward procedure for recognition and to standardize the interim relief available, thereby reducing the need to request specifically tailored injunctions and generally making U.S. bankruptcy courts more accessible and amenable to foreign debtors.¹⁷

When to Dance the Chapter 15 Two-Step

The chapter 15 two-step is most useful if a foreign representative seeks provisional relief pursuant to certain Code sections: adequate protection under § 361, the automatic stay of § 362, the authority to use cash collateral pursuant to § 363, the protections afforded to a trustee regarding executory contracts and leases under § 365 and any of the relief expressly set forth in § 1519, which includes the power of the foreign representative to administer the debtor's assets and affairs in the United States. Consistent with chapter 15's text, the two-step eliminates the unnecessary middle step of returning to the bankruptcy court 10 days after the first-day hearing for an extension of the same relief that the court granted pursuant to the TRO during the first-day hearings, which the court will extend on a permanent basis at the hearing regarding recognition. In general, the provisional relief sought mirrors the

protections and rights imparted to the trustee or debtor-in-possession upon the filing of a chapter 7 or 11 petition, so it makes sense that the more tailored remedy of obtaining a TRO and then a preliminary injunction can be collapsed into one motion for provisional relief in these instances. Further, with the exception of immediately incurring post-petition indebtedness, these sections most likely encompass much of the provisional relief a foreign representative may require.

In cases in which the foreign representative must incur post-petition indebtedness, consistent with how a debtor in possession (DIP) may go about securing the bankruptcy's court consent to enter into DIP financing, the traditional three-step may provide a more recognizable and less novel means to obtain authorization to incur a portion of the contemplated indebtedness on a provisional basis. Nevertheless, the less-demanding chapter 15 two-step may be usable in certain instances. As in *Angiotech*, if the debtor can wait until the bankruptcy court recognizes the foreign proceeding to incur the post-petition indebtedness, the foreign representative can request and the court can order that the provisional relief not limit or abridge any of the rights afforded to the contemplated post-petition lender and agent under the draft post-petition indebtedness documents.¹⁸ Given that the two-step procedure often decreases the number of days that the foreign representative must wait to gain recognition and lessens the likelihood of objections and unanticipated hearings, in some cases the two-step may provide the foreign representative with enough security to contemplate waiting until recognition to incur any post-petition indebtedness. Also, in its order granting provisional relief, a bankruptcy court can theoretically approve the borrowing of that portion of a debtor's contemplated post-petition indebtedness necessary for the debtor to survive until the recognition hearing. Thus, under the right circumstances, a foreign representative potentially could seek authorization to incur a portion of the indebtedness on a provisional basis.

Conclusion

In general, the chapter 15 two-step should be a foreign representative's

¹² *In re Angiotech Pharmaceuticals Inc.*, Case No. 11-10269 (Bankr. D. Del. Jan. 30, 2011), ECF No. 7.

¹³ *Id.* at ECF No. 26.

¹⁴ *Id.* at ECF No. 83.

¹⁵ *In re Chemokine Therapeutics Corp.*, No. 09-1189 (Bankr. D. Del. Apr. 3, 2009), ECF Nos. 6, 7, 11, 15 and 16.

¹⁶ See, e.g., *In re Bilrite Rubber (1984) Inc.*, No. 09-31423 (Bankr. N.D. Ohio Mar. 12, 2009), ECF No. 17; *In re MAXX Corp.*, No. 08-11443 (Bankr. D. Del. July 14, 2008), ECF No. 22; *In re Pro-Fit Holdings Ltd.*, No. 08-17043 (Bankr. C.D. Cal. May 21, 2008); *In re Madill Equip. Canada*, No. 08-41426 (Bankr. W.D. Wash. Apr. 4, 2008), ECF No. 18.

¹⁷ See Jay Lawrence Westbrook, "Chapter 15 at Last," 79-713, 726 (2005).

¹⁸ *In re Angiotech*, ECF No. 26.

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dance of choice to obtain almost all of the same relief as they sought under their traditional three-step procedure. Of particular importance, the two-step process has proven to be an acceptable method to secure the automatic stay. In some instances, this protection is all that a foreign representative may need while waiting for recognition of its for-

eign insolvency proceeding. Moreover, the two-step eliminates a hearing, reduces the risk of objections and additional hearings, and often results in recognition of the foreign proceeding earlier. Taken together, these benefits show that the two-step process reflects the purposes underlying chapter 15: to ensure that a foreign representative can

protect and administer a foreign debtor's assets and business, and to demonstrate that U.S. bankruptcy courts are willing and able to cooperate with foreign debtors holding assets in multiple countries. In the future, foreign representatives would be wise to learn this two-step. ■

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