

Foreign Representatives of Madoff Feeder Fund Obtain § 108 Extension

Written by:

T.M. Wiener

Cupid Investments Limited
Tortola, British Virgin Islands
tallymindy@gmail.com

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On May 23, 2011, the U.S. Bankruptcy Court for the Southern District of New York ruled that the tolling provisions of § 108 of the Bankruptcy Code applied to the chapter 15 cases of *Fairfield Sentry Limited, et al.* In a memorandum decision and order,¹ the court granted Fairfield's foreign representatives an extension of time to assert causes of action and meet deadlines with respect to pending and potential litigation.



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The bankruptcy court's ruling on the applicability of § 108 relief arose in the context of the chapter 15 proceedings of Fairfield Sentry Limited (Sentry), Fairfield Sigma Limited (Sigma) and Fairfield Lambda Limited (Lambda). Sentry was the largest of the "feeder funds" into Bernard L. Madoff Investment Securities LLC (BLMIS), and facilitated multi-billion U.S. dollar-denominated investments into BLMIS.² Sigma fed Sentry euros for investment into BLMIS, and Lambda fed Sentry Swiss francs for investment into BLMIS.³

The Collapse of BLMIS

BLMIS collapsed following Madoff's confession that he had been orchestrating a multi-billion-dollar fraud for decades, and became the subject of proceedings under the Securities Investor Protection Act, pending before Hon. **Burton R. Lifland** in the U.S. Bankruptcy Court for the Southern District of New York.⁴

¹ Memorandum Decision and Order Granting Foreign Representatives' Motion for Relief under 11 U.S.C. § 108 and Setting the Date of the "Order for Relief," *In re Fairfield Sentry Limited, et al.*, Case No. 10-13164 (Bankr. S.D.N.Y. May 23, 2011).

² "Settlement Agreement Reached with Joint Liquidators of Fairfield Sentry, Madoff's Largest Feeder Fund," Reuters (May 9, 2011), www.reuters.com/article/2011/05/09/idUS232334+09-May-2011+BW20110509.

³ *Id.*

⁴ *In re Bernard L. Madoff Investment Securities LLC*, Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y.).

About the Author

T.M. Wiener is a counselor at law and special situations consultant in private practice with a focus on transnational insolvency proceedings, and serves as director of Cupid Investments Limited, a British Virgin Islands business company.

BLMIS Feeder Funds File Chapter 15 Proceedings

Following the collapse of BLMIS, a number of funds that were heavily invested in BLMIS also collapsed, including Sentry, Sigma and Lambda. Subsequently, these funds were placed into liquidation proceedings in the British Virgin Islands (BVI), where each of the funds maintained a registered office. Sentry and Sigma were placed into involuntary liquidations by aggrieved shareholders. Lambda was placed into an involuntary liquidation by one of its creditors.

post-recognition actions against investors with the bankruptcy court while the recognition appeal to the district court was pending.⁷

The bankruptcy court, in a companion ruling entered the same day as the ruling concerning § 108, denied motions filed by defendants in 42 of the 209 adversary proceedings before it that were seeking remand or abstention, noting that the decision applies with equal force to non-moving defendants in the remaining proceedings or future actions.⁸ As a result, there are, as Judge Lifland put it, "upward of 209 actions pending and almost \$6 billion in play" and a determination that the U.S. Bankruptcy Court for the Southern District of New York "is the best ballpark to host the games."⁹

Section 108 Relief Available to Foreign Representatives

In a 19-page memorandum decision and order, the bankruptcy court ruled that

The International Scene II

By order of the BVI court, the liquidators of each of these funds were authorized to act as foreign representatives of the funds' BVI-based insolvency proceedings for the purpose of seeking recognition in the U.S. in accordance with chapter 15 of the Bankruptcy Code. Recognition as foreign main proceedings was granted by the U.S. Bankruptcy Court for the Southern District of New York on July 22, 2010.

Prior to obtaining recognition under chapter 15, the Fairfield funds' liquidators began commencing actions in New York State Supreme Court against investors, seeking the return of redemption payments through the assertion of common-law claims.⁵ Following recognition, the liquidators removed these actions from state court to the U.S. Bankruptcy Court for the Southern District of New York, and amended some of the complaints to include claims under BVI insolvency law.⁶ The liquidators commenced filing

the tolling provisions of § 108 applied in the jointly administered chapter 15 cases of Sentry, Sigma and Lambda. Section 108(a) states:

If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) two years after the order for relief.

⁶ *Id.* at 6-8.

⁷ *Id.* at 6.

⁸ Memorandum Decision and Order Denying Defendants' Motions for Remand or Abstention, *supra* n. 7, at 2 n. 1.

⁹ *Id.* at 2.

⁵ Memorandum Decision and Order Denying Defendants' Motions for Remand or Abstention, at 6-7, *In re Fairfield Sentry Limited, et al.*, Case No. 10-13164 (Bankr. S.D.N.Y. May 23, 2011).

Section 108(b) states:

Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 60 days after the order for relief.

As the bankruptcy court explained, § 108(a) essentially provides a two-year extension for a trustee in bankruptcy to commence actions in the interests of the bankruptcy estate, provided that the applicable time period has not lapsed prior to the filing of the bankruptcy petition.¹⁰ Similarly, § 108(b) provides a trustee with a short extension of time for filing pleadings and other documents, curing defaults and performing other acts on the debtor's behalf.¹¹

¹⁰ Memorandum Decision and Order Granting Foreign Representatives' Motion for Relief under 11 U.S.C. § 108 and Setting the Date of the "Order for Relief," *supra* n. 1, at 9.

¹¹ *Id.*

The bankruptcy court engaged in a statutory construction analysis and explained that, pursuant to § 103(a), the provisions of chapter 1 of the Bankruptcy Code, including § 108, apply in a case brought under chapter 15 of the Code.¹² The court rejected the objectors' argument that § 1520(a)(3), which allows a foreign representative the ability to "operate the debtor's business and...exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552," operates to the exclusion of the relief available to a foreign representative under § 108. "Simply put, inclusion of Section 108 relief in section 1520 would have been superfluous in light of the plain language of section 103(a) of the Code."¹³

The bankruptcy court also rejected the objectors' reading of the term "trustee" as used in § 108, which would have precluded foreign representatives from availing themselves of relief under § 108. The bankruptcy court observed that § 1502(1) provides that a debtor "means..." while § 1502(6) provides that the trustee definition "includes..."¹⁴ The conclusion that foreign representatives enjoy the same powers as domestic trustees was bolstered by a review of the Model Law on Cross-Border Insolvency, which is incorporated into U.S. law by chapter 15 and also by discussion of legislative history.¹⁵

¹² *Id.* (citing § 103(a), which states "[e]xcept 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 chapter, sections 307, 362(n), 555 through 557, and 559 through 562 apply in a case under chapter 15").

¹³ *Id.* at 11.

¹⁴ Section 1502(1) states that a "debtor" means an entity that is the subject of a foreign proceeding" whereas § 1502(6) states that a "trustee" includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title."

Finally, the bankruptcy court deemed July 22, 2010—the date it had entered its bench memorandum and order granting the relief sought in the chapter 15 petitions of Sentry, Sigma and Lambda—to be the date of the "order for relief" for purposes of calculating the foreign representatives' time under § 108 to avail themselves of certain rights and remedies under the Bankruptcy Code.¹⁶ The court also concluded that §§ 1507 and 1521(a)(7) provided it the statutory authority for providing the liquidators with an extension of time to the extent that § 108 is not a self-executing statute.¹⁷

Conclusion

Under the bankruptcy court's ruling, foreign representatives can, under appropriate circumstances,¹⁸ avail themselves of an extension to prosecute lawsuits in chapter 15 proceedings and take other actions in the U.S. for the benefit of the stakeholders to whom they answer. As such, the ruling brightens the new dawn for chapter 15 proceedings in Manhattan heralded by the recognition of the BVI-based insolvency proceedings of Sentry, Sigma and Lambda last summer. ■

¹⁵ Memorandum Decision and Order Granting Foreign Representatives' Motion for Relief under 11 U.S.C. § 108 and Setting the Date of the "Order for Relief," *supra* n. 1, at 13-14.

¹⁶ *Id.* at 17-18.

¹⁷ *Id.* at 18-19.

¹⁸ *Id.* at 19 ("Such relief is necessary to aid [the foreign representatives'] efforts to achieve multibillion-dollar recoveries for the benefit of stakeholders of the largest feeder fund in the largest Ponzi scheme in [U.S.] history. Accordingly, Section 108 relief is necessary under the circumstances for the fair and efficient administration of this cross-border insolvency and the effective protection and maximization of the value of the Debtor's principle assets, which are its causes of action.") (citing § 1501(a)(4)); *see also* § 1501(a)(4) ("The purpose of [chapter 15] is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of...(4) protection and maximization of the value of the debtor's assets[.]").