

International Forum Shopping Trip Cut Short by SDNY

January 31, 2012 by Benjamin M. Riskin

Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York recently weighed in on the standing of a chapter 15 debtor's foreign representative to allege a violation of the automatic stay following commencement of an action against a debtor's non-debtor affiliates. Further, Judge Sweet spoke to the extension of comity – legal reciprocity between jurisdictions – to orders of a foreign court. Specifically, Judge Sweet's decision stayed an action brought by CT Investment Management LLC, a U.S. party, against Pablo Gonzalez Carbonell and Grupo Costamex, S.A. de C.V., guarantors on certain obligations of Grupo Costamex's chapter 15 debtor subsidiary, Cozumel Caribe S.A. de C.V. CT Investment's action alleged a breach of a guaranty agreement entered into in connection with Cozumel Caribe's development and operation of several resort properties in Mexico. The decision is part of a growing body of case law recognizing the authority of a chapter 15 foreign representative to manage a debtor's international insolvency. See *CT Investment Management Co., LLC v. Carbonell*, 2012 U.S. Dist. LEXIS 3356, *16 (S.D.N.Y. Jan. 12, 2012).

CT Investment's action in the Southern District followed numerous failed attempts to bring the same claims against the defendants in the Mexican District Court, where debtor Cozumel Caribe commenced a concurso mercantile, or voluntary bankruptcy. CT Investment's claims were prohibited in the Mexican District Court pursuant to a May 2010 order staying actions on guarantees associated with debtor Cozumel Caribe. In August 2010, CT Investment sought and was denied a suspension of the Mexican court order by the Mexican District Court. CT Investment requested a review of the Mexican District Court's decision by the Mexican Appellate Court, which appeal was denied in August 2010. Subsequently, CT Investment commenced litigation in the Southern District seeking to enforce the guarantees.

Following commencement of its action in the Southern District, Cozumel Caribe's foreign representative sought to stay the action and requested an extension of comity to the Mexican court order which barred CT Investment's claims in Mexico. In response, CT Investment raised argument under sections 1509 and 1524 of the Bankruptcy Code, challenging the standing of Cozumel Caribe's foreign representative to seek such relief in connection with the action against Carbonell and Grupo Costamex, both non-debtors, and further argued that extending the automatic stay to actions involving non-debtor parties would be contrary to U.S. public policy.

Ultimately, Judge Sweet held that (i) Cozumel Caribe's foreign representative had standing to seek relief pursuant to section 1509(b)(2) of the Bankruptcy Code, which provides that "a foreign representative may apply directly to a court in the United States for appropriate relief from that court," and (ii) a foreign order staying actions against non-debtor parties is not manifestly contrary to U.S. public policy, and accordingly compels an extension of comity upon request.

CT Investment also challenged the foreign representative's standing under section 1524 of the Bankruptcy Code, which provides that "[u]pon recognition of a foreign proceeding, the foreign representative may intervene in any proceedings in a State or Federal court in the United States in

which the debtor is a party.” Because section 1524 appears to limit such right to intervene only to cases “in which the debtor is a party,” CT Investment argued that relief provided in section 1509(b)(2) is also limited to those cases in which the chapter 15 debtor is a party. Accordingly, CT Investment challenged the standing of Cozumel Caribe’s foreign representative to seek comity in connection with the Mexican court order, arguing that CT Investment’s U.S. action involved Cozumel Caribe’s guarantors, not the chapter 15 debtor, thereby precluding Cozumel Caribe’s foreign representative from seeking relief absent formal intervention. The Southern District disagreed, holding that section 1509 constitutes a separate grant of authority whereby a foreign representative’s standing to apply for relief is a specific consequence of chapter 15 recognition, unaffected by the language of section 1524.

Judge Sweet also rejected the CT Investment’s alternative argument, that section 1509(e) of the Bankruptcy Code provides an additional limitation on the standing of a foreign representative seeking comity. Section 1509(e) states that “[w]hether or not the court grants recognition . . . a foreign representative is subject to applicable nonbankruptcy law.” CT Investment argued that this provision also operates to require Cozumel Caribe’s foreign representative to formally intervene in the U.S. action pursuant to the Federal Rules of Civil Procedure prior to applying to a U.S. court for relief. Judge Sweet rejected this argument, holding that section 1509(e) is intended to subject foreign representatives to suit in their capacity as foreign representatives under applicable nonbankruptcy law. Judge Sweet also noted that case law has established that the language of section 1509(e) is meant to hold foreign representatives accountable in the same way as domestic trustees, thereby allowing them to administer estates with limited personal liability.

With respect to the public policy arguments, Judge Sweet held that extending comity to the Mexican court order would not prejudice any parties to the case and noted that the Mexican court order was meant to protect the interests of the chapter 15 debtor. While U.S. courts may have a strong interest in maintaining the enforceability of foreign debts owed to U.S. lenders, Judge Sweet held that it is not contrary to U.S. public policy for a U.S. court to suspend actions against non-debtor parties “in order to assist in, and maintain the integrity of, the administration of a debtor’s bankruptcy case.” Consequently, Judge Sweet extended comity to the Mexican court order and stayed the CT Investment’s U.S. action.