

U.S. BANKRUPTCY COURT GRANTS CHAPTER 15 FOREIGN MAIN RECOGNITION TO FAIRFIELD FUNDS

On July 22, 2010, the U.S. Bankruptcy Court for the Southern District of New York (Lifland, J.) entered an order recognizing the insolvency proceedings pending in the British Virgin Islands in respect of three BVI-registered hedge funds – Fairfield Sentry Limited and two other related funds – as foreign main proceedings under Chapter 15 of the Bankruptcy Code. The Fairfield funds were the largest of the so-called Bernard Madoff “feeder funds,” and, up until the disclosure of the Madoff fraud in December 2008, certain of their activities could be said to have taken place in New York City. Brown Rudnick LLP represented the BVI court-appointed liquidators for the Fairfield funds in their efforts to obtain Chapter 15 recognition of the BVI proceedings in U.S. Bankruptcy Court.

The core issues in the case were whether the BVI proceedings were entitled to recognition under Chapter 15 of the Bankruptcy Code, and, if so, whether the BVI proceedings were “foreign main” or “foreign non-main” proceedings. A foreign insolvency proceeding will be recognized as a “foreign main proceeding” if, among other requirements, it is pending in the jurisdiction where the debtor has its “center of main interests,”¹ and there is a statutory rebuttable presumption that the debtor’s registered office is the debtor’s center of main interests.² The distinctions between the two forms of recognition in terms of the relief provided are significant. Most notably, foreign main recognition automatically entitles a foreign debtor to the protections of the Bankruptcy Code’s automatic stay,³ and also affords the foreign liquidator unfettered access to other courts in the United States.⁴ The consequences of not obtaining any recognition are severe and can potentially defeat all efforts to administer a foreign debtor’s affairs and assets in the United States.

Judge Lifland, who presided over the Fairfield liquidators’ petitions for recognition, is a co-author of Chapter 15. He also issued the seminal 2007 Chapter 15 decision in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*,⁵ which denied any Chapter 15 recognition of the Cayman Islands liquidation proceedings of two Bear Stearns hedge funds. In denying recognition in *Bear Stearns*, Judge Lifland held that the presumption that the funds’ center of main interests was in the Cayman Islands had been rebutted by evidence to the contrary. That evidence included the fact that, at the time the funds filed their Chapter 15 petitions, which was the same day the Cayman Islands liquidators were appointed, the funds conducted no business within or from the Cayman Islands, substantially all of the funds’ affairs were administered in the United States and the funds’ tangible assets were located in the United States. Judge Lifland’s decision in *Bear Stearns* has been read and interpreted by other



New York

Seven Times Square
New York, NY 10036
+1.212.209.4800
+1.212.209.4801 [fax]

Boston

One Financial Center
Boston, MA 02111
+1.617.856.8200
+1.617.856.8201 [fax]

Washington, DC

601 Thirteenth Street NW,
Suite 600
Washington, DC 20005
+1.202.536.1700
+1.202.536.1701 [fax]

Hartford

185 Asylum Street
Hartford, CT 06103
+1.860.509.6500
+1.860.509.6501 [fax]

Providence

121 South Main Street
Providence, RI 02903
+1.401.276.2600
+1.401.276.2601 [fax]

London

8 Clifford Street
London, W1S 2LQ
United Kingdom
+44.20.7851.6000
+44.20.7851.6100 [fax]

Dublin

Alexandra House
The Sweepstakes
Ballsbridge, Dublin 4
Ireland
+353.1.664.1738
+353.1.664.1838 [fax]

www.brownrudnick.com

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courts across the country, as well as by the offshore funds industry, as setting a high bar for funds seeking to obtain Chapter 15 recognition, particularly in the case of offshore hedge funds that historically conducted, managed, and administered their businesses outside of their offshore domicile (and often in the United States).

In granting foreign main recognition to the Fairfield funds' BVI proceedings, Judge Lifland in effect distinguished the *Bear Stearns* decision in several important respects. Perhaps the most significant distinction is that for the extended period of time (some 18 months) after the Fairfield funds ceased doing business following the revelation of the Madoff fraud in December 2008, the funds' only activities consisted of the winding up of their businesses, which were performed in the BVI initially by the funds' independent directors and subsequently by the court-appointed liquidators. Judge Lifland made it clear that these activities made the BVI the administrative center for the Fairfield funds and, as such, entitled the BVI insolvency proceedings to recognition as foreign main proceedings under Chapter 15. In his decision, Judge Lifland overruled an objection to the Chapter 15 petitions which argued that the Fairfield funds' center of main interests is located in New York, and noted (in contrast to *Bear Stearns*) that the Fairfield funds have no place of business, no management and no tangible assets in the United States.

The Fairfield decision should have immediate impact both domestically and internationally on the offshore funds industry. Among other things, the Fairfield decision clarifies *Bear Stearns* by identifying clear criteria which will enable the offshore funds industry to utilize Chapter 15 in the United States and particularly the Southern District of New York where, since the *Bear Stearns* decision, offshore funds have been very reluctant to seek Chapter 15 relief. It is anticipated that Judge Lifland's decision in the Fairfield cases will make the offshore funds industry much less wary of the Chapter 15 process. Judge Lifland is expected to issue a full opinion with respect to this decision in the coming weeks.

¹ See 11 U.S.C. § 1517(b)(1).

² See 11 U.S.C. § 1516(c).

³ See 11 U.S.C. § 1520(a)(1).

⁴ See 11 U.S.C. § 1509(b).

⁵ 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) (Sweet, J.).

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For further legal information on this topic, please contact your Brown Rudnick attorney or one of the following attorneys:

David J. Molton
+1.212.209.4822
dmolton@brownrudnick.com

Daniel J. Saval
+1.212.209.4905
dsaval@brownrudnick.com

May Orenstein
+1.212.209.4913
morenstein@brownrudnick.com