Gating Issues for Foreign Trustees Looking to Obtain Chapter 15 Recognition

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There has been an uptick in chapter 15 cases, and they have raised various intriguing issues. Among them is the threshold question of who can actually file a Chapter 15. By design chapter 15 applies where assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding of a foreign debtor. The Bankruptcy Code itself proclaims that the purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency.

A decision rendered by the Eleventh Circuit (including Florida, Georgia and Alabama) in the spring of 2024 created a circuit split on a threshold eligibility question, namely whether the foreign debtor must have domicile, business or property in the U.S. to obtain recognition. Section 109(a) of the Bankruptcy Code limits the scope of who may be a debtor, stating that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor" in a domestic bankruptcy proceeding. The Eleventh Circuit held that a duly qualified representative of a foreign debtor that is properly subject to a foreign proceeding is entitled to seek and obtain Chapter 15 recognition even if such foreign debtor has no property in the United States or otherwise does not qualify to be a debtor under section109(a) of the Bankruptcy Code. In re Al Zawawi, No. 22-11024, 2024 WL 1423871 (11th Cir. Apr. 3, 2024). This is directly contrary to the precedent established in the Second Circuit more than ten years ago, which requires courts in New York, Connecticut and Vermont to factor in Section 109(a) of the Code. In re Barnet, 737 F.3d 238 (2d Cir. 2013).

It remains to be seen which approach will prevail and if the Eleventh Circuit courts will become the primary forum for foreign representatives when they want to investigate potential claims or conduct discovery in the United States, but the foreign debtor has no assets here.