

Section 1509

Do We Have All the Answers?



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Section 1509 Basics

- 1509(b) *If foreign rep obtains recognition, then*
 - She has capacity to sue/be sued
 - She can apply to any court in the US for appropriate relief in that court
 - All courts in the US have to grant comity and cooperation
- 1509(d) *But if court denies recognition to foreign rep*
 - Court can enter an order preventing the foreign rep from obtaining comity or cooperation from other US courts



Section 1509 Basics, cont'd

- 1509(c) *So, if court has granted recognition*
 - Foreign rep can ask other courts to grant comity
 - Just show them the recognition order that says they have to – *see* 1509(b)(3)
- 1509(d) *But if court denied recognition to foreign rep*
 - Can the foreign rep still ask for comity in another US court?
 - Assume there is no 1509(d) order barring ... Hmmmm.



Section 1509 Basics, cont'd

- 1509(e) *Regardless whether recognition was or was not granted ...*
 - Foreign rep is bound by applicable non-bankruptcy law
 - But still protected by 1510 (pewh!)
- 1509(f) *Notwithstanding anything that's been said above, even if the foreign rep doesn't get recognition (or doesn't even try) ...*
- wait for it →



Section 1509 Basics, cont'd

The Foreign Rep can exercise “any right” she has to sue in a court in the United States ...

“To collect or recover a claim which is the property of the debtor”

11 U.S.C. § 1509(f)



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Some Questions

1. What happens if the foreign rep requests dismissal of an action in another court on grounds of comity if the foreign rep has not been granted recognition under chapter 15?
2. What happens if the foreign rep brings an action in another court without first requesting recognition under chapter 15?



First Question

What happens if the foreign rep requests dismissal of an action in another court on grounds of comity if the foreign rep has not been granted recognition under ch 15?



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Answer: We're not sure yet ...

Basil v. CAI Master Allocation Fund, Ltd., 39 Misc.3d 1217(A), 966 N.Y.S.2d 344, 2013 NY Slip Op. 50649 (Sup.Ct.NY Apr 17, 2013)

- *Comity never sought via chapter 15, but dismissal still granted on comity grounds*

Pope Investments, LLC v. Pacificnet Games Ltd., et al., Docket No. 650379/2009 (slip op.), 2013 NY Slip Op 33136(U) (Sup.Ct. NY Dec 13, 2013)

- *Comity for foreign proceeding should not be granted because Foreign Rep never obtained recognition under chapter 15*



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Answer: We're not sure yet ...

Barclays Bank PLC v. Kemsley, 44 Misc.3d 773, 992 NY.S.2d 602, 2014 Slip Op. 24171 (Sup.Ct.NY. June 26, 2014)

- *Comity sought by estate representative, but denied. See In re Kemsley*, 489 BR 346 (Bankr. SDNY 2013) (Peck, J.)
- *Creditor seeks clarification from bankruptcy court that no comity should be accorded to defendant, but bankruptcy court declines to so rule, leaving the matter to the state court*
- *Comity pleaded as defense in the state court action by creditor; New York state supreme court grants dismissal on grounds of comity, finding that the bankruptcy court has left it up to the state court to rule.*



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Answer: We're not sure yet ...

Oui Financing LLC v. Dellar & Oui Management SAS, No. 12 Civ. 7744 (slip op.) (SDNY Oct. 9, 2013)

- *Chapter 15 recognition apparently not sought*
- *Chapter 15 not mentioned in the opinion*
- *Dismissal granted on grounds of “international comity”*

But, cf. Orchard Enter. NY, Inc. v. Megabop Records, Ltd., 2011 US Lexis 22896 (SDNY, Mar 4, 2011)

- *Request to dismiss on grounds of comity denied*
- *Because defendant's estate liquidators failed to obtain recognition*



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Answer: We're not sure yet ...

Oak Point Partners, Inc. v. Lessing, Case No. 11-CV-03328-LHK (slip op.) (N.D.Cal. Apr 19, 2013)

- *Comity request by defendant rejected in part because Ninth Circuit rule that there must first be a showing of a conflict of laws – and there is no current recognized exception to this rule for bankruptcy comity*
- *But, in addition, the defendant should have sought recognition under chapter 15 – that's the correct way to obtain comity for a foreign insolvency proceeding*
- *So the reference to ch 15 was DICTA!*



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Answer: We're not sure yet ...

Collins v. Oilsands Quest, Inc., 484 B.R. 593, 597 (S.D.N.Y. 2012)

- court found comity considerations were appropriate because recognition had been granted
- however, the court still conducted an independent evaluation whether comity was appropriate, notwithstanding the “shall” in section 1509(b)(3))



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Second Question

What happens if the foreign rep brings an action in another court without first requesting recognition under chapter 15?



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Answer: We're not sure ...

Matter of Condor Ins. Ltd., 601 F.3d 319 (5th Cir. 2010)

- Joint Official Liquidators authorized to bring suit to recover fraudulent conveyance under Nevis law
- Section 1509 not mentioned in the decision

In re British-American Ins. Co., Ltd., 488 BR 205 (Bankr. S.D.Fla. 2013)

- In rejecting objections to subject matter jurisdiction, court notes that section 1509(f) applies *regardless* whether recognition has been obtained (or even sought).
- Appears to apply to the pursuit of all causes of action owned by the debtor



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Answer: We're not sure ...

In re AJW Offshore, Ltd., 488 B.R. 551 (Bankr. E.D.N.Y. 2013)

- Premature to “authorize” suits in other *fora* at the recognition stage
- Court did not consider whether such “pre-authorization” is needed
- Query: would the court’s ruling be binding on other courts?

Easy enough, right?

Not so fast



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Answer: We're not sure ...

Iida v. Kitahara (In re Iida), 377 B.R. 243 (B.A.P. 9th Cir. 2007)

- Foreign representative must obtain recognition to have standing to appear as a party litigant

Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l. Ltd., 2010 U.S. Dist. LEXIS 42216 (S.D.N.Y. Apr. 28, 2010)

- Foreign representative cannot be substituted as the real party in interest unless and until she has first obtained recognition



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Answer: We're not sure ...

In addition, the comity is extended to the foreign representative, but not *necessarily* to the foreign court and its orders

- *In re* Elpida Memory, Inc., Case No. 12-10947(CSS) (Bankr. D. Del. Nov. 16, 2012)
- CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (*In re* Cozumel Caribe, S.A., de C.V.), 482 B.R. 96 (Bankr. S.D.N.Y. 2012) (same).



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Answer: We're not sure ...

So what's up here?

Section 1509(b)(3) says “go get recognition”

but section 1509(f) says “notwithstanding ... Go ahead and bring actions that belong to the debtor.”

????



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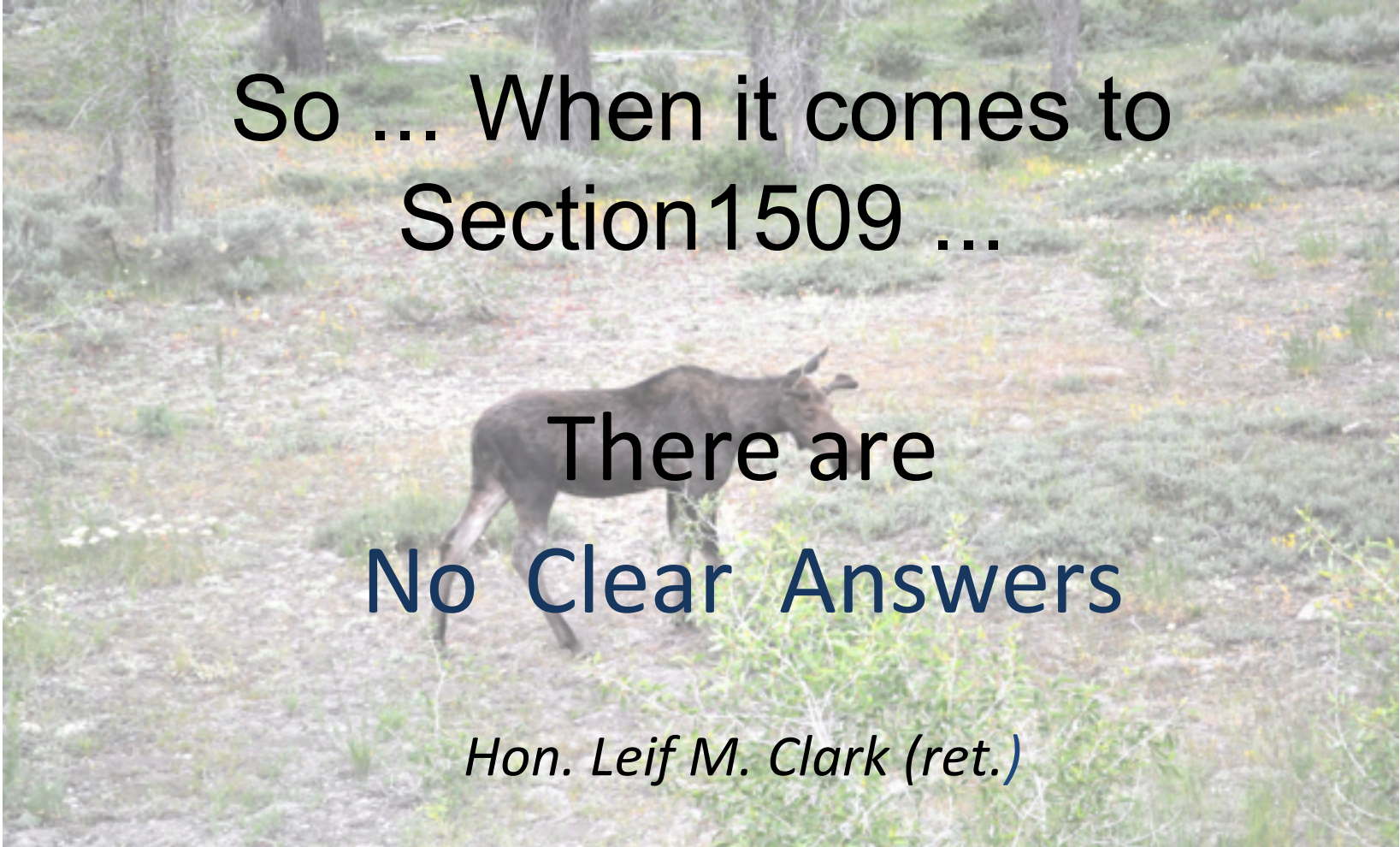
Answer: We're not sure ...

“Parties would be free to avoid the requirements of [chapter 15] and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements. Such an application could be made after denial of a petition under this chapter. This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.”

H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 110 (2005)



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So ... When it comes to
Section 1509 ...

There are
No Clear Answers

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