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In *re Condor Insurance Ltd*: the right result ... for the wrong reasons?

KEY POINTS

- The treatment of cross-border avoidance actions is a matter of critical importance for transactional and insolvency planning.
- Remarkably, very few published decisions provide guidance regarding the treatment of such actions in the US. No analytical framework or coherent lines of precedent exist to guide practitioners.
- The Fifth Circuit Court of Appeals' decision in *In re Condor Insurance Ltd*, F.3d, 2010 WL 961613 (5th Cir (Miss) 10 March 2010) is the first published appellate decision to address the issue since the enactment of the US Bankruptcy Code's Chapter 15.
- The Court of Appeals' decision is consistent with Congressional policy behind the statute, but provides an incomplete analysis – analysis which, left alone, may add further uncertainty to an already-unsettled, but critical, area of cross-border law.

What happens when an avoidable transfer crosses international borders? More specifically, which country's avoidance law applies: the law of the jurisdiction where the transfer originated? Or the law of the 'destination' jurisdiction? The question is not esoteric. The treatment of cross-border avoidance actions is arguably 'the single most important aspect' of cross-border insolvency practice where transactional planning is concerned. And yet, at least in the US, it remains remarkably uncertain and unsettled terrain for the planner – devoid of all but a few published decisions, and lacking entirely in any cohesive analytical framework. This insight briefly examines the United States Fifth Circuit Court of Appeals' recent decision in *In re Condor Insurance Ltd*, F.3d , 2010 WL 961613 – the first appellate decision to address the issue since the enactment of the US Bankruptcy Code's Chapter 15 – then seeks to discuss some areas in which that decision interacts with US bankruptcy law and with Congressional efforts to prescribe where and how such 'choice of law' questions are made.

A number of advanced commercial jurisdictions – such as the US, the UK, Germany, and Japan – permit a debtor's bankruptcy administrator or trustee to pursue and recover preferential or fraudulent transfers. Unwinding such transfers, typically made from the debtor to a third party located in the same country, is often an important source of recovery for creditors.

But what happens when the transfer crosses international borders? More specifically, which country's avoidance law applies: The law of the jurisdiction where the transfer originated? Or the law of the 'destination' jurisdiction?

The question is not esoteric. Avoidance actions within the international context are an important area of cross-border insolvency practice. Indeed, one noted author has described their treatment as 'the single most important aspect' of this practice where cross-border transactional planning is concerned. J. Westbrook, '*Avoidance Of Pre-Bankruptcy Transactions In Multinational Bankruptcy Cases*' 42 Tex Int'l LJ 899 (2007). And yet, at least in the US, it remains remarkably uncertain and unsettled terrain for the planner – devoid of all but a few published decisions, and lacking entirely in any cohesive analytical framework.

In light of this turmoil, the present article's aim is quite humble. It briefly examines the United States Fifth Circuit Court of Appeals' recent decision in *In re Condor Insurance Ltd*, F.3d, 2010 WL 961613 (5th Cir(Miss) 10 March 2010), then seeks to discuss some areas in which that decision interacts with US Bankruptcy Code and with Congressional efforts to prescribe where and how such 'choice of law' questions are made.

First, however, a bit of historical perspective on the unwinding of transfers originating outside – and ending inside – the US.

BEFORE CHAPTER 15

Most readers are no doubt aware that the US Bankruptcy Code's 2005 amendments implemented the US' version of the UNCITRAL Model Law on Cross-Border Insolvency, incorporated under Chapter 15. Prior to this, questions existed amongst US bankruptcy judges as to whether – and how – the administrator of a foreign insolvency proceeding could pursue allegedly fraudulent transfers, made to US recipients.

Initially, some courts permitted non-US administrators to pursue fraudulent transfers, either under US law or the law of the home jurisdiction, directly (ie, through an ancillary proceeding commenced for that purpose). But this approach fell into disfavor – primarily on the view that foreign administrators ought not to have unbridled access to the (frequently more favorable) provisions of US avoidance law. Later courts therefore permitted such recoveries under US law only through a separately filed Chapter 11 or 7 bankruptcy case. *See In re Metzeler*, 78 B.R. 674 (Bankr S. D. N. Y. 1987). The law was even less settled where administrators sought to pursue such transfers in the US using *non*-US law (typically, the law of the jurisdiction in which the insolvency case was pending).

AFTER CHAPTER 15

Chapter 15's enactment in 2005 resolved some of this uncertainty. The US statute now provides that upon recognition of a foreign

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proceeding, the court may grant 'any appropriate relief' including 'any additional relief that may be available to a trustee, *except* for relief available under [the avoidance sections of the US Bankruptcy Code].' 11 U.S.C. § 1521(a)(7) (emphasis supplied). Chapter 15 further provides that, upon recognition of a foreign proceeding, a foreign representative has 'standing in [the debtor's US bankruptcy] case ... to initiate actions [under the avoidance sections of the US Bankruptcy Code.' 11 U.S.C. § 1523.

With these provisions, Congress appeared to what happens where avoidance recovery efforts are initiated under *US* law: A full Chapter 11 (or 7) case is required, and any choice of law questions which arise are left to the bankruptcy judge. But what happens when recovery efforts are commenced under *non*-US law?

The case law is virtually silent on this issue. Compare *In re Loy*, 2008 WL 906503, at *6 (Bankr E.D. Va. 3 April 2008) ('A review of decisions under Chapter 15 of the Bankruptcy Code and its predecessor statute, former § 304, reveal no reported instances where a foreign representative has relied upon the law of the jurisdiction of the foreign main proceeding to avoid a transfer of a property situated in the United States ... '); *In re Atlas Shipping A/S*, 404 B.R. 726, at n.16 (Bankr S.D.N.Y. 2009) ('The court's research failed to locate any authority addressing whether 'applicable law' [under s 544(b)] includes foreign law.').

Those same courts have hinted at the confusion that persists.

In *Loy*, the Bankruptcy Court forbade a sale 'free and clear' of an avoidable English lien on procedural grounds – but in a footnote, expressed puzzlement over the fact that certain avoidance actions under the US Bankruptcy Code are cognizable only if the debtor is the subject of a case under Chapter 7 or 11, while other such actions are not. 2008 WL 906503, at n.5 (Bankr E.D. Va. 3 April 2008). In *Atlas Shipping*, the Bankruptcy Court denied a request by the administrator of a Danish insolvency proceeding for turnover of previously-garnished funds on the grounds that such turnover provisions were not applicable in Chapter 15 – but nevertheless went out of its way to note that nothing in Chapter 15's legislative history (or in prior US cross-border law) prohibited avoidance actions commenced under the law of the debtor's home jurisdiction. 404 B.R. at n.16.

To date, only *Condor Insurance* appears to have addressed the issue directly under Chapter 15.

THE FACTS IN CONDOR INSURANCE

Condor Insurance, Limited ('Condor'), a Nevis-incorporated insurer and surety bond issuer, was placed into winding-up proceedings in its home jurisdiction in 2007. The following year, Condor's liquidators sought recognition in Mississippi – in part, to pursue alleged fraudulent transfers aggregating more than $313m to Condor affiliates and principals. The liquidators sought to avoid the transfers utilising pertinent provisions of Nevis law.

THE BANKRUPTCY COURT AND DISTRICT COURT DECISIONS

The *Condor* defendants moved to dismiss the liquidators' complaint, claiming the Bankruptcy Court lacked jurisdiction to grant the relief requested. The Bankruptcy Court agreed, and – on appeal, in a published decision – the District Court affirmed. See *In re Condor Ins Ltd*, 411 B.R. 314 (S.D. Miss 2009). Central to the District Court's reasoning was the idea that, in US courts, 'the choice of law that is to be applied to a lawsuit is determined by a court having jurisdiction over the case, and the parties are not permitted to choose whatever law they wish when filing a lawsuit.' 411 B.R. at 318. As a result, the District Court found it lacked jurisdiction to hear the avoidance action. Instead, it suggested in a footnote that the liquidators commence and resolve the avoidance claims in Nevis – and then, upon procurement of a judgment there, seek enforcement in the US under principles of international comity. 411 B.R. at n.6.

THE FIFTH CIRCUIT DECISION

The Fifth Circuit respectfully disagreed. The Circuit's 3-judge panel observed Chapter 15's 'international origins' to encompass 'international law.' In their view, Chapter 15 is not merely a procedural vehicle by which foreign administrators may cost-effectively protect assets domiciled, or control litigation originating, in the US.

Instead, foreign administrators may *import* the substantive insolvency law of foreign jurisdictions into US courts, which have jurisdiction to apply such law to disputes pending in the US. *See* 2010 WL 961613 at *3 ('Whatever its full reach, Chapter 15 does not constrain the federal court's exercise of the powers of foreign law it is to apply.').

As a result, the statute's silence speaks volumes:

> 'The structure of Chapter 15 provides authority to the district court to assist foreign representatives once a foreign proceeding has been recognized by the district court. *Neither text nor structure suggests additional exceptions to available relief.* Though the language does not explicitly address the use of foreign avoidance law, it suggests a broad reading of the powers granted to the district court in order to advance the goals of comity to foreign jurisdictions. *And this silence is loud given the history of the statute including the efforts of the United States to create processes for transnational businesses in extremis.*' 2010 WL 961613 at *4 (emphasis supplied).

WHAT OF 'MIXING AND MATCHING?'

The panel addressed the disfavored practice of 'mixing and matching' foreign insolvency proceedings with US avoidance law previously identified in *Metzeler*, and Congressional efforts to prevent it. They traced the UNCITRAL working group's efforts to address choice of law in avoidance actions, and Congress' subsequent additions, concluding:

> 'The application of foreign avoidance law in a Chapter 15 ancillary proceeding raises fewer choice of law concerns as the

> court is not required to create a separate bankruptcy estate. It accepts the helpful marriage of avoidance and distribution whether the proceeding is ancillary applying foreign law or a full proceeding applying domestic law—a marriage that avoids the more difficult dépeçage rules of conflict law presented by avoidance and distribution decisions governed by different sources of law.' 2010 WL 961613 at *6.

The Fifth Circuit panel also found its own approach more consistent with that of US cross-border law extant prior to Chapter 15:

> 'In sum, under section 304, avoidance actions under foreign law were permitted when foreign law applied and would provide for such relief. Congress essentially made explicit *In re Metzeler*'s articulation of the bar on access to avoidance powers created by the U.S. Code by foreign representatives in ancillary proceedings.' 2010 WL 961613 at *7 (citing and discussing *In re Metzeler*, 78 B.R. at 677).

WHAT ABOUT 'SECTION SHOPPING?'

The Fifth Circuit recognised the appellees' concern over 'section shopping' – ie, the strategic use, either of Chapter 15 to commence non-US avoidance actions, or of Chapter 7 or 11 to commence US avoidance actions.

But where Congress had not taken further steps to guard against this threat, the Fifth Circuit overruled the District Court's own efforts to do so. In fact, the panel did not appear bothered by the spectre of 'section shopping,' noting that in the foreign insurance company case before it, these chapters were unavailable. Regarding the District Court's suggestion that the foreign administrator simply obtain an avoidance judgment in Nevis, then seek its enforcement in the US, it stated: 'Not all defendants are necessarily within the jurisdictional reach of the Nevis court.' 2010 WL 961613 at *6.

WHOLESALE IMPORTATION OF FOREIGN AVOIDANCE ACTIONS?

As for concerns that US courts – and US businesses – might find themselves awash in non-US avoidance claims under its interpretation of s 1521, the Fifth Circuit again reverted to the international policies undergirding the legislation:

> 'Providing access to domestic federal courts to proceedings ancillary to foreign main proceedings springs from distinct impulses of providing protection to domestic business and its creditors as they develop foreign markets. Settled expectations of the rules that will govern their efforts on distant shores is an important ingredient to the risk calculations of lenders and corporate management. In short, Chapter 15 is a congressional implementation of efforts to achieve the cooperative relationships with other countries essential to this objective.' 2010 WL 961613 at *7.

But for all its emphasis on policy, the Fifth Circuit's analysis skips a critical, predicate step.

CONDOR INSURANCE'S UNANSWERED QUESTION

According to the panel, 'the language [of Section 1521] does not explicitly address the use of foreign avoidance law.' Or does it?

Section 1521, by its terms, excludes avoidance actions predicated on s 544 of the Bankruptcy Code – which itself references 'applicable [non-bankruptcy] law.' The statute provides, in pertinent part, that:

> '(b)(1) … [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under *applicable law* by a creditor holding an unsecured claim …'

The statute's reference to 'applicable law' is commonly used to incorporate the various state-law avoidance provisions otherwise available to a debtor's creditors, making them available to the trustee. Such provisions are not unique to US law. Therefore, the 'plain language' of s 1521 presents an important – and, as yet, unanswered – question: Does *applicable* law, as the term is employed under s 544(b), extend to *foreign* [ie, non-US] law?

By its decision in *Condor*, the Fifth Circuit's *implicit* answer to this question is 'no.' Yet no Court reviewing the facts in Condor ever *explicitly* answered this question, or explained precisely why foreign law should be treated outside the scope of 'applicable law' otherwise referenced by s 544(b) (and, therefore, by s 1521).

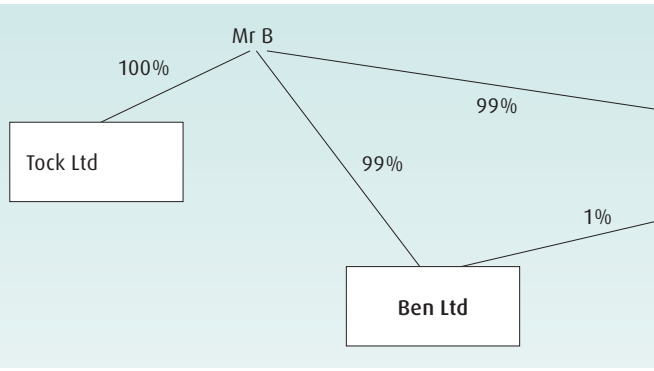
It is the author's belief that the Fifth Circuit decided *Condor Insurance* correctly, but missed an important opportunity to deal with ambiguity in the statute. The following discussion explains why a more complete analysis might have been helpful.

THE LIQUIDATORS' ARGUMENT ON APPEAL: QUOTING THE STATUTE AND BEGGING THE QUESTION

On appeal, Condor Insurance's liquidators relied on the statute's unambiguous terms 'any' and 'except.' They argued that because s 1521(a)(7) provides the court authorisation to grant '*any* additional relief available to a trustee [in bankruptcy] *except* for [the ability to commence certain avoidance actions],' other avoidance claims not dependent on these provisions are, by definition, available to a foreign representative.

The problem with this argument is that it merely begs the question. Unlike federal preference or fraudulent transfer claims arising under ss 547 or 548, s 544 is merely a mechanism whereby a Chapter 7 or 11 trustee may pursue recoveries, otherwise available to *certain* creditors *outside* of bankruptcy, for the benefit of *all* creditors *inside* bankruptcy. The liquidators' argument essentially reduces itself to the conclusory (and circular) proposition that their avoidance claims, asserted under applicable Nevis law for the benefit of Condor's creditors, were cognisable in Chapter 15 because they weren't claims arising under 'applicable [non-bankruptcy] law' within the contemplation of s 544.

FIGURE 1: Shareholdings



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THE DEFENDANTS' ARGUMENT ON APPEAL: MAKING THE LEGISLATIVE HISTORY SAY TOO MUCH

The defendants attempted to reconcile s 1521(a)(7) with s 1523(a), which affords a foreign representative the standing necessary to pursue avoidance claims under ss 544, 547, and 548 within a pending Chapter 7 or Chapter 11 case involving the debtor. They claimed these two sections, read together, mean that Congress intended to restrict *all* avoidance actions commenced in the US to Chapter 7 or Chapter 11 cases.

But this reading does not address these sections' extremely foggy legislative history. That history – quoted both by the District

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and by the Fifth Circuit courts, and foundational to their directly contradictory conclusions – states that the 'avoiding powers' addressed in s 1521 are dealt with specifically in s 1523. It states, further, that s 1523 was designed to address choice of law questions that arise when a foreign representative seeks to employ US avoidance law to unwind transactions for the benefit of creditors in a foreign proceeding. The answer to these questions is left to the presiding bankruptcy court. Sections 1521(a)(7) and 1523 are, effectively, a codification of recognised practice that existed under prior law regarding the prosecution of US avoidance actions. But aside from a passing general reference to 'avoidance actions' (which refer, presumably, to the US Bankruptcy Code sections enumerated in s 1523), the legislative history says *nothing* about the prosecution of claims arising under foreign law. Indeed, it appears almost intentionally vague.

THE DISTRICT COURT'S VIEW: AT ODDS WITH CHAPTER 15'S PRACTICAL PURPOSES

The District Court's reading of this legislative history reflects an understanding of Chapter 7 or 11 as 'gatekeeper' mechanisms for such questions. Under this view, Congress required foreign representatives to commence Chapter 7 or 11 cases to pursue *any* avoidance actions and resolve *any* attendant choice of law questions which might happen to arise along the way. The difficulty with this interpretation is its impracticality. Chapter 7 and 11 cases are frequently expensive, time-consuming, and ill-suited to the comparatively limited, 'surgical' purposes for which foreign representatives frequently seek redress in US courts. Requiring the commencement of a Chapter 7 or 11 case to prosecute a single avoidance action – or even a small group of them – would defeat a primary, practical purpose of Chapter 15: The 'fair and efficient administration of cross-border insolvencies that protects the interests of all creditors' (*see* 11 U.S.C. § 1501(a)(3)), not the least of which interests is the conservation of administrative costs.

THE FIFTH CIRCUIT'S DISCUSSION

The Fifth Circuit's contrary reading of the same legislative history evidences its understanding that Congress meant to preempt many 'choice of law' questions by restricting the employment of *US* avoidance provisions to cases in Chapter 7 and 11. The panel recognised that Congress' concern was over a foreign representative's application of US avoidance law in aid of non-US insolvencies – and not the other way around. The panel further recognised the potential practical difficulties created by employing Chapters 7 or 11 as 'gatekeepers' for the application of *any* avoidance law in US courts. In their view, Chapters 7 or 11 need only restrict the availability of *US* avoidance law – and nothing more.

But for all its sound grasp of Congressional policy, the 5th Circuit's analysis isn't without difficulty.

DOES *CONDOR INSURANCE* PRESERVE THE 'FIX' CONGRESS INTENDED?

A potential difficulty with the Fifth Circuit's view is that, as noted above, it permits 'section shopping' – which is merely an attenuated means of the same 'mixing and matching' problem identified as problematic by the US delegation to UNCITRAL, and which Congress meant to prevent. The panel's suggestion that 'section shopping' is of less concern because, in the foreign insurance company case before it, the liquidators would not have had access to Chapter 7 or 11 protection rings hollow. Chapter 15 was not drafted to address cross-border *insurance* insolvencies. Its reach is far greater than that. Perhaps the best answer to the 'section shopping' problem is – as Congress appears to have intended for other choice of law questions – to let bankruptcy courts police such problems as they arise.

IF CONGRESS WANTED TO CARVE OUT ONLY US AVOIDANCE ACTIONS, COULDN'T IT SIMPLY HAVE SAID SO?

More disturbingly, the Fifth Circuit's exegesis of s 1521's language and legislative history simply does not address the scope of 'other law' (as that term appears in s 544(b)) which may (or may not) be available to a recognised foreign representative proceeding under s 1521. It is worth noting that had Congress intended to read s 1521(a)(7) as the Fifth Circuit suggests, it certainly could have included specific language for this purpose (such as, for example, a reference to 'avoidance and recovery actions under US law, including without limitation relief available under ss . . . 544, 547, etc'). But it did not.

IS *CONDOR INSURANCE*'S ANALYSIS TRULY CONSISTENT WITH PRIOR US LAW?

The Fifth Circuit analogised the case before it to avoidance actions commenced in ancillary cases decided under prior law, noting that one – *In re Metzeler* – had authorised the prosecution of an avoidance action under German law, but refused to permit avoidance actions under US law. On its face, this appears a good analogy. But prior case law does not compensate for the Fifth Circuit's failure to reconcile ss 544(b) and 1521.

There are important differences between the law under which *Metzler* was decided and the current s 1521. The representative in *Metzeler* sought relief under a predecessor statute which referred broadly to 'other appropriate relief' available in a US ancillary proceeding, but had none of s 1521's limiting language. Moreover, the bankruptcy judge in *Metzeler* relied for his conclusions in part upon now-superseded federal venue provisions for ancillary proceedings, which at that time referred specifically to proceedings commenced to prevent enforcement of liens against, or require turnover of, property domiciled in the US. Those provisions have since been removed and replaced by an entirely re-drafted venue statute. Consequently, the analogy to *Metzler* isn't quite as strong as it seems.

Other cases cited by the Fifth Circuit unfortunately do little to help. *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1 (Bankr S.D.N.Y., 2003) concerns a Chapter 11 case commenced by a foreign debtor in the US – and not an ancillary proceeding. *In re Griffin Trading Co*, 270 B.R. 883 (Bankr N.D.Ill.,2001) concerns English liquidators' request to intervene in the Debtor's 'main' Chapter 7 case in the US for the purpose of asserting informal proofs of claim.

Along the way, *Griffin Trading* devotes some discussion to the liquidators' lack of authorisation to exercise those powers ordinarily reserved for a US trustee – something not in dispute in the *Condor* matter – but says nothing about the availability (or lack thereof) of foreign avoidance powers in an ancillary case. *Petition of Kojima*, 177 B.R. 696 (Bankr. D. Colo. 1995) is more on point: Like *Metzeler*, it involves a foreign representative's commencement of an ancillary proceeding to investigate and, as appropriate, recover title to real property in the US on behalf of creditors in a Japanese bankruptcy. However, like *Metzeler* (which it cites) *Kojima* draws distinctions between US and non-US avoidance actions under an ancillary statute which, on its face, had none of s 1521's limiting language. Finally, *In re Tarricone, Inc*, 80 B.R. 21 (Bankr. S.D.N.Y. 1987) involves the same foreign representative as *Metzeler* – but in this case, denies Metzeler's request for modification of the automatic stay to pursue recoveries based exclusively on US avoidance law for essentially the same reasons as those articulated in *Griffin Trading Co*.

More recent decisions are likewise unhelpful. In *Atlas Shipping* (cited above), the bankruptcy judge recently observed (in *dicta*), that s 544(b) gives the trustee the standing of a judgment lien creditor. The court observed that because a preference action under foreign law would not appear to depend on the trustee's status as a judgment lien creditor, neither s 544(b) nor s 547 (the preference provision available under the US Bankruptcy Code) would prevent the foreign representative's pursuit of such claims under s 1521. *See Atlas Shipping A/S*, 404 B.R. at n.16. But *Condor* didn't involve *preference* claims. It involved *avoidance actions*, which – at least in the US – *do* inure to the trustee's benefit by operation of s 544(b). Consequently, the court's observation in *Atlas Shipping* does not directly address s 1521's 'carve-out' for such actions.

GROPING TOWARD AN ANSWER

What else, then, might the Fifth Circuit have said about s 544(b)'s impact on the 'relief' otherwise available to a foreign representative under s 1521? The following discussion sketches out a few bases for the Fifth Circuit's decision that arise from the Bankruptcy Code itself – and, therefore, might be less susceptible to countervailing policy concerns not emphasised by the panel.

Section 544(b)'s natural context: a US trustee and a US bankruptcy estate

Perhaps the best starting place is a preliminary observation: s 1521 refers to 'relief ... available to a [US] *trustee*.' Where US trustees are concerned, the avoidance powers of s 544 – like those under ss 547 and 548 – are integral to the administration of a bankruptcy *estate* created under US law. Notably, many foreign systems do not create an estate in insolvency proceedings of the sort recognised under Chapter 15.

"Notably, many foreign systems do not create an estate in insolvency proceedings of the sort recognised under Chapter 15."

Section 544's relationship to US bankruptcy law is a natural one. The US Bankruptcy Code's Chapter 5 (in which ss 544, 547, and 548 are placed) concerns itself primarily with the creation, administration, and marshalling of bankruptcy estates in US proceedings. *See, eg, In re IFS Financial Corp*, 417 B.R. 419, 434 (Bankr. S.D.Tex. 2009) (quoting *Begier v I.R.S.*, 496 U.S. 53, 59, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) and observing with respect to the application of s 544(b) that '"[T]he purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate" so that all creditors receive the same, equitable, pro rata distribution ... For the purposes of chapter 5 avoidance provisions, a debtor's interest in property "is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." ... Property that would have been part of the estate if not for the transfer is defined by § 541 [of the US Bankruptcy Code] ...)'. As a result, s 544(b) is commonly understood to implicate the avoidance provisions of the 50 United States. See, eg, *ASARCO LLC v Americas Mining Corp.*, 404 B.R. 150, 156 (S.D.Tex. 2009) ('Plaintiffs brought their claim for actual-intent fraudulent transfer pursuant to 11 U.S.C. § 544(b), which provides that a "trustee may avoid any transfer of an interest of the debtor in property ... that is voidable under applicable [state] law by a creditor" holding an allowable unsecured claim. 11 U.S.C. § 544(b)(1). Trustees and

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Biog box

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debtors in possession use § 544(b) as a conduit to assert state-law-based fraudulent-transfer claims in bankruptcy.') (bracketed text in original).

In this purely domestic context, the previously-noted lack of case law addressing foreign law as 'applicable law' under s 544(b) is less surprising. Since a *US trustee* typically administers a *US estate* through *US law* – rather than foreign law – it appears Congress meant to restrict the availability of *US*-based avoidance actions related to a *US*-based estate when it 'carved out' this provision from the relief otherwise available under s 1521. It would be natural for Congress to preserve the integrity of US bankruptcy estates and supporting US avoidance law within the context of Chapters 7 and 11. But there is no similar rationale for prohibiting avoidance actions commenced under *non-US* law to further administration of *non-US* insolvencies. In the context of Chapter 15, therefore, s 544(b) should be read narrowly, prohibiting *only* avoidance actions commenced under US law.

Chapter 15's context

How well does this narrow reading fit within the framework of Chapter 15?

> "Fifth Circuit reached the right result in Condor Insurance. But it did so for incomplete reasons – reasons which, left alone, may add further uncertainty to an already unsettled area of law."

Section 1523

A narrow reading of s 1521's 'avoidance carve-out' provision is consistent with s 1523. As suggested by *Condor Insurance*'s holding, the foreign representative may assert *US* avoidance claims concerning a *US* estate, administered by a *US* trustee, in a Chapter 7 or 11 case.

Section 1508

A narrow reading is also consistent with Chapter 15's special rules of construction, which provide that when questions of the chapter's interpretation arise, 'the court shall consider [the statute's] international origin, and the need to promote an application of this chapter that is *consistent with the application of similar statutes adopted by foreign jurisdictions*.' 11 U.S.C. § 1508 (emphasis supplied).

How are 'similar statutes' applied by other adopters of the UNCITRAL Model Law? A multi-jurisdictional survey is well beyond the scope of this article; however, English law appears to provide broad access to the UK's avoidance provisions.

Though subject to some debate over its extent and application where non-English avoidance law is concerned, art 21(g) of the UK version of the UNCITRAL Model Law (the equivalent of s 1521(7)), appears to afford foreign representatives access to English avoidance provisions in English tribunals. It provides: 'Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, *grant any appropriate relief, including granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain* ...' On its face, at least, this language appears similar to the approach originally endorsed by US courts under former s 304, but subsequently criticised by later decisions and specifically prohibited under Chapter 15.

A permissive approach by other UNCITRAL jurisdictions suggests that in the 'international context' specifically prescribed by Congress for interpretation of Chapter 15, and for purposes of s 1521(a)(7), s 544(b)'s reference to 'applicable law' should be read as narrowly as possible.

Section 1507

Finally, a narrow reading of s 1521's 'avoidance carve-out' provision fits well with, and gives substantive effect to, s 1507(b)(3), which is designed to afford 'special assistance' to a foreign representative where doing so will 'reasonably assure [the] prevention of preferential or fraudulent dispositions of property of the debtor.'

This section's legislative history describes its expansive nature:

> 'Subsection [b] makes the authority for additional relief (beyond that permitted under sections 1519-1521 . . .) subject to the conditions for relief heretofore specified in United States law under [former] section 304 ... This section is intended to permit the further development of international cooperation begun under [former] section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter.'

Prevention of fraudulent transfers is specifically recognised as one of the 'elements of the grounds for granting comity.' Where comity is a central concept of US cross-border law (see, eg, 11 U.S.C. § 1509(b)(3) (providing that, upon recognition, US courts '*shall* grant comity' to the foreign representative)), it seems inconsistent to prohibit foreign representatives from pursuing avoidance actions under Chapter 15 that, but for s 544(b), would be directly available to them in their home jurisdiction.

CONCLUSION

In sum, the Fifth Circuit reached the right result in *Condor Insurance*. But it did so for incomplete reasons – reasons which, left alone, may add further uncertainty to an already-unsettled area of law considered vital to cross-border transactional planning. It remains for other courts to provide more complete analysis of s 544(b), its historical context within US bankruptcies, and the new statutory context it now inhabits within the provisions of s 1521(a)(7). ■