



**Exploring the Scope of the Property Requirement of Section 109(a) in Chapter 11 and 15
Cases**

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Introduction

Section 109 of title 11 of the United States Code (the “Bankruptcy Code”) provides that “only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor.”¹ In *In re Barnet*, the United States Court of Appeals for the Second Circuit held that debtor eligibility requirements of section 109 apply to a debtor in recognition proceedings under chapter 15.² If a debtor does not have a domicile or place of business in the United States, as is often the case with foreign debtors, then the debtor may rely on the broad interpretation of property to gain eligibility to file for bankruptcy. An analysis of chapter 11 and recent chapter 15 cases shows that the property requirement under section 109(a) can be satisfied in a multitude of ways, unrestrained by value limitations.

¹ 11 U.S.C. § 109(a) (2012).

² *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013) (holding that Chapter 1 “of this title . . . appl[ies] in a case under chapter 15”); *contra In re Bemarmara Consulting a.s.*, Case No. 13-13037 (KG), ECF. No. 38 at *8 (Bankr. D. Del. Dec. 17, 2013) (holding that the requirements of section 109(a) do not apply to foreign representatives seeking recognition of a foreign proceeding).

Part I of this memorandum will discuss chapter 11 case law that supports the general principle that the property element of section 109(a) may be satisfied by any property of any amount belonging to the Debtor in the United States. Part II focuses on chapter 15 cases where courts stated that retainers, causes of action and contract rights are sufficient property for debtor eligibility under section 109(a).

I. In Chapter 11 Cases, Section 109 May be Satisfied by Tangible and Intangible Property of the Debtor of Any Amount in the United States.

Courts have repeatedly held that, given the lack of specificity, section 109 is satisfied by any property, of any value, of the debtor in the United States.³ The court in *In re Global Ocean Carriers* concluded that, in light of the small amount of money in the debtor’s account, it was the party’s bank accounts in the United States—not the amount of money deposited therein—that made debtor’s property sufficient.⁴ Moreover, using the court’s reasoning in *In re McTague*, the court posited that in light of its clarity, section 109(a) does not afford the court any discretion “to look behind the language and declare that the quantity of property in the United States will be decisive of [debtor] eligibility.”⁵

Courts will recognize debtor eligibility to commence a bankruptcy case in the United States even when the debtor owns intangible property, such as bank accounts, clearing accounts, and

³ See *In re Glob. Ocean Carriers Ltd.*, 251 B.R. 31, 38 (Bankr. D. Del. 2000) (positing that under the plain meaning of section 109(a), any amount of property, whether “a dollar, a dime or a peppercorn located in the United States,” is sufficient for debtor eligibility) (quoting *In re McTague*, 198 B.R. 428, 432 (Bankr. W.D.N.Y. 1996)).

⁴ *Id.* at 38.

⁵ *Id.* at 39 (quoting *In re McTague*, 198 B.R. at 432).

stocks in the United States.⁶ However, a line is drawn where claims are too remote or “inchoate,” such as claims against property in the United States without an actual property interest.⁷

For property to suffice under section 109(a), it must be in the debtor’s possession at the time the bankruptcy petition is filed. For instance, the court in *In re Yukos Oil Company*, found that funds transferred to an entity created by the debtor just hours before filing for bankruptcy met the requirements of section 109(a).⁸

A majority of courts hold that under section 541(a) of the Code, prepetition retainers constitute property of the estate.⁹ Viewing prepetition retainers property of the estate, courts have held that retainers constitute sufficient property for debtor eligibility under section 109.¹⁰ Even retainers funded by non-debtor third parties also constitute property under section 109 as courts deem irrelevant who pays the retainer, so long as the debtor holds an interest in the retainer.¹¹

⁶ See, e.g., *In re Cenargo Int’l, PLC*, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2002) (stating that debtor eligibility was undisputed because debtor had property in United States in form of joint bank accounts and stock pledged to secure high yielding notes); *accord Bank of Am. v. World of English, N.V.*, 23 B.R. 1015, 1019-23 (N.D. Ga. 1982) (finding petitioners’ bank accounts in California property within the meaning of section 109(a)).

⁷ *In re Head*, 223 B.R. 648, 651–52 (Bankr. W.D.N.Y. 1996) (holding that debtors’ claims to remainder of trust fund in the event of a surplus was “too tenuous, too inchoate, and too contrived”).

⁸ 321 B.R. 396, 411 (Bankr. S.D. Tex. 2005); see also *In re Glob. Ocean Carriers Ltd.*, 251 B.R. at 37 (determining that having boats in U.S. ports 143 days each year did not qualify as property in the United States because the boats were not in the U.S. ports on the day the petition was filed).

⁹ See COLLIER ON BANKRUPTCY, ¶328.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2018), available at LEXIS, 3-328 Collier on Bankruptcy P 328.02.

¹⁰ See, e.g., *In re Glob. Ocean Carriers Ltd.*, 251 B.R. at 39 (holding that retainers paid on behalf of the debtors were sufficient property to meet the criteria of section 109).

¹¹ See *Miller v. United States Trustee (In re Indep. Eng’g Co.)*, 232 B.R. 529, 533 (B.A.P. 1st Cir. 1999) (finding retainer funded by a third party on behalf of debtor property of the estate as debtor retained an interest in the unapplied security retainer); see also *In re Crimson Inv., N.V.*, 109 B.R. 397, 402 (Bankr. D. Ariz. 1989) (stating “[i]f Debtor’s Counsel and the party supplying the funds to the debtor fail to disclose the source of those funds, then the interest in the trust funds devolves to the Debtor under 11 U.S.C. § 541(a)(7)”).

II. In Chapter 15 Cases, Courts Have Found that Retainers, Causes of Action and Contract Rights Suffice as Property Under Section 109

Courts in chapter 15 cases recognize retainers as sufficient property for debtor eligibility under section 109(a).¹² For example, in reviewing *de novo* whether an attorney retainer is sufficient basis for debtor eligibility, the United States District Court for the Northern District of California found that section 109 did not set parameters on the amount of property.¹³ As a result, the court held that retainers also satisfy the threshold for debtor eligibility, following the decisions of the district courts bound by *In re Barnet*.¹⁴ In support of a broad application of section 109, the court in *In re Octaviar* posited that an imposition of a requisite amount of property under section 109 would “subvert the intent of Congress” and undermine certain provisions of the Bankruptcy Code.¹⁵ In addition, several circuit courts have held that causes of action, though intangible, constitute property.¹⁶

In a chapter 15 case, the court in *In re Octaviar* found that the debtor had property in the United States by applying the well-established principle that property of the estate may include

¹² See, e.g., *In re Avanti Commc’n Grp. PLC*, 582 B.R. 603, 613–14 (Bankr. S.D.N.Y. 2018) (finding that a retainer and a 2023 Indenture governed by New York satisfied the property requirement); *In re U.S. Steel Can. Inc.*, 571 B.R. 600, 611 (Bankr. S.D.N.Y. 2017) (holding undrawn \$100,000 retainer in New York bank account paid by foreign debtor to its United States counsel property of debtor in the United States); *In re Cell C Proprietary Ltd.*, 571 B.R. 542, 552 (Bankr. S.D.N.Y. 2017) (holding foreign debtor eligible under section 109(a) on the basis of retainer paid to international law firm representing debtor, deposited in New York bank account); *In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016) (finding sufficient assets in the United States, among which included an attorney retainer deposited in New York).

¹³ See *Jones v. APR Energy Holdings Ltd. (In re Forge Grp. Power Pty Ltd.)*, 2018 WL 827913 at 36 (N.D. Cal. Feb. 12, 2018) (following the out of circuit bankruptcy courts, the court found that any amount, whether “a dollar, a dime or a peppercorn located in the United States” suffices) (quoting *In re Glob. Ocean Carriers Ltd.*, 251 B.R. at 38-39).

¹⁴ *Id.* at 38.

¹⁵ *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 373 (Bankr. S.D.N.Y. 2014) (stating that imposing a minimum amount of property would be inconsistent with “other provisions of the Code that reject lengthy and contentious examination of the grounds for a bankruptcy filing.”).

¹⁶ See, e.g., *Seward v. Devine*, 888 F.2d 957, 963 (2d Cir. 1989) (positing that all interests, including intangible property such as causes of action constitutes property); accord *Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez)*, 224 F.3d 1273, 1278 (11th Cir. 2000) (concluding that debtor’s legal malpractice cause of action is property of his bankruptcy estate); *State Farm Life Ins. Co. v. Swift (In re Swift)*, 129 F.3d 792, 802 (5th Cir. 1997) (finding that debtor’s causes of action accrued before filing his bankruptcy petition, the court held that the causes of action became the property of the bankruptcy estate).

claims and causes of action commenced in the United States.¹⁷ Furthermore, as explained by the court in *Octaviar*, courts possess a level of discretion in determining the situs of a cause of action, as it is dependent on the “common sense appraisal of the requirements of justice and convenience.”¹⁸

Courts have also recognized that a debtor’s contract rights, which in turn create property rights, are intangible property of the debtor, satisfying section 109(a) eligibility requirement.¹⁹ In *In re Ocean Rig*, the District Court for the Southern District of New York found that New York law governed the debtors’ debt, since the instruments governing the debt contained exclusive New York forum selection provisions.²⁰ As a result, the court held that the foreign debtors satisfied section 109(a)’s requirement of having property in the United States.²¹

Conclusion

Courts have regularly held that the property component of section 109, in both chapter 11 and chapter 15, is easily satisfied. Property is not limited to a specific amount or form, but rather may be satisfied by: *inter alia*, retainers, causes of action, and contract rights that are located in the United States.

¹⁷ *In re Octaviar Admin. Pty Ltd.*, 511 B.R. at 369–70 .

¹⁸ *Id.* at 372 (quoting *In re Fairfield Sentry Ltd.*, 484 B.R. 615, 624 (Bankr. S.D.N.Y. 2013)); *see also In re BCI Fin. Ltd.*, 583 B.R. 288, 302 (Bankr. S.D.N.Y. 2018) (finding that debtors’ fiduciary duty claims are located in New York under Australian law, basing their finding on several considerations, including those relating to enforcement).

¹⁹ *See In re Avanti Commc’n Group PLC*, 582 B.R. at 613–14 (basing debtor eligibility under section 109 on, *inter alia*, 2023 Indenture governed by New York law); *In re U.S. Steel Can. Inc.*, 571 B.R. 600, 609–611 (Bankr. S.D.N.Y. 2017) (explaining that a debtor’s contract rights are property of the debtor and those rights are tied to the location of the governing law of the contract); *see also In re Bureau Cap. Res. PTE Ltd.*, 540 B.R. 80, 83 (Bankr. S.D.N.Y. 2015) (holding that by virtue of the New York choice of law and forum selection clauses in debtor’s indenture, the situs of debtor’s intangible property rights was New York).

²⁰ *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 700 (Bankr. S.D.N.Y. 2017).

²¹ *Id.*