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Beyond *ASARCO*: Fee Shifting and Recovery in Bankruptcy Litigation

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I.
INTRODUCTION

In 2015, Supreme Court famously (at least for bankruptcy lawyers) reaffirmed "the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."[1] Departures from this fundamental precept are recognized only in "specific and explicit provisions for the allowance of attorney's fees under selected statutes."[2]

What constitutes a statute, procedural rule, or common law rule sufficiently explicit to override the American Rule is a matter of interpretation. At one end of the spectrum, Bankruptcy Code § 110(i)[3] represents an explicit decision by Congress to shift the burden of litigation between debtors and bankruptcy petition preparers to the latter.[4] Section 330(a)(1), on the other hand, does not.[5] From such cases, we can intuit how the Supreme Court might respond to arguments that even less explicit statutes, such as Bankruptcy Code § 105(a), allow for fee-shifting.

Aside from the fee-shifting provisions of the Bankruptcy Code, state law, too, offers opportunities for a litigant to recover legal fees incurred from an opposing party. Attention to the precise (and often straightforward) requirements of Texas law will open new opportunities for the careful practitioner to recover litigation costs in appropriate cases. Beyond statutory rights that may exist under state or federal law, "[p]arties are free to contract for a fee-recovery standard either looser or stricter" than any applicable statute may provide.[6]

In this paper, we identify and discuss several such fee-shifting statutes and procedural rules, their basic requirements, and some of the pitfalls that can trap the unprepared.

II.
THE BANKRUPTCY CODE

A. Bankruptcy Code § 506

Under Bankruptcy Code § 506(b), to the extent the value of any estate property securing a creditor's claim exceeds the amount of the creditor's claim, the creditor must be allowed to

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[1] *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (quoting *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010).

[2] *Id.*

[3] Unless otherwise noted, section (§) references herein are to the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532.

[4] *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. at 2165-66 (observing that § 110(i) "expressly transfer[s] the costs of litigation from one adversarial party to the other).

[5] *Id.*

[6] *Hancock v. Chicago Title Ins. Co.*, 2013 WL 2391500 at *6 (N.D. Tex. June 3, 2013) (citing *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650 , 653 (Tex. 2009); *Mohican Oil & Gas, LLC v. Scorpion Explor. & Prod., Inc.*, 337 S.W.3d 310, 321 (Tex. App.—Corpus Christi 2011, pet. denied)). "[T]he terms of the contract, not statute, control the outcome[.]" *Id.* (citing *Mohican Oil & Gas,* 337 S.W.3d at 321; *Intercontinental Grp.,* 295 S.W.3d at 653–54 (determining attorney's fees according to mandatory fee-award contract)).

recover interest on its claim and any reasonable costs, fees, or charges, as provided for in the agreement under which the creditor's claim arose.[7] The practical effect of § 506(b) is to allow oversecured creditors to receive post-petition interest and miscellaneous costs, including attorney's fees, related to their claim.[8]

Section 506(b) places three conditions on the allowance of charges within its purview: (i) the allowed claim must be oversecured; (ii) the fees, expenses, and charges must be provided for under the agreement that gave rise to the claim; and (iii) the fees, expenses, and charges must be reasonable.[9]

The first to requirements are largely factual in nature, and beyond the scope of this paper. In each case, however, the court must determine that there is sufficient equity value above the amount of the allowed secured claim from which to reimburse the requested fees, costs, and charges, and that the operative agreement between the parties (e.g., loan agreement, promissory note) expressly provides for the reimbursement of the requested fees. In that regard, the court must not only identify the relevant contractual provision but also ascertain whether all of the requested fees fall within its textual ambit, as all fees must be permitted only to the extent allowable the state law rights undergirding the main claim under Bankruptcy Code § 502.

The parameters for determining the reasonableness of professional fees requested under § 506(b) was stated by the Fifth Circuit in *Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc.* (*In re Hudson Shipbuilders, Inc.*),[10] which articulated a three-step approach to determine the reasonableness of attorney's fees for oversecured creditors: "(1) determine the nature and extent of the services supplied by the attorney with reference to the time and labor records submitted; (2) ascertain the value of the services; and, (3) briefly explain the findings and the reasons upon which the award is based."[11] The Fifth Circuit also made clear that federal law should apply when conducting a reasonableness inquiry in this regard.[12] This is even the case after a creditor has obtained relief from the automatic stay and the underlying collateral with respect to which such fees were incurred is no longer property of the estate.[13]

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[7] *See* 11 U.S.C. § 506(b).

[8] *See Southland Corp. v. Toronto-Dominion* (*In re Southland Corp.*), 160 F.3d 1054, 1059-60 (5th Cir. 1998); *In re Haber Oil Co.*, 82 B.R. 435, 438 (Bankr. N.D. Tex. 1988).

[9] *See* 11 U.S.C. § 506(b); *Southland Corp.*, 160 F.3d at 1059-60; *In re Pan Am. Gen. Hosp., LLC*, 385 B.R. 855, 862 (Bankr. W.D. Tex. 2008); *Haber Oil Co.*, 82 B.R. at 438.

[10] 794 F.2d 1051, 1058 (5th Cir. 1986).

[11] *Id.*

[12] *Id.* at 1056 ("Congress intended that federal law should govern the enforcement of attorneys' fees provisions, notwithstanding contrary state law.")

[13] *See Wells Fargo Bank, N.A. v. 804 Cong., L.L.C.* (*In re 804 Cong., L.L.C.*), 756 F.3d 368, 373-75, 378-79 (5th Cir. 2014).

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