AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Feature

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# The *Boomerang* Effect[2]

## *Is There a Contract Exception to* ASARCO *(and if Not, What Then)?*

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The Supreme Court ruled, in *ASARCO*,[3] that nothing in the Bankruptcy Code created a sufficient exception to the American Rule and that, accordingly, there was no statutory basis to support awarding to retained professionals compensation for the defense of their fee applications, even when successful. The Court thus upended the established approach of most courts. However, given the Court's express and sole reliance on the American Rule as the basis for its decision, some hope arose that the effects of *ASARCO* could be offset by including a provision in retention agreements, and blessed by the bankruptcy courts under § 328 of the Bankruptcy Code, that allowed fees for the defense of fees, at least where the defense was successful. After all, writing for the majority, Justice Thomas described the American Rule such that: "Each litigant pays his own attorneys' fees, win or lose, *unless a statute or contract provides otherwise*."[4] *ASARCO* merely dispensed with the first of these possible exceptions, the statutory one.

Professionals were quick to test the premise, including in retention application requests for the court to bless provisions allowing for fees for defense of fees. The Office of the U.S. Trustee (the "UST") — which had joined the losing side in *ASARCO* and defended, on statutory and policy grounds, fees for defense of fees in some circumstances — quickly objected, arguing that such provisions ran afoul of the Supreme Court's ruling. A recent decision from Delaware, in the *Boomerang Tube* chapter 11 case, has largely sided with the UST, refusing to approve fees for a defense of fees provision.[5] Other Delaware judges are following that decision.[6]

This article will survey the pre-*ASARCO* approach to fees for defense of fees, the Supreme Court's decision, and the arguments for and against the contract exception to that ruling. It will then explore in detail the decision of the Delaware court in *Boomerang Tube* and discuss what, if anything, is left of the contract exception. The article then explores the implications of these decisions for everyday practice, as well as unresolved issues in the wake of these decisions.

## The Pre-*ASARCO* Case Law

Prior to the Supreme Court's decision in *ASARCO*, the decisional law was *relatively* settled with respect to whether fees and costs incurred by a professional in defending his or her fee application were compensable: applying the "American Rule," such fees and costs generally were not compensable *unless* the applicant "substantially prevailed" in the defense of a fee application. Almost 10 years ago, Judge **Stuart M. Bernstein**, in reviewing the prevailing case law, reasoned in *Brous*:

> [F]ee litigants, like other litigants, must generally bear their own legal expenses under the "American Rule."

1 The authors acknowledge the contributions of **Roma N. Desai** of Bernstein Shur and Jill Bradshaw of Godfrey & Kahn for providing invaluable assistance with this article. Mr. Keach has served as a fee examiner in, among other cases, *In re AMR Corp. (American Airlines)* and *Exide Technologies*. Mr. Williamson and his firm also served as fee examiner and fee committee counsel in a number of cases, including *General Motors*, *Lehman Brothers* and *Energy Future Holdings*. The authors joined fellow fee examiners **Nancy B. Rapoport** (UNLV William S. Boyd School of Law; Las Vegas) and **Robert M. Fishman** (Shaw Fishman Glantz & Towbin LLC; Chicago) in filing an *amicus brief* in the *ASARCO* case that advocated permitting the award of fee defense compensation in limited circumstances.

2 In social psychology, appropriately enough, the "'boomerang effect' refers to the unintended consequences of an attempt to persuade resulting in the adoption of an opposing position instead." Wikipedia, "Boomerang effect (psychology)," *available at* en.wikipedia.org/wiki/Boomerang_effect_(psychology) (last visited on March 7, 2016).

3 *Baker Botts LLP v. ASARCO LLC*, – U.S. –, 135 S. Ct. 2158, 2164 (2015).

4 *Id.* at 2164 (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53, 130 S. Ct. 2149 (2010)) (emphasis added).

5 *See In re Boomerang Tube Inc.*, No. 15-11247 (MFW), 2016 WL 385933 (Bankr. D. Del. Jan. 29, 2016).

6 *See, e.g., In re Samson Resources Corp.*, No. 15-11934 (CSS), Dkt. No. 641 (Bankr. D. Del. Feb. 8, 2016) (Letter from Hon. Christopher S. Sontchi to Counsel); *In re New Gulf Resources LLC*, No. 15-12566 (BLS), Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016) (Letter from Hon. Brendan Linehan Shannon to Counsel).

Nevertheless, some courts have awarded the litigation fees and expenses incurred by the successful applicant out of fear that the failure to do so would dilute the fee award, and encourage parties to file frivolous objections. Conversely, other courts have declined to award the fees where the objection was filed in good faith and the objecting party prevailed. At least one court has expressed the concern that allowing the losing applicant to recover its legal fees would encourage meritless fee requests because the applicant could earn more fees opposing objections to its frivolous request.[7]

Other courts, however, took a stricter approach, finding that the fees and costs incurred in defending a fee application benefit only the professional and provide no benefit to the estate; accordingly, such courts, albeit a minority, denied categorically the allowance of such fees and the reimbursement of such expenses.[8]

The UST's Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases (the "UST Large Case Guidelines")[9] took a similar approach to the then-prevailing majority case law. The UST Large Case Guidelines provided that activities that the UST may consider or object to as non-compensable under § 330 review included but were not limited to:

> **Contesting or litigating fee objections:** Whether the fee application seeks compensation for time spent explaining or defending monthly invoices or fee applications that would normally not be compensable outside of bankruptcy. Most are not compensable because professionals typically do not charge clients for time spent explaining or defending a bill. The USTP's position is that *awarding compensation for matters related to a fee application after its initial preparation is generally inappropriate, unless those activities fall within a judicial exception applicable within the district (such as litigating an objection to the application where the applicant substantially prevails)*. Thus, the United States Trustee may object to time spent explaining the fees, negotiating objections, and litigating contested fee matters that are properly characterized as work that is for the benefit of the professional and not the estate.[10]

Thus, most available case law and the UST Large Case Guidelines generally provided, in effect, that time spent defending fee applications would not be compensable unless the party defending the fees substantially prevailed. If the applicant substantially prevailed, however, fees and expenses incurred for the defense of fees were allowable and compensable.

## Fee Examiner Practice

As fee examiners, or counsel appointed to fee committees, the authors here also took the position, based on the case law and guidelines, that responding to the fee examiner's inquiries and objections presented the possibility of both compensable and noncompensable time. Given the procedure mandated by most fee examiner orders, **Bob Keach** took the position, before *ASARCO*, that it would be unfair to recommend that all fees incurred in responding to the fee examiner's inquiries and attempting to resolve such inquiries be disallowed. *Routine* involvement in the process should not be penalized. Under Keach's approach, the fee examiner exercises his judgment in this respect on a case-by-case basis, given his direct involvement in the process. However, consistent with both the case law and the applicable guidelines, Keach *generally* recommended that time be treated as compensable when spent (a) preparing an *initial* response to the preliminary report (which response may be detailed); (b) in an *initial* meeting or teleconference with the fee examiner as to a preliminary report; and/or (c) considering a *single* revised resolution proposal or response by the fee examiner following such response, meeting and/or teleconference. Moreover, Keach took the position that a routine response to a preliminary report and participation in the routine process above does not require the retention and use of outside counsel, even as to retained professionals that are not law firms. Accordingly, he generally recommended that retained professionals *not* be reimbursed for outside counsel fees incurred in connection with this process.

**Brady Williamson**, as the fee examiner in the *Motors Liquidation* case, recommended that some fees be allowed on (at least in part) a formula basis:

> The recommendation embodied in the Fee Examiner's individual reports suggests a pragmatic approach. For experienced firms, it proposes a 50 percent payment for time spent on responding to the Fee Examiner or to the U.S. Trustee or, for that matter, to the Court itself. For less experienced firms, the suggested reduction is less. This approach takes into account the case law, to the extent there is bright line authority in those cases, and tries to account both for sustained objections and stipulations as well as for objections that, though not sustained, are made in good faith — generally in concert, though not jointly, by the U.S. Trustee and the Fee Examiner.[11]

## The *ASARCO* Decision

In *ASARCO*, the U.S. Supreme Court held that professional fees incurred in litigating the defense of a fee applica-

7 *In re Brous*, 370 B.R. 563, 572 (Bankr. S.D.N.Y. 2007) (internal citations omitted); *see also In re 14605 Inc.*, No. 05-11910 (MFW), 2007 WL 2745709, at *10 (Bankr. D. Del. Sept. 19, 2007); *In re Worldwide Direct Inc.*, 334 B.R. 108, 109-12 (D. Del. 2005) ("[R]equiring counsel who has successfully defended a fee claim to bear the costs of that defense is no different than cutting counsel's rate or denying compensability on an earlier fee application."); *In re CCT Commc'ns*, No. 07-10210 (SMB), 2010 WL 3386947, at *8-9 (Bankr. S.D.N.Y. Aug. 24, 2010) (duplicating the reasoning of *Brous*, but allowing fees and costs in defending fee application where applicant "substantially prevailed, and denial of the defense costs would dilute its award"); *In re 530 West 28th Street LP*, No. 08-13266 (SMB), 2009 WL 4893287, at *11 (Bankr. S.D.N.Y. Dec. 11, 2009) (following *Brous* and not awarding any portion of fees incurred in defending fee application where objections to application were made in good faith, the court sustained many of the objections, and determined that "there [was] no reason to deviate from the American Rule under which litigants must bear their own legal expenses"); *In re Ahead Commc'ns Sys. Inc.*, No. 02-30574, 2006 WL 2711752, at *4 (Bankr. D. Conn. Sept. 21, 2006) (collecting cases and holding that: "This court concurs with the courts which have allowed the compensation of attorneys' fees incurred in successfully defending fee applications against objections."); *see also* Bench Decision on Pending Fee Issues, *In re Motors Liquidation Co.*, No. 09-50026 (REG), Dkt. No. 7896 (Bankr. S.D.N.Y. Nov. 23, 2010) (Judge **Robert E. Gerber** adopts holdings of *CCT* and *Brous*).

8 *In re Wireless Telecomm. Inc.*, 449 B.R. 228, 237-38 (Bankr. M.D. Pa. 2011); *In re Parklex Assocs. Inc.*, 435 B.R. 195, 214 (Bankr. S.D.N.Y. 2010) (although Court reluctant to establish *per se* rule); *In re St. Rita's Assocs. Private Placement LP*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001); *cf. Stations Holding Co.*, No. 02-10882 (MFW), 2004 WL 1857116, at *2 (Bankr. D. Del. Aug. 18, 2004) (time spent negotiating compensation is unreasonable as "the purpose of such work is to improve the position of the applicant, not the Debtor or creditor body in general"); *see also In re 415 W. 150 LLC*, No. 12-13141 (SMB), 2013 WL 4603162, at *6 n.2 (Bankr. S.D.N.Y. Aug. 28, 2013) ("[A]n applicant should not be compensated for fixing a defective fee application.").

9 28 C.F.R. Part 58, Appendix B.

10 *Id.* at section B.2.g (emphasis added).

11 Fee Examiner's Summary and Recommendations — Interim Fee Applications Scheduled for Hearing on October 26, 2010 (Including Those Adjourned From September 24, 2010), *In re Motors Liquidation Co.*, No. 09-50026 (REG), Dkt. No. 7448, at 11 (Bankr. S.D.N.Y. Oct. 19, 2010).

tion are not compensable under § 330. In reaching that conclusion, the Court used the American Rule as a starting point: Each party pays his or her own attorney's fees, win or lose, unless a statute or contract provides otherwise.[12] Historically, with respect to the "statutory" exception to the American Rule, the Court has recognized departures from the American Rule only where there are specific and explicit statutory provisions for the allowance of attorney's fees.[13]

Applying this rule to § 330, the Court found that the language there — "reasonable compensation for actual, necessary services rendered" — permits courts to award fees for work done "to assist the administrator of the estate...."[14] However, "reasonable compensation for actual, necessary services rendered" does not specifically or explicitly authorize a shifting of litigation costs from one party to another.[15] Rather, § 330(a)(1) authorizes courts to award attorneys' fees for "work done *in service of* the estate administrator."[16] Time spent litigating a fee application "against the administrator of a bankruptcy estate cannot be fairly described as 'labor performed for' — let alone 'disinterested service to' — that administrator."[17] Since § 330 does not authorize a departure from the American Rule, professionals must bear the cost of defending their own fee applications in litigation.[18]

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented. In contrast to the majority opinion, their rationale started with § 330(a)(3) — finding that bankruptcy courts have broad discretion to determine what constitutes "reasonable compensation" under § 330(a)(3).[19]

Section 330(a)(3) provides, they noted, that a court shall "consider the nature, the extent, and the value of ... services [rendered], taking into account *all relevant factors*."[20] According to the dissent, it is within the bankruptcy court's discretion to consider as "relevant factors" the cost and effort that a professional has reasonably expended to recover professional fees.[21] For example,

> [c]onsider a bankruptcy attorney who earns $50,000 — a fee that reflects her hours, rates, and expertise — but is forced to spend $20,000 defending her fee application against meritless objections. It is within a bankruptcy court's discretion to decide that, taking into account the extensive fee litigation, $50,000 is an insufficient award. The attorney has effectively been paid $30,000, and the bankruptcy court might understandably conclude that such a fee is not "reasonable."[22]

Furthermore, a contrary interpretation "undercuts a basic objective of the statute."[23] In directing bankruptcy courts to consider "whether the compensation is reasonable based on customary compensation charged by comparably skilled practitioners in cases other than" bankruptcy cases, Congress intended high-quality attorneys and other professionals to receive comparable compensation and to ensure that "professionals would remain in the bankruptcy field."[24] In contrast to the relatively straightforward process of billing outside the bankruptcy context, the process by which a bankruptcy professional defends his or her fees may be "so burdensome that additional fees are necessary in order to maintain comparability of compensation."[25] Precisely "to maintain comparable compensation, a court may find it necessary to account for the relatively burdensome fee-defense process required by the Bankruptcy Code. Accounting for this process ensures that a professional is paid 'reasonable compensation.'"[26]

Finally, the dissent finds no distinction between costs of fee preparation — which the majority notes are explicitly provided for under § 330(a)(6) — and costs of defending fee litigation.[27] The majority suggests that preparation of a fee application is a "service" to the estate, because the preparation of a fee application is a specific requirement of the Bankruptcy Code.[28] As the Bankruptcy Code permits a bankruptcy court to award fees only after a hearing, however, the dissent notes that preparation for that hearing and appearing at that hearing would also be compensable as the type of activities that are required by the Bankruptcy Code.[29]

## The *Boomerang Tube* Decision

As noted above, it did not take long for practitioners to test the efficacy of a possible contract exception, given the reliance by the *ASARCO* majority on the American Rule. Motions were filed in a series of cases asking courts to bless a form of fees for defense of fees provision in a retention agreement. The first case to reach a decision was *Boomerang Tube*, and it is proving to be a trend-setter.

In *Boomerang Tube*, the bankruptcy court considered whether (a) § 328 authorizes the approval of fee defense provisions; (b) retention agreements for court-approved professionals provide a contractual exception to the American Rule; and (c) fee defense provisions can be approved as a reasonable expense under § 328.[30] Counsel ("committee counsel") to the official committee of unsecured creditors (the "committee") in *Boomerang Tube* sought approval of retention agreements that included an indemnity provision for *any* successful defense of committee counsel's fees. The UST objected to that provision of the retention agreements.[31]

The bankruptcy court held that § 328 does not expressly authorize the approval of fee defense provisions. Utilizing the two-part test in *ASARCO*, which provides that "any statutory departures from the American Rule must be 'specific and explicit' and must 'authorize the award of a reasonable attorney's fee, fees, or litigation costs,' and usually refer to a 'prevailing party' in the context of an 'adversarial action,'" the bankruptcy court determined that, like § 330, the text of § 328 "does not refer to the award of defense fees to a pre-

12 *See ASARCO*, 135 S. Ct. at 2164.
13 *Id.*
14 *Id.* at 2165.
15 *Id.*
16 *Id.* (emphasis in original).
17 *Id.*
18 *Id.* In support of this conclusion, the majority opinion noted, in contrast, one other section of the Bankruptcy Code that expressly transfers costs of litigation from one party to another. Section 110(i)(1)(C) provides, "[i]f a bankruptcy petition preparer ... commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States [T]rustee (or the bankruptcy administrator, if any)," the bankruptcy court must "order the bankruptcy petition preparer to pay the debtor ... reasonable attorneys' fees and costs in moving for damages under this subsection." 11 U.S.C. § 110(i)(1)(C).
19 *Id.* at 2169 (Breyer, J. dissenting).
20 *Id.* (emphasis in original).
21 *Id.* at 2170.
22 *Id.*
23 *Id.*
24 *Id.* (quoting 11 U.S.C. § 330(a)(3)(F)).
25 *Id.*
26 *Id.* at 2171.
27 *Id.* at 2173.
28 *Id.*
29 *Id.*
30 *Boomerang Tube*, 2016 WL 385933, at *1.
31 *Id.*
32 *Id.* at *1-2 (quoting *ASARCO*, 135 S. Ct. at 2164).

vailing party."[32] Judge **Mary F. Walrath** found significance in the fact that several other sections of the Bankruptcy Code contained the express language necessary to create an exception to the American Rule, but such language was omitted (presumably on purpose) from §§ 328 and 330.[33]

In reviewing whether the proposed fee-defense provisions fit within the scope of "reasonable terms and conditions of employment" under § 328, the bankruptcy court determined that the fee defense provisions were not reasonable, by definition, because these conditions to employment "do not involve any services for the Committee."[34] Instead, fee defense only serves to benefit the committee counsel's own interest. Moreover, the bankruptcy court held that *ASARCO*'s holding precludes a finding that § 328 permits fee indemnification provisions even if courts permitted such provisions pre-*ASARCO*.[35]

The bankruptcy court also distinguished *ASARCO*'s holding that § 330 does not provide the express statutory basis for the approval of fee defense provisions from the theory that § 330 flatly prohibits fee defense provisions. This distinction might have been important because it left open the possibility of a contractual exception to the American Rule. The bankruptcy court extended this same distinction to § 328, but noted a catch-22: "any such contract has to be consistent with the other provisions of the Bankruptcy Code."[36] Although the bankruptcy court found that committee counsel's retention agreements are contracts, the court determined as well that the agreements could not create a contractual exception to the American Rule, because the fee-defense provision did not provide for fee shifting among just the parties to the contract. Rather, the provisions would bind a non-party to the contract, the estate, to pay committee counsel's defense costs even if the estate was not the party challenging fees.[37]

Finally, the bankruptcy court concluded that the analysis under § 328 does not differ when outside counsel fees for defense of fees are sought as reasonable *expenses* under § 328. "[S]ection 328 permits only approval of fees or expenses in performing services *for the Committee*"; here, the services, fee defense, would be performed for committee counsel.[38]

Other Delaware courts quickly followed suit. In a letter to counsel in the *Samson Resources* case, Bankruptcy Judge **Christopher S. Sontchi** announced that he would follow Judge Walrath's decision.[39] Bankruptcy Judge **Brendan Linehan Shannon** issued a similar letter to counsel in the *New Gulf Resources* case.[40]

## What's Next: Implications of the *Boomerang Tube* Decision

The decision in *Boomerang Tube* — and apparently now the governing rule in at least the Delaware bankruptcy court given its express adoption by other judges in that district — may not definitively answer the question, outside of Delaware, of whether the "contract exception" to the American Rule survives as an option for obtaining fees for the defense of fees in bankruptcy cases. There is, of course, the possibility that other bankruptcy courts will refuse to follow the decision. Courts in the Southern District of New York, where the rule that fees for defense of fees were compensable if the applicant substantially prevailed in opposing an objection was solidly entrenched and widely followed, would be prime candidates for a different view. Given the long history of that practice, and given the argument that *ASARCO* was not policy-based but simply dealt with statutory construction, the theory persists that a fees-for-defense-of-fees provision in a retention agreement is a reasonable term or condition of employment under § 328 and can be approved by a court as such.

The authors agree with the *Boomerang Tube* court that retention agreements for court-approved retained professionals are not mere bilateral agreements, given the necessity of court approval. However, this arguably may not *per se* disqualify such agreements under the contract exception to the American Rule in the event that the court approves retention — and the fees for defense of fees provision — after notice and hearing, especially if the estate fiduciary consents. This issue then, as that court properly identified it, is whether such a provision is a reasonable term of employment. *ASARCO* cannot be read to say that fees for the defense of fees provisions *conflict* with the Bankruptcy Code; it simply holds that the Code does not expressly authorize such fees. The *ASARCO* majority's rejection of policy arguments and market considerations as inadequate to otherwise influence its construction of § 330 does not also mean — as the *Boomerang Tube* court reasoned — that such policy arguments and market considerations are not relevant to a determination of reasonableness. And reasonableness cannot be limited to terms that literally benefit the estate; bonus and fee-enhancement provisions do not benefit the estate. In addition, for the policy reasons cited by the minority, such terms may in fact be beneficial to the estate. One could also justifiably contend that holding that such provisions are not reasonable because of the absence of express statutory authorization suffers from potential circularity and collapses the two exceptions to the American Rule into one. Stay tuned to see if the courts split on this point.

However, the *Boomerang Tube* holding is likely to stick and gain traction. Practitioners and courts will now need to wrestle with virtually no prospect for presumptive compensation for fee defense fees. There is a discernable trend in large chapter 11 cases for the "reorganized debtor — now run by the creditor groups that were opposed by the committee and perhaps even by the management and counsel of the prior debtor-in-possession — to question final fees, either because of a genuine belief that fees run up opposing such creditors were necessarily excessive or for purposes of retribution, or both. If fee defense fees cannot be compensated, this tactic

33 *Id.* at *2 (noting that §§ 110(i)(1)(C), 303(i)(1)(B), 362(k)(1), 526(c)(2), 707(b)(4)(A) and 707(b)(5)(A) all provide for an award of fees and costs to the prevailing party).
34 *Id.* at *5.
35 *Id.* at *6-7.
36 *Id.* at *3.
37 *Id.* at *4.
38 *Id.* at *8 (emphasis added).
39 *In re Samson Resources Corp.*, No. 15-11934 (CSS), Dkt. No. 641 (Bankr. D. Del. Feb. 8, 2016) (Letter from Hon. Christopher S. Sontchi to Counsel).
40 *In re New Gulf Resources LLC*, No. 15-12566 (BLS), Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016) (Letter from Hon. Brendan Linehan Shannon to Counsel). The decisions have not discouraged counsel from being creative. For instance, in *New Gulf Resources*, Baker Botts LLP then sought approval of a fee premium that would be waived "barring significant objections" to base fees. In response to Judge Shannon's letter and his invitation for further briefing, Baker Botts takes the position that such fee premium neither runs afoul of *ASARCO* and *Boomerang Tube* nor violates the Bankruptcy Code. Brief in Support of Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Baker Botts LLP as Counsel for the Debtors and Debtors in Possession, *In re New Gulf Resources*, No. 15-12566 (BLS), Dkt. No. 344, at 3-5 (Bankr. D. Del. March 2, 2016). Judge Shannon disagreed and held that the fee-premium "structure proposed by Baker Botts runs afoul of the holdings in *ASARCO* and *Boomerang Tube*." *In re New Gulf Resources LLC*, No. 15-12566 (BLS), Dkt. No. 395 (Bankr. D. Del. March 16, 2016) (Letter from Hon. Brendan Linehan Shannon to Counsel).

becomes more attractive. However, the real potential harm is in small cases. If a trustee or counsel has to defend a four- or five-figure fee against serious opposition, it does not take long before the net return to the professional approaches zero and, therefore, inequity. Professionals may be forced to capitulate rather than litigate. Defenders of the rule against fees for defense of fees will argue that Rule 9011 and 28 U.S.C. § 1927 will provide adequate remedies in cases where the opposition is unjustified. However, experience suggests that courts will be very reluctant to impose sanctions on those grounds in such cases.[41] Moreover, the real danger is that the court will never see the dispute, especially in small cases, where practitioners will take a discount rather than incur potentially noncompensable fees and costs. This may lower fees, but it will not necessarily do so fairly and justly.

The absence of any argument for fees for defense of fees also has implications for fee examiner practice. While, as fee examiners, the authors can follow their usual practices set forth above, others may disagree that the fees incurred in dealing with the fee examiner are compensable — at least to a point — and seek to have them disallowed. Should that become the rule, parties may be reluctant to join requests to appoint fee examiners or fee committees. Expect an effort by some to clarify what is and is not compensable in fee examiner orders.

*ASARCO* and *Boomerang Tube* will also prevent reimbursement of non-lawyer professionals for outside counsel fees incurred by such professionals in defending fees to the extent such expenses are, as they usually are, subject to being reasonable under § 330.[42] Expect such professionals to try to resist § 330 review of such counsel fees, if such an exception is even permissible after *ASARCO* and *Boomerang Tube*.

Application of *ASARCO* and *Boomerang Tube* in the post-confirmation period may be especially problematic, or at least uncertain. For example, in *AMR Corp.*, the plan contained a provision that fees incurred post-confirmation were not subject to judicial (or fee examiner) review and would be paid by the reorganized debtor in the ordinary course upon submission of fee requests and/or invoices.[43] Such provisions are not uncommon. However, most fees for defense of fees — at least for final fee applications, where the battles will most often occur — will be incurred post-confirmation. After *ASARCO* and *Boomerang Tube*, should courts approve such plan provisions, thus potentially allowing some payment for fees and expenses incurred for defense of fees? In other contexts, courts have been reluctant to approve plan provisions allowing payments otherwise barred by the Bankruptcy Code.[44] This may suggest a need to maintain fee review through the effective date so as to include the period of any fee or expense challenges. Expect provisions like the one in *AMR Corp.* to draw fire.

**ABI's Commission to Study the Reform of Chapter 11 has recommended that the Code be amended to allow much more flexibility in compensating estate professionals and to open the door more widely to alternative and case-specific fee structures.**

On its face, the *Boomerang Tube* decision is a case about legal fees applying a case about legal fees, and as a result, is of relatively limited interest. But there are broader implications, and the decision falls into a broader trend of preventing bargaining around the Code when third-party rights or considerations (or even optics) of fairness come into play. The most significant sentence in the comprehensive opinion by Judge Walrath may be this one: "The Court nonetheless agrees with the UST's assertion that the parties cannot, by contract, violate another provision of the Code."[45] This assertion may soon be before the U.S. Supreme Court in *Jevic Holding Corp.*, where the U.S. Court of Appeals for the Third Circuit approved a district court and bankruptcy court decision that a "structured dismissal," over the objection of some interested parties but approved by the bankruptcy court, could contain "plan" provisions that violated the absolute priority rule.[46]

In addition, the U.S. District Court for the Southern District of New York reversed the bankruptcy court's decision in *Lehman Brothers* that had approved a plan that, among other things, provided for the payment of the professional fees submitted by individual members of the creditors' committee.[47] The UST argued, successfully on appeal, that the stipulated provision in the plan violated 11 U.S.C. § 503(b)(4), which permits the payment of specific professional fees but "does not cover expenses on the basis of committee membership."[48] Indeed, the district court held that the Code "glaringly exclude[s] professional fee expenses for official committee members."[49] Specifically declining to accept a contrary result in *Adelphia Commc'ns Corp.*,[50] the district court concluded that the Code "cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences."[51] The individual committee members may have an argument

41 An example of the potential danger of *ASARCO* in a small case can be found in *In re Huepenbecker*, No. 12-02269, 2015 Bankr. LEXIS 2352 (Bankr. W.D. Mich. July 13, 2015). The bankruptcy court there noted:

> The court cannot turn a blind eye to the impact that Baker Botts will have on members of the bar whose livelihood depends on approval of fees under § 330. Today's decision… presents a telling example of the hardship to estate professionals (and debtors' counsel in chapter 12 and 13 cases) whose fee petitions draw objection. [Counsel] has spent at least $1,925.00 of his own (non-compensable) time seeking $6,625.00 in fees for [representing] his client. Constrained by *Baker Botts*, the court will approve fees in a reduced amount, totaling only $4,700.00 for the first and second applications. This means that [Counsel] will net only $2,781.00, resulting in an effective rate of approximately $146.00 per hour. The result, though dictated by recent precedent, undermines important policies affecting administration of estates.
>
> This calculation suggests that, in some cases, the court and counsel will have to rely more heavily on Fed. R. Bankr. P. 9011, 28 U.S.C. § 1927, and perhaps other authorities to police frivolous or vexatious objections to fee petitions, and ensure that, as a practical matter, "compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title [11]." 11 U.S.C. § 330(a)(3)(F).

*Id.* at *8-10.

42 *In re River Road Hotel Partners LLC*, 536 B.R. 228, 239-41 (Bankr. N.D. Ill. 2015).

43 *In re AMR Corp.*, 497 B.R. 690 (Bankr. S.D.N.Y. 2013).

44 *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283 (S.D.N.Y. 2014) (barring plan provision that provided for payment of legal fees of individual members of creditors' committee); *see also AMR Corp.*, 497 B.R. at 690 (barring payment, under plan, of severance payment not allowable under § 503 of the Code).

45 *Boomerang Tube*, 2016 WL 385933, at *3.

46 *In re Jevic Holding Corp.*, 787 F.3d 173 (3d Cir. 2015).

47 *Lehman Bros.*, 508 B.R. at 283.

48 *Id.* at 287-88.

49 *Id.* at 290.

50 *In re Adelphia Commc'ns Corp.*, 441 B.R. 6 (Bankr. S.D.N.Y. 2010).

51 *Lehman Bros.*, 508 B.R. at 294.

for payment under the "substantial contribution" provisions of § 503(b), the court concluded, but that requires a separate process and hearing.[52] On that point alone, the district court remanded the dispute to the bankruptcy court, where it remains pending.

Most recently, the Delaware bankruptcy court in *Energy Future Holdings Corp.*, confirming a complex plan of reorganization, made a specific finding that professionals had made a substantial contribution to the proceedings, but that their fees and expenses still required court approval in a separate process, subject again to notice, objection and a hearing.[53] The court concluded that the parties "cannot contract around" the Code by providing for the payment of professional fees and expenses without review by the UST and by the fee committee that had been appointed by the court at the outset of the case.[54]

The Bankruptcy Code does indeed value flexibility, placing a premium on negotiation and consensus.[55] But the Code itself places boundaries that cannot be stipulated or wished away — whether the subject is payments to creditors, executive compensation and benefits, or professional fees. Congress can change those boundaries, but, at least with respect to professional fees and expenses, anyone hoping for that may well be disappointed. Expect this trend to continue.

Ultimately, the situation cries out for a legislative solution. The rule that fees for defense of fees were generally not compensable unless the applicant substantially prevailed created a commendable balance. It precipitated fee reductions where there was a legitimate question about compensability or value, but left room for professionals to combat extortion. The rule should be codified, and sooner rather than later.

ABI's Commission to Study the Reform of Chapter 11[56] has recommended that the Code be amended to allow much more flexibility in compensating estate professionals and to open the door more widely to alternative and case-specific fee structures. Those amendments could also deal with the problems that are created when fee-defense fees are noncompensable, even when the applicant succeeds. abi

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52 *Id.* at 295-96.
53 *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS), Dkt. No. 7255 (Bankr. D. Del. Dec. 3, 2015) (Confirmation Hr'g Tr. at 80).
54 *Id.* at 34.
55 *See, e.g., In re Parmalat Sec. Litig.*, 501 F. Supp. 2d 560, 578 (S.D.N.Y. 2007).
56 *Am. Bankr. Inst. Comm'n to Study Reform of Chapter 11, Final Report and Recommendations* at 48-55 (2014), *available at* commission.abi.org/full-report.