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ASARCO-NO: Estate Professionals Cannot Be Paid Fees-on-Fees by Contract or Alternate Statute

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Basis Points

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We previously wrote about an effort to address an issue left unresolved in ***Baker Botts v. ASARCO***, 135 S. Ct. 2158 (2015): can an estate professional by statute or contract be entitled to payment of fees incurred in defending against fee application objections (so-called "fees-on-fees")? It is certainly the case both that (i) the Supremes held in *ASARCO* that the American Rule (each side pays its own fees) does not permit on fees-on-fees unless a statute is explicit on this point and (ii) the Court acknowledged that the American Rule can be contracted around. So the question in Chapter 11 is, can an estate professional by contract or by reference to a different Code provision be paid its fees-on-fees? As promised, we have an update from Delaware.

In ***In re Boomerang Tube, Inc., et al.*** (15-11247, Bankr. D. Del.), Judge Walrath sustained the objection of the United States Trustee (UST) and declined to approve the fee-on-fee provisions in the retention applications of counsel to the Unsecured Creditors Committee. It was a valiant and exceptionally well-briefed effort with many fingers crossed in the Chapter 11 community, but to no avail. Given this decision, it appears that *Boomerang Tube* is the law of Delaware-land unless appealed and reversed. Here is a copy of the decision.

The Committee argued that *ASARCO*, which dealt with compensation under § 330, was not applicable where the Committee was seeking compensation under § 328(a), an exception to § 330. The Court acknowledged that § 328 is an exception to § 330,

but held that § 328, like § 330, does not permit fee shifting. The Court noted numerous sections of the Bankruptcy Code that explicitly allow for fee shifting – §§ 110(i)(1)(C), 303(i)(1)(B) and 526(c)(2), to name a few – and determined that the lack of similar express language in § 328 is evidence that Congress did not intend to create an exception to the American rule.

The Committee also argued that regardless of § 328, the retention agreements were contractual exceptions to the American Rule, which were not precluded by *ASARCO*. The Court agreed with the Committee that *ASARCO* acknowledged a contractual exception to the American Rule but then agreed with the UST that a retention application is not a bilateral contract but a court application subject to objection and ultimate court approval. Additionally, the Court agreed with the UST that the contract between the parties is a one-way street: "Committee Counsel seeks a ruling that the estate is liable for their legal fees but make no similar commitment to the estate." The Court held that a contract between two parties that a third, non-contracting party (the estate) would pay the legal fees of one of the two parties could not create a contractual exception to the American Rule.

Lastly, the Court agreed with the UST that fees-on-fees cannot be approved under § 328 because they do not involve any services for the Committee but rather involve services for the Committee's professionals, and therefore are not "reasonable" as required under § 328.

This issue is arising in courts outside of Delaware, as well, but given how well the Committee briefed its arguments and the lengthy analysis of those arguments by the Delaware court, we suspect that *Boomerang Tube*, like *ASARCO*, is now the law of the land.