

HEADED THROUGH THE BOOMERANG TUBE: PROFESSIONAL COMPENSATION AFTER ASARCO

Raff Ferraioli and Steven Golden

Introduction

Legal professionals, like any other service providers, need to be paid. And being a bankruptcy professional is no exception. Regardless, getting paid in bankruptcy is not as simple as it is in other areas of the law. A motion to retain a professional must be submitted under section 327, approved by court order, and, in order to be paid, must satisfy the requirements of section 330. In short, professionals need to be expressly permitted to provide services, and must obtain court approval to get paid.

But unlike professionals outside of bankruptcy, often a party in interest, such as the Debtor or United States Trustee, will object to professional compensation. This brings us to *Baker Botts L.L.P. v. ASARCO LLC*.¹ There, the Supreme Court of the United States held that the Bankruptcy Code,² in particular section 330(a)(1),³ “does not explicitly override the American Rule with respect to fee-defense litigation, [and] it does not permit bankruptcy courts to award compensation” for defense against objections to compensation.⁴ Under the American Rule, “[e]ach litigant pays his own attorney’s fees, win or lose, unless a statute or

¹*Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 192 L. Ed. 2d 208, 61 Bankr. Ct. Dec. (CRR) 41, 73 C.B.C. 1017, Bankr. L. Rep. (CCH) P 82811 (2015).

²Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 11 U.S.C. §§ 101, et seq. (2012) (hereinafter “the Code” or “the Bankruptcy Code”).

³11 U.S.C.A. § 330(a)(1).

⁴*ASARCO*, 135 S. Ct. at 2169.

contract provides otherwise.”⁵ And, absent an explicit statutory departure, fee shifting is inappropriate.⁶ A brief recitation of what has been described as “positive and unexpected, and perhaps the single most successful in American bankruptcy history”⁷ is instructive.

In 2005, ASARCO LLC, facing financial difficulties in the copper industry, filed for chapter 11 bankruptcy protection.⁸ Pursuant to section 327,⁹ ASARCO, as debtor in possession retained Baker Botts L.L.P and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., as counsel.¹⁰ In carrying out their duties, debtor’s counsel obtained a fraudulent transfer judgment against ASARCO’s parent company that enabled ASARCO to successfully reorganize with all creditors having been paid in full.¹¹ Having been properly retained under section 327(a), debtor’s counsel sought compensation under section 330(a)(1).¹² Reorganized ASARCO, controlled by its parent, objected to the compensation sought by debtor’s

⁵ASARCO, 135 S. Ct. at 2164 (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 49 Employee Benefits Cas. (BNA) 1001 (2010)).

⁶See ASARCO, 135 S. Ct. at 2164 (internal citations omitted).

⁷*In re ASARCO, L.L.C.*, 751 F.3d 291, 59 Bankr. Ct. Dec. (CRR) 129, 71 Collier Bankr. Cas. 2d (MB) 683, Bankr. L. Rep. (CCH) P 82633 (5th Cir. 2014), cert. granted, 135 S. Ct. 44, 189 L. Ed. 2d 897 (2014) and judgment aff’d, 135 S. Ct. 2158, 192 L. Ed. 2d 208, 61 Bankr. Ct. Dec. (CRR) 41, 73 C.B.C. 1017, Bankr. L. Rep. (CCH) P 82811 (2015).

⁸See ASARCO, 135 S. Ct. at 2163.

⁹11 U.S.C.A. § 327(a), which provides in pertinent part: “[T]he trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.” Chapter 11 “Debtors in Possession” stand in the shoes of trustee, if none is appointed. See 11 U.S.C.A. § 1107(a).

¹⁰See ASARCO, 135 S. Ct. at 2163.

¹¹See ASARCO, 135 S. Ct. at 2163. The judgment was valued between \$7 and \$10 billion, and ASARCO emerged from chapter 11 “in 2009 with \$1.4 billion in cash, little debt, and resolution of its environmental liabilities.”

¹²See ASARCO, 135 S. Ct. at 2163.

counsel.¹³ After a trial, the bankruptcy court awarded counsel's fees, including over five million dollars incurred in defending the fee applications over ASARCO's objection.¹⁴ ASARCO appealed, and the United States Court of Appeals for the Fifth Circuit reversed the bankruptcy court, ultimately finding an award of fees for defense of counsels' fee application was not permitted by the Code.¹⁵

As explained above, the Supreme Court affirmed the Fifth Circuit's holding that fees incurred in defending fee applications was not permitted by the Code.¹⁶ The Court reasoned that there was no indication that Congress intended to depart from the American Rule,¹⁷ but defending one's own fee application was not compensable under section 330(a)(1) because it was neither "labor performed for" nor "disinterested service to" the bankruptcy estate.¹⁸ Thus, fees for defense of fee applications is not compensable in bankruptcy.

Since the Court decided *ASARCO* in 2015, there have been a number of cases applying and interpreting the decision to many of the issues bankruptcy courts and professionals face every day. Particularly, the most important issue that has arisen post-*ASARCO* is whether parties can contract around its prohibition against fees for fees. This article seeks to update the reader on developments post-*ASARCO* with respect to that question.¹⁹ First, this article will explore the recent decisions after *ASARCO* addressing issues related to the Supreme Court's holding. Finally, we will explain questions unanswered by these subsequent decisions.

The Court's holding in *ASARCO* was clear: professionals are not entitled to compensation for time spent defending

¹³See *ASARCO*, 135 S. Ct. at 2163.

¹⁴See *ASARCO*, 135 S. Ct. at 2163.

¹⁵See *In re ASARCO, L.L.C.*, 751 F.3d 291, 299, 301, 59 Bankr. Ct. Dec. (CRR) 129, 71 Collier Bankr. Cas. 2d (MB) 683, Bankr. L. Rep. (CCH) P 82633 (5th Cir. 2014), cert. granted, 135 S. Ct. 44, 189 L. Ed. 2d 897 (2014) and judgment aff'd, 135 S. Ct. 2158, 192 L. Ed. 2d 208, 61 Bankr. Ct. Dec. (CRR) 41, 73 C.B.C. 1017, Bankr. L. Rep. (CCH) P 82811 (2015).

¹⁶See *ASARCO*, 135 S. Ct. at 2169.

¹⁷See *ASARCO*, 135 S. Ct. at 2164.

¹⁸See *ASARCO*, 135 S. Ct. at 2165.

¹⁹Other post-*ASARCO* cases have dealt with

against objections to fee applications.²⁰ Although that was clear with respect to compensation under the Code, *ASARCO* did not answer whether the parties could contract around that result by adding a provision in a retainer agreement providing for fees in the event counsel will need to defend its compensation.

The operative language in *ASARCO* which gave hope to the profession is found in the Court's recitation of the American Rule: "Our basic point of reference when considering the award of attorney's fees is 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.*"²¹ So, while the majority held the statute did not "hold otherwise," a retainer agreement, a contract, seemingly may opt out of the default American Rule, subject to the "reasonableness" requirement of section 327.²² However, courts since *ASARCO* have treated such agreements harshly.

For example, in *In re River Rd. Hotel Partners, LLC*,²³ the United States Bankruptcy Court for the Northern District of Illinois held the debtors' financial advisor was not entitled to attorneys' fees incurred in defending its request for compensation.²⁴ There, the debtor entered into an agreement retaining a financial advisor.²⁵ Pursuant to the debtors' plan, an entity was designated "plan transferee and made entirely responsible for paying allowed administrative expenses . . ."²⁶ When the financial adviser sought reimbursement of

²⁰See discussion *supra*.

²¹*Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164, 192 L. Ed. 2d 208, 61 Bankr. Ct. Dec. (CRR) 41, 73 C.B.C. 1017, Bankr. L. Rep. (CCH) P 82811 (2015) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53, 130 S. Ct. 2149, 176 L. Ed. 2d 998, 49 Employee Benefits Cas. (BNA) 1001 (2010)) (emphasis added).

²²See 11 U.S.C.A. § 327(a).

²³*In re River Road Hotel Partners, LLC*, 536 B.R. 228 (Bankr. N.D. Ill. 2015).

²⁴See *River Road*, 536 B.R. at 241.

²⁵See *River Road*, 536 B.R. at 231–33.

²⁶See *River Road*, 536 B.R. at 233.

expenses and compensation of fees incurred pursuant to the engagement letter, that entity objected.²⁷

Before the court, the financial adviser argued it was entitled to “reimbursement of expenses, including attorneys’ fees and costs” for two reasons.²⁸ First, “because the Engagement Letter and Retention Order provide for them and [second] because [the financial adviser] is entitled to reasonable compensation under [section] 330(a)(1).”²⁹ Relying on *ASARCO*, the court ultimately rejected these arguments and denied the financial adviser reimbursement of expenses incurred in defending against objections.³⁰ The court found the fact that any award was subject to review under section 330 fatal since *ASARCO* prohibits such awards under section 330(a)(1).³¹ The court found the fees were not incurred in connection with the services for which the financial adviser was retained, likely to benefit the estate, necessary to case administration, and “were incurred primarily in connection with . . . fee-defense litigation *against* the bankruptcy estate.”³² And, with respect to the alleged contract around the *ASARCO* result, the court held that even though the agreement “refers to ‘reasonable fees and expenses of legal counsel,’” it failed to include any “‘prevailing party language in the context of an adversarial ‘action,’” which would have been to explicitly trump the American Rule.³³ As such, legal fees incurred in defense of its fee application were not compensable.

More recently, the United States Bankruptcy Court for the District of Delaware has addressed this issue. In *In re*

²⁷See River Road, 536 B.R. at 233.

²⁸See River Road, 536 B.R. at 241.

²⁹River Road, 536 B.R. at 241.

³⁰River Road, 536 B.R. at 241.

³¹See River Road, 536 B.R. at 241 (“The problem for . . . however, is that the Retention Order expressly states that the reimbursement of . . . expenses, including attorneys’ fees, is subject to review under § 330. And, as discussed at length above, the Supreme Court has now explicitly held that § 330(a)(1) does not permit a bankruptcy court to award attorneys’ fees for work performed in defense of fee requests.”).

³²River Road, 536 B.R. at 241. (emphasis in original).

³³River Road, 536 B.R. at 241.

Boomerang Tube, LLC,³⁴ counsel to the Official Committee of Unsecured Creditors (the “Committee”) sought approval of a provision in its retention agreement entitling it to compensation from the Debtors’ estates for fees and expenses arising from the successful defense of their fees under section 328 of the Bankruptcy Code. Citing to *ASARCO*, the United States Trustee (the “Trustee”) objected. In response, the Committee contended that *ASARCO* was inapplicable because “the Supreme Court found only that section 330(a) of the Bankruptcy Code did not contain an express statutory exception to the American Rule,” whereas the Committee sought “approval of the fee defense provisions under *section 328(a)*, not section 330.”³⁵ Moreover, despite the Trustee’s contention that under *ASARCO*, although the Committee was retained under section 328, it could only be compensated under section 330, the Committee contended that “section 328 is an express exception to section 330 and that section 328 allows compensation to professionals . . . that would otherwise not be available under section 330.”³⁶ In rejecting the provision contained in the Committee’s retention agreement and sustaining the Trustee’s objection, the Court held that “section 328, like section 330, does not provide an exception to the American Rule and cannot support the fee defense provisions at issue under the Supreme Court’s ruling in *ASARCO*.”³⁷

First, the Court expressed its agreement with the Committee’s contention that *ASARCO* did not abrogate the contract exception to the American Rule.³⁸ Nonetheless, the Court held that the Committee’s retention agreement had to be consistent with other provisions of the Bankruptcy Code.³⁹ Although the Committee’s retention agreement is a contract, “it is not a bi-lateral one; rather, it is subject to objection by other parties and is ultimately subject to approval (and

³⁴*In re Boomerang Tube, Inc.*, 548 B.R. 69, 62 Bankr. Ct. Dec. (CRR) 28 (Bankr. D. Del. 2016).

³⁵*Boomerang Tube*, 2016 WL 385933, at *2.

³⁶*Boomerang Tube*, 2016 WL 385933, at *2.

³⁷*Boomerang Tube*, 2016 WL 385933, at *3.

³⁸*Boomerang Tube*, 2016 WL 385933, at *3.

³⁹*Boomerang Tube*, 2016 WL 385933, at *3.

modification) by the Court.”⁴⁰ The Court therefore held that, although the Committee’s retention agreement is a contract, it cannot bind the estate, a non-party to the agreement, and accordingly does not fit into the contractual exception to the American Rule.⁴¹

Next, the Court evaluated whether the fee defense provisions would have been permissible under the Bankruptcy Code if the Court *had* held that a retention agreement was within the contractual exception to the American Rule. Agreeing with the Trustee, the Court found that the fee defense provisions are not “reasonable terms and conditions of employment” of a Committee professional, as required under section 328(a) of the Bankruptcy Code, because they do not involve any services for the Committee, but only for services performed for the Committee counsel’s own interests.⁴² In response to this argument, the Committee noted that some courts hold that exculpation and indemnification clauses are permissible in retention agreements under section 328(a) so long as such clauses are reasonable.⁴³ The Court noted that, although some courts that disagree, the Third Circuit “has held that indemnification provisions sought by professionals may be approved as reasonable under section 328(a), but with limits.”⁴⁴ However, the Court expressed reservations about the viability of *United Artists*, noting that it “predated the *ASARCO* decision and did not address whether section 328(a) is an explicit statutory exception, or whether a retention agreement approved under that section is a contractual exception, to the American Rule.”⁴⁵

At least two other cases to date have followed *Boomerang*

⁴⁰Boomerang Tube, 2016 WL 385933, at *4 (citing *In re Federal Mogul-Global, Inc.*, 348 F.3d 390, 397–98, 42 Bankr. Ct. Dec. (CRR) 34 (3d Cir. 2003)).

⁴¹Boomerang Tube, 2016 WL 385933, at *4–5.

⁴²Boomerang Tube, 2016 WL 385933, at *5.

⁴³Boomerang Tube, 2016 WL 385933, at *5 (citing *In re Firstline Corp.*, 56 Collier Bankr. Cas. 2d (MB) 775, 2007 WL 269086, *2 (Bankr. M.D. Ga. 2007)).

⁴⁴Boomerang Tube, 2016 WL 385933, at *5 (citing *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 230, 40 Bankr. Ct. Dec. (CRR) 182, 49 Collier Bankr. Cas. 2d (MB) 1434, Bankr. L. Rep. (CCH) P 78777 (3d Cir. 2003)).

⁴⁵Boomerang Tube, 2016 WL 385933, at *6.

Tube. First, in *In re New Gulf Resources, LLC*,⁴⁶ Baker Botts L.L.P, in its application for retention as debtors' counsel, included and sought approval of a provision for a "fee premium."⁴⁷ This premium was "payable in the event of litigation over Baker Botts' fees."⁴⁸ The United States Trustee objected to the inclusion of this provision, arguing it violated the Supreme Court's holding in *ASARCO*.⁴⁹ After the issue was fully briefed and decided in *Boomerang Tube*, Chief Judge Shannon "agree[d] with its holding," and footnote six of the opinion "applying its rationale to the retention of debtor's counsel."⁵⁰ Thus, *New Gulf Resources* extends the actual holding of *Boomerang Tube* by putting into effect footnote six and prohibiting debtors' counsel from contracting around *ASARCO*.

Second, in *In re Samson Resources Corp.*,⁵¹ debtors' counsel included language in their engagement letters "regarding reimbursement of those fees and expenses incurred in connection with participating in, preparing for, or responding to any action, claims, suit, or proceeding brought by or against any third party that relates to" their services provided as debtors' counsel.⁵² In his letter, Judge Sontchi stated, "[t]his [c]ourt agrees with and endorse the reasoning of Judge Walrath in *Boomerang Tube*."⁵³ And, even though *Boomerang Tube* dealt with a fee application by the official committee of unsecured creditors, the same reasoning extends to any

⁴⁶*In re New Gulf Resources, LLC*, No. 15-12566, Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016) (Letter, Hon. Brendan Linehan Shannon).

⁴⁷See *In re New Gulf Resources, LLC*, No. 15-12566, Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016).

⁴⁸*In re New Gulf Resources, LLC*, No. 15-12566, Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016).

⁴⁹See *In re New Gulf Resources, LLC*, No. 15-12566, Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016).

⁵⁰*In re New Gulf Resources, LLC*, No. 15-12566, Dkt. No. 228 (Bankr. D. Del. Feb. 1, 2016) (citing *In re Boomerang Tube, Inc.*, 548 B.R. 69, 79 n.6, 62 Bankr. Ct. Dec. (CRR) 28 (Bankr. D. Del. 2016)).

⁵¹*In re Samson Resources Corp.*, No. 15-11934, Dkt. No. 641 (Bankr. D. Del. Feb. 8, 2016) (Letter, Hon. Christopher S. Sontchi).

⁵²*In re Samson Resources Corp.*, No. 15-11934, Dkt. No. 641 at 2 (Bankr. D. Del. Feb. 8, 2016).

⁵³*In re Samson Resources Corp.*, No. 15-11934, Dkt. No. 641 at 2 (Bankr. D. Del. Feb. 8, 2016).

retained professional by virtue of section 328.⁵⁴ So, like *New Gulf Resources*, *Samson Resources* represents an extension of *Boomerang Tube*'s prohibition on contracting around *ASARCO* to debtors' counsel.

As the first comprehensive professional fee decision after *ASARCO*, *Boomerang Tube* is likely only the first such major decision concerning compensation after the Supreme Court's ruling. *Boomerang Tube* leaves open multiple other questions on the topic. For example, as the Court itself previewed, courts may revisit the appropriateness of professional indemnification provisions in light of *ASARCO*. Moreover, courts will likely face questions of the appropriateness of other "creative" approaches to professional compensation.⁵⁵

What also remains to be seen is whether bankruptcy professionals will start to pass risk onto clients. Put another way, if professionals cannot contract around *Boomerang Tube*, will they just raise their costs, passing on the potential for expenses in defending fee applications, to clients? If so, this would surely impact many debtors' prospect of a successful reorganization, especially considering the administrative expense priority given to professional fees and expenses.⁵⁶ Moreover, if the costs of retaining professionals increases, will the United States Trustee, and other parties in interest, more aggressively object to professional compensation awards in bankruptcy? The answer is likely, given the increasing press and scrutiny over professional fees in bankruptcy.⁵⁷

⁵⁴See *In re Samson Resources Corp.*, No. 15-11934, Dkt. No. 641 at 2 (Bankr. D. Del. Feb. 8, 2016) (quoting *In re Boomerang Tube, Inc.*, 548 B.R. 69, 79 n.6, 62 Bankr. Ct. Dec. (CRR) 28 (Bankr. D. Del. 2016)).

⁵⁵See, e.g., *In re New Gulf Resources, LLC*, Case No. 15-12566, at Dkt. No. 395.

⁵⁶See 11 U.S.C. § 503(b)(3)–(4).

⁵⁷See, e.g., *The American Lawyer*, *Latham Lands Latest Energy Bankruptcy as Fees Draw Scrutiny* available at: <http://www.americanlawyer.com/id=1202757330417/Latham-Lands-Latest-Energy-Bankruptcy-as-Fees-Draw-Scrutiny#ixzz4A6lp1Na5>; *The American Lawyer*, *Ropes & Gray Seeks \$10.9M in Fees in Sabine Oil Bankruptcy*, available at: <http://www.texaslawyer.com/id=1202757780554/Ropes-amp-Gray-Seeks-109M-in-Fees-in-Sabine-Oil-Bankruptcy#ixzz4A6mOnGW8>; *Forbes*, *Nortel Bankruptcy Fees Near \$2 Billion As Creditors, Pensioners Fight Over Assets*, available at: <http://www.forbes.com/sites/danielfisher/2016/04/05/nortel-bankru>

[ptcy-fees-approach-2-billion-as-court-hears-arguments-over-assets/#6574419c1e05](#); Variety, Lawyers In Relativity Bankruptcy Case Have Billed For More Than \$7 Million, available at: <http://variety.com/2015/biz/finance/relativity-lawyers-fees-6-million-1201647269/>; Nathan Bomey, Detroit Free Press, Detroit bankruptcy judge: Were fees too high?, available at: <http://www.freep.com/story/news/local/detroit-bankruptcy/2015/01/06/detroit-bankruptcy-judge-steven-rhodes-legal-fees/21334507/>; New York Times Editorial June 9, 2012, The Trouble With Bankruptcy Lawyers; DealBook, New York Times, Clash over Bankruptcy Fees, available at: <http://dealbook.nytimes.com/2011/02/04/the-clash-over-bankruptcy-fees/>; DealBook, New York Times, Time for a Fresh Approach to Bankruptcy Fees, available at: <http://dealbook.nytimes.com/2012/01/20/time-for-a-fresh-approach-to-bankruptcy-fees/>.