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Reimbursement of Fees and Expenses in Chapter 15 Cases

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The most recent chapter of the Bankruptcy Code,[2] chapter 15, was created less than a decade ago by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[3] Chapter 15 replaced what had previously been found in a single Code provision (§ 304, which has been repealed). The primary purpose of § 304 was — and the primary purpose of chapter 15 is — to provide U.S. bankruptcy courts with law and guidance to aid in dealing with foreign insolvency proceedings.[4] Specifically, and among other things, chapter 15 is designed to incorporate the Model Law on Cross-Border Insolvency proposed by the United Nations Commission on International Trade Law (UNCITRAL) to provide effective mechanisms for dealing with cases of cross-border insolvency in a way that facilitates cooperation among domestic and foreign authorities and stakeholders.[5]

As a chapter of the Code that is used by large, reorganizing businesses, it is tempting to view chapter 15 as a somewhat different kind of chapter 11, but it is not. Rather, it typically applies only in the event that an insolvency case is pending in another jurisdiction, a proceeding that is subject to "recognition" by a U.S. bankruptcy court.[6] Unlike in chapter 11, where the authors start with the premise that all statutory provisions within other chapters of the Bankruptcy Code are applicable to the case (*e.g.*, chapters 1, 3 and 5), only certain specific sections of the "nonfiling" chapters of the Bankruptcy Code apply automatically to a chapter 15 case.[7] As discussed below, while it is possible that a bankruptcy court could exercise its discretion to incorporate into a chapter 15 case additional provisions found within other chapters of the Bankruptcy Code, by default (and by design), much of the relief that is available to debtors and creditors under the other chapters simply does not apply.

One such exclusion is § 503(b)(3)(D), which allows for the reimbursement of creditors' expenses under certain circumstances, and a related subsection[8] that allows for reimbursement of attorneys' fees for creditors who qualify under § 503(b)(3)(D). Section 503(b)(3)(D), by its terms, applies only "in a case under chapter 9 or 11."[9] Given that § 503(b)(3)(D) was last amended prior to the enactment of BAPCPA,[10] it is possible that its inapplicability to chapter 15 is inadvertent. However, whether purposeful or not, the rising complexity of chapter 15 proceedings and the ever-increasing role of creditors provide good reasons to consider lifting this ban in order to provide for the possibility of expense and fee reimbursements for chapter 15 creditors. This article briefly explains the applicable standards for creditor reimbursement under § 503(b)(3)(D) and (b)(4), reviews the mechanics of chapter 15 relief and advances an argument for amending the Bankruptcy Code to permit, under the same stringent standards that apply in chapter 11, expense and fee reimbursements for creditors in chapter 15 who are determined to have made a "substantial contribution" to the case.

Creditor Reimbursement Standards and Limits

Section 503(b)(3)(D) of the Bankruptcy Code provides for the reimbursement of the "actual, necessary expenses ... incurred by ... a creditor, an indenture trustee, an equity security-holder, or a committee representing creditors or equity security-holders other than [an official creditors'] committee ... in making a substantial contribution in a case under chapter 9 or 11." Section 503(b)(4), in turn, allows for "reasonable compensation for professional services [that have been] rendered by an attorney or an accountant of an entity whose expense is allowable under [§ 503(b)(3)(D)], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under [the Bankruptcy Code], and reimbursement for actual, necessary expenses incurred by such attorney or accountant." A claim that is allowed under § 503(b)(3)(D) and/or (b)(4) will be entitled to administrative priority (*i.e.*, the claim will be among a class of claims that must be paid in full before general unsecured claims are paid).[11]

1 Mr. Drobish contributed to this article while working as an associate at Landis Rath & Cobb LLP. The views expressed herein are solely those of the author and not necessarily those of the Delaware Department of Justice.
2 11 U.S.C. § 101, *et seq.*
3 Pub. L. 109-08, 119 Stat. 23.
4 *See, e.g., In re Hamilton*, 240 F.3d 148, 156 (2d Cir. 2001) ("The purpose of [§ 304] is to provide a statutory mechanism through which United States courts may defer to and facilitate foreign insolvency proceedings."); *see also* § 1501(a).
5 Section 1501(a) ("The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency ... as to provide effective mechanisms for dealing with cases of cross-border insolvency."). Chapter 15 is also intended to foster greater legal certainty for trade and investment, fair and efficient administration of cross-border insolvencies, maximization of assets and financial rehabilitation. *Id.*
6 *See* §§ 1501(b) and 1515-24.
7 *See* § 103(a).
8 Section 503(b)(4).
9 Section 503(b)(3)(D).
10 BAPCPA, enacted on April 20, 2005, amended parts of § 503, but not § 503(b)(3)(D).
11 *See* § 507(a)(2).

In order to qualify for reimbursement of attorneys' fees under § 503(b)(4), a creditor must demonstrate that it has made a "substantial contribution" in the bankruptcy case under § 503(b)(3)(D). Under the "substantial contribution" standard, services of professionals that have been engaged by creditors "are presumed to be incurred for the benefit of the engaging party and are reimbursable if, but only if, the services 'directly and materially contributed' to the reorganization."[12] Inherent in the term "substantial" is the concept that "the benefit received by the estate must be more than an incidental one arising from activities [that] the applicant has pursued in protecting his or her own interests."[13] Factors to be considered in determining whether a creditor has met its substantial contribution burden under § 503(b)(3)(D) and (b)(4) include whether the services benefited only the creditor/applicant, provided a demonstrable benefit to the estate and/or were duplicative of other services paid for by the estate.[14]

As previously noted, § 503(b)(3)(D) is limited by its terms only to cases under chapters 9 and 11; this limitation applies by implication to § 503(b)(4).[15] While there does not appear to be a reported opinion directly addressing whether this limitation bars § 503(b)(3)(D) and (b)(4) from applying in a chapter 15 case, there are decisions holding that the specific reference to chapters 9 and 11 in § 503(b)(3)(D) bars its application to chapter 7 cases by negative inference.[16] By this logic, § 503(b)(3)(D) and (b)(4) would also be inapplicable in chapter 15 cases.

Chapter 15 Relief Following Recognition of Foreign Main Proceeding

In a chapter 15 case, a foreign representative[17] may petition the court to recognize a foreign insolvency proceeding as either a foreign "main" or "non-main" proceeding.[18] If the bankruptcy court recognizes a foreign proceeding as a foreign main proceeding,[19] certain provisions of the Bankruptcy Code automatically apply to the chapter 15 case, including §§ 361, 362, 363, 549 and 552.[20] Section 1521(a) empowers the court to, "at the request of the foreign representative, grant any appropriate relief" where necessary to effectuate the purpose of chapter 15, including "any additional relief that may be available to a trustee," subject to certain conditions.[21] Section 1507(a) also permits a court to render "additional assistance to a foreign representative under [the Bankruptcy Code] or under other laws of the United States."

In at least one case, a bankruptcy court relied on its authority under § 1521(a) to order that several Code sections in addition to those enumerated in § 1520 — including §§ 365 and 503 — would apply in the chapter 15 case before it.[22] On appeal from a supplemental order that limited the application of § 365, the district court acknowledged that a bankruptcy court properly exercised its discretion under § 1521(a) to order that additional Code provisions would apply in a chapter 15 case.[23] However, the additional relief available under §§ 1521(a) and 1507(a) is generally limited to relief that has been granted at "the request of the foreign representative" and "additional assistance to a foreign representative," leaving no explicit authority for a creditor to move for fee and expense reimbursements, even if such relief were not implicitly precluded by the limitations in § 503(b)(3)(D).

Creditor Reimbursement in Chapter 15

It has been noted that the policy behind allowing substantial-contribution applications "is to promote meaningful creditor participation in the reorganization process."[24] For this reason, the exclusion of § 503(b)(3)(D) from chapters 7, 12, and 13[25] in favor of chapters 9 and 11[26] makes sense insofar as it may be more likely in the latter chapters than in the former that creditors' efforts would enhance reorganization and distributions to all creditors.

Given that a chapter 15 case often stands only in "recognition" of another principal insolvency proceeding and not as its own reorganization scheme, chapter 15, at a glance, may seem more like the chapters excluded from § 503(b)(3)(D) than those that are included. However, notwithstanding this dynamic, a court presiding over a chapter 15 case might have jurisdiction over the considerable assets and affairs of a reorganizing company, and might confront issues that are more akin to those arising in a chapter 11 case than in a case under chapters 7, 12 or 13. For example, courts in chapter 15 cases might be called upon to decide complex, contested issues of law and facts arising in connection with motions to use or sell property under § 363 that are very much akin to similar motions in chapter 11 cases.[27]

In addition, while only recently an order recognizing and enforcing a foreign reorganization plan was essentially unheard of,[28] the Fifth Circuit recently issued an extensive opinion detailing a step-by-step analysis for courts to undertake in considering such relief in a chapter 15 case,[29]

12 *Lebron v. Mechem Fin.*, 27 F.3d 937, 943 (3d Cir. 1994) (citation omitted).
13 *Id.* at 944 (citations, quotation marks and internal editing marks omitted).
14 *See In re Worldwide Direct Inc.*, 334 B.R. 112, 122 (Bankr. D. Del. 2005).
15 *See Collier on Bankruptcy* ¶ 503.11 (Alan N. Resnick and Henry J. Sommer eds., 16th ed.) (explaining that while language of § 503(b)(4) "does not specifically limit the professional services to those incurred in the activity for which the entity qualified for treatment under section 503(b)(3), courts have implied such a requirement").
16 *See, e.g., In re Hackney*, 351 B.R. 179, 196 (Bankr. N.D. Ala. 2006); *In re Blount*, 276 B.R. 753, 757 (Bankr. M.D. La. 2002); *In re Griffin Trading Co.*, 270 B.R. 883, 904 (Bankr. N.D. Ill. 2001); *In re Alumni Hotel Corp.*, 203 B.R. 624, 631 (Bankr. E.D. Mich. 1996).
17 A foreign representative is "a person or body, including a person or body appointed on an interim basis, [that has been] authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." *See* § 101(24).
18 *See* §§ 1515 and 1517(b).
19 The relief to which a foreign representative is entitled following recognition of a foreign proceeding as a foreign "non-main" proceeding — *i.e.*, one not pending in the country where the debtor has the center of its main interests, but pending where the debtor has only an "establishment" — is more limited than that to which the foreign representative is entitled following recognition of a foreign proceeding as a foreign "main" proceeding. *See* §§ 1502(4) and (5) and 1521(c).
20 *See* § 1520(a).
21 *See* §§ 1521(a)(7), 1522(a) and 1506.
22 *See In re Qimonda AG*, No. 09-14766-RGM, 2009 Bankr. LEXIS 4410 (Bankr. E.D. Va. July 22, 2009) (ordering application of §§ 305-307, 342, 345, 349, 350, 364-366, 503, 504, 546, 551 and 558). The order was subsequently amended to remove § 365(n) from the scope of the additional sections to apply to the chapter 15 case. *See In re Qimonda AG*, 2009, No. 09-14766-RGM, Bankr. LEXIS 3786 (Bankr. E.D. Va. Nov. 19, 2009).
23 *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 558-59 (E.D. Va. 2010).
24 *In re Am. Plumbing & Mech. Inc.*, 327 B.R. 273 (Bankr. W.D. Tex. 2005) (quoting *In re Consolidated Bancshares Inc.*, 785 F.2d 1249, 1253 (5th Cir. 1986)).
25 Providing for liquidation, family farmer and fisherman debt adjustment, and consumer debt adjustment, respectively.
26 Providing a framework for municipalities and business entities, respectively, to reorganize and rehabilitate.
27 *See, e.g., In re Elpida Memory Inc.*, No. 12-10947(CSS), 2012 Bankr. LEXIS 5367 (Bankr. D. Del. Nov. 16, 2012); *In re Loy*, No. 07-51040-SCS, 2008 Bankr. LEXIS 1038 (Bankr. E.D. Va. April 3, 2008).
28 *See In re Japan Airlines Corporations, et al.*, No. 10-10198-jmp, Tr. of Hr'g March 1, 2011, at pages 5:21-7:2 (Bankr. S.D.N.Y.) (denying motion to recognize foreign order confirming reorganization plan based on, *inter alia*, lack of available precedent for relief that had been requested).
29 *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2012). Other courts have recently entered orders disposing of motions to recognize and/or enforce reorganization plans that have been approved in a foreign jurisdiction. *See, e.g., In re Elpida Memory Inc.*, Case No. 12-10947 (CSS), Dkt. No. 449 (Bankr. D. Del. June 25, 2013).

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setting the stage for increased litigation in chapter 15 cases over plan recognition and enforcement. In connection with these and other matters, creditors — without the opportunity to form a statutory committee — may raise a variety of issues and provide feedback in connection with relief that has been requested by the foreign representative, which in theory could "substantially contribute" to the reorganization of the foreign enterprise and the recoveries for rank-and-file creditors.

In light of this reality, there is seemingly little reason not to permit a creditor to seek reimbursement for a demonstrable substantial contribution to the reorganization of a chapter 15 debtor, particularly if such relief is circumscribed, as in a chapter 11 case, by the stringent rule that reimbursement only be allowed in "rare and extraordinary circumstances" where the creditor's involvement "truly enhances the administration of the estate."[30] For this reason, the authors propose to amend § 503(b)(3)(D) by amending its reference to "chapter 9 or 11" to include reference to "chapter 9, 11, *or 15*." Further amendments to §§ 103(a), 1521(a) and/or other sections might be desirable to avoid potential doubt as to the applicability of § 503(b)(3)(D) and (b)(4) in a chapter 15 case and the ability of a creditor in a chapter 15 case to move for relief thereunder. However, standing alone, this proposed amendment to § 503(b)(3)(D) could provide sufficient authority for courts to consider motions for creditor reimbursement in chapter 15 cases, which, subject to the stringent limitations that already have developed in the case law, might encourage efforts by creditors who lack the benefit of a statutory committee to contribute substantially to the reorganization process. abi

30 *In re Dana Corp.*, 390 B.R. 100, 108 (Bankr. S.D.N.Y. 2008).