THE MAGAZINE OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Los Angeles Lawyer

MARCH 2017 / $5

EARN MCLE CREDIT

3rd PARTY LITIGATION FUNDING
page 19

Prop. 65
page 9

Digital Assistants
page 34

Presidential Emoluments
page 36

Plus

Attorney Fee Dilution in Bankruptcy
page 26

HIGH TIME

Los Angeles lawyer Julia Sylva deconstructs the nexus of medical marijuana law among California, the federal government, and local jurisdictions
page 12

by David S. Kupetz

Is the American Rule "American"?

Bankruptcy professionals face a significant risk of fee dilution when forced to address objections to their billing

COMPENSATION of professionals, including attorneys, employed in bankruptcy cases is subject to court approval. Under U.S. Bankruptcy Code Section 330(a), the bankruptcy court is authorized to award "reasonable compensation for actual, necessary services" rendered by attorneys and other professionals employed by the bankruptcy estate's representative.[1] The clear intent of the Bankruptcy Code is that attorneys and other professionals serving in bankruptcy cases be compensated no less favorably than they would for performing comparable services in nonbankruptcy cases.[2] The Bankruptcy Code specifically provides for compensation for preparing a fee application that is required to be filed with the court[3] yet lacks explicit language authorizing compensation to professionals for work performed in defending a fee application.

Before a professional is eligible to be compensated under Section 330(a), the professional's employment must be approved by the court. Pursuant to Section 327(a) of the Bankruptcy Code, the debtor in possession or bankruptcy trustee is authorized, subject to court approval, to employ professionals to represent and assist them in carrying out their statutory duties.[4] Accordingly, unlike most nonbankruptcy situations, the employment and compensation of attorneys and other professionals in bankruptcy cases is subject to court approval after notice and a hearing.[5]

Outside the bankruptcy context, there is the long-established "American Rule" that each side must pay its own attorney's fees unless a statute or contract provides otherwise.[6] In *Baker Botts L.L.P. v. ASARCO LLC*,[7] the U.S. Supreme Court addressed a collision between the American Rule and the intent of the Bankruptcy Code that attorneys in bankruptcy cases be compensated at the rate they would be compensated outside of bankruptcy court. The Court considered "whether §330(a)(1) permits a bankruptcy court to award attorney's fees for work performed in defending a fee application in court."[8] Justice Clarence Thomas delivered the opinion of the Court holding that a departure from the American Rule was not warranted and, accordingly, the rule precluded the award of fees.[9] The dissenting opinion filed by Justice Stephen Breyer asserts, among other things, that "the American Rule is a default rule that applies only where 'a statute or contract' does not 'provid[e] other-

David S. Kupetz, a partner in the Los Angeles law firm of SulmeyerKupetz, concentrates his practice on restructuring, business reorganization, bankruptcy, assignments for the benefit of creditors, and other insolvency solutions.

AMANE KANEKO

wise.' And here, the statute 'provides otherwise.'"[10]

Facts of ASARCO

When it began its Chapter 11 bankruptcy case, ASARCO LLC was a severely distressed mining, smelting, and refining company based in Tucson, Arizona. It faced enormous debt, serious cash flow problems, falling copper prices, a striking workforce, and environmental liabilities. Upon commencement of the Chapter 11 case, ASARCO became a debtor in possession (with all the powers of a bankruptcy trustee) and obtained bankruptcy court approval to retain two law firms as counsel in the case. "Among other services, the firms prosecuted fraudulent-transfer claims against ASARCO's parent company and ultimately obtained a judgment against it worth between $7 and $10 billion."[11] The judgment played a significant role in the successful reorganization of ASARCO, resulting in ASARCO's emerging from Chapter 11 in 2009 with creditors paid in full, $1.4 billion in cash, little debt, and satisfaction of all environmental issues.[12]

ASARCO's counsel filed fee applications seeking court approval of compensation under section 330(a). The fee applications were opposed by ASARCO, which was now "once again controlled by its parent company."[13] Thus, while the law firms' client objected to their fees, the parent company—the unsuccessful defendant in the litigation—was now in control and attempting to seek retribution against former opposing counsel.

> After extensive discovery and a six-day trial on fees, the Bankruptcy Court rejected ASARCO's objections and awarded the law firms approximately $120 million for their work, plus a $4.1 million enhancement for exceptional performance. The court also awarded the firms over $5 million for time spent litigating in defense of their fee applications.[14]

ASARCO appealed, and the district court held that the law firms could recover the fees incurred for the fee-defense litigation. The Fifth Circuit Court of Appeals reversed, concluding that without a specific statutory provision explicitly providing for the recovery of attorney's fees for defending a fee application, the American Rule barred the law firms from being paid for fee-defense litigation.[15] This was an unusual application of the American Rule in which the client (although now controlled by the former adversary) was challenging fees of its counsel based on the American Rule, rather than the other party to litigation raising the issue. The Supreme Court granted certiorari on the issue of whether the fees incurred defending the fee applications are compensable under Section 330(a).

Justice Thomas began the majority's analysis by identifying the American Rule as the "bedrock principle" when considering the award of attorney's fees, with "roots in our common law reaching back to at least the 18th century…."[16] Moreover, the Court explained that "[w]e have recognized departures from the American Rule only in 'specific and explicit provisions for the allowance of attorneys' fees under selected statutes.'"[17] Acknowledging that statutory deviations from the American Rule may take various forms, the Court emphasized that "they [statutes] tend to 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 …."[18] The Court cited the attorney's fees provision of the Equal Access to Justice Act (EAJA)[19] as an example of the clarity required of a fee-shifting statute that trumps the American Rule.[20] Under this provision, a court is to award a prevailing party other than the United States fees incurred in a civil action in accordance with certain conditions.[21] The Court stated that there could be little dispute that this type of fee-shifting provision adequately authorizes deviation from the American Rule.[22]

In contrast, the Court reasoned that in the Bankruptcy Code "Congress did not expressly depart from the American Rule to permit compensation for a fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings."[23] In considering Section 327(a), which governs the estate representative's employment of professionals, the Court found that professionals are employed to serve "for the benefit of the estate."[24] Turning to Section 330(a)'s authorization of payments to professionals of "reasonable compensation for actual, necessary services rendered," the Court concluded that the "text [of the Bankruptcy Code] cannot displace the American Rule with respect to fee-defense litigation."[25]

The Court recognized that the statute's provision for "reasonable compensation for actual, necessary services rendered" authorizes courts to award attorney's fees for work done in representing the estate's representative, "as the Bankruptcy Court did here when it ordered *ASARCO* to pay roughly $120 million for the firms' work in the bankruptcy proceeding."[26] However, the Court concluded that "the phrase 'reasonable compensation for actual, necessary services rendered' neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other—in this case, from the attorneys seeking fees to the administrator of the estate—as most statutes that displace the American Rule do."[27]

Language Limitations

The Court identified limitations in the language of Section 330(a) allowing "reasonable compensation" only for "actual, necessary services rendered." The Court determined that this language dictates that compensable work only can be work done in service of the estate's representative. Further, the Court found that the dictionary definition of the word "services" involves labor performed for another.[28] The Court reasoned that litigating the fee application "against the administrator of a bankruptcy estate" does not constitute labor performed for the estate's representative.[29]

The Court asserted that Congress could have shifted the burdens of fee-defense litigation under Section 330(a) by including such language in that provision. Moreover, the Supreme Court cited a particular Bankruptcy Code section in which this had been done.[30] Interpreting Section 330(a) to embody a legislative decision to limit compensation, the majority concluded that the statute precludes the redistribution of litigation costs. The Court was not persuaded by the arguments of the law firms, the United States as amicus curiae, and the dissent and characterized them as resisting its "straightforward" interpretation of the Bankruptcy Code.[31]

The law firms argued that fee-defense litigation falls within "services rendered" to the representative of the estate under Section 330(a). The Court rejected this reading of the term "services" asserting that this approach "could end up compensating attorneys for the unsuccessful defense of a fee application."[32] While it would seem that this concern could be mitigated by the exercise of the court's discretion, the majority found this potential result would be a particularly unusual and inappropriate deviation from the American Rule.[33]

Unlike most nonbankruptcy situations, to be paid, a professional in a bankruptcy case needs to file a detailed application seeking compensation.[34] The application will only be granted following notice and a hearing.[35] Further, the Bankruptcy Code specifically provides that "[t]he court may, on its own motion or on the motion of the United States Trustee,...the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested."[36] Moreover, unlike in symmetrical litigation, multiple parties may object to fee applications in bankruptcy cases. Nonbankruptcy fee litigation typically involves a lawyer and his or her client. In contrast, the process for obtaining compensation in bankruptcy cases is more complicated, involves multiple parties, and may impose substantially greater costs. The Court discounted this concern as resting "on unsupported predications of how the statutory scheme will operate in practice."[37] Reaching a different conclusion, the dissent contended that "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.'"[38]

The dissent accepted the Court's view "that a professional's defense of a fee application is not a 'service' within the meaning of the Code."[39] The dissent, however, found it significant that the Bankruptcy Code provides broad discretion for the courts to determine what constitutes "reasonable compensation" and cited the statutory language providing that a court should consider the nature, extent, and value of services rendered, "taking into account *all relevant factors*."[40] Agreeing with the brief filed by the government, the dissent reasoned that it is appropriate to view compensation for fee-defense work as part of the compensation for the underlying services in a bankruptcy case.[41]

The dissent further found that a bankruptcy court has discretion to "consider as 'relevant factors' the cost and effort that a professional has reasonably expended in order to recover his or her fees."[42] The dissent explained that it was taking a restrained approach and that "where fee-defense work is not necessary to ensure reasonable compensation for some underlying service,...a court should not consider that work when calculating compensation."[43]

The dissent recognized the risk of fee dilution if fee-defense work were uncompensated. As an example, the dissent stated:

> Consider 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.'[44]

The dissent argued that in a previous case cited by the majority, involving the EAJA, the Court acknowledged that work performed in defense of a fee application is relevant to determining reasonable compensation.[45] The dissent reasoned that to interpret "reasonable compensation" differently would run counter to a basic objective of the Bankruptcy Code. Under section 330(a)(3)(F), bankruptcy courts are directed to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under" the Bankruptcy Code.[46] This provision arises from the intent of Congress to "ensure that high-quality attorneys and other professionals would be available to assist trustees in representing and administering bankruptcy estates" and would "remain in the bankruptcy field."[47]

The Court was unconvinced by this "flawed and irrelevant policy argument."[48] The majority was not concerned with the warning that absent compensation for fee-defense litigation bankruptcy attorneys will have their fees diluted, and thus the congressional goals that bankruptcy attorneys receive compensation comparable to nonbankruptcy lawyers so talented attorneys take on bankruptcy works will be undermined. The Court asserted that "[i]n our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization. Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers."[49]

The majority sought to assuage concerns regarding potential frivolous objections to fee applications that will have the effect of diluting attorney's fees, noting that "Federal Rule of Bankruptcy Procedure 9011—bankruptcy's analogue to Civil Rule 11—authorizes the court to impose sanctions for bad-faith litigation conduct, which may include an order directing payment…of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."[50] Section 330(a)(6) provides that "any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application."[51] The dissent explained that "[t]his provision does not authorize compensation, but rather assumes (through the words 'any compensation awarded') pre-existing authorization under §330(a)."[52] The dissent asserted that because time spent preparing a fee application is compensable, time spent defending it must be, too.

The Court, however, found that Section 330(a)(6) "cuts the other way."[53] The majority concluded that while preparation of a fee application is a "service rendered" to the estate's representative, defense of that application is not. The Court made an analogy to an auto mechanic:

> [I]it would be natural to describe a car mechanic's preparation of an itemized bill as part of this 'services' to the customer because it allows the customer to understand—and, if necessary dispute—his expenses. But it would be less natural to describe a subsequent court battle over the bill as part of the 'services rendered' to the customer.[54]

The dissent countered the majority's argument by stating:

> [C]ustomers do not generally pay their mechanics for time spent preparing the bill. A mechanic's bill is not a sep-

Compensable Work

In re Stanton[1] involves a situation in which the law firm employed by a Chapter 7 bankruptcy trustee supplemented its fee application in response to an objection of the U.S. Trustee. Applying the analogy used by the majority in *ASARCO*, the Florida bankruptcy court characterized counsel's "work supplementing his fee application and responding to the U.S. Trustee's objection [as being]...akin to the mechanic's preparation of an itemized bill as part of his 'services' to the customer."[2] At issue were fees incurred after the case was converted from Chapter 11 to a Chapter 7 case, and the U.S. Trustee was asking in its objection for the type of detail required in a Chapter 11 case even though the local rules did not require such detail in a Chapter 7 case. As a result, the bankruptcy court held that supplementing the fee application should be compensable, stating "[h]ad the U.S. Trustee simply objected to...[the] fees because they were unnecessarily duplicative, the outcome might be different. A fight over whether fees were unnecessarily duplicative is more akin to time spent on a subsequent court battle over the mechanic's bill which would not properly be understood as part of his services. Here, the parties were not fighting over the amount of the bill, but whether it was detailed enough."[3]

The *Stanton* court found that the supplemental disclosure benefitted the administration of the bankruptcy estate by providing additional information allowing the parties to understand the work performed. Applying *ASARCO*, the court concluded that "[t]he takeaway from the Supreme Court's decision...is clear: It is the nature of the work—not when it is performed—that determines whether it is compensable. Only work done in service of the estate administrator is compensable. Because supplementing the detail provided in his initial fee application benefitted the estate and was necessary for the administration of the case,...[counsel] is entitled to recover...fees incurred performing that work."[4]

---

[1] In re Stanton, No. 8:11-bk-22675, 2016 Bankr. LEXIS 3827 (Bankr. M.D. Fla. 2016.)
[2] *Id.* at *8-9.
[3] *Id.* at *9.
[4] *Id.* at *14.

> arate 'service' but rather is a medium through which the mechanic conveys what he or she wants to be paid. Similarly, a legal bill is not a 'service' rendered to a client…. A bill prepared by an attorney, or another bankruptcy professional, is not a 'service' to the bankruptcy estate.[55]

The Court seemed to take offense at what it characterized as a change in position by the U.S. Trustee.[56] The Court cited to statements of the U.S. Trustee a few years prior and in filings with the lower courts in this case that reasonable charges for preparing fee applications are compensable, but time spent defending them ordinarily is not. Accordingly, the Court asserted that the U.S. Trustee previously (before changing its position) properly characterized such work as being for the benefit of the professional and not the estate.[57] Further, the majority used the U.S. Trustee's change of position to support its rejection of policy-based arguments in this case, stating: "The speed with which the Government has changed its tune offers a good argument against substituting policy-oriented predictions for statutory text."[58] The dissent argued that the Court is unable to reconcile its narrow interpretation of "reasonable compensation" with the provision under Section 330(a)(6) for fee-application preparation fees.[59] The dissent rejected the majority's apparent adoption of the view that preparation of a fee application must be a "service" because it is not required of lawyers in areas other than bankruptcy as a condition to getting paid. The dissent explained:

> [I]f the existence of a legal requirement specific to bankruptcy were sufficient to make an activity a compensable service, then the time that a professional spends at a hearing defending his or her fees would also be compensable. After all, the statute permits a court to award compensation only after 'a hearing' with respect to the issue. §330(a)(1). And there is no such requirement for most attorneys, who simply bill their clients and are paid their fees. But the majority does not believe that preparing for or appearing at such a hearing—an integral part of fee-defense work—is compensable.[60]

In concluding that the majority wrongly distinguished between recovery of fees for fee application preparation and fee-defense litigation, the dissent contended that the basic purpose of the Bankruptcy Code's fee award provision is undermined.[61] On the other hand, the Court stated that it is simply applying the text of the Bankruptcy Code and that the arguments of the dissent and the government are "too insubstantial to support a deviation from the American Rule."[62] Moreover, the Court rejected the statutory basis for fee-defense compensation identified by the dissent as inadequate since "[t]he open-ended phrase 'reasonable compensation,' standing alone, is not the sort of 'specific and explicit provisio[n]' that Congress must provide in order to alter this default rule."[63] Further, the majority justified its conclusion: "[W]e would lack the authority to rewrite the statute even if we believed that uncompensated fee litigation would fall particularly hard on the bankruptcy bars."[64] As a result, the Court concluded, "because §330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation."[65]

Boomerang Tube

ASARCO did not address the contract exception to the American Rule. Subsequently, in *In re Boomerang Tube, Inc.*,[66] a bankruptcy court in the District of Delaware, applying *ASARCO,* considered the contract exception. In this case, the Official Committee of Unsecured Creditors filed applications seeking approval for the employment of counsel that included a provision indemnifying counsel for expenses incurred in any successful defense of their fees. The U.S. Trustee contended that *ASARCO* precludes payment of fees under the provision. The U.S. Trustee also argued "that the fee defense provision should not be approved because such fees are outside the scope of employment and are unreasonable."[67]

Unlike *ASARCO*, in which the professionals' employment was under Section 327, approval of the fee defense provisions in *Boomerang Tube* were sought pursuant to Section 328 of the Bankruptcy Code, which is an express exception to Section 330 and allows compensation to professionals (subject to advance approval by the court) "that would otherwise not be available under section 330 (such as fixed fees, contingent fees, etc.")."[68] Recognizing that Section 328 is an exception to Section 330, the *Boomerang Tube* court determined this distinction to be irrelevant since "[t]he text does not refer to the award of defense fees to a prevailing party. Therefore, the Court concluded that section 328 does not provide the statutory exception to the American Rule and cannot provide authority for approval of the fee defense provisions."[69]

In *Boomerang Tube,* the bankruptcy court found that "the contract exception to the American Rule is not precluded by the ruling in *ASARCO.*"[70] However, the court explained that to be enforceable any contractual exception to the American Rule would have to be consistent with the other provisions of the Bankruptcy Code.[71] The *Boomerang Tube* court viewed the retention agreements between the committee and counsel as contracts. However, they are not conventional bilateral agreements since they are "subject to objection by other parties and…ultimately subject to approval (and modification) by the Court."[72] The bankruptcy court next examined whether such contracts are exceptions to the American Rule.

Determining they are not, the court again focused on the unconventional nature of the contracts, stating:

> [T]here is not a contract between two parties providing that each will be responsible for the other's legal fees if it loses a dispute between them. Rather, here there is a contract between two parties (the Committee and Committee Counsel) that in the event Committee Counsel win a challenge to their fees, the third party (the estate) will pay their defense costs even if the estate is not the party who objected.[73]

The court noted that this was not the typical contract modifying the American Rule and found that the contract cannot bind the estate, which is not a party to it.

The court further explained that retention agreements in bankruptcy are more complicated than simple contractual matters. Regardless of the terms of an employment contract, court approval in accordance with the requirements of the Bankruptcy Code is necessary. Accordingly, "if the Court finds that a contract that the Debtor or the Committee negotiated is impermissible, the Court may not approve it or may modify it."[74] This led the court to determine that the retention agreements do not constitute contractual exceptions to the American Rule. The court added that "[e]ven if they were, however, the Court must still determine if they are permissible under the Bankruptcy Code."[75]

Following the approach taken by the majority in *ASARCO*, the *Boomerang Tube* court found that the fee defense provisions do not involve services for the creditors' committee but rather would only be for the benefit of committee counsel. The court concluded that such provisions are not reasonable terms for employment of counsel. The committee pointed out that exculpation and indemnification clauses are relatively common in retention agreements in large Chapter 11 cases and should be approved if the clauses are reasonable in accordance with section 328(a). The court acknowledged that the Third Circuit, in a case that predated the *ASARCO* decision, "has held that indemnification provisions sought by professionals may be approved as reasonable under section 328(a)."[76] The court distinguished the Third Circuit decision that "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."[77] Further, the court pointed out that the Third Circuit case involved indemnification of financial advisors, which are "typically provided similar protections outside of bankruptcy."[78]

The *Boomerang Tube* court found cases that predate *ASARCO* to be unpersuasive. Under *ASARCO*, the court concluded that it is prevented from ruling that Section 328 allows defense fees, even if they were routinely allowed by the market in bankruptcy or nonbankruptcy contexts prior to that ruling."[79] The court also rejected the attempt to recover defense fees as expenses as opposed to fees, stating "there is no difference in the analysis between approving the defense costs as fees (because the retained professional defends its own fees) or as expenses (because the retained professional hires outside counsel to represent it). Both are subject to the American Rule and to the Supreme Court's ruling in *ASARCO*."[80] The court concluded by advising that it would reach the same conclusion if the fee defense provisions were in a retention agreement submitted by any professional under Section 328(a), including professionals retained by the debtor. "Such provisions are not statutory or contractual exceptions to the American Rule and are not reasonable terms of employment of professionals."[81]

Amendment to Section 330

An amendment to Section 330 of the Bankruptcy Code specifically authorizing the court to award fees for the successful defense of a fee application would address the threat to comparable compensation posed by *ASARCO*. While the Bankruptcy Code already directs the court to consider all relevant factors when determining reasonable compensation, the Supreme Court finds this directive inadequate to overcome the American Rule. As a result, bankruptcy professionals face a significant risk of fee dilution when forced to address objections to their fees. This risk is heightened by the asymmetrical nature of bankruptcy cases in contrast to the ordinarily bilateral litigation from which the American Rule arose. The suggestion of the *ASARCO* majority that this issue may be addressed through the recovery of sanctions would likely only work in extreme cases since courts are constrained in imposing sanctions. Further, as reflected by *Boomerang Tube*, under *ASARCO*, the door may have closed on the ability to contract around the American Rule in the bankruptcy context. ■

---

[1] 11 U.S.C. §330(a). *See also* 11 U.S.C. § 1103(a).

[2] *See* In re Nucorp Energy, Inc. 764 F. 2d 655, 658 (9th Cir. 1985). *See also* Burgess v. Klenske (In re

Manoa Finance Company, Inc.), 853 F. 2d 687, 689-90 (9th Cir. 1988).
[3] 11 U.S.C. §330(a)(6).
[4] 11 U.S.C. §327(a). *See also* 11 U.S.C. §1106(a) for duties of the estate's representative in Chapter 11.
[5] *See* 11 U.S.C. §102(1).
[6] *See* Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252-53 (2010); Arcambel v. Wiseman, 3 U.S. 306 (1796).
[7] Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015).
[8] *Id.* at 2162.
[9] Justices Roberts, Scalia, Kennedy and Alito joined in the entirety of the opinion; Justice Sotomayor concurred in the judgment and all but one section of the opinion. Justices Breyer, Ginsburg and Kagan filed a dissenting opinion.
[10] ASARCO, 135 S. Ct. at 2171 (citations omitted) (dissent).
[11] *Id.* at 2163.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] ASARCO LLC v. Jordan Hyden Wombel Culbreth & Holzer, P.C. (In re ASARCO LLC), 751 F .3d 291, 299-302 (5th Cir. 2014), *aff'd sub nom.* Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158.
[16] ASARCO, 135 S. Ct. at 2164, (citing Arcambel v. Wiseman, 3 U.S. 306.)
[17] ASARCO, 135 S. Ct. at 2164 (citing Alyeska Pipeline Service Co., v. Wilderness Society, 421 U.S. 240 (1975)).
[18] ASARCO, 135 S. Ct. at 2164 (citing 28 U.S.C. §2412(d)(1)(A), 42 U.S.C. §§1988(b), 2000e-5(k), and citing generally Hardt v. Reliance Standard Life Ins. Co, 560 U.S. 242, 253, and nn. 3-7 (collecting examples)).
[19] 5 U.S.C. §504; 28 U.S.C. §2412.
[20] ASARCO, 135 S. Ct. at 2164.
[21] *See* 28 U.S.C. §2412(d)(1)(A).
[22] ASARCO, 135 S. Ct. at 2164. The dissent, however, asserts that "[t]he fee provision of the Equal Access to Justice Act, as enacted at the time, permitted an 'award to a prevailing party…of fees and other expenses… incurred by that party in any civil action… brought by or against the United States.'…The provision did not mention fee-defense work—but the Court [in *Jean*] nonetheless held that such work was compensable.…I would do the same here." *Id.* at 2171-72 (dissent) (citations omitted) (citing Commissioner v. Jean, 496 U.S. 154, 158, 160-66 (1990)) (quoting 28 U.S.C. §2412(d)(1)(A) (1988)).
[23] *Id.*
[24] *Id.*
[25] *Id. See also* 11 U.S.C. §330(a)(1).
[26] ASARCO, 135 S. Ct. at 2165.
[27] *Id.*
[28] *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934); BLACK'S LAW DICTIONARY 3d ed. 1933, and OXFORD ENGLISH DICTIONARY (1933).
[29] ASARCO, 135 S. Ct. at 2165.
[30] The Court references section 110(i), which provides that "[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 trustee (or the bankruptcy administrator, if any)," the bankruptcy court must "order the bankruptcy petition preparer to pay the debtor … reasonable attorneys' fees and costs and moving for damages under this subsection." ASARCO, 135 S. Ct. at 2165-66 (citing 11 U.S.C. §110(i)(1)(C). Other fee-shifting provisions in the Bankruptcy Code appear at §§303(i)(1)(C), 363(k)(1), 523(a)(2), 526(c)(2), 707(b)(4)(A), and 707(b)(5)(A).
[31] ASARCO, 135 S. Ct. at 2166.
[32] *Id.*
[33] *Id.*
[34] *See* FED. R. BANKR. P. 2016(a).
[35] 11 U.S.C. §330(a).
[36] 11 U.S.C. §330(a)(2). *See also* ASARCO, 135 S. Ct. at 2171 (dissent).
[37] *Id.* at 2168.
[38] *Id.* at 2171 (dissent).
[39] *Id.* at 2169 (dissent).
[40] *Id.* (emphasis in original), (citing 11 U.S.C. §330(a)(3)).
[41] *Id.* at 2169.
[42] *Id.* at 2170.
[43] *Id.* at 2172.
[44] *Id.* at 2071.
[45] *Id.* (citing Commissioner v. Jean, 496 U.S. 154, 160-166 (1990). The dissent asserts that in *Jean* "[t]he Court quoted with approval the Second Circuit's statement that '[d]enying attorneys' fees for time spent in obtaining them would dilute the value of a fee award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." ASARCO, 135 S. Ct. at 2170 (dissent, (citing Jean, 496 U.S. at 162) (quoting Gagne v. Maher, 594 F.2d 336, 344 (1979) (internal quotation marks omitted)).
[46] 11 U.S.C. §330(a)(3)(F).
[47] ASARCO, 135 S. Ct. at 2170 (dissent), (citing H. R. REP. NO. 95-595, at 330 (1977), *reprinted in* 1978 U.S.C.A.A.N. 5963, 6286).
[48] ASARCO, 135 S. Ct. at 2168.
[49] *Id.*
[50] *Id.* at 2168 n.4 (quotation marks omitted), (quoting Law v. Siegel, 571 U.S. __, __, 134 S. Ct. 1188,1198 (2014)).
[51] 11 U.S.C. §330(a)(6).
[52] ASARCO, 135 S. Ct. at 2170.
[53] *Id.* at 2167.
[54] *Id.*
[55] *Id.* at 2172 (dissent).
[56] The U.S. Trustee is a division of the Department of Justice with responsibility for monitoring bankruptcy cases and in the opinion, the U.S Trustee is generally referred to by the Court as the "Government."
[57] ASARCO, 135 S. Ct. at 2167.
[58] *Id.* at 2168.
[59] *Id.* at 2173 (dissent).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 2168.
[63] *Id.* (citing Alyeska Pipeline, 421 U.S. 240, 260, (1975).
[64] ASARCO, 135 S. Ct. at 2169
[65] *Id.*
[66] In re Boomerang Tube, Inc., 548 B.R. 69 (Bankr. Del. 2016).
[67] *Id.* at 70.
[68] *Id.* at 72.
[69] *Id.*
[70] *Id.* at 73.
[71] *Id.*
[72] *Id.* at 74.
[73] *Id.* at 74-75.
[74] *Id.* at 75.
[75] *Id.*
[76] *Id.* at 76 (citing In re United Artists Theatre Co., 315 F. 3d 217, 230 3d Cir. 2003).
[77] In re Boomerang Tube, Inc., 548 B.R. at 76.
[78] *Id.* Bletchley Hotel at O'Hare Field LLC v. River Rd. Hotel Prtnrs, LLC, B.R. No. 09-B-30029, 2016 U.S. Dist. LEXIS 102884 (N.D. Ill. 2016). The district court in this case holds that under *ASARCO* the American Rule precludes fee-shifting.
[79] In re Boomerang Tube, Inc., 548 B.R. at 78.
[80] *Id.*
[81] *Id.* at 79 n.6.