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"Protecting Professional Fees from Disgorgement: Obtaining Carve-Outs from Secured Creditors to Safeguard Against Uncertainties"

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"Protecting Professional Fees From Disgorgement: Obtaining Carve-Outs from Secured Creditors to Safeguard Against Uncertainties"[1][2]

I. Introduction.

Professional compensation is always subject to approval, reexamination and adjustment for unreasonableness or excessiveness under 11 U.S.C. §§ 329 and 330. However, in recent years, some courts appear to have broadened the scope of this reexamination and adjustment when an estate becomes administratively insolvent.

In *Specker Motor Sales Co. v. Eisen*, 393 F.3d 659 (6th Cir. 2004), the Sixth Circuit Court of Appeals ordered a debtor's attorney to disgorge his post-petition retainer for pro-rata distribution among administrative claimants after the administratively insolvent case was converted to a Chapter 7. In so ruling, however, the Court did not consider (a) the impact of an attorney being paid from a carve-out or by a third party, or (b) other actions an attorney may take to protect the integrity of the retainer or fees previously approved by the Court and paid by the debtor prior to an estate being rendered administratively insolvent.

Recently, in *In re U.S. Flow*, 2005 WL 2952597 (Bankr. W.D. Mich. 2005), Judge James Gregg, of the United States Bankruptcy Court for the Western District of Michigan, allowed professionals appointed under the Bankruptcy Code to retain fees paid during the course of a

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Chapter 11 case, over the objection of the U.S. Trustee, when the estate subsequently became administratively insolvent. The primary fact upon which Judge Gregg justified retention of the fees paid to the professionals was they had been derived from a carve-out previously approved by the Court and consented to by the secured creditor. His ruling, however, makes clear that the facts upon which the Court relied in making its ruling, *i.e.*, those specifically set forth in a previously approved financing order, justified the holding that such fees would <u>not</u> be subject to disgorgement to the Trustee for payment of Chapter 7 administrative claims and, thereafter, for pro-rata distribution to holders of Chapter 11 administrative expense claims -- the result that otherwise would have been dictated by the *Specter* decision.

Thus, in order to *"Get What You Earn and Keep What You Got,"* it is important that a professional consider, at the onset of a case, the options that may arise if the estate subsequently becomes administratively insolvent. Failure to consider and take appropriate action to protect retainers received and fees paid may otherwise result in the professional having to disgorge amounts earned, approved and received.

II. *Specker Motor Sales Co. v. Eisen*, 393 F.3d 659 (6th Cir. 2004).

A. The Facts Underlying the *Specker* Decision.

In *Specker*, Donald Bays ("Counsel") was authorized to be employed as counsel for the chapter 11 debtor and received a $10,000 retainer from the debtor shortly after commencement of the chapter 11 case.[3] A few months later, the case was converted to chapter 7 liquidation, a trustee was appointed and the estate was found to be administratively insolvent. Thereafter, the bankruptcy court approved Counsel's final fee application and allowed him to keep the retainer

[3] The *Specker* decision sets forth the facts in this manner, stating that the retainer was received post-petition. However, in the *U.S. Flow* decision the Court suggests that the *Specker* retainer was actually received pre-petition. See *U.S. Flow*, 2005 WL 2952597 at fn. 7. It is unclear whether this factual distinction would have altered the ruling of the Court.

as interim compensation. However, upon final administration, because the estate was administratively insolvent Counsel was ordered by the bankruptcy court to disgorge over 90% of his retainer to share pro-rata with the four other administrative claimants of the debtor. The bankruptcy court found "that the plain language of 11 U.S.C. § 726(b) mandates disgorgement when necessary to achieve *pro rata* distribution among similarly situated claimants." *Specker*, 339 F.3d at 661. Counsel appealed.

The district court affirmed the bankruptcy court's decision, reasoning that Section 726(b), governing distribution of property of the estate in a chapter 7 case, mandated a pro-rata distribution of assets among creditors in the same statutory class. Section 726(b) states, in relevant part, as follows:

> Payment on claims of a kind specified in paragraphs (1), (2), (3), (4), (5), (6), (7) or (8) of section 507(a) of this title, or in paragraph (2), (3) (4) or (5) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112, 1208 or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

Id.

Section 507(a) establishes a payment scheme based upon a hierarchy of creditors and describes the order in which such claimants may lay claim to, and be paid from, the assets of a bankruptcy estate. Administrative claims, including professional fees awarded under Section 330(a)(1), are treated as administrative expenses allowed under Section 503(b)(1).[4] The court

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[4] Under the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), administrative expense claims for compensation and reimbursement awarded under Section 330 are now treated under (a) Section 503(b)(2) and subordinated to wages, salaries and commissions for services rendered after the commencement of the case, including the nonpayment of domestic support obligations, and (b) Section 507(a)(2) and subordinated to domestic support obligations.

found that, in addition to the professionals that had been awarded compensation, four (4) creditors also held administrative claims and, therefore, each was entitled to share pro-rata with the professionals in receiving a distribution from the estate. Thus, the district court ruled that Counsel was required to disgorge almost all of the retainer that he had previously been authorized to use to pay interim compensation – *i.e.*, fees and expenses that were in excess of the pro-rata share of the estate that he would have received -- in order to share it with the other administrative claimants. In making this ruling, the district court found that "mandatory disgorgement is the only reasonable and logical result if 11 U.S.C. § 726(b) is to be given any effect." *Id*. Counsel appealed to the Sixth Circuit.

B. *Specker* Holding by the Sixth Circuit.

The Sixth Circuit affirmed the decision of the district court, holding that Section 726(b) is clear in its mandate, requiring pro-rata distribution among creditors in the same class. Furthermore, the court held that retainers are held in trust for the estate and remain property of the estate. While a retainer may be authorized for application to and payment of interim compensation, interim compensation remains subject to reexamination, adjustment and eventual disgorgement under Section 726(b).

C. *Specker* Analysis.

On appeal, the sole issue before the Court was one of statutory construction. Counsel argued that (i) nothing in Section 726(b) requires a trustee to request disgorgement from professionals, and (ii) debtor's counsel should not be treated as similarly situated to other administrative claimants based on various public policy grounds. The Sixth Circuit rejected both of these arguments.

Counsel first argued that disgorgement was not mandatory, but rather within the discretion of the court based upon *United States v. Schottenstein, Zox & Dunn (In re Unitcast,*

Inc.), 219 B.R. 741(B.A.P. 6th Cir. 1998), which found that there was nothing in Section 726(b) that compelled the trustee of an administratively insolvent estate to reach back through prior administrative periods to recover payments to professionals. To do so, according to the *Unitcast* court, would "transform into (unpayable) 'administrative expenses.'" *Id* at 753. Moreover, to permit disgorgement of professional fees would "subordinate" professionals when an estate's funds are insufficient to cover administrative costs. The *Unitcast* court ultimately concluded that it was within the sound discretion of the bankruptcy court to order disgorgement to achieve pro rata distribution.

The Sixth Circuit refused to adopt the *Unitcast* view, finding it to be unpersuasive and inconsistent with the view of the majority of courts that have ruled on this issue. In reaching this determination, the Court focused on the language of Section 726(b), which was found to be clear and unambiguous. According to the Sixth Circuit, by its use of the word "shall" with the pro-rata requirement, Congress indicated that such distribution is not discretionary, but rather mandatory, and thus requires pro-rata distribution among creditors of the same statutory class. The Court also dismissed *Unitcast's* emphasis on the harshness of disgorgement and its effect of subordinating professionals as being misplaced, noting that only professionals are required to disgorge their interim compensation because only professionals can receive interim compensation under Section 331(a). Moreover, failure to order disgorgement would give interim compensation superpriority treatment not otherwise authorized under the Bankruptcy Code. Finally, the *Specker* Court held that the Bankruptcy Code was clear in directing equitable distribution among creditors. Thus, once an estate becomes administratively insolvent, fees previously allowed and paid to professionals as compensation under Section 330 are subject to disgorgement to be shared pro rata with the other administrative creditors of the estate.

Counsel next suggested that various "considerations of a public policy nature" supported a finding that professionals should not be required to disgorge fees previously paid, but rather should be treated like other administrative claimants. In addition, Counsel argued that his fiduciary relationship with the estate created a special ethical relationship with the estate that would be undermined by being treated equally with other administrative creditors or being subjected to uncertainty of payment. Because the statute is unambiguous, the Sixth Circuit held -- presumably based upon rules of statutory construction -- that it "need not reach the merits of these arguments," and ultimately concluded that Counsel, like the other administrative creditors in bankruptcy cases, was a gambler. *Id*. at 664.

III. *In re U.S Flow*, 2005 WL 29525 (Bankr. W.D. Mich. 2005).

The Court in *Specker* did not consider, however, the availability of other avenues that professionals may pursue to protect retention of retainers received and fees paid. In the Fall of 2005, Judge James Gregg (United States Bankruptcy Court for the Western District of Michigan) issued an opinion in *In re U.S. Flow*, 2005 WL 2952597 (Bankr. W.D. Mich. 2005), that appears to provide a bypass around *Specker*. In *U.S. Flow*, over the objection of the U.S. Trustee, court-appointed professionals were allowed to retain fees paid to them after an estate became administratively insolvent based on such fees having been paid through a carve-out pursuant to a DIP financing order consented to by secured creditors and approved by the court.

A. *U.S. Flow* Facts.

U.S. Flow and four related corporations ("Debtors") filed for relief under chapter 11 of the Bankruptcy Code on August 12, 2003. The chapter 11 cases were jointly administered. The Court appointed two professionals: Kaye Scholer for the Debtors and Pepper Hamilton for the Official Committee of Unsecured Creditors (collectively, the "Professionals"). On August 14, 2003, the Court entered an interim order authorizing use of cash collateral, which automatically

terminated on August 22, 2003. Thereafter, the Court issued its Second Interim Order (I) Authorizing Debtors' Use of Cash Collateral; (II) Granting Adequate Protection; and (III) Scheduling Additional Hearing Thereon (the "Second Interim Order"). The Second Interim Order authorized a $55,000 carve-out to benefit chapter 11 court-appointed professionals ("Carve-Out").

Under the Second Interim Order, "Carve-Out" was defined to mean:

> (i) the unpaid fees of the clerk of the Bankruptcy Court and of the United States Trustee pursuant to 28 U.S.C. § 1930(a) and (b) and (ii) the aggregate allowed unpaid fees and expenses payable under Sections 330 and 331 of the Bankruptcy Code to professional persons retained pursuant to an order of the Court by the Debtor or any statutory committee appointed in this Chapter 11 case not to exceed $55,000. [Second Interim Order ¶ 16.]

The Second Interim Order also expressly recognized that: (i) the liens of the secured creditors were found to be valid, perfected and indefeasible in the bankruptcy case; (ii) the secured creditor's replacement liens were deemed to be senior to the rights of the Debtors and any successor trustee or other estate representative; (iii) the Carve-Out was superior to the secured creditors' interests in the collateral; (iv) the rights and obligations of the Debtors and the secured creditors would survive any termination of the Second Interim Order; (v) it did not create any rights for the benefit of any third party, creditor, or any direct, indirect or incidental beneficiary, other than the Professionals; and (vi) the court would retain jurisdiction to resolve issues which arose under the Order.

Despite negotiations, the Debtors were unable to obtain authority for continued use of cash collateral beyond August 22nd. On September 3, 2003, the Second Interim Order expired of its own terms. Thus, only one month after the initial filing, the estate was found to be administratively insolvent and the case was converted to a chapter 7. Following conversion, the U.S. Trustee asked the court to determine that the Carve-Out was property of the estate and

should be distributed pursuant to Section 726(b) according to the priorities of the Bankruptcy Code. The Professionals objected and requested that the court order that the Carve-Out be distributed to them.[5]

B. *U.S. Flow* Holding.

While the court recognized that, under *Specker*, interim compensation granted in a chapter 11 case must be disgorged in a converted chapter 7 when necessary to achieve a pro-rata distribution among similarly situated creditors, it found that the facts upon which *Specker* was decided were very limited and did not address the instance where a court-ordered carve-out is established or when court-appointed professionals are paid from collateral of a secured creditor, instead of from property of the estate. After analyzing the Carve-Out and *Specker*, Judge Gregg found that the Carve-Out was not property of the estate and was not recoverable by the estate for the benefit of all creditors because it was specifically set aside for the Professionals pursuant to a prior court order.

C. *U.S. Flow* Analysis

In making its ruling, the Court engaged in a two-step analytical process: (i) Was the Carve-Out valid and enforceable? and (ii) Does *Specker* require disgorgement of the Carve-Out?

The court first analyzed the Carve-Out. By definition, although not specifically defined in the Bankruptcy Code, a carve-out is essentially an agreement pursuant to which a secured creditor allows post-petition proceeds otherwise subject to its secured claim to be exclusively earmarked to pay professionals. The Court found that the Carve-Out was valid and enforceable in this case because: (i) the secured creditors consented to the Carve-Out; (ii) the court approved it; (iii) the court's order was not appealed; and (iv) there was no challenge to the validity or

[5] The secured creditors that authorized the Carve-Out did not take a position on this issue.

priority of the secured creditors' pre-petition or post-petition liens. The Court ruled that the liens were not avoidable, and the proceeds transferred to the Professionals could not be recovered for the estate. Thus, since the Carve-Out was derived from the secured creditors' otherwise unassailable collateral, the estate had no right to this collateral.

Second, the Court found that *Specker* did not require disgorgement of the Carve-Out. Judge Gregg distinguished *Specker* on the facts – it dealt with a retainer, not a carve-out – which created very different legal results. The crucial difference was that a retainer remains property of the estate, while a carve-out is not property of the estate, but rather the collateral of the secured creditor. Therefore, while a retainer may be assailable, a carve-out is generally unassailable (provided that the secured creditor's liens are valid and enforceable).

Judge Gregg also rejected the U.S. Trustee's argument that the result was unfair to other creditors. First, other creditors did not negotiate a carve-out for themselves, object to the Second Interim Order or appeal the order establishing the Carve-Out. Second, the Court found that it would be unfair to require the Professionals to lose their entitlement to the Carve-Out funds after they relied upon a final non-appealable court order. Finally, if the terms and conditions of the Carve-Out were disagreeable, then third parties, including the U.S. Trustee, should have challenged them either (i) before the Second Interim Order was entered, or (ii) via a timely appeal from the Second Interim Order. However, no such action was taken in this case.

D. Lessons to Learn on Carve-Outs from *U.S. Flow.*

The result obtained in *U.S. Flow* was based on certain key facts that prevented disgorgement. These essential facts included: (i) the secured creditors' consent to the carve-out; (ii) court approval of the Carve-Out; (iii) no appeal was taken from the court's order; (iv) no challenge to the validity or priority of the secured creditors' prepetition or post-petition liens -- thus, the liens were not avoidable and the proceeds transferred by the secured creditors to the

professionals could not be recovered for the benefit of the bankruptcy estate; and (v) the monies subject to the Carve-Out were not property of the estate, but rather were property of the secured creditors. It is therefore important to delineate such findings and incorporate them as conclusions of law in any financing order that creates a carve-out for payment of professionals' fees and expenses.

Secondly, and as noted above, it is crucial for a carve-out to be approved by the court. Some courts have ruled that purely consensual carve-outs, *i.e.*, those only agreed to between the secured party and the professionals but not approved by the court, are property of the estate. Therefore, they are subject to disgorgement. *See*, Claude Bowles, *Your Retainer: Pocket Aces or A 7-2 Off Suit?*, 24 Am. Bankr. Inst. J. 29 (May 2005) (citing *In re Ben Franklin Retail Stores, Inc*., 210 B.R. 315 (Bankr. N.D. Ill. 1997) (holding that proposed agreement between debtor's counsel and secured creditors, which permitted counsel to be compensated directly from secured creditors' collateral, resulted in counsel's payment before other professionals of same priority level were paid, and thus impermissibly re-ordered Bankruptcy Code's distribution priorities)).

Thirdly, while the liens, claims and interests of the secured creditors were not subject to contest or avoidance in *U.S. Flow*, in other instances the situation may not be the same. If the secured creditor's claim cannot be validated at the time of the entry of a financing order, a tension is created in two respects: (i) whether the underlying claim will ultimately be allowed as a secured claim; and (ii) whether the collateral securing the claim has sufficient value to pay the carve-out. In either case, it is important to carefully craft the carve-out under the financing order to ensure that the first monies paid out from the proceeds of the secured creditor's collateral go to pay the professionals' carve-out. Providing for a "first out" option should protect the professionals and allow them to argue that payment of their fees is protected even if the secured

creditor's claims are subsequently attacked (assuming that the secured claim is not invalidated in its entirety) (as further indicated below in Section IV, *infra*), and further provide sufficient value for payment of the carve-out, even if it is ultimately determined that the secured claim is undersecured.

IV. Protection of Carve-Outs Under Section 364(e).

While Section 364(e) was not considered in *U.S. Flow*, some courts have found that this Code section may also protect carve-outs from disgorgement. In *In re Cooper Commons*, the Ninth Circuit dismissed a challenge to the payment of the trustee and his professionals under a post-petition financing agreement. *Weinstein, Eisen & Weiss v. Gill (In re Cooper Commons)*, 430 F.3d 1215 (9th Cir. 2005). In this case, a law firm that had served as general counsel to the debtor objected to approval of the proposed post-petition financing agreement because, while the agreement set aside funds for payment of the trustee and his professionals, it failed to set aside funds for the law firm. The court rejected the law firm's argument that the proposed agreement granted the trustee a superpriority treatment over the law firm contrary to 11 U.S.C. § 507(a)(1), which places the professionals on equal priority. The court ruled that, because the agreement was a post-bankruptcy extension of credit, 11 U.S.C. § 364(e) broadly protects the agreement and funds advanced in "good faith" thereunder.

Thus, if the retention agreement is deemed to constitute a post-petition extension of credit under Section 364, not only will the agreement to advance funds to pay the carve-out be protected, but the funds paid to professionals will similarly not be subject to disgorgement and redistribution.

V. Security Retainers.

Some jurisdictions have found that pre-petition security retainers do not have to be returned or are not subject to disgorgement when an estate is rendered administratively insolvent.

This line of authority is based on a determination that the professional has a security interest in the retainer for future services based on its possession of the funds. *See* Bowles, *supra*; see also, *In re Printcrafters, Inc.*, 233 B.R. 113, 120 (D. Colo. 1999) (finding that, pursuant to Colorado law, law firm had a possessory lien in retainer that had been paid pre-petition and was entitled to immediate payment from retainer without having to wait to see if sufficient funds existed to pay other administrative claims); *In re Pannebaker Custom Cabinet Corp.*, 198 B.R. 453 (Bankr. M.D. Pa. 1996) (holding that pre-petition security retainer debtor paid to its attorneys prior to filing for chapter 11 relief was not subject to disgorgement simply for purpose of obtaining parity among administrative claimants where funds on hand were not sufficient to permit full payment of administrative claims, absent any evidence as to excessive or unreasonable nature of retainer); *In re North Bay Tractor, Inc.*, 191 B.R. 186 (Bankr. N.D. Cal. 1996) (stating that a rule requiring attorneys to disgorge their retainers so that other claimants of equal priority receive equal dividends would undermine the purpose of retainers and chill the willingness of many professionals to undertake representation of chapter 11 debtors); *In re Cottrell International*, 2000 WL 1180282 at *4 (Bankr. D. Col.) (ruling that the *Printcrafters* decision equally applies to pre and post-petition retainers); *In re Printing Dimensions, Inc.*, 153 B.R. 715 (Bankr. D. Md. 1993) (finding that debtor's counsel was not required to share pre-petition retainer pro-rata with other administrative claimants, if either retainer is treated as security or retainer is held in trust). A "security retainer" secures payment for future services of the attorney and the attorney is said to have a security interest in the payment. *In re Renfrew Center of Florida, Inc.*, 195 B.R. 335, 338 (Bankr. E.D. Pa. 1996).

Some courts have even gone further and distinguished between pre-petition retainers and administrative expense claims, stating that a pre-petition retainer is entitled to superpriority

treatment. *E.g.*, *In re Hohenberg*, 191 B.R. 694, 701 (Bankr. W.D. Tenn. 1996) (distinguishing pre-petition retainer from administrative expense claim). Unlike these cases, however, most courts have not distinguished between administrative versus superpriority treatment. *See e.g.*, Bowles, *supra*, and cases cited therein.

At the same time, courts have, depending on the nature of the retainer, required disgorgement of the unused portion of pre-petition retainers. *E.g., In re Prudoff*, 196 B.R. 64, 66-67 (Bankr. E.D. Va. 1995) (requiring disgorgement of unused portion of retainer based upon state law which gave debtor equitable interest in any unused portion of a retainer).

It is unclear whether, or how, the *Specker* decision affects this area of law. First, that decision did not discuss whether the attorney acquired a security interest in the retainer as the Ninth Circuit Bankruptcy Appellate Panel acknowledged in *In re Cepek* in distinguishing *Specker*. *Rus, Miliband & Smith v. Yoo (In re Cepek),* 2006 WL 851188 (9th Cir. B.A.P.) (holding that a professional with a valid pre-petition security retainer that has been properly documented, disclosed and approved by the bankruptcy court cannot be required to surrender in it in the interest of equal treatment under § 726(b)). Presumably, having found that the retainer was granted post-petition and without authority for the granting of a security interest post-petition, the Sixth Circuit would have ruled that no such security interest was granted or arose. On the other hand, it is not clear how the Sixth Circuit would have ruled if it found, like Judge Gregg, that the retainer had been given pre-petition. As previously noted, the Sixth Circuit did not address the significance, if any, between receipt of a pre-petition and a post-petition retainer. Therefore, while *Specker* appears to apply only to cases in which post-petition retainers are at issue, it is unclear whether the Sixth Circuit would apply the same reasoning in the case of a pre-petition retainer.

Ultimately, how a court deals with the issue of whether a security interest is created by virtue of the payment of a pre-petition retainer will largely depend on the particular state law involved. Law in this area differs significantly from state to state. Moreover, the language of the specific retainer agreement at issue may also influence how the retainer is treated and how it is applied. Therefore, at the onset of a matter, practitioners must ensure that their jurisdiction recognizes a security interest in a pre-petition retainer before relying upon it for payment and a security interest.

VI. Attorney Liens.

An attorney-charging lien is an equitable interest in money or property awarded or recovered through the attorney's services. Property interests are determined by state law and, therefore, the nature and extent of attorney liens vary from state to state. Whether the retainer constitutes property of the estate, and under what circumstances the retainer can be "protected" from the claims of others creditors and/or a trustee, will depend upon state law. For example, under Georgia law, the automatic stay did not allow a post-petition attorney lien for post-petition services. *In re Chewning & Frey Security, Inc.*, 328 B.R. 899 (Bankr. N.D. Ga. 2005). However, another state's law may allow a lien perfected post-petition to relate back to a pre-petition date and cause the lien to be considered separate from property of the estate. *Id.* Furthermore, it is unclear whether an attorney lien attaches merely to the file or also to the funds held by the attorney. Thus, the result may likewise vary from state to state. Therefore, practitioners must be cognizant of the law of their jurisdiction and the possibility and/or implications of obtaining a charging lien prior to undertaking the representation or taking a retainer.

VII. Are Fees Awarded in a Confirmed Chapter 11 Case Subject to Attack in Subsequently Filed Case?

Generally, once the final order granting allowance and payment of professional fees is entered and funds are distributed in payment of such fees under a confirmed chapter 11 plan that has become effective and substantially consummated, most professionals believe that the fees they received are inviolate and beyond attack. However, a motion recently filed in a Massachusetts bankruptcy case may now give rise to second thoughts before professionals breathe a sigh of relief.

In *In re High Voltage Engineering Corp.*, Case No. 05-10787 (Bankr. D. Mass. 2005), the chapter 11 trustee appointed in a subsequent case filed by the debtor filed a motion asking the court to reconsider the administrative expense claims of professionals that had been paid in the debtor's prior chapter 11 bankruptcy case as part of a confirmed plan. A short time after the plan was confirmed and professionals had been paid, the debtor found that it was in need of additional bankruptcy relief. In lieu of seeking to reopen the prior chapter 11 or to modify the plan post-confirmation,[6] the debtor filed a new chapter 11 case and a trustee was appointed.

Rather than seeking to reopen the prior chapter 11 case in order to set aside and challenge the fee awards, the trustee filed a motion in the debtor's second chapter 11 case. The trustee alleged that the professionals may have been aware that the debtor's plan was not feasible at the time of confirmation and, therefore, they may not be entitled to their fees. The trustee thus sought reconsideration of the order(s) allowing the professionals' claim(s) for payment in the prior bankruptcy pursuant to 11 U.S.C.§ 502(j) and Federal Rule of Civil Procedure 60(b), made applicable in bankruptcy proceedings by Rule 3008 of the Federal Rules of Bankruptcy

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[6] It is unclear whether the plan had been substantially consummated by the time the new case was filed or whether the debtor would have had the right to seek to modify the plan post-confirmation under Section 1127 of the Bankruptcy Code.

Procedure. The motion is currently stayed, as the trustee has twice assented to a motion to stay proceedings while he further investigates the claims.

The filing of such a motion presents significant issues for professionals. First, should professional fees be subject to attack after confirmation of a plan of a solvent estate? If the *High Voltage* court believes that they should, professionals can never be assured that payment of their fees is final. Second, once fees are approved pursuant to a confirmed plan that has been substantially consummated, should a trustee or other interested party be able to challenge those professional fees in the subsequent bankruptcy case (assuming they are not subject to avoidance under another applicable provision of the Bankruptcy Code or otherwise procured by fraud)? While, from a procedural perspective, it may be appropriate for such fees to be challenged by reopening the prior bankruptcy case, it remains to be seen how the court will deal with this issue in *High Voltage*. On the other hand, to allow such a process to go forth in the absence of fraud or an avoidance action, essentially makes the professional a guarantor of the success of a confirmed plan, or else risk potential disgorgement of its fees and expenses incurred and approved in the case.

VIII. Conclusion.

The book is certainly not closed on the sanctity of previously awarded attorneys (and other professionals') fees. When a case becomes administratively insolvent, unpaid post-petition creditors – be they trade creditors, landlords or other professionals – may very well look to a previously paid professional to share some of the wealth, as well as the pain. Only time, and the specific facts of the case, may tell how successful their efforts will be.