

The Transactional Lawyer

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Fees on Fees – Drafting to Include Attorney’s Fees Incurred in Seeking Fees

Allen Benson

While successful litigants who claim a right to recover attorney’s fees under statute are typically also entitled to recover those fees incurred in litigating their right to or the amount of such fees, the same is not universally true for litigants who claim a right to fees pursuant to contract. A statutory authorization for attorney’s fees is meant to incentivize lawyers to take Title VII, civil rights, and the other types of cases to which the statute applies. Not extending the award to cover time spent in litigating fee disputes would effectively reduce the hourly compensation and incentive for attorneys to take these cases and thus would go against the purpose of the fee-shifting provision. See e.g. *Prandini v. National Tea Co.*, [585 F.2d 47](#), 53 (3d Cir. 1978); *Souza v. Southworth*, [564 F.2d 609](#) (1st Cir. 1977). In contrast, when an attorney’s fee award is based on contract, the language of the agreement will determine whether the court may award fees on fees. See *Fidelity Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, [1997 WL 308846](#) at *2 (N.D. Ill. 1997); *United States, for Use of C.J.C., Inc. v. Western States Mechanical Contractors, Inc.*, [834 F.2d 1533](#), 1548 (10th Cir. 1987).

New York, like several jurisdictions, construes attorney’s fees provisions strictly in an attempt to adhere to the “American Rule,” which requires each party to pay its own attorney’s fees. See *Gottlieb v. Such*, [740 N.Y.S.2d 44](#), 44 (N.Y. App. Div. 2002). Consequently, litigants often encounter difficulty in obtaining an award of attorney’s fees that includes time

spent in obtaining fees. For example, in *214 Wall Street Associates, LLC v. Medical Arts-Huntington Realty*, [953 N.Y.S.2d 124](#) (N.Y. App. Div. 2012), the parties entered into an agreement that contained a provision awarding costs and attorney’s fees to the prevailing party in litigation “arising under or in connection with” the agreement. However, in a post-trial dispute over attorney’s fees, the court refused to award fees for the attorney’s fee dispute, holding that authorization for such an award could not be implied and therefore must be addressed by the fee provision “in a clear and decided fashion.” *Id.* at 126. New York courts have also recently denied fees on fees pursuant to a contractual indemnity clause that covered “all claims and demands to the maximum extent permitted by [law],” *546-552 W. 146th St. LLC v. Arfa*, [950 N.Y.S.2d 24](#), 26 (N.Y. App. Div. 2012), and in a lease that did not contain clear language expressly providing for an award of fees on fees, *IG Second Generation Partners, L.P. v. Kaygreen Realty Co.*, [980 N.Y.S.2d 479](#) (N.Y. App. Div. 2014).

Florida courts have ruled that, in general, a party may recover attorney’s fees for litigation relating to the entitlement of fees but not for litigation surrounding the amount of the fee award. See *Mediplex Construction of Florida, Inc. v. Schaub*, [856 So. 2d 13](#) (Fla. Dist. Ct. App. 2003). However a 2012 case allowed an attorney’s fee award to include fees for litigating the amount because the fee provision in the parties’ agreement was drafted broadly to include “any litigation between the parties under this Agreement.” See *Waverly at Las Olas Condo. Ass’n, Inc. v. Waverly Las Olas, LLC*, [88 So. 3d 386](#), 388 (Fla. Dist. Ct. App. 2012).

The importance of drafting to expressly include fees-on-fees coverage is clearly illustrated by *214 Wall Street Associates*. In that case, the defendant, was awarded \$123,104.63 in attorney’s fees for the underlying litigation, but was denied an award for the \$61,730.00 in fees incurred in litigating the fees award. Thus, in an effort to ensure recovery of all attorney’s fees, when drafting such a provision one ought to use language such as the following:

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... any attorney's fees incurred in connection with this Agreement [or the relationship of the parties], including those incurred on appeal, post-trial, or in resolving the entitlement to or amount of an attorney's fee award.

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How Not to Describe the Collateral

Stephen L. Sepinuck

One recent case provides a great illustration of how not to draft a security agreement. A brief study of the case also yields some guidance on how to draft it properly.

First, some background. Many lenders take a security interest in all of the debtor's personal property or all of one or more types of property. Article 9 facilitates this kind of activity by having a rather lax rule on how the security agreement describes the collateral. The description need not be "specific;" it need only "reasonably identif[y] what is described." § 9-108(a). In other words, it must "make possible" – through use of other objective evidence – the identification of the collateral. *Id.* cmt. 2. While a description of collateral as "all personal property" is not adequate (*see* § 9-108(c)), a description by one or more types of collateral defined in the UCC is (*see* § 9-108(b)(3)).

Thus, describing the collateral as "all the debtor's equipment" is fine. In contrast, defining the collateral as "some of the debtor's equipment" would not be effective unless there were some other basis for identifying which items of equipment were covered and which were not.

In *In re Inofin, Inc.*, [512 B.R. 19](#) (Bankr. D. Mass. 2014), the debtor was a financial services company that

specialized in purchasing and servicing sub-prime automobile loans. Individuals purchased vehicles on credit from dealers, giving the dealer a security interest in the vehicle purchased to secure payment of the purchase price. The dealers then sold these receivables – classified by Article 9 as "chattel paper" – to Inofin. Inofin, in turn, obtained most of its capital for purchasing chattel paper from a large number of private lenders, one of which was Raymond C. Green, Inc. ("RCG").

Because RCG did not finance all of Inofin's operations, it did not acquire a security interest in all of Inofin's chattel paper. Instead, its security agreement described the collateral as: "all of the Debtor's rights in and to chattel paper . . . purchased by Debtor with the proceeds of loans from Secured Party and assigned and delivered to Secured Party." In short, RCG was to get a security interest only in the chattel paper it financed and took delivery of.

While the concept is perfectly legitimate and quite possibly common, the language used was very problematic. That is because it essentially imposed a requirement that the funds RCG advanced be used by Inofin to acquire the chattel paper intended to serve as collateral. In essence, RCG's security agreement imposed a tracing requirement for the original collateral that often exists as a matter of law for proceeds. Article 9 provides that a security interest extends to "identifiable" proceeds of the original collateral. This identifiability requirement for proceeds often requires that the secured party trace funds or other property through various transmigrations, transactions, or commingled accounts. In doing so, the secured party might be assisted by equitable principles and rules, such as the lowest-intermediate-balance rule. *See* § 9-325(b), cmt. 3. RCG's security agreement, however, made no reference to such equitable principles for identifying the original collateral. Moreover, while RCG could have insisted that Inofin maintain a segregated deposit account for RCG's advances, so that RCG could trace its advances to the purchase of specific chattel paper, it never did so. As a result, RCG could not show that any of Inofin's chattel paper came within the collateral description in the security agreement.

Fortunately for RCG, the court ruled that the parties' course of performance over 15 years cured the problem. Inofin regularly delivered chattel paper to RCG with allonges stating that it "hereby assigns to [RCG] all of its right, title and interest in, to and under"

the delivered chattel paper, and that language was sufficient, the court concluded, to grant a security interest in the delivered paper regardless of whether Inofin had purchased that paper with the loan proceeds. Had Inofin not used those allonges, however, RCG would have found its \$8.4 million claim against Inofin to be entirely unsecured.

The moral of this case is to be extremely careful when describing the collateral in a security agreement, especially if the secured party is acquiring a security interest in less than all of an entire classification of personal property. The more specific lesson is not to describe the collateral by what happens to the loaned funds. RCG would have saved itself a lot of time, expense, and aggravation if it had simply used fewer words to describe the collateral:

all of the Debtor's rights in and to chattel paper purchased by Debtor with the proceeds of loans from Secured Party and assigned and delivered to Secured Party.

Even this simplified language could present a problem. There would be preference exposure if there were a substantial delay between the lender's advancement of funds and the debtor's delivery of chattel paper. However, that risk can easily be monitored and controlled. Moreover, this language, like the original, might not cover electronic chattel paper because electronic assets are arguably not "delivered." That could be solved, though by adding a reference to the Secured Party's acquisition of "control." See § 9-105.

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Recent Cases

SECURED TRANSACTIONS

Attachment Issues

Terry J. Nosan Decl. of Trust v. GS CleanTech Corp.,
[2014 WL 2753150](#) (Mich. Ct. App. 2014)

While the guaranty agreements signed by the debtor's affiliates stated that the note to a group of new lenders "shall be guaranteed by a pledge of the [debtor's] net cash flows" and the subordination agreement signed by the prior lender stated that "[t]he Borrower shall be entitled to pledge the Net Cash Flow" to the new lenders, there was no security agreement signed by the debtor and thus the new lenders did not acquire a security interest.

Dougherty v. Trustmark Bank,
[2014 WL 2767380](#) (Tex. Ct. App. 2014)

Although the individual debtor represented in a security agreement with a lender that he was the owner of specified property in which he purported to grant a security interest, the debtor's sworn testimony three years later in bankruptcy that his corporation owned the property meant that the lender obtained no security interest. The representation in the security agreement was insufficient to create an issue of fact to avoid summary judgment in the lender's action against the bank that later obtained and foreclosed on a security interest from the corporation.

Fifth Third Bank v. Gulf Coast Farms, LLC,
[2014 WL 3607585](#) (6th Cir. 2014)

LLC that authenticated a security agreement purporting to grant a bank a security interest in all its stallions, stallion syndicate agreements, fractional interests in stallions, and stallion shares did in fact grant a security interest in a share of Distorted Humor, a thoroughbred, because the evidence established that: (i) the owners of the dissolved partnership that previously owned the share contributed it to the LLC; (ii) the LLC reported the income subsequently produced from ownership of the share on its tax returns while the dissolved partnership did not file further tax returns; (iii) the income from the share was deposited into the LLC's deposit account; and (iv) the LLC, not the partnership, insured the share. It was irrelevant that another entity had a right of first refusal on the partnership's share because that right was never triggered due to the fact that the partnership and the LLC had common owners.

Enforcement & Liability Issues

Vinings Bank v. Brasfield & Gorrie, LLC,
[2014 WL 3297429](#) (Ga. Ct. App. 2014)

Bank with a security interest in the accounts of a subcontractor that had gone out of business was not entitled to summary judgment on the bank's collection action against the general contractor because the subcontracts entitled the contractor to withhold or deduct from any payment the amounts necessary to protect the contractor if the subcontractor failed to complete the work or failed to pay its suppliers, and those amounts were not yet determined. The bank was also not entitled to summary judgment on the contractor's claim against the bank for debiting the subcontractor's deposit accounts because some of the deposited funds might have been held in constructive trust for the subcontractor's suppliers who had filed liens or had the right to file liens.

Express Working Cap., LLC v. Starving Students, Inc.,
[2014 WL 2862310](#) (Tex. Ct. App. 2014)

Seller of accounts receivable had no usury defense against the buyer under Texas law because the defense applies only to loan transactions, not to sales of accounts, and despite the seller's recourse against the buyer, the transaction was a sale because there was no specified amount or due date and, more important, that is what the transaction purported to be, and pursuant to a non-uniform provision in Texas version of § 9-109, the parties' characterization of the transaction is binding.

BANKRUPTCY

Sale of Assets

In re KVN Corp.,
[2014 WL 3398388](#) (9th Cir. BAP 2014)

While carve-out agreements by which a secured creditor has the trustee sell fully encumbered collateral in return for the estate's retention of a portion of the sale proceeds are generally improper, there is no per se ban and each proposed carve-out must be reviewed to determine whether: (i) the trustee fulfilled his or her basic duties (by scrutinizing the secured claim to determine if there is a basis for avoiding the lien); (ii) there a benefit to the estate through a meaningful distribution to unsecured creditors; and (iii) the terms of the carve-out agreement have been fully disclosed. Because all three of these requirements were met in this case, the bankruptcy court should have permitted the trustee to sell the property.

In re Wilson,

[2014 WL 3700634](#) (Bankr. N.D. Tex. 2014)

Term in LLC operating agreement providing that any member who wishes to transfer his or her interest must notify the other members, whereupon they will each have the right to purchase the interest at the lesser of book value or the proposed purchase price was generally effective in the Chapter 7 bankruptcy proceeding of one member. The bankruptcy trustee could auction the debtor's economic rights but the other members will have the right to buy at the highest price bid. The other members will not have the right to buy for book value because that would undermine the bankruptcy trustee's ability to realize fair value for the debtor's interest.

Avoidance of Transfers

In re Lloyd,

[511 B.R. 657](#) (Bankr. D. Ariz. 2014)

The bankruptcy trustee could not avoid a PMSI in a vehicle, which the secured party perfected postpetition by filing an application for a certificate of title on the 30th day after the purchase, because although UCC § 9-317 provides for perfection of a PMSI to relate back 20 days, the Arizona certificate of title statute, Ariz. Rev. Stat. § 28-2133, allows perfection to relate back 30 days, that statute controls, and Bankruptcy Code § 546(b)(1) subjects the trustee's avoiding powers to such a relation-back rule.

Reorganization Plans

In re LightSquared Inc.,

[2014 WL 3535130](#) (Bankr. S.D.N.Y. 2014)

Claims acquired by an entity controlled by the debtor's competitors could be separately classified because the competitors had manifested an intent to further their own strategic and competitive interests, which are different from the interests of creditors. The debtor could not, however, designate the vote in favor of the plan because: (i) the claimant did not acquire the claims above par or after the plan was proposed; and (ii) the plan did not propose to pay the claim in or almost in full, but instead to deprive the claimant of its first priority lien and provide it with consideration that is virtually indistinguishable from equity interests. While it might be permissible to designate the claim of a creditor that votes against a plan that compensates the creditor in full, it is quite another to designate the claim when doing so would circumvent the cram-down protections of § 1129(b).

Other Bankruptcy Matters

In re Lower Bucks Hospital,

[2014 WL 2981215](#) (3d Cir. 2014)

Bankruptcy and district courts did not err in refusing to enforce a provision of the confirmed plan purporting to prohibit bondholders from bringing claims against their indenture trustee for allowing the security interest to become unperfected after the debtor's name change because the release was not adequately disclosed and was not necessary to the debtor's reorganization.

LENDING & CONTRACTING

Quadrant Structured Products Co., Ltd. v. Vertin,

[2014 WL 2573378](#) (N.Y. 2014)

"No-action" clause in indenture providing that "[n]o holder of any Security shall have any right by virtue or by availing of any provision of this Indenture to institute any action or proceeding at law or in equity" unless specified conditions were satisfied was limited to contractual claims arising out of the indenture; the language did not – as many similar clauses do – apply to common-law and statutory securities-based claims.

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