

EQUITY WILL RULE UNTIL AMENDMENT IN SECTION 503 BANKRUPTCY ADMINISTRATIVE EXPENSES

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I. INTRODUCTION

Congress established the Bankruptcy Court system to serve as a “unit of the district court” in each federal district.¹ The Supreme Court further defined that the system serves as “specialized courts of equity,”² operating under the “overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.”³ The Supreme Court, however, also limited their powers to be exercised solely “within the confines of the Bankruptcy Code.”⁴ If this task should prove difficult due to complicated or vague statutory language, the Supreme Court delineated the way the bankruptcy courts should interpret the Bankruptcy Code: “[T]he task of resolving the dispute over the meaning...begins where all such inquiries must begin: with the language of the statute itself.”⁵ Thus, if the answer to a legal question is clear in the language, the bankruptcy courts “need not look further because Congress ‘says in a statute what it means and means in a statute what it says.’”⁶

Under this standard of analysis, and following procedural instructions in the first chapter of the Bankruptcy Code, bankruptcy courts answer questions of interpretation in a methodical, predictable manner.⁷ One recent opinion from the Sixth Circuit splits from the beaten path of analysis of one particular provision, in a decision that could change the way bankruptcy creditors treat every bankruptcy matter in which they participate.⁸ The Sixth Circuit overturned a ruling of the Bankruptcy Court for the Eastern District of Michigan, which held that a Chapter 7 creditor could not receive attorney’s fees as part of administrative expenses allowed under section 503(b) of the Bankruptcy Code.⁹

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1. 28 U.S.C. § 151 (2012).

2. *Curtis v. Loether*, 415 U.S. 189, 195 (1974).

3. *Bank of Marin v. England*, 385 U.S. 99, 103 (1966).

4. *Architectural Bldg. Components v. McClarty (In re Foremost Mfg. Co.)*, 137 F.3d 919, 924 (6th Cir. 1998) (quoting *In re Omegas Group*, 16 F.3d 1443, 1453(6th Cir. 1994)).

5. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

6. *Mediofactoring v. McDermott (In re Connolly N.Am., LLC)*, 802 F.3d 810, 815 (6th Cir. 2015) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

7. See 11 U.S.C. § 101–112 (2012).

8. *Mediofactoring*, 802 F.3d 810.

9. *In re Connolly N. Am.*, 479 B.R. 719 (Bankr. E.D. Mich. 2012).

This Note analyzes the way the Sixth Circuit and other federal courts treat claims for administrative expenses in light of ambiguous language of the Bankruptcy Code. Part II outlines basic bankruptcy proceedings and describes how certain provisions of the Bankruptcy Code interplay to make a complicated pattern of policy and equity concerns. Part III analyzes holdings from bankruptcy proceedings around the nation, which each deal with various applications for administrative expenses under section 503(b) of the Bankruptcy Code. The courts come to varying conclusions, utilizing similar plain language analysis to differing effect. Part IV introduces the Sixth Circuit's majority and dissenting opinions in *Mediofactoring v. McDonald* which marked the Sixth Circuit's split from the traditional interpretation approaches exemplified in Part III. Finally, Part V evaluates the general reaction to the *Mediofactoring* opinion, ultimately showing that the Sixth Circuit ended at the proper conclusion that was in common with the spirit of equity expected of bankruptcy courts.

II. BANKRUPTCY BASICS

Every bankruptcy case, including the case featured in the *Mediofactoring* decision, must utilize dozens of provisions of the Bankruptcy Code, including those that cover the automatic stay, the contents of the bankruptcy estate, the duties of the Trustee in bankruptcy, and claims of creditors against the assets of the debtor. Arguably the most important provision of the Bankruptcy Code is the automatic stay, which serves as the debtor's greatest protection in bankruptcy. Section 362 provides: ". . . a [bankruptcy] petition filed . . . operates as a stay, applicable to all entities, of [commencement or continuation of judicial or administrative actions; enforcement of pre-obtained judgments; and debt collection activities]."¹⁰ While the rest of this section continues to list exceptions to the automatic stay, the general rule from this provision is that the debtor is freed from any actions that might be brought against him throughout the duration of the debtor's bankruptcy case.

In order to obtain an automatic stay and initiate the bankruptcy case, the debtor must file a petition for relief¹¹ and submit to the court a list of his creditors, a schedule of assets and liabilities, and a complete accounting of the debtor's financial position¹² so that all creditors may be given notice of the initiation of the case.¹³ All of the assets listed in

10. 11 U.S.C. § 362(a)(1)–(8) (2012).

11. 11 U.S.C. § 301 (2012).

12. 11 U.S.C. § 521(a)(1) (2012).

13. 11 U.S.C. § 342(a) (2012).

the debtor's disclosures that exist at the time of the onset of the automatic stay become part of the bankruptcy estate, which is collected in order to pay what the debtor owes to his various creditors.¹⁴

A consumer debtor also has some limited choice of which chapter under which he wishes to file.¹⁵ Chapter 7 results in liquidation of the estate, which is when the contents of the estate, once collected, are sold and proceeds are given to creditors as repayment of debt.¹⁶ Chapter 13 is a reorganization of the debtor's finances, where the debtor and creditors agree to a repayment plan.¹⁷ In all cases, creditors file claims for repayment of debt that must comply with requirements set out in section 501.¹⁸ Section 501 Creditors are separated into two general categories—secured and unsecured—which follow the general definition established under U.C.C. Article 9-102(73): “[A] person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding”¹⁹ This is an important distinction for creditors in Chapter 7, as secured creditors are treated much better under the Bankruptcy Code than unsecured creditors: only after all priority claims and secured claims are paid to creditors do unsecured creditors receive repayment.²⁰

According to the Code, a secured creditor's interest in debtor's property is secured “to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.”²¹ This process, where the unsecured portion of the secured creditor's claim is separated and added to the total amount of unsecured claims, is called “bifurcation.”²²

All Chapter 7 bankruptcy cases are administered by a trustee who is approved by vote of the assembled unsecured creditors who are entitled to repayment.²³ The trustee's administrative duties include collecting and selling the property of the estate and ensuring that the debtor's

14. 11 U.S.C. § 541(a) (2012).

15. *See* 11 U.S.C. § 109 (2012) (general guidelines of who may file under which chapter); *see also* 11 U.S.C. § 707(b) (2012). The oft-maligned “means test” describes when a debtor who files for Chapter 7 relief must instead file under Chapter 13. Additionally, other options may be available for nonconsumer debtors under chapters 9, 11, and 12.

16. 11 U.S.C. § 726 (2012).

17. 11 U.S.C. § 1322 (2012).

18. 11 U.S.C. § 501 (2012).

19. U.C.C. § 9-102(a)(73) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

20. 11 U.S.C. § 726(a)(2) (2012).

21. 11 U.S.C. § 506(a)(1) (2012).

22. DOUGLAS G. BAIRD, *ELEMENTS OF BANKRUPTCY* 14 (6th ed. 2014).

23. 11 U.S.C. § 702 (2012).

assets are properly accounted for.²⁴ Trustees are held accountable by creditors for fulfilling their duties;²⁵ in earlier proceedings of the *Mediofactoring* case, the original trustee of the Chapter 7 estate was dismissed²⁶ for malpractice for failing to properly secure over \$3.2 million for the estate.²⁷ After the trustee compiles and sells off the debtor's assets added to the estate, and distributes the proceeds to pay creditors' claims, the bankruptcy court grants the debtor a discharge of all remaining outstanding debt.²⁸ After discharge, the consumer debtor is granted a fresh start, free from obligations of debt that were incurred before the automatic stay was established.²⁹ For nonconsumer debtors, the entity is considered liquidated and continues under a different name, if at all.

A trustee's fees are given priority status under section 507(a)(2) and are thus paid out before almost every unsecured claim on the contents of the estate.³⁰ When other parties to the bankruptcy incur costs, however, they are not always guaranteed and must qualify under section 503(b) to be paid back.³¹ This Note addresses the property interpretation of this section's ambiguous language describing which—and whose—expenses qualify.

III. SURVEY OF SECTION 503(B) RULINGS

The Bankruptcy Code explicitly describes under which circumstances entities may collect administrative expenses in section 503(b). The Code provides: "After notice and a hearing, there shall be allowed administrative expenses . . . including—[list of nine examples of entities who may collect] . . ."³² This provision, while seemingly straightforward, is the source of great disparity in interpretation when bankruptcy courts try to apply the multitude of real-world examples to the nine listed examples in the Code. What follows is a brief survey of decisions that generally represent the variety of conclusions possible when entities apply for expenses under section 503(b).

The Bankruptcy Court for the Eastern District of New York

24. 11 U.S.C. § 704 (2012).

25. *See* 11 U.S.C. § 705(b) (2012).

26. *See* Shapiro v. French (*In re* Connolly N. Am., LLC), 432 B.R. 244, 245 (Bankr. E.D. Mich. 2010).

27. Shapiro v. Art Leather, Inc. (*In re* Connolly N. Am., LLC), 398 B.R. 564, 567 (Bankr. E.D. Mich. 2008).

28. 11 U.S.C. § 727 (2012).

29. *Id.*

30. *See* 11 U.S.C. § 507(a)(2) (2012).

31. 11 U.S.C. § 503(b) (2012).

32. *Id.*

concluded in *In re Pappas* that a judgment creditor in a Chapter 7 should receive attorney's fees as administrative fees under section 503(b)(3)(B).³³ In the case, one creditor, Marshall, was a former legal partner of the debtor, who had obtained a judgment against the debtor for over \$4 million.³⁴ Including Marshall, there were six unsecured claims against the estate.³⁵ Most significant of these were two claims from the Internal Revenue Service (IRS) for over \$8 million, and the IRS asserted a priority for their claim under section 507(a)(8).³⁶ This priority meant that the IRS would receive as much of their claim as possible, leaving the remainder of the estate to be distributed pro rata in satisfaction of the other unsecured claims.³⁷ In this case, the remainder would be \$0.³⁸ In order to defeat the IRS's priority, at least to some extent, Marshall filed claims for administrative expenses because he "substantially assisted the trustee in the discovery and recovery of significant assets."³⁹ Specifically, he claimed \$115,787 broken into four separate claims ranging from approximately \$2,000 to over \$117,000.⁴⁰ The trustee and the IRS both opposed these claims.⁴¹

In adjudicating this claim, the bankruptcy court emphasized the word "including" in the chapeau language, just as the Sixth Circuit did in *Mediofactoring*, which set the stage for the eventual outcome: "The use of the word 'including' is significant. Subsection (b)(3)(B) is but one example of administrative expense allowed under section 503(b). The categories of administrative expense listed in section 503(b) are intended to be illustrative, not exhaustive."⁴² The court thus began by establishing their freedom to interpret the code liberally, implying its intention to go as far as the Code's plain language allows. In the end, the court disallowed three of Marshall's five claims for administrative expenses, applying a but-for standard to determine whether Marshall incurred "actual" "expenses" in assisting the trustee.⁴³ Even though several of Marshall's claims were ultimately denied, the court importantly chose to award section 503(b) administrative fees to an

33. *In re Pappas*, 277 B.R. 171 (Bankr. E.D.N.Y. 2002).

34. *Id.* at 173.

35. *Id.*

36. *Id.* at 174.

37. *Id.*

38. *Id.* ("All [parties to the case] agree that, after payment of the IRS's priority claim, there will be no funds available for the payment of general unsecured claims, which would include Marshall's claim.")

39. *In re Pappas*, 277 B.R. at 174.

40. *Id.* at 174–75.

41. *Id.* at 175.

42. *Id.* at 176.

43. *Id.* at 176–79.

unsecured creditor in a Chapter 7 proceeding, based on the premise that the Code should be understood to apply in a more generalized manner. The court did not expressly address equitable principles or use them as the basis of the conclusion, but the idea of a but-for test that reimburses “actual” and necessary expenses to protect and supplement the estate undoubtedly advances a spirit of fairness and equity.

The Bankruptcy Court for the Eastern District of Louisiana in *In re Zedda* also found that attorney’s fees were appropriate for a Chapter 7 creditor’s attorneys under section 503(b). In the case, a debtor made an allegedly fraudulent transfer to her father within the two-year fraudulent transfer window.⁴⁴ One creditor brought an action for collection of a sum he cosigned on before the bankruptcy proceedings began.⁴⁵ After the debtor filed for bankruptcy, the creditor could no longer pursue his cause of action due to the automatic stay.⁴⁶ Instead, the trustee overseeing the case commenced proceedings to avoid the allegedly fraudulent transfer and collect the money to add to the estate.⁴⁷ The creditor’s attorneys assisted with the trustee’s case by providing the evidence and work they had produced in the previous civil action, including: “noticing of depositions, preparation of the title opinion on the property, assisting in developing the theories of the case, and negotiating the eventual sale of the property” in question.⁴⁸ For this work, the creditor’s attorneys sought administrative expenses under section 503(b). The trustee agreed that, “but for the work completed by the movers, a judgment in favor of the estate in the amount of \$54,383.57 would not have been entered.”⁴⁹

The bankruptcy court used dicta of the bankruptcy court from the Southern District of Florida, which reasoned: “To not allow, under the appropriate circumstances, creditors and their counsel to recover fees and costs incurred and paid with relation to this investigation and prosecution of action would have a chilling effect upon creditor

44. *In re Zedda*, 169 B.R. 605, 606 (E.D. La. 1994); see 11 U.S.C. § 548(a)(1) (2012) (“The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within two years before the date of the filing of the petition, if the debtor voluntarily or involuntarily (A) made such transfer or incurred such obligation with an actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred . . .”).

45. *Zedda*, 169 B.R. at 606.

46. See 11 U.S.C. § 362 (2012) (“[A] petition filed [for bankruptcy] . . . operates as a stay, applicable to all entities, of (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title. . .”).

47. *Zedda*, 169 B.R. at 606.

48. *Id.* at 606–607.

49. *Id.* at 607.

participation within a bankruptcy proceeding.”⁵⁰ Instead, the court determined that the word “including” controls the analysis, making section 503(b) merely illustrative of the types of claims allowed, “not a limitation on what can be determined to be an administrative claim.”⁵¹ Thus, the court concluded, “it is not fatal that the movers’ application does not fit squarely within the language of section 503(b)(3) or (b)(4).”⁵² In the end, the court granted the creditor’s attorneys the same amount they would have received under their retainer agreement with the creditor for the prior action for their contribution to the estate.⁵³

In *In re Rumpza*, the Bankruptcy Court for the District of South Dakota found in favor of the creditor seeking section 503(b) administrative expenses.⁵⁴ In the case, a creditor, Damgaard, discovered irregularities in the debtor’s schedules of assets.⁵⁵ Damgaard conducted an official examination, which uncovered several valuable assets including a lake cabin, a Bobcat tractor, and others.⁵⁶ Damgaard petitioned for fees for the official examination, which directly resulted in amending the debtor’s schedules of assets in favor of the estate.⁵⁷

The court’s analysis followed two questions: “whether Mr. Damgaard’s efforts were of benefit to the estate; and, if so, whether he is entitled to payment in the amount stated as an administrative expense under section 503(b) of the Code.”⁵⁸ The court concluded Damgaard’s contributions did, in fact, benefit the estate, finding that they were “instrumental in the discovery of the assets for the estate.”⁵⁹ With regards to whether Damgaard was entitled to payment under section 503(b), the court concluded that he “proceeded and took the risk that he might not be compensated out of estate funds for his efforts. Those efforts in total benefitted all the creditors of the estate. His risk, in this case, will be rewarded.”⁶⁰ In other words, the bankruptcy court ruled in spirit of the equitable principles of bankruptcy proceedings: risky actions that help the court more fairly administer the bankruptcy will be

50. *Id.* at 607–608 (quoting *In re Antar*, 122 B.R. 788, 791 (Bankr. S.D. Fla. 1990)).

51. *Id.* at 608.

52. *Id.*

53. *Zedda*, 169 B.R. at 608.

54. *See In re Rumpza*, 54 B.R. 107 (Bankr. D.S.D. 1985).

55. *Id.* at 108.

56. *Id.* *See* FED. R. BANKR. P.R. 2004 (“(a) On motion of any party in interest, the court may order the examination of any entity. (b) The examination of an entity under this rule . . . may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate . . .”).

57. *Rumpza*, 54 B.R. at 108.

58. *Id.*

59. *Id.* at 109.

60. *Id.*

rewarded.

In *In re Alumni Hotel Group*, the Bankruptcy Court for the Eastern District of Michigan ruled against allowing a creditor to claim administrative expenses in a matter that combined one Chapter 7 and two Chapter 11 bankruptcies.⁶¹ In this case, one of the parties to the bankruptcy sought expenses for “proposing and designing a settlement of the trustee’s adversary proceeding” against him, which he claimed substantially benefitted the three estates.⁶² This was a complicated bankruptcy that involved several corporate entities all managed by the same man, Martin Fine.⁶³ The trustee brought an adversary action against Fine to add several non-included properties and entities into the bankruptcy estate.⁶⁴ Ultimately, the parties settled the matter.⁶⁵ Fine sought administrative expenses under section 503(b)(3)(D) and (b)(4) because his counsel “‘spearheaded’ the ‘beginning of settlement discussions,’” thus providing “significant savings of expense to the estates” by “avoiding ‘many hours of discovery, preparation, and litigation.’”⁶⁶

The court’s customary interpretation of section 503(b)(3)(D) and (4) was that these provisions make “an accommodation between the twin objectives of encouraging ‘meaningful creditor participation in the reorganization process,’ and keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for creditors.”⁶⁷ As such, the applicant must show that his efforts amount to a substantial contribution to the estate, because “as a creditor, he owes no fiduciary obligation to the bankruptcy estate and is presumed to act in his own best interest.”⁶⁸ Thus, “[c]ompensation must be preserved for those rare occasions when the creditor’s involvement truly fosters and enhances the administration of the estate”⁶⁹ In other words, the creditor’s claim must be factually based and proven by the creditor before any further analysis of individual code provisions takes place.

The court denied Fine’s application for section 503(b) expenses for two reasons. First, under a strict interpretation of section 503(b)(3)(D), Fine was not entitled to collect administrative expenses for assisting the

61. *In re Alumni Hotel Group*, 203 B.R. 624 (Bankr. E.D. Mich. 1996).

62. *Id.* at 626.

63. *Id.* at 626–29.

64. *Id.* at 629.

65. *Id.*

66. *Id.* at 630.

67. *Alumni Hotel Group*, 203 B.R. at 630 (quoting *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 944 (3rd Cir. 1994)).

68. *Id.*

69. *Id.* at 631 (quoting *In re D.W.G.K. Restaurants Inc.*, 84 B.R. 684, 690 (Bankr. S.D. Cal. 1988)).

Chapter 7 estate because this provision only allows for such collection in Chapters 9 and 11.⁷⁰ Second, Fine failed to show that his “efforts and [the] efforts of [his] counsel resulted in a substantial contribution” to either of the Chapter 11 cases.⁷¹ The court had final words for the equitable aspect of this decision: “It is equally abundantly clear that fairness and equity will simply not permit this Court to grant Fine’s request for fees for his attorneys, to the prejudice of creditors, to settle the difficult legal issues arising from the complexity of the estate and the transactions that he created.”⁷² The court thus seemed to rely on Fine’s negative influence as extra equitable justification for its decision to deny Fine’s application for section 503(b) fees.

In another case, the Bankruptcy Court for the Northern District of Ohio ruled against allowing attorneys representing the debtor in a Chapter 7 case to collect section 503(b) fees.⁷³ The attorneys claimed fees for legal services for a case against the debtor that continued both pre- and post-petition.⁷⁴ The court took little time in its analysis, emphasizing that section 503(b)(3)(D) specifically names Chapter 9 and 11 when providing for administrative expenses.⁷⁵ The court concluded by stating, “Since this proceeding is under Chapter 7, this section clearly does not apply herein.”⁷⁶

In *In re Harvey*, the Bankruptcy Court for the Northern District of Maryland granted a creditor’s application for section 503(b) expenses in a Chapter 7 case, but under section 503(b)(3)(B) not section 503(b)(3)(D).⁷⁷ In the case, creditor Mills discovered the debtor had failed to disclose an escrow account established under pre-petition legal action.⁷⁸ The debtor filed less than one month before the first court date, but failed to list the escrow account he had established that was held by his attorney.⁷⁹ Mills objected to the debtor’s discharge on the basis of this failure, and the case was converted to a Chapter 13.⁸⁰ In the proceedings for Mills’ successful objection, he incurred substantial legal fees and sought reimbursement under section 503(b)(3)(B) and (D).

The bankruptcy court, recognizing how “the court’s sense of

70. *Id.*

71. *Id.*

72. *Id.* at 633.

73. *In re Francosky*, 185 B.R. 550, 552 (Bankr. N.D. Ohio 1995).

74. *Id.* at 551.

75. *Id.*

76. *Id.*

77. *In re Harvey*, No. 04-35576PM, 2006 Bankr. LEXIS 4205, at *1 (Bankr. N.D. Md. Nov. 22, 2006).

78. *Id.* at *2.

79. *Id.* at *3.

80. *Id.* at *2.

fundamental fairness cries out for [Mills'] reimbursement," nevertheless held that administrative fees in this Chapter 13 case were not available under section 503(b)(3)(D).⁸¹ Instead, the court granted Mills' application for fees under section 503(b)(3)(B), which provides "actual, necessary expenses . . . incurred by a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor . . ."⁸² Mills had not waited for court approval before recovering the concealed property from the debtor, but the court overcame this by following "substantial authority for the allowance of retroactive court approval . . . where a creditor's recovery of an asset is for the benefit of the estate."⁸³ The court granted retroactive approval for Mills' efforts to recover the debtor's concealed assets, and thus granted administrative expenses under section 503(b)(3)(B).⁸⁴ Thus, even though the court followed strict statutory interpretation and did not grant expenses under section 503(b)(3)(B), the court reached an equitable conclusion with retroactive approval for Mills' work.

These cases demonstrate how courts may either conclude in keeping with *expressio unius est exclusio alterius*—"the express mention of one thing excludes all others"—statutory interpretation, or rule in favor of chapter 7 applicants who truly deserve to be compensated for their assistance to bankruptcy estates. The Sixth Circuit in *Mediofactoring* takes the latter method to a different level by expressly rejecting interpretation methods in the spirit of rewarding a Chapter 7 creditor who went to great lengths to contribute to the estate.

IV. *IN RE CONNOLLY SAGA* AND THE SIXTH CIRCUIT'S EQUITABLE PREROGATIVE

The *In re Connolly North America, Inc.* line of cases began in September 2001, when an involuntary Chapter 7 petition was filed against debtor Connolly North America, LLC.⁸⁵ In October 2009, the Bankruptcy Court of the Eastern District of Michigan granted creditors' motion for removal of the first trustee of the Chapter 7 estate.⁸⁶ Three unsecured creditors brought the motion, but one in particular was instrumental in securing money that "substantially benefitted the

81. *Id.* at *5. ("However, § 503(b)(3)(D) is limited to cases under Chapter 9 and 11 of this Title, and this case never was a case under either chapter.")

82. *Id.* at *7; *see* 11 U.S.C. 503(b)(3)(B) (2012).

83. *Harvey*, 2006 Bankr. LEXIS 4205, at *6.

84. *Id.* at *7.

85. *See Shapiro v. Art Leather, Inc. (In re Connolly N. Am., LLC)*, 340 B.R. 829, 831 (Bankr. E.D. Mich. 2006).

86. *See Shapiro v. French (In re Connolly N. Am., LLC)*, 432 B.R. 244, 246 (Bankr. E.D. Mich. 2010).

bankruptcy estate and the unsecured creditors.”⁸⁷ Accordingly, Coface Argentina (Coface) claimed an administrative expense of \$164,336.28 for reimbursement of attorney’s fees incurred while securing additional money for the estate in the dismissal of the first trustee.⁸⁸

The court denied Coface’s application for administrative fees because section 503(b) of the Bankruptcy Code does not specifically provide for reimbursement of attorney’s fees incurred by unsecured creditors in Chapter 7 bankruptcy proceedings.⁸⁹ Coface’s claim for reimbursement rested on the following ambiguous language in section 503(b): “After notice and a hearing, there shall be allowed administrative expenses . . . including— . . .”⁹⁰ Coface argued that the presence of the word “including” does not limit available reimbursement to the nine enumerated scenarios in section 503(b)(1) through (9).⁹¹ Instead, Coface relied on the definition of “including” provided in the Bankruptcy Code’s Rules of Construction: “(3) ‘includes’ and ‘including’ are not limiting. . . .”⁹² arguing that their petition should be allowed as it is not explicitly denied by the Code.⁹³

The court, however, found section 503(b)(3)(D) problematic for the plausibility of this argument. This provision allows for administrative expenses that are “the actual, necessary expenses . . . incurred by a creditor, an indenture[d] trustee, an equity security holder, or a committee representing creditors . . . in making a substantial contribution in a case under Chapter 9 or 11 of this title.”⁹⁴ The court found that the language that specifically mentions creditors under Chapters 9 and 11 also rules out the inclusion of creditors under Chapter 7, no matter the presence of the word “including” in the chapeau language: “The presence of the provision . . . expressly allowing an administrative expense . . . in a Chapter 9 or Chapter 11 case, but not extending that to a Chapter 7 case, shows a Congressional intent *not* to extend administrative expense . . . in a Chapter 7 case.”⁹⁵ In making this conclusion, the bankruptcy court relied on a South Dakota decision that denied expenses to a Chapter 12 creditor that made a similar claim. Initially, the South Dakota court recognized that the creditor’s claim is valid under all but one section of the code: “In the absence of section

87. *In re Connolly N. Am.*, 479 B.R. 719, 722 (Bankr. E.D. Mich. 2012).

88. *Id.* at 721.

89. *Id.* at 724.

90. 11 U.S.C. § 503(b) (2012).

91. *Connolly*, 479 B.R. at 721.

92. 11 U.S.C. § 102(3) (2012).

93. *Connolly*, 479 B.R. at 721.

94. 11 U.S.C. § 503(b)(3)(D) (2012).

95. *Connolly*, 479 B.R. at 722–23 (emphasis in the original).

503(b)(3)(D) the Court might be persuaded that a creditor . . . would be entitled to compensation for those efforts on the basis that the use of the word ‘including’ in section 503(b) is not limiting.”⁹⁶ However, when the court takes into account the entire code, a different result is necessary: “But the presence of subsection (3)(D) . . . casts an entirely different light on the analysis of the statute.” Thus, using a method of statutory interpretation, *expressio unius est exclusio alterius*, the court denied Coface’s claim for administrative expenses.

On appeal, the District Court for the Eastern District of Michigan affirmed the Bankruptcy Court’s conclusion, holding that “[t]he Bankruptcy Court properly construed section 503(b) as authorizing reimbursement of a creditor for its substantial contribution only in Chapter 9 or 11 cases, and not in a Chapter 7 case.”⁹⁷ In the opinion, the court relied on the Supreme Court’s dicta in *Radlax Gateway Hotel* that described the method of statutory interpretation where the “specific governs the general.”⁹⁸ The Court in *Radlax* provided that the *expressio unius* standard applies especially when “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.”⁹⁹ Bankruptcy Code section 503(b)(1) through (9) undoubtedly fulfills this requirement and should, according to the Eastern District of Michigan, be read to avoid creating “superfluity” when a “specific provision [. . .] is swallowed by [a] general one,” thus giving effect to every clause in a statute.¹⁰⁰

Ultimately, the District Court upheld the Bankruptcy Court’s decision to reject Coface’s application for attorney’s fees under section 503(b). This was an issue of first impression for the court, and the court rejected several cases Coface introduced that supported the practice of granting attorney’s fees as administrative expenses under section 503(b).¹⁰¹ Instead, the court sided with what it considered to be a majority: “Yet, the majority of courts addressing the issue have concluded that administrative expense priority *may not* be accorded to expenses incurred by a creditor making a ‘substantial contribution’ in a Chapter 7 case regardless of when those expenses were incurred.”¹⁰²

Upon review, the Sixth Circuit reversed the conclusions from the lower court, even though both opinions were based on well-founded

96. See *U.S. Trustee v. Farm Credit Bank (In re Peterson)*, 152 B.R. 612, 614 (D.S.D. 1993).

97. *In re Connolly N. Am., LLC*, 498 B.R. 772, 774 (E.D. Mich. 2013).

98. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 693, 645 (2012).

99. *Id.*

100. *Connolly*, 498 B.R. at 775 (quoting *RadLAX Gateway Hotel*, 566 U.S. at 645).

101. *Connolly*, 498 B.R. at 776.

102. *Id.*

traditions of statutory interpretation.¹⁰³ Writing as amicus curiae on behalf of Coface, replacement trustee Bruce French argued there is no “specific bar to the recovery sought herein or to a Bankruptcy Court’s exercise of discretion to make such an award.”¹⁰⁴ French then proceeded to voice support for the argument that ultimately swayed the Sixth Circuit: “The use of Section 105 of the Bankruptcy Code . . . would be consistent with underlying purposes of the Code and is certainly not precluded by any specific provision of the Code.”¹⁰⁵

The Sixth Circuit followed the Supreme Court’s two guidelines of bankruptcy analysis: consideration of overriding principles of equity and allowing the plain meaning of the Bankruptcy Code speak for itself.¹⁰⁶ The Sixth Circuit summarized its reading of the plain language of section 503(b):

Nowhere does the Act say, “expenses incurred by a creditor in security the removal of a Chapter 7 trustee are not allowable”; or, “expenses incurred in making a substantial contribution in a case under Chapters 9 or 11, but not Chapter 7, may be allowed”; or, “only the enumerated expenses shall be allowed.”¹⁰⁷

In other words, the Sixth Circuit concluded bankruptcy and district courts erred in expanding the meaning of the Code to include restrictions that were not strictly explicit in the text.

To reach a more appropriate conclusion, then, the court returned to principles of equity as a new starting point. The court first noted that distribution of section 503(b) expenses has the potential to impact many other parties that would vie for the same pool of money from which expenses are drawn first.¹⁰⁸ Second, it cited “broad consensus” from other circuits supporting the notion that the categories of administrative expenses listed in section 503(b)(1) through (9) are not exhaustive.¹⁰⁹ The court specifically considered the word “including” in the chapeau language, finding that a failure to specifically exclude an award under these circumstances, combined with inclusive language, allows this

103. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 813 (6th Cir. 2015).

104. Brief for Successor Trustee Bruce Comly French as Amicus Curiae Supporting Appellants at *7, *Mediofactoring v. McDermott*, 803 F.3d 810 (6th Cir. 2013) (No. 13-2489), 2014 WL 1998625.

105. *Id.*

106. *Mediofactoring*, 802 F.3d at 814–15.

107. *Id.* at 816.

108. *Id.*

109. *Id.*; see, e.g., *In re Al Copeland Enters.*, 991 F.2d 233, 239 (5th Cir. 1993); *United States v. Ledlin (In re Mark Anthony Constr., Inc.)*, 886 F.2d 1101, 1106 (9th Cir. 1989).

award.¹¹⁰

In this way, broadly speaking, the Sixth Circuit's opinion empowers bankruptcy courts in the spirit of equity. The court read the Code to allow bankruptcy cases to nimbly apply the law to cases that will always test new questions and present new facts:

Congress anticipated that bankruptcy courts would encounter a variety of administrative expenses and circumstances warranting reimbursement, which it could then evaluate on a case-by-case basis depending on the specific facts of the case, the benefit conferred upon the bankruptcy estate and its creditors, and whether the expenses at issue were actual, necessary, and reasonable.¹¹¹

Later, the Sixth Circuit further empowered the bankruptcy courts in situations where the Bankruptcy Code is silent on a particular question: "Congress was fully capable of stating that section 503(b) *excludes* reimbursement in Chapter 7 cases if that is what it actually intended It did not. We refuse, therefore, to find a limitation where Congress did not expressly create one."¹¹² Compared to the method and conclusions of the lower courts, the Sixth Circuit clearly treats the Code as a ceiling, with license to operate within that framework to achieve equitable ends.

The Sixth Circuit concluded by addressing counterarguments from the U.S. Trustee and the dissenting opinion, primarily that Coface should not receive the attorney's fees under section 503(b) because they were already set to receive nearly 50% of the net increase to the estate.¹¹³ The trustee made the argument that equitable principles should dictate that a creditor who already will receive a majority of the estate should not receive pre-distribution attorney's fees in addition to their estate payout.¹¹⁴ The Sixth Circuit rejected this, however, saying that Coface took a risk in paying for the proceedings that secured the additional money for the estate.¹¹⁵ According to the court, such risk is exactly the type of action that section 503(b) encourages; bankruptcy courts should incentivize participation, or, at least, not *dis*-incentivize it.¹¹⁶

Thus, it seems that the Sixth Circuit takes the view that bankruptcy

110. *Mediofactoring*, 802 F.3d at 816.

111. *Id.*

112. *Id.* at 818 (emphasis in original).

113. *Id.*

114. *Id.* at 818–19.

115. *Id.* at 819.

116. *Mediofactoring*, 802 F.3d at 819.

courts have the authority and, arguably, the responsibility to reach equitable decisions that the Code limits where applicable. In contrast, the two lower courts used the Code as the basic principle of analysis and did not apply principles of equity when the Code only tangentially addressed the problem at issue.

Like the lower courts, the dissent's logic began from the language of the Code "to determine whether Congress has confined the reach of the bankruptcy court's equitable powers in section 503(b)."¹¹⁷ Initially, the dissent conceded the plausibility of the Sixth Circuit's interpretation of the Bankruptcy Code but insisted the opposite conclusion is equally plausible: "Although it is true that Congress could have explicitly stated that section 503(b) excludes substantial contribution claims in Chapter 7, it remains just as true that Congress only specified that substantial contribution claims can be considered administrative expenses under Chapters 9 and 11."¹¹⁸

To reconcile these differences, the dissent looked to legislative history, which suggested that Congress only considered Chapters 9 and 11 when allowing administrative expenses for creditors who make a substantial contribution to the estate in section 503(b), and did not even consider including Chapter 7 creditors in the statute.¹¹⁹ The majority reconciled this problem by concluding that the Code's silence on the matter "does not divest bankruptcy courts of authority" to grant administrative expenses in circumstances like these.¹²⁰ The dissent claimed, in direct opposition to the majority's conclusion, that the fact "that Congress may not have foreseen the unusual circumstances at issue here does not give us the freedom to rewrite the statute in order to take account of them and reach an 'equitable' solution."¹²¹ In other words, in the dissent's opinion, amending the Bankruptcy Code to include this treatment of Chapter 7 creditors should be left to Congress and not the courts.

The dissent then demonstrated that the majority's decision also contradicts the majority of jurisdictions that have ruled on allowing administrative expenses under section 503(b) to creditors who made substantial contributions to the estate.¹²² It further emphasized how novel the majority's position on this issue was by quoting another Sixth

117. *Id.* at 820 (O'Malley, J., dissenting).

118. *Id.* at 821.

119. *Id.* at 822.

120. *Id.* at 819 (majority opinion).

121. *Mediofactoring*, 802 F.3d at 822 (O'Malley, J., dissenting).

122. *Id.* at 822 n.2 (listing twenty-five bankruptcy or district court decisions that "either denied recovery for substantial contributions in a Chapter 7 case or recognized that § 503(b)(3)(D) is limited to only Chapters 9 and 11").

Circuit opinion from 2009:

There is no textual support in the Code for drawing such a distinction between the Chapter 7 and Chapter 11 contexts [for section 503(b)(3)(B)]. Section 503(b)(3)(B) . . . applies in both Chapter 7 and Chapter 11 proceedings. We do not believe that this was a mere oversight, given that Congress expressly limited another subsection of [section] 503(b)(3) to Chapters 9 and 11.¹²³

The majority addressed this quote in a footnote at the end of their opinion: “We are also aware that, when analyzing a claim for derivative standing we have stated in dictum that [Congress expressly limited section 503(b)(3)(D) to Chapters 9 and 11]. We conclude, however, that [this case was] wrongly decided.”¹²⁴ The Sixth Circuit, in other words, fully understood the novelty of their conclusion and still stands by its decision to empower bankruptcy courts with greater freedom to make equitable rulings.

The dissent concluded by emphasizing the lower courts’ logic that Coface, as an unsecured creditor with an approximately 50% claim on the revenue of the estate, does not deserve extra consideration under equity principles because administrative expenses would come from the pool they already share with the rest of the creditors.¹²⁵ In addition, the dissent urged that the bankruptcy courts, as Article III courts, should allow Congress to amend the Code to mitigate “improper incentives” that may arise from the application of the plain meaning of a Code provision.¹²⁶

A trend, starting with previous cases *Alumni Hotel*, *Rumpza*, *Zedda*, and *Pappas*, arises and tracks through every decision, no matter which way the courts decide: when courts rule in line with the Sixth Circuit in *Mediofactoring*—to allow administrative fees to Chapter 7 creditors who make substantial contributions to the estate under section 503(b)—courts do so to advance principles of equity. When courts hold in line with the dissent and the lower courts from *Mediofactoring*, they use the Bankruptcy Code as the basic principle, and adhere to the narrowest available interpretation of the Code’s language.

V. HOW BIG A ROLE SHOULD EQUITABLE PRINCIPLES PLAY?

Courts around the nation clearly have difficulty with applying section

123. *Id.* at 822 (citing *In re Trailer Source, Inc.*, 555 F.3d 231, 243 (6th Cir. 2009)).

124. *Id.* at 819 n. 8 (majority opinion).

125. *Id.* at 825 (O’Malley, J., dissenting).

126. *Id.*

503(b)(3)(D) uniformly to claims from Chapter 7 creditors. The Sixth Circuit's liberal interpretation that valued equity over sound statutory interpretation signaled an explicit split from nearly unanimous treatment of section 503(b)(3)(D) expenses and sparked early discussion on the issue. In the February 2016 edition of the *American Bankruptcy Institute Journal*, Nathaniel R. Hull argued the Sixth Circuit's opinion was inherently flawed because it read too far beyond the explicit language in section 503(b).¹²⁷ Hull implied that the Sixth Circuit should have deferred more to Congress's intent, arguing that both majority and dissent failed to properly investigate why Congress only included Chapters 9 and 11 in the statutory language.¹²⁸ Hull concludes that what little consideration the Sixth Circuit gave to understanding Congressional intent was flawed: "[I]t is unclear how, 'as a matter of course,' a creditor will spend its own time and resources to 'benefit the estate' (rather than its own interests) in chapters 9 and 11"¹²⁹ "[N]or," he continued, "is there any particularly obvious division in the 'roles' that the U.S. Trustee fulfills in various chapters under title 11."¹³⁰

Hull's argument, however, is based entirely on a shallow reading of the Bankruptcy Code and shows that the language does not specifically distinguish between the trustee's roles. He simply quotes Title 28 on Judiciary and Judicial Procedure and the Bankruptcy Code, where the basic language only generally describes the trustee's role.¹³¹ This shallow analysis gives no consideration to the reality of Chapter 7 practice, where the trustee's enumerated tasks make him the ultimate caretaker of the estate, giving him an unparalleled level of familiarity with the nature and goings-on of the case.¹³² Moreover, the U.S. Trustee does not even play as big of a role as Hull implies. Rather, the U.S. Trustee merely appoints an interim trustee who oversees the case until the collective creditors vote to install a permanent trustee.¹³³ Creditors rely fully on the trustee's capability to effectively manage and recover assets for the estate.

127. See Nathaniel R. Hull, *Building Blocks, Section 102(3): "Includes" and "Including" Are Not Limiting*, AM. BANKR. INST. J., Feb. 2016, at 36, 58.

128. *Id.*

129. *Id.* (quoting *Mediofactoring*, 802 F.3d at 817.)

130. *Id.*

131. *Id.* at 58 n.34 (analyzing 28 U.S.C. § 586(a)(3) (2012) ("[The U.S. Trustee shall] supervise the administration of cases and trustees in cases under chapter 7, 11, 12, 13, or 15 of title 11"); 11 U.S.C. § 307 (2012) ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title. . . .").

132. See 11 U.S.C. § 704 (2012).

133. 11 U.S.C. § 701(a)(1) (2012) ("[T]he United States trustee shall appoint one disinterested person that is a member of the panel of private trustees. . . ."); 11 U.S.C. § 702(b) (2012) ("At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee").

The Sixth Circuit's conclusion was based in part on the assumption that, in the majority of cases, the trustee is successful and creditors can rest easy in the trustee's capability.¹³⁴ In the case at hand, however, the trustee was ultimately removed for having exhibited gross negligence in failing to secure substantial capital for the estate, and Coface footed the bill for the action to remove.¹³⁵ The Sixth Circuit thus concluded that extraordinary creditor activity was necessary in this case, which called for extraordinary equitable consideration and acceptance of Coface's application for section 503(b) administrative expenses.

Hull's final argument posits that Chapter 7 corporate creditors, as was Coface in this case, do not deserve special treatment from the courts because "creditors of a corporate chapter 7 debtor will be able to continue to pursue unadministered assets after case closure if they believe that it is worth the price."¹³⁶ While this is certainly true, this does not give equal remedy to Coface in their circumstances as the Sixth Circuit provided by approving their 503(b) application. Coface sought reimbursement for their actions which, but for their efforts, avoided irreparable damage to the estate that would have affected all creditors including Coface. The Sixth Circuit's award of expenses, therefore, merely made Coface whole for the risk and sacrifice they proactively took on, and empowered bankruptcy courts in the future to do the same in similar extraordinary circumstances. It is crucial to note that the Sixth Circuit did not create a new standard wherein *all* Chapter 7 creditors are eligible for section 503(b)(3)(D) expenses, but rather granted courts discretion to do so in the spirit of equity.¹³⁷

In a later edition of the *American Bankruptcy Institute Journal*, Keith J. Larson called on Congress to address the split he considered the Sixth Circuit created by accepting Coface's section 503(b) application.¹³⁸ Larson proposed a statutory solution to this problem rather than focusing on the dispute over statutory interpretation. The thrust of his argument called for Congress to amend the Bankruptcy Code to explicitly allow for bankruptcy courts to allow section 503(b)(3)(D) claims to Chapter 7

134. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 817 (6th Cir. 2015).

135. *Id.* at 812.

136. Hull, *supra* note 127, at 58; *see also* 11 U.S.C. § 554(c) (2012) ("[A]ny property . . . not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.").

137. *Mediofactoring*, 802 F.3d at 819 ("Instead, we hold that § 503(b)(3)(D) of the Bankruptcy Code does not divest bankruptcy courts of authority to allow reimbursement under § 503(b) of reasonable administrative expenses of creditors whose efforts substantially benefit the bankruptcy estate and its creditors in a Chapter 7 proceeding.").

138. *See* Keith J. Larson, *Congress: Resolve Split on Ch. 7 Substantial-Contribution Claims*, AM. BANKR. INST. J., Apr. 2016, at 20.

entities who make substantial contributions to the estate.¹³⁹ This, Larson reasoned, would “make it clear that the court *may*—but does not have to—grant such requests.”¹⁴⁰

Larson’s proposal follows the Sixth Circuit’s rationale, and would give proper recompense to creditors and other entities who use their own resources in extraordinary ways to benefit the estate. He is right to call on Congress to amend the statute to include Chapter 7 cases, as doing so would definitively solve the issue by taking the problem out of the hands of the courts. Larson’s theory seeks to avoid what he calls a “quicksand” for creditors who find themselves “stuck in the shapeless and diverging interpretations of a puzzling statute.”¹⁴¹

As vivid an image as Larson’s quicksand creates, the Sixth Circuit’s opinion already brushes away this somewhat-exaggerated mire. The Sixth Circuit grants bankruptcy courts the authority to use their discretion to award fees to *deserving* creditors and other entities. After *Mediofactoring*, there is little unpredictability for potential applicants, as the Sixth Circuit formulated a simple rule: if the creditor takes a risk and invests in making a substantial contribution, there will be compensation.

VI. A TEMPORARY SOLUTION, NOT A CONCLUSION

Admittedly, *Mediofactoring* splits from the way many courts interpret section 503(b)(3)(D). Yet, in creating a definitive circuit split, the Sixth Circuit additionally provides the best solution a court could offer to the problem. When a statute is ambiguous and causes disunity of interpretation, Congress should amend the statute to protect its intended goal. In the meantime, the Sixth Circuit gave courts the power to, on a case-by-case basis, protect creditors who deserve protection. Some argue that this solution from *Mediofactoring* challenges the deference traditionally given to Congressional intent when courts use the plain language of a statute as their guide. However, the Sixth Circuit challenges tradition in order to advance the equitable principles that the bankruptcy courts were created to maintain. Until Congress can amend the statute, with such protection of fundamental equitable principles, at least there will be fairness instead of “quicksand.”

139. *Id.* at 112.

140. *Id.* (emphasis in the original).

141. *Id.*