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Building Blocks

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Section 102(3): "Includes" and "Including" Are Not Limiting

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Section 102(3) of the Bankruptcy Code directs that "[i]n this title ... 'includes' and 'including' are not limiting."[2] The Sixth Circuit recently confirmed in a split decision that — at least in the Sixth Circuit — this directive is expansive enough to provide a creditor making a substantial contribution in a chapter 7 case an administrative expense for legal fees and expenses, despite the apparent limitation in § 503(b)(3)(D) to cases "under chapter 9 or 11 of this title."[3] Whether other circuits will follow suit, or will continue to limit substantial-contribution claims to cases under chapters 9 or 11, remains to be seen in this ongoing circuit split. This case provides yet another example of how applying canons of statutory construction with respect to the same Code provision can lead to diametrically opposed conclusions as to congressional intent. Finally, this article suggests an additional explanation for why Congress may have intentionally excluded chapter 7 from the ambit of § 503(b)(3)(D).

Background

The underlying chapter 7 case began in 2001 with the successful prosecution of an involuntary chapter 7 petition against Connolly North America LLC.[4] Several years into the case, the bankruptcy court began a jury trial initiated by the panel trustee against an accounting firm for pre-petition malpractice.[5] After nine days, the bankruptcy court declared a mistrial, concluding "(1) that both the Trustee and his attorney breached their obligations under the discovery rules; (2) that while these breaches were not intentional or in bad faith, they were the product of gross negligence by both the Trustee and his attorney; and (3) that the proper remedy is dismissal of this action with prejudice."[6]

Subsequent to the accounting malpractice lawsuit being dismissed with prejudice, but prior to case closure, the petitioning creditors filed a motion under § 324[7] to remove the panel trustee.[8] The motion was granted over the panel trustee's objection, with the bankruptcy court finding that the potential claims against the panel trustee and his law firm over the handling of the accounting malpractice lawsuit subjected the panel trustee to a conflict of interest, which precluded his continued service to the estate.[9] The U.S. Trustee appointed a new panel trustee, who filed an adversary proceeding against the former panel trustee, his law firm and their professional liability insurance companies based on allegations that the former panel trustee had failed to investigate and prosecute certain claims on behalf of the bankruptcy estate.[10] The parties reached a court-approved settlement in 2012, which provided "significant" additional funds for the estate.[11]

After that adversary proceeding against the prior panel trustee was settled, the creditor that successfully prosecuted the removal of the prior panel

1 The author expresses his sincere appreciation for the thoughtful review and comments of Stephen B. Segal of Verrill Dana, LLP.
2 11 U.S.C. § 102. As noted in *Collier on Bankruptcy*, "One or the other of the terms 'includes' or 'including' is used in 84 sections of the Bankruptcy Code, not counting section 102 itself, and in 30 Bankruptcy Rules, often multiple times in each section or rule." 2 *Collier on Bankruptcy* ¶ 102.04 (Alan N. Resnick and Henry J. Sommer eds. 16th ed.).
3 *In re Connolly N. Am. LLC*, 802 F.3d 810 (6th Cir. 2015).
4 *Id.* at 813.
5 *Shapiro v. Plante & Moran LLP (In re Connolly N. Am. LLC)*, 376 B.R. 161, 164 (Bankr. E.D. Mich. 2007).
6 *Id.* at 164-65.
7 11 U.S.C. § 324 provides that "(a) [t]he court, after notice and a hearing, may remove a trustee, other than the [U.S. Trustee], or an examiner, for cause; (b) [w]henever the court removes a trustee or examiner under subsection (a) in a case under this title, such trustee or examiner shall thereby be removed in all other cases under this title in which such trustee or examiner is then serving unless the court orders otherwise."
8 *Connolly*, 802 F.3d at 813.
9 *Id.* at 813. Section 701 provides that the U.S. Trustee "shall appoint one *disinterested* person that is a member of the panel of private trustees" to serve as chapter 7 trustee. 11 U.S.C. § 701. Section 101(14), in turn, provides that the "term 'disinterested person' means a person that ... (C) does not have an interest materially adverse to the interest of the estate." 11 U.S.C. § 101(14).
10 *Connolly*, 802 F.3d at 813.
11 *Id.*

trustee filed an application for allowance of administrative expenses. The creditor requested attorneys' fees and costs pursuant to § 503(b)[12] on the grounds that it had made a "substantial contribution" to the chapter 7 case.[13] The thrust of the argument was that but for the creditor's efforts to remove the panel trustee, the cause of action against the panel trustee would not have been prosecuted, and accordingly, the resulting value to the estate would not have been realized for the benefit of the debtor's creditors. Although the successor panel trustee supported the application, the U.S. Trustee objected, maintaining that the administrative expense claims for creditors in chapter 7 are not authorized by § 503(b)(3)(D).[14] The bankruptcy court agreed and, despite concluding that it was "clear to the Court, that at least some of the work that [the creditor] paid its attorneys ... substantially benefited the bankruptcy estate and the unsecured creditors,"[15] denied the application.[16] In the bankruptcy court's view, "Congress's failure to extend § 503(b)'s express provision for reimbursement for a creditor that makes a substantial contribution in a case under chapter 9 or 11 ... to a creditor making such a contribution in a case under Chapter 7 reflected 'a Congressional intent' to deny reimbursement in Chapter 7 cases."[17] The creditor then appealed to the district court, which affirmed and held that the "proposed reading of § 503(b) ... runs afoul of the 'well-established canon of statutory interpretation' that 'the specific governs the general.'"[18] The creditor then appealed to the Sixth Circuit, which reversed and remanded by a split decision.[19]

Both the majority and dissent applied common canons of statutory interpretation to § 503(b) to arrive at opposite conclusions as to congressional intent. Neither side, however, waded too deeply into why Congress omitted chapter 7 from the subsection.

Statutory Interpretation: The Majority

The Sixth Circuit acknowledged that "claims for expenses under § 503(b) [are] strictly construed because they 'reduce the funds available for creditors and other claimants,'"[20] but the statutory list of potential administrative expense claims — being introduced by the word "including" — was not intended to be exhaustive.[21] The majority, therefore, pondered "whether the inclusion of the 'substantial contribution in a case *under chapter 9 and 11*' language in subsection (b)(3)(D) negates the meaning of 'including' in the introductory provision of § 503(b) and divests bankruptcy courts of the authority to allow reimbursement of administrative expenses incurred by a Chapter 7 creditor who makes a substantial contribution to the debtor's estate."[22] Answering in the negative, the majority trained its attention to what it believed was missing from the language: *to wit*, "Nowhere does the Act say, 'expenses incurred by a creditor in securing 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.'"[23]

> **[I]t is possible that Congress was considering the *outcomes* of chapters 9 and 11 cases versus a corporate chapter 7 case when it excluded chapter 7 from the ambit of § 503(b)(3)(D).**

The majority reasoned that by employing "including" in the introductory provision, "Congress built a mechanism into § 503(b) for bankruptcy courts to reimburse expenses not specifically mentioned in § 503(b)'s subsections"[24] such that "Congress anticipated that bankruptcy courts would encounter a variety of ... circumstances warranting reimbursement, which it could then evaluate on a case-by-case basis."[25] Responding to the anticipated criticism that the phrase "under chapter 9 and 11" must mean *something*, the majority offered the explanation that "[i]t makes good sense that in providing these examples, Congress would expressly mention Chapters 9 and 11 in the context of creditor activity making a 'substantial contribution,' but not Chapter 7. In both Chapters 9 and 11, as a matter of course, a creditor will spend its own time and resources to benefit the estate; however, in all but the most atypical Chapter 7 case (such as the instant case), the U.S. [T]rustee fulfills this role."[26]

Statutory Interpretation: The Dissent

In the dissent's view, despite the equitable seat of a bankruptcy court's authority, the majority gave too "sweeping [a] reach" to § 503(b), relying on the term "including" in the introductory provision while ignoring the "explicitly narrower language" in § 503(b)(3)(D), which does not include chapter 7 within its ambit.[27] The dissent's most powerful criticism of the majority's read of the statute is a structural one: It is true that Congress chose to use "including" in the introductory provision of § 503(b), but Congress also employed "including" in certain subsections *other* than § 503(b)(3). For example, § 503(b)(1)(A) provides that "there shall be allowed, administrative expenses ... *including* ... the actual, necessary costs and expenses of preserving the estate, *including* ... (i) wages ... for services rendered after the commencement of the case; and (ii) wages and benefits awarded pursuant to a judicial proceeding."[28]

12 Section 503(b) provides the following:
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including ...
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by ...
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title.

13 *Connolly*, 802 F.3d at 813.
14 *In re Connolly N. Am. LLC*, 479 B.R. 719, 722 (Bankr. E.D. Mich. 2012).
15 *Id.* at 722.
16 *Id.* at 723.
17 *Id.*
18 *In re Connolly N. Am.*, 498 B.R. 772, 775 (E.D. Mich. 2013).
19 *Connolly*, 802 F.3d at 819.
20 *Id.* at 814 (quoting *City of White Plains v. A & S Galleria Real Estate Inc. (In re Federated Dep't Stores Inc.)*, 270 F.3d 994, 1000 (6th Cir. 2001)).
21 *Connolly*, 802 F.3d at 815.
22 *Id.* at 816.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 816-17.
27 *Id.* at 820.
28 11 U.S.C. § 503(b)(1)(A).

Read together, then, this subsection uses "including" twice: once in the opening provision, and once in the specific subsection. Conversely, with respect to § 503(b)(3), Congress did not include a second "including," implying that the list of "actual, necessary expenses" covered by that subsection was exclusive.[29]

Stated differently, the dissent believed that we can better understand congressional intent by examining how, within the structure of § 503, Congress employed the phrase "including." This reading seems more consistent with the broader approach outside of the Sixth Circuit, which denies these requests in chapter 7 cases by relying on the precept *expressio unius est exclusio alterius* ("the expression of one thing excludes others") and the U.S. Supreme Court's endorsement of the "well-established canon ... of statutory construction that the specific governs the general."[30] In sum, the dissent concluded that "[t]he majority's construction of § 503(b) would also read § 503(b)(3)(D) out of the statute, violating a fundamental canon of statutory construction."[31]

Is There a Sound Policy Reason for Excluding Chapter 7 (and Chapters 12 and 13) from the Scope?

Neither the majority nor the dissent focused too deeply on the question of why Congress would choose to explicitly include chapter 9 and 11 cases in § 503(b)(3)(D) without including chapter 7. The majority posited that "[i]t makes good sense that in providing these examples, Congress would expressly mention Chapters 9 and 11 ... [since] [i]n both Chapters 9 and 11, as a matter of course, a creditor will spend its own time and resources to benefit the estate; however, in all but the most atypical Chapter 7 case (such as the instant case), the U.S. [T]rustee fulfills this role."[32] The dissent responded to this theory that "this explanation seems to support the notion that Congress consciously chose to *exclude* Chapter 7 from § 503(b)(3)(D)."[33]

The majority's theory seems flawed, since it 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, nor is there any particularly obvious division in the "roles" that the U.S. Trustee fulfills in various chapters under title 11.[34] Although both sides acknowledge that, as the holder of approximately 50 percent of the unsecured claims pool, the creditor in this instance would benefit from the increased value of the estate even without the allowance of an administrative expense,[35] this does not make for a satisfying policy consideration since it is entirely case-specific. Although one walks on "quicksand when we try to find in the absence of corrective legislation a controlling legal principle,"[36] it is possible that Congress was considering the *outcomes* of chapters 9 and 11 cases versus a corporate chapter 7 case when it excluded chapter 7 from the ambit of § 503(b)(3)(D). Specifically, a confirmed plan under chapter 9 or 11 "binds" any creditors of the debtor.[37]

On the other hand, under chapter 7, unadministered assets are abandoned back to the debtor upon case closure,[38] and for corporate debtors, no discharge (or corresponding injunction) is provided by the Bankruptcy Code.[39] Therefore, at least in the corporate chapter 7 setting, creditors may not warrant the same administrative expense treatment as creditors in a chapter 9 or 11 in the course of the bankruptcy case itself, since 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. abi

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29 *Connolly*, 802 F.3d at 821.
30 *Id.* at 820.
31 *Id.* at 821 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'")).
32 *Id.* at 816-17.
33 *Id.* at 821 (emphasis supplied).
34 *See* 28 U.S.C. § 586(a)(3) (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 (U.S. Trustee "may raise and may appear and be heard on any issue in any case or proceeding").
35 *Connolly*, 802 F.3d at 818.
36 *Id.* at 822 (quoting *Helvering v. Hallock*, 309 U.S. 106, 121 (1940)).
37 *See* 11 U.S.C. § 944 ("[P]rovisions of a confirmed plan bind the debtor and any creditor."); 11 U.S.C.A. § 1141 ("[T]he provisions of a confirmed plan bind the debtor ... and any creditor.").
38 11 U.S.C. § 554(c) ("[A]ny property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350.").
39 11 U.S.C. § 727(a) ("[T]he court shall grant the debtor a discharge, unless — the debtor is not an individual.").