

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Last in Line

BY MARK L. DESGROSSEILLIERS AND JULIE B. PAPE

NHL Scores Big on Attorneys' Fees Against Nondebtors



Mark L. Desgrosseilliers
Womble Carlyle Sandridge & Rice, LLP
Wilmington, Del.



Julie B. Pape
Womble Carlyle Sandridge & Rice, LLP
Winston-Salem, N.C.

Mark Desgrosseilliers is a partner in the Capital Markets Group of Womble Carlyle Sandridge & Rice, LLP in Wilmington, Del. Julie Pape is Of Counsel in the Capital Markets Group in the firm's Winston-Salem, N.C., office.

Last fall, the National Hockey League (NHL) enjoyed a big off-ice victory when the U.S. District Court for the District of Arizona found that it was entitled to recover from Jerry and Vickie Moyes and the Jerry and Vickie Moyes Family Trust (collectively, the “Moyes defendants”) significant attorneys’ fees and expenses (up to \$15 million) incurred by the NHL in connection with the bankruptcy cases of several corporate entities that the Moyes defendants controlled and that comprised the Phoenix Coyotes hockey franchise.¹ Specifically, the court held that the NHL’s claims for indemnification (including attorneys’ fees and expenses), based on a consent agreement and a separate guaranty into which the NHL and the Moyes defendants had entered in connection with the Moyes defendants’ original acquisition of the Phoenix Coyotes, were not pre-empted by the Bankruptcy Code and federal bankruptcy law, and were therefore enforceable against the Moyes defendants. This article examines the recent *NHL v. Moyes* decision in the context of current law addressing the ability of unsecured creditors to recover claims for attorneys’ fees and expenses incurred after and in connection with a bankruptcy filing from a debtor, or, as was the case for the NHL in the Coyotes dispute, against nondebtor parties.

Enforceability of Attorneys’ Fees Provisions in Bankruptcy Cases

Section 365(e)(1) of the Bankruptcy Code generally provides that contractual clauses purporting to terminate or modify the contract based on a bankruptcy filing are not enforceable. In line with the prohibition of these *ipso facto* clauses, bankruptcy courts have refused to enforce, among other things,

contractual provisions that would prohibit a debtor from filing a bankruptcy case.² A contractual provision does not need to expressly prohibit a bankruptcy filing to be invalid; it may be enough that the substance or practical result of the provision is to waive a benefit afforded to a debtor under the Bankruptcy Code.³ Some courts have found such clauses unenforceable, even against nondebtor third parties such as guarantors.⁴

In 2007, in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*,⁵ the U.S. Supreme Court held that contract-based claims for attorneys’ fees are not disallowed solely because the fees at issue were incurred litigating issues of bankruptcy law.⁶ In *Travelers*, the lower court had found that the attorneys’ fees were not recoverable because they were incurred while litigating issues that were “peculiar to” or “governed entirely” by federal bankruptcy law.⁷ The Supreme Court found that there were no Code provisions addressing unsecured claims for contractual attorneys’ fees incurred while litigating issues of bankruptcy law.

Accordingly, based on the permissive scope of § 502(b)(1) and upon its prior recognition that “[t]he character of [a contractual] obligation to pay attorney[s]’ fees presents no obstacle to enforcing it in bankruptcy,” the idea that attorneys’ fees cannot be recovered where they were incurred in liti-

² See, e.g., *In re Madison*, 184 B.R. 686, 690-91 (Bankr. E.D. Pa. 1995) (citing plethora of case law for well-accepted presumption that an agreement whereby a debtor agrees to forgo bankruptcy protection violates public policy and is unenforceable).

³ See, e.g., *In re Pease*, 195 B.R. 431, 435 (Bankr. D. Neb. 1996) (concluding that “any attempt by a creditor in a private prebankruptcy agreement to opt out of the collective consequences of a debtor’s future bankruptcy filing is generally” unenforceable because “Bankruptcy Code pre-empts the private right to contract around its essential provisions”).

⁴ See, e.g., *Astor Holdings Inc. v. Roski*, 325 F. Supp. 2d 251, 262 (S.D.N.Y. 2003) (finding claim against nondebtor party was pre-empted because claim “that could have been made, and for which a remedy is provided, under the Bankruptcy Code cannot be the subject of regulation by state statutory or common-law remedies”).

⁵ 549 U.S. 443 (2007).

⁶ *Id.* at 449-54.

⁷ *Travelers Cas. & Surety Co. of Am. v. Pac. Gas & Elec. Co.*, 167 Fed. App’x. 593, 594 (9th Cir. 2006).

¹ *National Hockey League v. Moyes*, Case No. CV-10-01036, slip op., 2015 WL 7008213 (D. Ariz. Nov. 12, 2015).

gating bankruptcy claims and issues cannot stand.⁸ While the Supreme Court found that unsecured creditors were not pre-empted from enforcing contractual attorneys' fees provisions against a debtor, the Court expressly refused to address the issue of whether, based on the express language of § 506(b) of the Bankruptcy Code, the right to recover post-petition attorneys' fees is nonetheless limited to oversecured creditors.⁹

Following *Travelers*, courts have been split on the issue of whether *unsecured* creditors (as opposed to oversecured creditors) can recover post-petition attorneys' fees.¹⁰ In the *Tribune* bankruptcy cases, the U.S. Bankruptcy Court for the District of Delaware recently disallowed claims for attorneys' fees and other costs incurred by an indenture trustee for certain unsecured subordinated notes.¹¹ In a brief opinion, the court adopted the reasoning previously set forth in *In re Global Industrial Technologies*¹² and held that the indenture trustee's post-petition costs and attorneys' fees totaling in excess of \$30 million would not be allowed because such fees and expenses are not expressly permitted by the Bankruptcy Code.¹³ Section 502(b) requires a bankruptcy court to determine the amount of a claim as of the filing date (thereby precluding the addition of post-petition fees and expenses unless otherwise authorized by the Code). Allowing one unsecured creditor to assert such post-petition fees and costs (based on a contractual provision) would unfairly discriminate against other unsecured creditors.¹⁴

The Phoenix Coyotes Case

In 2006, through their ownership of a series of limited liability companies (the "Moyes entities"), the Moyes defendants became the controlling owners of the Phoenix Coyotes NHL team and its hockey arena in Glendale, Ariz.¹⁵ As part of that transaction, the Moyes defendants entered into two agreements with the NHL: (1) a consent agreement, which bound the Moyes defendants and entities to the NHL constitution and bylaws, required them to keep the Coyotes in Arizona for a least seven years, and required that any transfer of ownership interest or relocation of the Coyotes comply with the NHL transfer or relocation procedures; and (2) a guaranty under which the Moyes defendants guaranteed the Coyotes' losses for up to \$30 million.¹⁶

The team struggled both on and off the ice, and by 2008, the Moyes defendants had advanced more than \$300 million to operate the Coyotes franchise, which was in a tenuous financial situation despite such funds.¹⁷ In August 2008, the NHL began advancing new funds to allow the Coyotes to meet their operating expenses.¹⁸ The Moyes defendants and the NHL agreed to seek a buyer for the Coyotes, while

the NHL agreed to continue to finance the Coyotes' losses until the sale closed.¹⁹

[C]ontractual provisions allowing a creditor to recover attorneys' fees and other costs caused by a bankruptcy filing are not pre-empted and are not invalid ipso facto clauses that are per se unenforceable when a debtor files for bankruptcy.

However, in 2008 and 2009, without the NHL's knowledge, the Moyes defendants negotiated the sale of the Coyotes to a third party, who planned to relocate the team to Ontario, Canada.²⁰ Despite the NHL's refusal to approve this sale and the team's relocation to Canada, the Moyes defendants entered into an asset-purchase agreement that, among other things, required bankruptcy court authorization of such a sale.²¹ At that point, no bankruptcy had been filed, yet under the asset-purchase agreement between the Moyes defendants and the Canadian third party, the agreement was conditioned upon bankruptcy court approval. Nothing says why the bankruptcy court authorization was necessary, but one would assume that the parties included this requirement because they intended to put the Coyotes team (*i.e.*, the various limited liability companies controlled by the Moyes defendants) into bankruptcy and attempt to sell the assets free and clear under § 363 (and over the NHL's objection).

To close the sale (over the NHL's objection), prevent the NHL from effectuating its own alternative sale (after stripping the Moyes defendants of their authority to act for the Coyotes) and stem ongoing losses, the Moyes defendants caused the Moyes entities to file for bankruptcy on May 5, 2009.²² Two days later, the Moyes defendants caused the Moyes entities to file an adversary proceeding against the NHL for antitrust violations, which was later voluntarily dismissed.²³ The Moyes entities sought court approval of the sale to the Canadian third party, to which the NHL objected.²⁴

In the bankruptcy case, after several bids by the NHL, the Moyes defendants and the NHL reached an agreement (the "sale agreement"), which the bankruptcy court approved on Nov. 2, 2009, and under which the NHL would purchase the Coyotes for \$128.4 million and the unsecured claims in the case for \$11.6 million. In addition, all parties would reserve all rights and defenses regarding the guaranty, and the Moyes defendants' liability under the guaranty would be capped at \$15 million.²⁵

On March 5, 2010, the NHL sued the Moyes defendants in New York state court (1) for aiding and abetting the breach of fiduciary duty owed by the Coyotes to the NHL, (2) for breach of the consent agreement and (3) as guarantors under the guar-

8 *Travelers*, 549 U.S. at 453-54 (internal quotations omitted).

9 *Id.* at 456.

10 *Compare In re Old Colony LLC*, 476 B.R. 1, 31-32 (Bankr. D. Mass. 2012); *In re Seda France Inc.*, Case No. 10-12948, 2011 WL 3022563, at *4 (Bankr. W.D. Tex. July 22, 2011); *In re Electric Mach. Enters. Inc.*, 371 B.R. 549, 551 (Bankr. M.D. Fla. 2007), with *SNL Corp., et al. v. Centre Ins. Co. (In re SNL Corp., et al.)*, 571 F.3d 826, 842-43 (9th Cir. 2009); *In re Holden*, 491 B.R. 728 (Bankr. E.D.N.C. 2013).

11 *In re Tribune Media Co., et al.*, Case No. 08-13141, *slip op.*, 2015 WL 7307305 (Bankr. D. Del. Nov. 19, 2015).

12 *Global Indus. Tech. Serv. Co. v. Tanglewood Inv. Inc. (In re Global Indus. Techs. Inc.)*, 327 B.R. 230, 239-40 (Bankr. W.D. Pa. 2005).

13 *Tribune*, 2015 WL 7307305, at *3-4.

14 *Id.*

15 *NHL v. Moyes*, 2015 WL 7008213, at *1.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at *2.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

anty. The NHL sought damages for, among other things, its attorneys' fees and expenses incurred during the bankruptcy proceedings and the amounts that the Coyotes team owed to unsecured creditors and to the Coyotes' coach, Wayne Gretzky.²⁶ The Moyes defendants removed the matter to the U.S. District Court for the Southern District of New York, then transferred venue to the Arizona District Court, which then referred the matter to the Arizona Bankruptcy Court because it was related to the pending Coyotes bankruptcy.²⁷

Following years of discovery and motions practice, the parties each filed competing summary-judgment motions. Having determined that the claims asserted in the NHL's lawsuit were *Stern* claims, the Arizona Bankruptcy Court issued proposed findings of fact and conclusions of law to the Arizona District Court with respect to the competing summary-judgment motions. Among other things, the Arizona Bankruptcy Court recommended that the Arizona District Court find that the NHL was entitled to recover only its attorneys' fees and costs incurred after approval of the sale agreement. Specifically, the Arizona Bankruptcy Court recommended finding that the NHL's claims for aiding and abetting a breach of fiduciary duty were precluded by the bankruptcy pre-emption doctrine, as were its claims for most of the attorneys' fees and other costs incurred in connection with the bankruptcy cases.

By an order entered on Nov. 12, 2015, the Arizona District Court ruled on the pending summary-judgment motions, agreeing with the bankruptcy court that the NHL's claim for aiding and abetting a breach of fiduciary duty and part of its breach-of-contract claims were pre-empted to the extent that such claims were based on an allegation that the Moyes defendants wrongfully compelled the Moyes entities' bankruptcy filings.²⁸

However, the Arizona District Court disagreed that the majority of the post-petition attorneys' fees and expenses that the NHL incurred in pursuing its claims and defending its rights in the Moyes entities' bankruptcy were not recoverable from the Moyes defendants.²⁹ Citing *Travelers* for the presumption that "[c]ontractual agreements to pay attorneys' fees arising in bankruptcy court are not pre-empted under the Bankruptcy Code," the Arizona District Court expressly determined that "[i]f a debtor can be [held] contractually liable for the attorneys' fees [that] its creditors incur[red] in its bankruptcy, it follows that a nondebtor can be contractually liable for the same fees."³⁰ The district court distinguished an unenforceable contractual term purporting to prohibit a debtor from filing for bankruptcy from a term providing that, in the event that a debtor chooses to file for bankruptcy protection, the other party must pay the creditor's attorneys' fees.³¹ The district court stated that "[a]lthough such a contractual provision provides a disincentive to filing for bankruptcy, it does not effectively proscribe or limit bankruptcy protection or otherwise conflict with the Bankruptcy Code ... nor does it call into question the good faith of the bankruptcy filing."³² Thus, the court granted summary judgment for the

NHL on the issue of the Moyes defendants' liability for attorneys' fees and costs incurred in connection with the Moyes entities' bankruptcy proceedings and the antitrust suit filed against the NHL therein.

Conclusion

NHL v. Moyes confirms that contractual provisions allowing a creditor to recover attorneys' fees and other costs caused by a bankruptcy filing are not pre-empted and are not invalid *ipso facto* clauses that are *per se* unenforceable when a debtor files for bankruptcy. Thus, as a general rule, creditors would be wise to include such clauses in their operative agreements.

However, the *NHL v. Moyes* court's analysis was focused on whether the NHL was able to assert its attorneys' fees claim against the Moyes defendants, not against the Moyes entities, which were the actual debtors. Since the NHL was not seeking allowance of its attorneys' fees as part of a claim against a debtor, the district court did not need to interpret § 506(b) of the Bankruptcy Code and determine whether the NHL, as an unsecured creditor, could even have an allowed attorneys' fees claim against a debtor for post-petition fees and expenses. As previously noted, courts are split fairly evenly on this issue. Until the Supreme Court decides the issue, or the Bankruptcy Code is amended to expressly address the issue, the outcome may depend (like many things) on the specific arena in which the parties choose to play. **abi**

Reprinted with permission from the ABI Journal, Vol. XXXV, No. 2, February 2016.

The American Bankruptcy Institute is a multi-disciplinary, non-partisan organization devoted to bankruptcy issues. ABI has more than 12,000 members, representing all facets of the insolvency field. For more information, visit abi.org.

²⁶ *Id.*

²⁷ *Id.* Four entities filed jointly in 2009; three cases were converted to chapter 7 cases on Dec. 20, 2010, leaving one remaining case in chapter 11, *Coyotes Hockey LLC* (the main case).

²⁸ *Id.* at *4-8.

²⁹ *Id.* at *11-12.

³⁰ *Id.* at *11.

³¹ *Id.* at *12.

³² *Id.* (citation omitted).