



## U.S. Supreme Court: Attorneys' Fees Provisions Must be Strictly Construed

David J. Marmins

“Our basic point of reference when considering the award of attorneys’ fees is the bedrock principle known as the American Rule: Each litigant pays his own attorneys’ fees, win or lose, unless a statute or contract provides otherwise,” wrote Clarence Thomas for the majority in last month’s United States Supreme Court decision in *Baker Botts L.L.P. et al. v. ASARCO LLC*, 2015 U.S. LEXIS 3920, 83 U.S.L.W. 4428 (June 15, 2015)<sup>1</sup>. With that, the highest court demanded strict adherence to the American Rule in a case that will be cited repeatedly by those seeking to curtail attorneys’ fee awards.

*Baker Botts* posed the question of whether attorneys’ fees incurred prosecuting and defending an application for the recovery of statutory attorneys’ fees are also recoverable. By all accounts, Baker Botts, the law firm that represented ASARCO in the one of the largest environmental bankruptcy cases ever, had a great result in the case. ASARCO recovered enough money in adversary proceedings to pay its creditors in full, resolve its environmental liabilities and emerge as a profitable company. For its role, Baker Botts sought and was awarded \$120 million in fees. These fees were not in dispute in the Supreme Court case. The lower court also awarded Baker Botts \$5 million for fees incurred in the protracted litigation required for it to win the \$120 million fee award. Those fees, said the Supreme Court, did not fall under the Bankruptcy Code definition of fees attorneys can recover. The fee statute, Section 330(a)(1) of the Bankruptcy Code, permits courts to “award... reasonable compensation for actual, necessary services rendered by” certain professionals, including lawyers.

“The word ‘services’ ordinarily refers to ‘labor performed for another’,” wrote the Supreme Court majority, citing Webster’s, Black’s Law, and Oxford English dictionaries. Therefore, the statute did not cover the fees incurred litigating the appropriateness of the statutory fee award for work on the underlying case. “Because Section 330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation.”

In light of this narrow interpretation of the Bankruptcy Code fee provision, litigants and their counsel can expect adversaries and courts to make similar arguments when debating the breadth of numerous other fee statutes. Importantly for you, the *Baker Botts* logic also requires the narrowest possible reading of fee shifting contractual provisions. When in doubt, the American Rule will prevail, so draft contracts accordingly.

<sup>1</sup> [http://www.supremecourt.gov/opinions/14pdf/14-103\\_bpdg.pdf](http://www.supremecourt.gov/opinions/14pdf/14-103_bpdg.pdf)

## Authors and Contributors

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**David J. Marmins**

Partner, Atlanta Office  
404.873.8126  
david.marmins@agg.com

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**Atlanta Office**

171 17th Street, NW  
Suite 2100  
Atlanta, GA 30363

**Washington, DC Office**

1775 Pennsylvania Avenue, NW  
Suite 1000  
Washington, DC 20006

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