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*BRIGGS & STRATTON AND EXTRACTION OIL & GAS:*  
RECENT DEVELOPMENTS IN FAVOR OF PAYMENT OF INDENTURE TRUSTEE FEES  
IN CHAPTER 11 PLANS

While the payment of indenture trustee fees frequently is negotiated in chapter 11 cases, it has become particularly relevant in recent years for at least two reasons. First, as bondholder recoveries in chapter 11 cases have grown increasingly uncertain, the value of an indenture trustee's charging lien is equally precarious. This is especially significant where an indenture trustee's bondholders might receive little consideration in a chapter 11 plan, or where that consideration otherwise is illiquid. As a result, indenture trustees often seek to ensure that chapter 11 plans provide for the payment of their fees. Second, the effects of a 2014 Southern District of New York decision in the Lehman Brothers bankruptcy<sup>1</sup> continue to reverberate throughout the industry. While distinguishable, parties that object to the payment of indenture trustee fees (often the United States Trustee) commonly rely on this decision. These two reasons, among others, have made it all the more important for indenture trustees to be proactive about getting their fees paid in chapter 11 cases. Fortunately, two recent bankruptcy court decisions have reinforced an indenture trustee's ability to get paid its fees in a chapter 11 plan.

In In re Briggs & Stratton Corporation, Case No. 20-43597 (BSS), pending in the United States Bankruptcy Court for the Eastern District of Missouri, the chapter 11 plan reflected a global settlement among multiple parties, including the debtors, the unsecured creditors committee and the unsecured bondholders. The plan included a provision that allowed for the payment of the unsecured indenture trustee fees.<sup>2</sup> The United States Trustee lodged an objection, citing Lehman, arguing that other than exercising its charging lien, the sole means by which an indenture trustee can be paid is through section 503 of the Bankruptcy Code.<sup>3</sup> At a December 18, 2020 confirmation hearing, the Bankruptcy Court overruled the objection of the United States Trustee and confirmed the plan, concluding that: (i) the payment of the indenture trustee fees was negotiated as part of a global settlement among the parties; (ii) section 503

<sup>1</sup> Davis v. Elliot Mgmt Corp. (In re Lehman Brothers Holdings, Inc.), 508 B.R. 283 (S.D.N.Y. 2014) ("Lehman").

<sup>2</sup> Pryor Cashman LLP represented the indenture trustee for senior unsecured notes in the Briggs bankruptcy cases.

<sup>3</sup> Section 503(b)(3) of the Bankruptcy Code provides, in part, as follows: "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, [or] an indenture trustee ... in making a substantial contribution in a case under chapter 9 or 11 of this title; and (F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee." See 11 U.S.C. § 503(b)(3). Section 503(b)(4) of the Bankruptcy Code provides for "(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection." See 11 U.S.C. § 503(b)(4).

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is not the sole source of authority for payment of those fees, and (iii) section 1123(b)(6) further supported payment of the fees.<sup>4</sup> (*See* 12/18/20 Tr. 86:20-87-10).

Just two business days later, on December 22, 2020, the identical issue again was argued before Judge Sontchi in *In re Extraction Oil and Gas, Inc.*, Case No. 20-11548 (CSS), pending in the United States Bankruptcy Court for the District of Delaware.<sup>5</sup> There, the United States Trustee asserted the same arguments as it did in *Briggs*, again citing *Lehman*. The United States Trustee also reminded Judge Sontchi that in *Energy Future Holdings* (“EFH”),<sup>6</sup> he mandated that indenture trustees file substantial contribution applications under section 503 of the Bankruptcy Code. However, Judge Sontchi overruled the objection, noting that EFH was *sui generis*.<sup>7</sup> The Bankruptcy Court instead concluded that section 503 was not the exclusive means by which an indenture trustee can be paid, and cited section 363 of the Bankruptcy Code as support for the payment of indenture trustee fees. (*See* 12/20/20 Tr. 84:6-15). Judge Sontchi also cited *Adelphia*<sup>8</sup> favorably, ultimately finding that payment of indenture trustee fees was part of a consensual deal term included in the *Extraction* chapter 11 plan. (*See* 12/20/20 Tr. 84:16-25).

If the past is instructive, we can expect to see future litigation over the payment of indenture trustee fees. Rather than resorting to substantial contribution motions or exercising their charging lien, indenture trustees often find themselves negotiating fee payments as part of a chapter 11 plan. Yet, the successful negotiation of that plan provision remains susceptible to objection, often facing challenges lodged by the United States Trustee. Hopefully, the recent decisions from the St. Louis and Delaware Bankruptcy Courts will provide greater consistency and predictability for indenture trustees in favor of the payment of their fees in chapter 11 cases.

<sup>4</sup> Section 1123(b)(6) of the Bankruptcy Code permits a debtor to include in its plan any “other appropriate provision not inconsistent with the applicable provisions of this title.”

<sup>5</sup> As was the case in *Briggs*, Pryor Cashman LLP represented the indenture trustee for the two sets of unsecured notes in *Extraction*.

<sup>6</sup> *In re Energy Future Holdings*, Case No. 14-10979 (Bankr. D. Del. 2014) (CSS), 12/3/15 Tr. 36:7-10.

<sup>7</sup> *See* 12/20/20 Tr. 83:16-20.

<sup>8</sup> *In re Adelphia Commc’ns Corp.*, 441 B.R. 6 (Bankr. S.D.N.Y. 2010).