

# A Win for Lenders — Fourth Circuit Allows Claim for Post-Petition Attorney Fees in Bankruptcy Case

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In a case decided on February 8, 2019, the United States Court of Appeals for the Fourth Circuit held that bankruptcy creditors may assert unsecured claims for attorney fees incurred post-petition, if those fees were guaranteed under a pre-petition contract. *SummitBridge Nat'l Investments III, LLC v. Faison*, No. 17-2441, 2019 WL 490573 (4th Cir. Feb. 8, 2019) is the case in reference.

The *SummitBridge* case involved loans totaling \$2.1 million dollars made by Branch Banking and Trust Company (“BB&T”) to Ollie William Faison between 2003 and 2012. Faison signed three promissory notes secured by deeds of trust on Faison’s farmland in North Carolina. The loan documents stipulated that, in the event the notes were placed with an attorney for collection, Faison would pay “all costs of collection, including but not limited to reasonable attorneys’ fees.”

Following Faison’s January 3, 2014 petition for Chapter 11 bankruptcy, BB&T filed three proofs of claims for the outstanding principal and interest due on the promissory notes. BB&T then assigned its interest in the promissory notes and the three bankruptcy claims to SummitBridge National Investments III, LLC (“SummitBridge”) in January 2015.

The bankruptcy court approved a proposed plan for repaying creditors, in which Faison proposed to treat SummitBridge’s three claims as one aggregate secured claim for \$1,715,000 – the value of the farmland securing the notes. This amount was sufficient to cover the outstanding principal and pre-petition interest on the three notes, as well as a portion of SummitBridge’s post-petition interest and attorney fees. The plan also allowed SummitBridge to file an unsecured claim to recover any post-petition attorney fees that exceeded the farmland’s value.

In accordance with the proposed plan, SummitBridge filed an unsecured claim against Faison’s estate for the excess post-petition attorney fees, and Faison objected on two grounds: First, Faison argued that the claim was unenforceable because SummitBridge failed to comply with North Carolina’s notice requirements. Second, Faison argued that the

Bankruptcy Code does not allow unsecured claims for post-petition attorney fees or costs. The bankruptcy court addressed only Faison’s second argument, and agreed that the Code does not allow creditors to assert unsecured claims for post-petition attorney’s fees. SummitBridge appealed this decision to the district court, which affirmed the bankruptcy court’s holding. SummitBridge appealed again to the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit Court”).

The Fourth Circuit Court reversed and remanded, holding in favor of SummitBridge and allowing the unsecured claim for post-petition attorney fees. Generally, under section 502(b) of the Code, creditors’ claims in bankruptcy are fixed as of the petition date. Therefore, Faison argued that SummitBridge could not have a valid claim for post-petition attorney fees because those fees were not incurred until after bankruptcy proceedings began.

Following the lead of the Second and Ninth Circuit Courts, the Fourth Circuit Court found that nothing in section 502(b) of the Bankruptcy Code expressly disallows unsecured claims for post-petition attorney fees. In fact, it found that such an argument is inconsistent with section 502 when read as a whole. Furthermore, the promissory notes at issue required Faison to pay SummitBridge “all costs of collection, including but not limited to reasonable attorneys’ fees.” Therefore, the Fourth Circuit Court found that SummitBridge’s right to post-petition attorney fees actually arose *pre-petition*. The claim was merely contingent upon a future, post-petition event – the notes being placed with an attorney for collection.

The *SummitBridge* decision directly impacts lenders and debtors in bankruptcy proceedings pending in the Fourth Circuit. Lenders should file proofs of claim for both the underlying loan balance and, by either amendment or permission to amend, the post-petition attorney fees incurred in cases where the loan documents give lenders a right to costs and fees associated with collection efforts. These increased claims may encourage debtors to resolve their bankruptcy cases more quickly. In any event, lenders may now assert a claim for and possibly recover more of their legal costs when borrowers and other obligated parties seek bankruptcy protection. **UNITY**

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