Reimbursement of Indenture Trustees for Substantial Contribution Under Section 503 of the Bankruptcy Code

Mark A. Cohen

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REIMBURSEMENT OF INDENTURE TRUSTEES FOR
SUBSTANTIAL CONTRIBUTION UNDER SECTION
503 OF THE BANKRUPTCY CODE

INTRODUCTION

An indenture trustee, the person or institution charged with the fiduciary duty of carrying out the terms of an agreement under which bonds or debentures are issued, participating in a Chapter 9 or 11 case under the Bankruptcy Code often plays a significant role in the initiation of the proceeding, as well as in the formulation of, opposition to or confirmation of the debtor's plan of reorganization. Section 503(b) of the Bankruptcy Code provides that the indenture trustee must have made a "substantial contribution" to the case in order to be reimbursed for services and expenses arising out of the bankruptcy. Approved applications for reimbursement of expenses and fees result in an administrative expense priority that is paid directly from the assets of the bankruptcy estate, thereby decreasing the estate's net value.

Courts vary in their fundamental approaches to determining whether an indenture trustee and its counsel have made a substantial contribution to a reorganization. No comprehensive standard exists by which to measure a substantial contribution. Consequently, applicants for reimbursement face potentially different results based on similar sets of facts in different jurisdictions.

To understand Section 503(b)'s "substantial contribution" test, it is necessary to review both the section's legislative history and decisions by

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2. See 11 U.S.C. § 303(b) (1988), discussing the commencement of involuntary cases by indenture trustees. Involuntary cases are commenced by filing a petition in a bankruptcy court under either Chapter 7 or Chapter 11 of the Bankruptcy Code. See id.


5. "The policy underlying administrative expense priority is that 'the estate as a whole is benefited if general creditors subordinate their pre-bankruptcy claims in order to secure goods and services necessary to an orderly and economical administration of the estate after the petition is filed.'" Christian Life Center Litig. Defense Comm. v. Silva (In re Christian Life Center), 821 F.2d 1370, 1373 (9th Cir. 1987)(quoting Yermakov v. Fitzsimmons (In re Yermakov), 718 F.2d 1465, 1470 (9th Cir. 1983)); see also 11 U.S.C. § 507(a)(1) (1988) ("[f]irst, administrative expense [priority] allowed under section 503(b)").
courts interpreting its predecessor statutes. The dynamic between legislative history and case law provides the groundwork for contemporary decisions concerning reimbursement for services rendered and fees incurred. A coherent and thorough substantial contribution test may be formulated by analogizing to pre-Bankruptcy Code decisions involving both indenture trustees and other bankruptcy participants and by considering the Trust Indenture Act of 1939, which prescribes the duties of indenture trustees.

This Note offers guidelines that courts should employ when determining future questions of substantial contribution. Part I provides a background from which to view applications for reimbursement. Part II investigates Section 503's legislative history and discusses the benefit-to-the-estate test, the foundation for contemporary substantial contribution determinations. Part III critically evaluates the tests that various courts use to determine entitlement to allowances for both indenture trustees and other applicants under pre-Bankruptcy Code statutes and under the Bankruptcy Code of 1978. This Part concludes that no satisfactory approach exists for evaluating applications for expenses incurred and services rendered by indenture trustees in a Bankruptcy Code reorganization. Drawing heavily on Section 503(b)'s legislative history, its interaction with the Trust Indenture Act, and analogy to awards to other applicants, Part IV of this Note proposes uniform guidelines for evaluating applications by indenture trustees for reimbursement based on the benefit conferred both directly and indirectly on the estate.

I. BACKGROUND

Chapters 9 and 11 of the Bankruptcy Code give municipal governments and businesses in financial trouble the opportunity to reorganize...
themselves as viable concerns. The Bankruptcy Code also seeks to ensure that creditors' interests are protected in the reorganization process. In addition, the Trust Indenture Act of 1939 protects these interests by requiring that every qualified indenture impose certain fiduciary duties on the indenture trustee in the event of the issuer's default, and protect the holders during the subsequent reorganization. Bankruptcy is such a default.

The Bankruptcy Code recognizes the fiduciary duties of the indenture trustee and incorporates provisions for the reimbursement of indenture trustees in representing the interests of debt securities holders. Section 503(b)(3)(D) provides for an allowance of administrative expenses to 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. In addition, Section 503(b)(5) provides that reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, [may be granted] based on the time, the nature, the extent, and the value of such services, and the cost of comparable services

9. See supra note 3.
12. Indenture was defined by the Bankruptcy Act of 1898 as "mean[ing] mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor." 3 Collier, supra note 6, at 503-51-52 n.99. In order to be qualified, the indenture must contain those provisions required by §§ 77jjj-77rrr of the Trust Indenture Act of 1939. Section 77jjj contains criteria assuring the independence of the indenture trustee; § 77kkk relates to certain self-dealing by the indenture trustee; § 77lll deals with communications among bondholders; § 77mmm describes periodic reporting requirements by the indenture obligor, requiring the indenture obligor to comply with certain formalities in connection with its substantive contractual commitments under the indenture; § 77nnn mandates certain recording and certificate requirements; § 77ooo sets forth the indenture trustee's duties and responsibilities; § 77ppp describes certain rights of bondholders; § 77qqq authorizes the indenture trustee to bring suit against the obligor on behalf of the bondholders for unpaid debt; and § 77rrr provides that if any of the indenture's mandatory provisions conflict with another provision, the mandatory provisions control. See 15 U.S.C. §§ 77jjj-77rrr (1988).
14. In particular, § 315(c) of the Trust Indenture Act mandates provisions in each qualified indenture "requiring the indenture trustee to exercise in case of default . . . such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs." 15 U.S.C. § 77ooo(c) (1988).
other than in a case under this title.\textsuperscript{16}

Currently, courts use many tests to ascertain whether an indenture trustee has conferred the requisite services to satisfy Section 503's substantial contribution requirement. These tests include the benefit-to-the-estate test, the significance test, the actual-direct-and-demonstrable-benefit test, the tangible-benefit test, the foster-and-enhance-rather-than-retard-or-interrupt-the-progress-of-reorganization test and the but-for test.\textsuperscript{17} The benefit-to-the-estate test finds its basis in the Bankruptcy Code's predecessors, the Chandler Act of 1938 and the Bankruptcy Act of 1898, and in decisions rendered thereunder.\textsuperscript{18} The significance test appears to have been created under the Bankruptcy Code as a threshold to determine the nature of conduct.\textsuperscript{19} Both the actual-direct-and-demonstrable-benefit test and the tangible-benefit test appear to be refinements of the basic benefit-to-the-estate test and are also grounded in the Chandler Act.\textsuperscript{20} The foster-and-enhance-rather-than-retard-or-interrupt-the-progress-of-reorganization test and the but-for test seem to be judicial creations less rooted in legislative action.\textsuperscript{21}


The benefit-to-the-estate test is perhaps the most widely used and earliest means of analysis developed to determine whether a substantial contribution has been made by an indenture trustee or other applicant, and consequently whether such a person is entitled to compensation under Section 503 of the Bankruptcy Code. Prior to enactment of the Bank-

\textsuperscript{16} Id. at § 503(b)(5) (emphasis added).

\textsuperscript{17} See supra note 8.

\textsuperscript{18} See infra notes 78-79, 90-91 and accompanying text. In order to collect compensation, the benefit-to-the-estate test requires conduct that is of a beneficial nature to the estate, such as discovery of fraud. Confirmation of the debtor’s plan of reorganization is not necessary to establish a benefit. See 3 Collier, supra note 6, at 503-48; In re Russell Transfer, Inc., 59 Bankr. 871, 872 (Bankr. W.D. Va. 1986); see also In re Eastern Me. Elec. Coop., Inc., 121 Bankr. 934, 939 (Bankr. D. Me. 1990) (“services must be ‘closely beneficial’ to the estate, but it is no longer the case that compensable services contribute to a plan that is ultimately confirmed”).

\textsuperscript{19} The significance test resembles the benefit-to-the-estate test, although it is employed more frequently as an initial inquiry to characterize the category of service rendered. See infra notes 130-132 and accompanying text.

\textsuperscript{20} These tests are mutations of the benefit-to-the-estate test; their differences are based almost exclusively on the terms that courts select to define the type of benefit necessary to satisfy the substantial contribution standard. See infra notes 134-149 and accompanying text.

\textsuperscript{21} Unlike the actual-direct-and-demonstrable-benefit test and the tangible-benefit test, which faithfully observe § 503’s foundations and describe benefits, these tests look to the overall effect on the reorganization process due to the claimant’s actions. See infra notes 152-162 and accompanying text.
ruptcy Code in 1978, the Bankruptcy Act of 1898 and its amendments governed all bankruptcy cases. The benefit-to-the-estate test was the basis for reimbursement decisions under these predecessor statutes. Because Congress sought to maintain continuity between allowance awards determined under these statutes, in particular the Chandler Act of 1938 and the Bankruptcy Code, pre-Bankruptcy Code benefit-to-the-estate decisions continue to have a profound impact on modern allowance analyses. Many of the same actions, factors and standards are considered today, albeit under the ambit of different statutory parameters.

A. Legislative History of Section 503 of the Bankruptcy Code

The present day benefit-to-the-estate test can be traced to the debate over the propriety of equity receivership, a pre-1933 procedure whereby management of a debtor company commenced a bankruptcy proceeding by filing a creditor's bill in federal court. The court had an extremely limited role in the equity receivership procedure, however. The bankruptcy estate, administered by a reorganization committee, compensated all participants in the administration of the reorganization for services

22. The Supreme Court has stated that a case commenced under the Bankruptcy Act continues to be governed by it regardless of the enactment of the Bankruptcy Code. See Brown v. Felsen, 442 U.S. 127, 129 n.1 (1979). Many courts, however, have undoubtedly been influenced by the adoption of the Bankruptcy Code in their analysis of cases that arose prior to the effective date of the Bankruptcy Code (October 1, 1979) but that were decided subsequently. Many of these courts have gone to great lengths to dispel any perception of influence.

The Fifth Circuit noted in a 1980 case that the Bankruptcy Code, which was "effective for bankruptcy cases commenced on October 1, 1979, does not apply to this case." Citibank, N.A. v. Multiponics, Inc. (In re Multiponics, Inc.), 622 F.2d 731, 734 n.6 (5th Cir. 1980). The Tenth Circuit rejected any conclusions drawn from the timing of Congress' adoption of the Bankruptcy Rules and Congress' consideration of the Bankruptcy Reform Act, enacted as the Bankruptcy Code, to its ultimate decision in the case. See King Resources Co. v. Phoenix Resources Co. (In re King Resources Co.), 651 F.2d 1349, 1353-54 (10th Cir.), cert. denied, 454 U.S. 881 (1981).

Another court has acknowledged the influence of the new Bankruptcy Code. This court found the Bankruptcy Code likely responsible for the allowance of prevailing or market rates charged to nonbankruptcy matters as reimbursement in bankruptcy proceedings. See In re Pacific Homes, 20 Bankr. 729, 737 (Bankr. C.D. Cal. 1982). Such rates were forbidden under § 503's predecessors. See id.

23. See infra note 45 and accompanying text.
24. See infra notes 86-89 and accompanying text.
25. See infra note 46 and accompanying text.
27. Equity receivership requires "the exercise of administrative jurisdiction, as distinguished from decision of controverted or litigated questions." Lincoln Printing Co. v. Middle West Util. Co., 6 F. Supp. 663, 683 (N.D. Ill. 1934), aff'd, 74 F.2d 779 (7th Cir.), cert. denied, 295 U.S. 746 (1935). The equitable benefit doctrine provided for compensation of services that were beneficial to the estate but did not include compensation for services rendered in resisting a bankruptcy filing. See Randolph v. Scruggs, 190 U.S. 533, 539 (1903).
rendered and expenses incurred.28 Under equity receivership, the reorganiz-
ization committee possessed sole discretion to grant allowances.29

In 1933, because of congressional dissatisfaction with equity receivership as a means of reorganizing corporations, Congress enacted Section 77 as an amendment to the Bankruptcy Act of 1898.30 Congress hoped to "put a stop to the wholesale plundering by reorganization managers, both by way of fees and for commissions covering new securities"31 by placing the reorganization proceedings and plan under the control of the Interstate Commerce Commission and the courts. Section 77, however, applied only to the reorganization of railroads.32 Furthermore, consummation of the plan was not a condition precedent to the granting of an allowance pursuant to Section 77(c).33 This last situation is still the case under Section 503(b) of the Bankruptcy Code.34

Two years later, in 1935, Congress revised Section 77,35 explicitly granting indenture trustees (1) an allowance for actual and reasonable expenses incurred, and (2) compensation36 for services rendered "in connection with the proceeding and plan"37 of a railroad reorganization. Congress' intent to treat indenture trustees differently from other bankruptcy participants is demonstrated by this statutory allowance for compensation.38

28. The SEC criticized the abuses created by the committee's fee-setting power. See 1 SEC Report, supra note 26, at 647-48.
29. Reorganization committee decisions were subject to review by courts, but courts were reluctant to interfere with committee decisions. See Teton, Reorganization Revised, 48 Yale L.J. 573, 592-94 (1939).
32. Congress was concerned with the "expensive, protracted, confusing, and inefficient administration of affairs of railroad companies engaged in interstate commerce . . . ." Id. at 5.
33. See In re New York, Ont. and W. Ry., 171 F. Supp. 634, 637 (S.D.N.Y. 1958); see, e.g., In re McGann Mfg. Co., 188 F.2d 110, 112 (3d Cir. 1951) (recognizing interim allowances); Finn v. Childs Co., 181 F.2d 431, 440 (2d Cir. 1950) (fairness demands opportunity to make claim).
36. This was the first time that a statute explicitly provided indenture trustees with reimbursement. Unlike committees and other representatives of creditors reimbursed only for expenses incurred, indenture trustees were entitled to both expenses and compensation. See 11 U.S.C. § 205(c)(12) (Supp. V 1940) (repealed 1978).
38. Of all participants in the bankruptcy proceeding, indenture trustees were the only party to be singled out for reimbursement of both expenses and compensation, as opposed to only expenses incurred. See 11 U.S.C. § 205 (Supp. V 1940) (repealed 1978).
Congress further expressed its intent to accord indenture trustees unique treatment when it added Section 77B, which dealt with corporate reorganizations generally, to Chapter VIII of the Bankruptcy Act in 1934.\(^\text{39}\) Congress placed allowances for compensation for services rendered and expenses incurred under the supervision and discretion of the court, as it had done under Section 77, to “reduce[e] the cost of reorganizing corporations.”\(^\text{40}\) Despite the broad language of Section 77B, allowances were made, for the most part, only to dominant interests and then only for services that led to the confirmation of a plan of reorganization.\(^\text{41}\) In *Dickinson Industrial Site, Inc. v. Cowan*\(^\text{42}\) and *Realty Associates Securities Corp. v. O'Connor*,\(^\text{43}\) the Supreme Court narrowly construed Section 77B by strictly limiting compensation to persons able to demonstrate entitlement under the language of Section 77B.\(^\text{44}\) The Supreme Court further defined those instances in which claimants were entitled to compensation: compensation was to be granted for “service rendered to and benefits received by the estate”—\(^\text{45}\)—the foundation of to-


\(^{40}\) S. Rep. No. 482, 73d Cong., 2d Sess. 3 (1934).

\(^{41}\) See 8 SEC Report, *supra* note 26, at 245-46; see also Steere v. Baldwin Locomotive Works, 98 F.2d 889, 891 (3d Cir. 1938) (compensation available only for direct and material contribution leading to successful reorganization); Teton, *supra* note 29, at 603-07 (comparing the rationale behind the tendency to award fees only to management monopolies under Section 77B with the increased participation envisioned by sections 242 and 243 of the Chandler Act).

\(^{42}\) 309 U.S. 382 (1940).

\(^{43}\) 295 U.S. 295 (1935).

\(^{44}\) The Court explained that Congress intended to limit administrative expenses by enacting § 77B of the Bankruptcy Act of 1898, which restricted reimbursement only to dominant interests who assisted in the confirmation of a plan. See *Dickinson Indus.*, 309 U.S. at 388-89; *Realty Corp.*, 295 U.S. at 299. But see *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 835-36 (S.D.N.Y. 1935) (declining to follow Supreme Court’s dictum, broad interpretation of § 77B justified award to indenture trustees and their attorneys of fees for services and expenses which were beneficial and not in opposition to plan), affd in part sub nom. *Bohm v. Paramount Pictures, Inc.* (In re Paramount Publix Corp.), 85 F.2d 592 (2d Cir. 1936), cert. denied, 300 U.S. 655 (1937).

After congressional revision of the Bankruptcy Act, the Supreme Court refused to construe the terms of an agreement that set compensation for a bankruptcy referee to include a percentage of the principle payable on bonds. Instead, the Court limited compensation to a percentage of cash received by the creditors. This construction saved the estate approximately $41,000. See *Realty Corp.*, 295 U.S. at 298.

In another situation involving the assets of a bankruptcy estate, the Supreme Court again narrowly interrupted allowance priorities. See *Dickinson Indus.*, 309 U.S. at 389. In an appeal by a bondholders’ committee over a reduced allowance award, the Supreme Court discussed jurisdictional questions in light of the interaction between § 77B of the Bankruptcy Act and the Chandler Act. Resolving all statutory ambiguities in favor of a conservative interpretation of Congressional intent and seeking to prevent excess fees and administrative expense in corporate reorganizations, the Court denied, as a matter of right, appeals of allowance awards. See *id*. This decision effectively limited participation in reorganization proceedings to dominant groups. See 1-2 Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. 1, at 257-58 (1973) [hereinafter CBL Report].

\(^{45}\) *Dickinson Indus.*, 309 U.S. at 389 (footnote omitted). The Southern District of
day's benefit-to-the-estate test. These Section 77B cases set forth certain guidelines that courts have used to analyze subsequent cases: benefit to the estate and nonduplication of efforts.

Between 1936 and 1940, the Securities and Exchange Commission ("SEC") reported to Congress, questioning the merit of granting reorganization committees near absolute power. Dissatisfied with the prior role of indenture trustees, the SEC proposed that indenture trustees be given "the obligation to exercise that degree of care and diligence which the law attaches to such high fiduciary position[s]." The SEC recommended that the role of the indenture trustee "be built up, so that an indenture trustee will be made a more active person."

According to the SEC, the Supreme Court's narrow interpretation of Section 77B "disfavor[ed]" individual action and "encouraged" group action. Such limited participation ran contrary to congressional in-

New York employed a similar notion of benefit. See Paramount-Publix, 12 F. Supp. at 827.


47. The SEC noted "the vice inherent in the situation where the committee is the sole arbiter of the reasonableness of its fees and the propriety of its expenses." 1 SEC Report, supra note 26, at 647; see also In re Paramount-Publix Corp., 12 F. Supp. 823, 827 (S.D.N.Y. 1935) (noting the "grave abuses" that occurred prior to the adoption of § 77B of the Bankruptcy Act), aff'd in part sub nom. Boehm v. Paramount Pictures, Inc. (In re Paramount Publix Corp.), 85 F.2d 592 (2d Cir. 1936), cert. denied, 300 U.S. 655 (1937). The Paramount-Publix court observed that § 77B's language was "sufficiently comprehensive to include in the several categories any one having an interest in the reorganization, provided the services... [were] proper and beneficial..." 12 F. Supp. at 823. The court did not, however, offer any parameters by which to assess whether an applicant's activities were in fact "proper and beneficial."

48. See 8 SEC Report, supra note 26, at 341. Throughout its investigation, the SEC noted that many indenture trustees failed to take an active role in reorganization proceedings, even though they had the power to do so. See id.


51. 8 SEC Report, supra note 26, at 252. Such an interpretation limited participation in bankruptcy proceedings to groups of creditors with sufficient votes to force adoption of a plan of reorganization and foreclosed the opportunity for individual participation. See CBL Report, supra note 44, pt. 1, at 257-58.
The SEC recommended that Congress provide reasonable compensation for services rendered and reimbursement for costs and expenses incurred to parties in interest and their attorneys in connection with the administration of an estate or with a plan of reorganization.53

Congress enacted these recommendations into law as part of the Chandler Act,54 which later became the foundation for Section 503(b) of the Bankruptcy Code of 1978.55 Sections 242 and 243 of the Chandler Act liberalized the allowance provisions of Section 77B by enlarging the class eligible for compensation and by expanding the category of services for which compensation was allowed.56 The new provisions allowed compensation for services rendered by indenture trustees and reimbursement for expenses incurred by indenture trustees, creditors, stockholders and other parties in interest and their attorneys.57 Furthermore, activities eligible for compensation not only included services that contributed to confirmation of a plan, but also those beneficial to the administration of the estate.58

The statutory language and legislative history of Sections 242 and 243 reveal that Congress intended59 to grant indenture trustees an allowance

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52. See In re Middle West Util. Co., 17 F. Supp. 359, 364 (N.D. Ill. 1936). Congress had attempted to remove the fixing of allowances from the domain of the reorganization committees. See id.

53. 1 SEC Report, supra note 26, at 902. The SEC stressed that "[t]he standard should be sufficiently broad and flexible to give . . . recognition to the value of services rendered in submission of suggestions for plans, or in opposing confirmation of plans." Id.


55. See infra note 87 and accompanying text.


57. See 8 SEC Report, supra note 26, at 253. The Chandler Act recognized such claimants as fiduciaries. See Dickinson Indus. Site, Inc. v. Cowan, 309 U.S. 382, 389 n.7 (1940). The SEC lauded Congress' passage of the Chandler Act as a measure to accomplish the objective of more active and independent creditor representation in the reorganization process. The SEC noted that the Chandler Act "broaden[ed] the area of representation consistently with the mandate of Chapter X, while keeping it within bounds of expense not burdensome to the estate." 8 SEC Report, supra note 26, at 253. In addition, the Supreme Court, in Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972), noted the widespread abuses that the Chandler Act was designed to cure and acknowledged the comprehensive role played by the SEC in the "protection of public investors." Id. at 422.


59. Both the Chandler Act and the Trust Indenture Act were adopted as the result of the congressionally mandated SEC Report. See Caplin, 406 U.S. at 422. See also 8 SEC Report, supra note 26, at 341 n.13 (SEC concluded that its recommendations contained in Part 6 of its SEC Report were "enacted into law by the Trust Indenture Act of 1939"). The SEC submitted Part 6 of the Report, entitled "Trustees Under Indentures," to Congress in 1936 and thus Part 6 was available for use by Congress when it drafted and
for compensation for services rendered and expenses incurred as a result of their expanded role and increased duties. Chapter X reflected "the enlarged role which such [indenture] trustees may play thereunder in representing and safeguarding the interests of securities issued pursuant to such indentures."65

The Chandler Act modified the more restrictive allowance provisions and decisional law of Section 77B of the Bankruptcy Act of 1898 and placed the ultimate power to grant allowances in the court’s discretion.61 The Chandler Act limited applications for reimbursement to services or conduct that benefited the estate.62 Thus, because the Bankruptcy Code incorporates certain Chandler Act principles, the Supreme Court’s early benefit-to-the-estate test enunciated under Section 77B of the Bankruptcy Act continues to be relevant.63 Only nonduplicative services that are beneficial to the estate are compensable.

B. Impact of Chandler Act Decisions

Courts continue to disagree over the meaning of “beneficial.”64 According to decisions interpreting the Chandler Act, beneficial services embrace “(1) services contributing to the plans of reorganization ap-

60. S. Rep. No. 1916, 75th Cong., 3d Sess., pt. 2, at 23 (1938). As a result of the Chandler Act, an indenture trustee could also file an answer to a petition (§ 126 of the Bankruptcy Act and Rule 10-112); it could file claims (§ 197 of the Bankruptcy Act and Rule 401(b)); it could file a plan of reorganization (§§ 167(b), 169 and 170 of the Bankruptcy Act and Rule 301(c)); it was entitled to notice (§ 207 of the Bankruptcy Act and Rule 10-209); it had the right to be heard (§ 206 of the Bankruptcy Act and Rule 10-210); and it had the right to administrative allowances for compensation and expenses (§ 242 of the Bankruptcy Act and Rule 10-215(c)(1)(B)). The Bankruptcy Code has similar provisions. See, e.g., 11 U.S.C. § 343 (1988) (right to examine the debtor); id. § 501(a) (right to file a proof of claim); id. § 503(b)(3)(D) (right to administrative expenses); id. § 1109(b) (right to be heard); id. § 1121(c) (right to file a plan).

61. See 8 SEC Report, supra note 26, at 253; see also Dickinson Indus. Site, Inc. v. Cowan, 309 U.S. 382, 385 (1940) (allowances for compensation and reimbursement made at discretion of court).

62. Additionally, as was the case under § 77(c) of the Bankruptcy Act, consummation of a plan of reorganization continued not to be a condition precedent to the granting of an allowance under the Chandler Act. See 11 U.S.C. §§ 642, 643 (1976) (codification of §§ 242, 243) (repealed 1978).

63. See supra note 46 and accompanying text.

64. See infra notes 92-115 and accompanying text.
proved by the court; (2) services leading to disapproval of plans rejected as being unfair or economically untenable; and (3) services which aided the administration of the estates.”

In *In re Continental Investment Corp.*, a bankruptcy case involving a holding company engaged in both the insurance and investment advisory fields, a First Circuit court used the Southern District of New York’s benefit definition developed in *In re Yale Express System, Inc.* as a starting point for its analysis of Sections 242 and 243. The *Continental Investment* court accepted the indenture trustee’s claim that its fiduciary duties compelled its services, and therefore it should not be bound by the benefit-to-the-estate test.

The language of Section 503 of the Bankruptcy Code probably influenced the *Continental Investment* court, even though the court reached its decision under the Chandler Act. In evaluating the services provided by another claimant, a creditor’s committee, the court stated that a compromise between a claimant and another party was a “substantial contribution.” The phrase “substantial contribution” does not appear in either Section 242 or 243. This broad definition of substantial contribution, which, according to the First Circuit, includes compromise, continues to mature today.

A more liberal view has expanded the interpretation of Sections 242 and 243. The sections “[have] been consistently construed to also require that the applicants have rendered services which are beneficial to the estates.” This interpretation allows compensation to indenture trustees who oppose the interests of the estate in certain situations involving conflicts of interest, barring an absolute rule prohibiting such conflicts.

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66. 28 Bankr. at 972.

67. 366 F. Supp. 1376 (S.D.N.Y. 1973). Yale Express is a publicly owned integrated transportation company with numerous subsidiaries and thus is regulated by the Interstate Commerce Commission. Yale Express began reorganization proceedings after its failed acquisition of a freight forwarder. See *id.* at 1380. Based in part on the difficulty of the seven-year reorganization, the court began its Chandler Act analysis by noting that compensation “should not be niggardly” and “should be generous enough to encourage competent lawyers.” *Id.* at 1381. The court considered many factors in reaching its decision to grant the indenture trustee’s application, such as the trustee's statutory role, its objection to a proposed sale of certain real estate holdings (which in turn resulted in a substantial increase in value to the estate), an objection to a debt set-off, the above average competence of the trustee’s counsel, and the recommendations of the SEC. See *id.* at 1387.

68. “[C]ompensation to indenture trustees is governed by § 242, which does not limit compensation to the ‘benefit’ standard of § 243.” *Continental Inv.*, 28 Bankr. at 985.

69. See supra note 22.


Thus, this view, in its enlarged analysis of Sections 242 and 243, advocates the use of judicial discretion.

Another version of the benefit-to-the-estate test distinguishes services rendered by the claimant that benefit the estate from those that primarily benefit the claimant. The differences among the views are accentuated by consideration of other factors, such as the interplay between Section 77B and Section 242 and the importance of the policy aims behind the Trust Indenture Act. Still another approach does not limit those parties entitled to compensation to a list of specific entities. In a bankruptcy proceeding concerning the validity of fees-compensation-reimbursement previously awarded to two institutional indenture trustees, the court stated that "[t]hose who in good faith provide valuable services" are entitled to compensation. Other courts, however, limit claimants to those services authorized by Sections 242 and 243. In an unusual case, one bankruptcy court ignored a rigorous benefit-to-the-estate test and instead based its decision to reimburse on the uncommon nature of the case and the moral and legal obligation owed to a nursing home's residents. Thus, while most courts engage in some form of benefit-to-the-estate test, the meaning of the term "benefit" under the Chandler Act varies from providing a valuable contribution to fulfilling a moral obligation.

In 1978, Congress enacted the Bankruptcy Code, thus replacing the Chandler Act. Congress derived Section 503(b) of the Bankruptcy Code

74. See Citibank, N.A. v. Multiponics, Inc. (In re Multiponics, Inc.), 622 F.2d 731, 733 (5th Cir. 1980). The court set forth twelve factors to be used in considering an award of attorneys' fees. They are:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

Id. at 733; see also In re Pacific Homes, 20 Bankr. 729, 736-37 (Bankr. C.D. Cal. 1982) (services benefiting only applicant's client are noncompensable).

75. The Fifth Circuit has stated that "[w]hile counsel need not show his services specifically benefitted the administration or protection of the estate as had been required by § 77B, the predecessor of Section 242, economy of administration remains a proper concern." Multiponics, Inc., 622 F.2d at 733. In addition, the court acknowledged that, "like the Bankruptcy Act, [the Trust Indenture Act] mandates the participation of indenture trustees in reorganization proceedings. . . ." Id. at 734. Furthermore, the Multiponics court implicitly rejected the tangible-benefit test and acknowledged its use of judicial discretion in allocating the estate's limited resources. See id. at 734-35.


77. See Pacific Homes, 20 Bankr. at 737-39; see also Creditors' Comm. # 1 v. Osborne (In re THC Fin. Corp.), 659 F.2d 951, 954 (9th Cir. 1981) (compensating applicant for superior services with market rates), cert. denied, 456 U.S. 977 (1982).

from Sections 64a(1), 242 and 243 of the Chandler Act, however. As a result of this interaction, much of the case law developed under the Chandler Act remains in effect.

C. Congressional Rejection of Attempts to Limit Favorable Allowance Provisions

On July 30, 1973, the Commission on Bankruptcy Laws of the United States ("CBL") filed with Congress a comprehensive report on the deficiencies of the nation's bankruptcy laws. Among other recommendations, the CBL Report proposed limitations on allowances. The CBL Report employed the phrase "substantial contribution," which may have been borrowed from case law under Section 77B. Moreover, the CBL Report sought to eliminate the indenture trustee's special status. The SEC, however, opposed the CBL's attempt to revive the more limited procedure that had been used under Section 77B. In all subsequent drafts of the Bankruptcy Code, Congress rejected the CBL's proposal.

80. See infra notes 90-91 and accompanying text.
82. See CBL Report, supra note 44, pt. 1, at 107. The Commission's report, which was mostly disregarded, would in effect have repealed the favorable treatment of indenture trustees and others under §§ 242 and 243 of the Chandler Act and revived the narrower interpretation of § 77B. In addition, the CBL Report would have limited reimbursement to situations where a plan had been confirmed. See id.
83. See id., pt. 2, at 107; see, e.g., Warren v. Palmer, 132 F.2d 665, 668 (2d Cir. 1942) ("The criterion of reasonableness under § 77B... was... contribution in some substantial manner to the 'working out' of a plan of reorganization."); In re Mountain States Power Co., 118 F.2d 405, 408 (3d Cir. 1941) (accountant, who was member of preferred stockholders' committee, "made a substantial contribution to the successful result achieved in this proceeding"); In re Midland United Co., 64 F. Supp. 399, 408 (D. Del. 1946) (attorney representing trustee for utilities "contributed very substantially" to the reorganization plan), aff'd, 159 F.2d 340 (3d Cir. 1947); In re La France Indus., Inc., 42 F. Supp. 642, 647 (E.D. Pa. 1942) ("contribution" of the indenture trustee and counsel "was a substantial one").
85. The SEC recommended removal of CBL proposals that would inhibit active participation in the reorganization process and would bar compensation for successful opposition to confirmation of a plan, as was common under existing case law. See id. at 734. According to the SEC,

[t]he [CBL] bills repeal the existing authority to compensate voluntary committee, investors and their representatives for successful opposition to proposals of the trustee or debtor on a business or legal matter or for defeating an unfair plan. This would have the effect of inhibiting presentation of conflicting views to the court.

Id.
and instead based Section 503(b) of the Bankruptcy Code on Sections 242 and 243 of the Chandler Act. Despite Congress' rejection of the CBL Report, an imprecise substantial contribution standard was incorporated into the text of Section 503 of the Bankruptcy Code, thereby creating confusion and problems of interpretation.

Nevertheless, the Bankruptcy Code preserved the special status accorded indenture trustees.\textsuperscript{86} Thus, Congress effectively disassociated itself from the CBL Report. In Section 503's legislative history, Congress attributed the roots of the phrase "substantial contribution" to Sections 242 and 243 of the Chandler Act.\textsuperscript{87} The phrase does not appear in either of these sections, however. It seems likely, then, that Congress used "substantial contribution" as shorthand for the last sentence of Section 243:

In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto.\textsuperscript{88}

Former Bankruptcy Rule 10-215(c)(1)(B) contains similar language.\textsuperscript{89}

The principal test under Sections 242 and 243 was "the benefit to the debtor's estate, the creditors, and, to the extent relevant, the stockholders."\textsuperscript{90} Perhaps because of the relation Section 503 bears to former Sections 242 and 243, this test "continues to be the touchstone for compensating professional services"\textsuperscript{91} under the Bankruptcy Code. Despite this apparent agreement as to the origin of Section 503 and the


\textsuperscript{88} Where, as here, Congress adopts a new law...[it] normally can be presumed to have had knowledge of the interpretation given to the [old] law." Lorillard v. Pons, 434 U.S. 575, 581 (1978).


\textsuperscript{91} In re White Motor Credit Corp., 50 Bankr. 885, 892 (Bankr. N.D. Ohio 1985); see also In re Jensen-Farley Pictures, Inc., 47 Bankr. 557, 566 n.7 (Bankr. D. Utah 1985) ("[b]enefit to the estate...lies at the heart of awards under Section 503(b)(3)(D) and (4)").
analysis to be applied, however, no consensus exists as to the meaning of the term “benefit.”92

Some courts interpret the lack of definition for “benefit” and “substantial contribution” as a signal to employ their equity powers.93 Another court reacted differently. By refusing to employ its equity powers, that court suggested that all applicants will suffer from this congressional imprecision.94

D. Despite Agreement as to Origin of Substantial Contribution, No Agreement Exists as to the Application of “Benefit” to this Standard

Courts seem to agree that the phrase “substantial contribution” was derived from Sections 242 and 243 of the Bankruptcy Act.95 Nonetheless, interpretational problems continue because of the differing statutory language contained in the Chandler Act and the Bankruptcy Code. While Section 503(b) uses the phrase “substantial contribution,” Sections

92. The Bankruptcy Court for the Northern District of Ohio has found that “developing a consensual plan, assisting the compromise of appointment of the Investment Banker and aiding in litigation strategy” are specific contributions beneficial to the estate. White Motor Credit, 50 Bankr. at 908. The Southern District of Ohio rejected applications by four indenture trustees because “[i]t cannot be said that their efforts were for some broader purpose than to serve the individual clients, because, in fact, their clients represented virtually the entire creditor burden on [the] estate.” In re Rockwood Computer Corp., 61 Bankr. 961, 966 (Bankr. S.D. Ohio 1986).

While White Motor Credit and Rockwood Computer were decided by two different courts faced with markedly different factual circumstances, the applicants for reimbursement performed similar services. The different results make sense only if the courts used different definitions of what constitutes a benefit.

93. “§ 503(b) does not recite a cut-and-dried list of entities only that should be allowed administrative expense treatment for reasonable compensation for their attorneys. Instead, the list of entities contains merely examples which should be expanded when appropriate.” In re Perdido Motel Group, Inc., 115 Bankr. 340, 342-43 (Bankr. N.D. Ala. 1990); see also In re Catalina Spa & R.V. Resort, Ltd., 97 Bankr. 13, 19 (Bankr. S.D. Cal. 1989) (bankruptcy court has wide discretion to determine compensable administrative expenses).


242 and 243 used words such as "contributed" and "beneficial." In its enactment of Section 503(b), "Congress intended to adhere to the 'direct benefit' rule of decisions under Sections 242 and 243 of the Bankruptcy Act, without the requirement of a confirmed plan, and, with respect to superseded custodianships, to the 'equitable benefit' doctrine." Thus, Congress has impliedly asserted an intention to preserve the benefit-to-the-estate standard of analysis. Despite this congressional urging, a tension exists between the need to interpret Section 503(b) broadly to encourage meaningful participation in reorganizations and to preserve the estate's resources by limiting administrative costs. This tension dates from the Supreme Court's creation of the equitable benefit doctrine in its interpretation of the Bankruptcy Act of 1898.

Historically, certain conduct does not produce a substantial contribution. Services conferred primarily for the benefit of the petitioning creditor do not result in a benefit to the estate. Moreover, an incidental benefit alone is insufficient basis upon which to grant administrative priority. Cognizant of congressional attitudes, at least one court has construed statutory priorities narrowly in order to preserve the value of congressionally preferred priorities. Another court rejected the argument that a "benefit" is not confirmed in order to satisfy the substantial contribution test. Quite to the contrary, substantial contribution "does not require a contribution that leads to confirmation of a plan, for in many cases, it will be a substantial contribution if the person involved uncovers facts that would lead to a denial of confirmation, such as fraud ...." In re Baldwin-United Corp., 79 Bankr. 321, 341 (Bankr. S.D. Ohio 1987).

96. Compare 11 U.S.C. § 503 (1988) (Bankruptcy Code) with 11 U.S.C. §§ 642-43 (1976) (Chandler Act) (repealed 1978). Because the origin of § 503(b) is not in dispute, the phrase "substantial contribution" must have the same meaning as the words "contributed" and "beneficial." See supra notes 90-91 and accompanying text.


98. See Randolph v. Scruggs, 190 U.S. 533, 539 (1903); see also supra note 27 (explaining equity receivership).

99. See In re Kam, 106 Bankr. 207, 209 (Bankr. D. Haw. 1989); see also Manufacturers Hanover Trust Co. v. Barth (In re Flight Transp. Corp. Sec. Litig.), 874 F.2d 576, 581 (8th Cir. 1989) (bankruptcy estate should not reimburse for services and expenses that "primarily benefit the debenture holders"); In re Standard Metals Corp., 105 Bankr. 625, 630 (Bankr. D. Colo. 1989) (applicants did not overcome presumption that their actions were taken primarily for benefit of their clients and not estate as a whole).

100. One court reduced its fee award because the benefit was more than incidental but "the evidence [was] less than clear that . . . representatives provided something more than an indirect benefit to the estates." In re Baldwin-United Corp., 79 Bankr. 321, 341 (Bankr. S.D. Ohio 1987).

101. See Flight Transp., 874 F.2d at 581; see also In re 9085 E. Mineral Office Bldg., Ltd., 119 Bankr. 246, 251 (Bankr. D. Colo. 1990) (incidental refers to accidental, inadvertent or unintentional result). This does not mean that a plan must be confirmed in order to satisfy the substantial contribution test. Quite to the contrary, substantial contribution "does not require a contribution that leads to confirmation of a plan, for in many cases, it will be a substantial contribution if the person involved uncovers facts that would lead to a denial of confirmation, such as fraud . . . ." In re Jensen-Farley Pictures, Inc., 47 Bankr. 557, 566 (Bankr. D. Utah 1985) (citation omitted); see also In re Texaco, Inc., 90 Bankr. 622, 630 (Bankr. S.D.N.Y. 1988) (substantial contribution must result in demonstrable benefit to the debtor's estate); In re Revere Copper and Brass, Inc., 60 Bankr. 892, 897 (Bankr. S.D.N.Y. 1986) (services are compensable under § 503 regardless of the litigation's ultimate disposition).

102. See supra note 5.

103. See In re Philadelphia Mortgage Trust, 117 Bankr. 820, 826-28 (Bankr. E.D. Pa.)
ment that an extension of credit made a substantial contribution to the debtor's reorganization, stating that "the tenor of the cases suggests that items supplied to the estate must be essential for the preservation of the estate." Finally, services considered a part of the claimant's normal tasks, engaged in primarily for the benefit of the claimant, do not qualify as a substantial contribution.

No consensus exists among courts as to the propriety of granting claims for pre-petition expenses and fees that an applicant incurs. Section 503 does not explicitly address pre-petition claims, yet courts, seemingly relying on their equitable powers, have both granted and denied such claims, further confusing any understanding of Section 503. "[C]ourts may give the broadest latitude in the interpretation of what constitutes substantial contribution... [I]t is impossible to lay down hard and fast rules to determine what is, in a given case, substantial contribution." Some courts have based their decisions entirely upon whether the pre-petition services conferred a benefit on the estate. Thus, if a claimant conferred such a benefit, the court granted an allowance awarding the applicant reimbursement for services and expenses under Section 506(b) based on the increased value of the estate after reorganization. Some courts that have rejected applications for reimbursement of pre-petition claims have found that the literal meaning of Section 503 must be applied and applications denied "absent a result demonstrably at odds with legislative intent." These courts argue that had Congress intended to reimburse pre-petition claims from the proceeds of a bankruptcy estate, it would have included a provision in the Bankruptcy Code.

In a more liberal interpretation of Section 503, one court awarded both attorneys' fees and compensation for services to an indenture trustee for its vital and highly visible role. The court made no mention of benefit

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1990). The court denied the application of the debtor's trustee under a trust agreement stating that expenses must benefit the debtor and not merely further the self-interest of the claimant or merely provide an incidental benefit. See id.


110. See In re Penn-Dixie Indus., Inc., 18 Bankr. 834, 838-39 (Bankr. S.D.N.Y. 1982). The court acknowledged that its basis for the award was its own knowledge of the "extent and value of the services" provided by the indenture trustee. Id. The court also recognized that the "strict economy of the Bankruptcy Act of 1898 has been abandoned." Id.
except to the extent that it noted the indenture trustee played a vital role in the reorganization.111 Following this liberal approach to Section 503 applications, some courts have concluded that a substantial contribution may be made by an individual member of a creditors' committee112 or by raising an objection to or even entering into a post-petition agreement.113 Such an agreement may increase the value of the estate and consequently confer a benefit on it.114 In addition, those parties who wind up the estate's affairs and at the same time confer a benefit on the estate must be

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111. See id.

112. The controversy surrounding the propriety of compensating individual members of a creditor's committee provides another opportunity for divergent interpretations of § 503 and the term benefit. One court, using a benefit-to-the-estate test, found that reimbursement of members of committees or the committees themselves may be justified as an administrative expense under § 503(b)(1) or with respect to individual members, under § 503(b)(3)(D) "since they individually make a substantial contribution to the reorganization by agreeing to serve on the committees." In re Kaiser Steel Corp., 74 Bankr. 885, 890 (Bankr. D. Colo. 1987); see also In re Kam, 106 Bankr. 207, 209 (Bankr. D. Haw. 1989) (creditor must benefit estate in order to receive compensation); In re J.E. Jennings, Inc., 96 Bankr. 500, 501 (E.D. Pa. 1989) ("[o]ther courts have discovered a distinction made by Section 503 between committees per se and committee members"); In re Farm Bureau Servs., Inc., 32 Bankr. 69, 71 (Bankr. E.D. Mich. 1982) ("committee members must do more than faithfully attend meetings and contribute thoughts and opinions in order to recover expenses").

113. See In re McLean Indus., Inc., 88 Bankr. 36, 38 (Bankr. S.D.N.Y. 1988). For example, the Eastern District of Pennsylvania found that an agreement for the installation of individual gas utility meters by a creditor in each apartment was a substantial contribution to the estate because the installation allowed the debtor to reorganize by selling the individual apartments. See In re Washington Lane Assoc., 79 Bankr. 241, 244 (Bankr. E.D. Pa. 1987).

114. See McLean, 88 Bankr. at 38; see also American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119, 124 (2d Cir. 1960) ("The right to priority in the event the ... debtor in possession receives benefits ... 'is an equitable right based upon the reasonable value of the benefits conferred') (citation omitted). Another option available to courts is a middle ground or compromise. Rather than deny all expenses incurred, a court may grant certain expenses administrative priority under § 503. See supra note 5; see, e.g., In re Packard Properties, Ltd., 118 Bankr. 61, 63-64 (Bankr. N.D. Tex. 1990) (unclear how certain charges for supplies, contingencies and professional services benefited the estate, but sufficient evidence to support reimbursement for insurance, utilities, landscape maintenance and taxes); In re Moore, 109 Bankr. 777, 780 (Bankr. E.D. Tenn. 1989) ("court has broad discretion to determine whether a claim for an administrative expense is, in actuality, an administrative expense").

In addition, applicants for compensation have argued that their opposition to various pre- and post-petition agreements and plans of reorganization, their cooperation with trustees and receivers, and their assistance locating various holders have provided a benefit to the estate, and thus have made a substantial contribution. See, e.g., In re White Motor Credit Corp., 50 Bankr. 885, 908 (Bankr. N.D. Ohio 1985) (indenture trustee's beneficial contributions included developing consensual plan, assisting in compromise, and aiding in litigation strategies); In re Med Gen., Inc., 17 Bankr. 13, 14 (Bankr. D. Minn. 1981) (pre-petition activity resulted in beneficial results); see also Kelley Drye & Warren's Brief for Appellant at 13, 38-41, Manufacturers Hanover Trust Co. v. Bartsh (In re Flight Transp. Corp. Sec. Litig.), 874 F.2d 576 (8th Cir. 1989) (No. 87-5414) (appellant argued, unsuccessfully, that indenture trustees who fulfill fiduciary duties under Trust Indenture Act have provided a benefit and made a substantial contribution within the meaning of § 503).
assured of payment or they will not participate in the reorganization.\textsuperscript{115} Thus, winding up an estate's affairs may be considered a benefit.

This lack of uniformity in the application of the benefit-to-the-estate test to such disparate concerns as equity powers, pre-petition allowances and definitions of what constitutes a benefit renders the test nearly as meaningless as the term "substantial," which the present-day benefit-to-the-estate test is designed to clarify.

Despite its widespread use, the benefit-to-the-estate test is defective due to the many contrary meanings that courts attach to the term "benefit." Some courts simply require a benefit to the estate, while others require a demonstrable\textsuperscript{116} or a tangible\textsuperscript{117} benefit. Thus, courts have found many different types of conduct to be beneficial to an estate.

### III. Other Tests

As a result of the emphasis placed on different factors,\textsuperscript{118} courts have developed different and often contradictory tests\textsuperscript{119} to determine whether indenture trustees have made a substantial contribution to a reorganization. Significantly, many of these tests are applied only by the court creating the test and often only to the case at bar.\textsuperscript{120} This failure to proffer an adequate basis for judging a Section 503 application provides little guidance to the would-be applicant.

Most standards developed to assess whether an applicant has made a substantial contribution are based on the benefit-to-the-estate test and Section 503's legislative history. Some courts have modified the benefit-to-the-estate test\textsuperscript{121} by establishing threshold inquiries,\textsuperscript{122} developing


\textsuperscript{116} See infra notes 134-145 and accompanying text.

\textsuperscript{117} See infra notes 146-148 and accompanying text.

\textsuperscript{118} Such factors include: degree of significance of services, perceived congressional priorities, impact of conduct, type of bankruptcy proceeding, impact of decision on estate or applicant, first hand knowledge of the court, recommendations by other bankruptcy participants, pre-petition or post-petition expenses, individual member or committee expense, duplication or nonduplication of services, reasonableness of expense, degree of expertise, imaginative assistance, and judicial interpretation of § 503. See, e.g., \textit{In re George Worthington Co.}, 913 F.2d 316, 321-22 (6th Cir.) (no basis for creditor's committee reimbursement), reh'g granted, vacated, 921 F.2d 635 (6th Cir. 1990); Iannotti v. Manufacturers Hanover Trust Co. (\textit{In re New York, N. H. & H. R.R.}), 567 F.2d 166, 179 (2d Cir.) (creditors' assistance was imaginative), \textit{cert. denied}, 434 U.S. 833 (1977); \textit{In re 9085 E. Mineral Office Bldg., Ltd.}, 119 Bankr. 246, 249 (Bankr. D. Colo. 1990) (testimony of disinterested party has proven decisive); \textit{In re Philadelphia Mortgage Trust}, 117 Bankr. 820, 827 (Bankr. E.D. Pa. 1990) (consideration of congressional intent); \textit{In re D'Lites of Am., Inc.}, 108 Bankr. 352, 356 (Bankr. N.D. Ga. 1989) (applicant must prove significant benefit); \textit{In re Baldwin-United Corp.}, 79 Bankr. 321, 338 (Bankr. S.D. Ohio 1987) (consideration of type of benefit conferred and whether services were duplicative).

\textsuperscript{119} See \textit{supra} note 8 and accompanying text.

\textsuperscript{120} For example, the Fifth Circuit is the only court to apply the foster-and-enhance test in the context of an application by an indenture trustee. \textit{See infra} notes 156-160 and accompanying text.

\textsuperscript{121} Both the actual-direct-and-demonstrable-benefit and the tangible-benefit tests are refinements of the benefit-to-the-estate tests.
elaborate terminology to substitute for an apparent lack of legislative guidance,\textsuperscript{123} using judicial discretion,\textsuperscript{124} weighing the respective costs,\textsuperscript{125} or acknowledging Section 77B of the Bankruptcy Act as a foundation for decision.\textsuperscript{126} Many of these other tests, including the actual-direct-and-demonstrable-benefit and tangible-benefit tests, are in essence mere matters of degree, refinements or permutations of the benefit-to-the-estate test. Still other tests are judicially created with no grounding in the benefit-to-the-estate test. For example, the but-for test, and to a lesser extent the foster-and-enhance-rather-than-retard-or-interrupt-the-reorganization-process test, appear to stem from innovation and whim, rather than from congressional guidance. Courts do, however, agree on certain limited matters.\textsuperscript{127}

A. Significance Test

Despite the lack of textual coherence\textsuperscript{128} between the Chandler Act and the Bankruptcy Code, Section 503's substantial contribution test represents the dividing line between services that are compensable as administrative claims and those that are not.\textsuperscript{129} Some courts grant applications for reimbursement only when the claimant's services reach a significant level.\textsuperscript{130} The use of the significance test parallels the benefit-to-the-estate test: only conduct that produces tangible benefits\textsuperscript{131} or promotes the reorganization process is compensable. Still other courts use this significance test as a threshold measure to assess whether further inquiry is

\begin{itemize}
\item \textsuperscript{122} See infra notes 130-132 and accompanying text.
\item \textsuperscript{123} See infra note 152 and accompanying text. The foster-and-enhance-rather-than-retard-or-interrupt-the-reorganization-process test offers as little guidance to the would-be applicant as the phrase "substantial contribution." The tangible-benefit test, however, at least offers a more succinct standard—materiality.
\item \textsuperscript{124} See infra notes 143-144 and accompanying text.
\item \textsuperscript{125} Courts consider both human and monetary costs. See, e.g., In re Cutler Mfg. Corp., 95 Bankr. 230, 232 (Bankr. M.D. Fla. 1989) (questioning fiduciary duty of self-interested directors); Roberts v. Petroleum World, Inc. (Ex parte Roberts), 93 Bankr. 442, 445 (D.S.C. 1988) (claimant's efforts may have resulted in additional $75,000 to unsecured creditors); In re Pacific Homes, 20 Bankr. 729, 737 (Bankr. C.D. Cal. 1982) (recognizing significant human cost in retirement home reorganization).
\item \textsuperscript{126} See, e.g., Christian Life Center Litig. Defense Center v. Silva (In re Christian Life Center), 821 F.2d 1370, 1373 (9th Cir. 1987) ("The principal test of substantial contribution under the 1898 Act was the extent of benefit to the estate, and the same test applies to claims under comparable section 503(b)(3)(D)"); In re Baldwin-United Corp., 79 Bankr. 321, 337 (Bankr. S.D. Ohio 1987) ("The established rule under the Bankruptcy Act of 1898 was . . . only services actually rendered in preparing, filing and prosecuting an involuntary petition were deemed reimbursable").
\item \textsuperscript{127} See infra note 163 and accompanying text.
\item \textsuperscript{128} See supra notes 90-91 and accompanying text.
\item \textsuperscript{129} See Manufacturers Hanover Trust Co. v. Bartsh (In re Flight Transp. Corp. Sec. Litig.), 874 F.2d 576, 582 (8th Cir. 1989).
\item \textsuperscript{130} Significant has been defined as "[s]omething more than minimal assistance to the estate . . . ." In re 9085 E. Mineral Office Bldg., Ltd., 119 Bankr. 246, 253 (Bankr. D. Colo. 1990); see also In re D'Lites of Am., Inc., 108 Bankr. 352, 356 (Bankr. N.D. Ga. 1989) (applicant must prove both significant and tangible benefits).
\item \textsuperscript{131} See D'Lites, 108 Bankr. at 356.
\end{itemize}
required. Only when services reach a significant level will courts using the test in this manner proceed to evaluate the claimant’s activity as a whole. Application of this loose framework continues today and takes many forms.

B. Actual-Direct-and-Demonstrable-Benefit Test

Few cases have investigated the special relationship between the Bankruptcy Code, the Trust Indenture Act and their legislative histories. Most courts that have examined this relationship have applied the actual-direct-and-demonstrable-benefit test. Even those that have acknowledged both a statutory fiduciary duty and a contractual duty on the part of an indenture trustee nonetheless require “an actual and demonstrable benefit to the debtor’s estate.” Most courts have rejected the argument that indenture trustees need not make a substantial contribution to the reorganization in order to receive compensation:

There is no distinction between indenture trustees and other applicants for compensation under § 503, nor any conflict in the statutory language of the Bankruptcy Act and the Trust Indenture Act. The Trust Indenture Act sets forth duties and responsibilities of the indenture trustee and has no bearing on the decision by Congress via § 503 to compensate those particular indenture trustees which substantially contribute to the bankruptcy proceeding.

In addition, duties that are routine or of no quantitative value to the estate are not compensable. Courts routinely require that the applicant prove that its efforts conferred an “actual, direct and demonstrable benefit upon the estate” before compensation is awarded.

133. See supra note 59 and accompanying text.
135. In re Buttes Gas & Oil Co., 112 Bankr. 191, 196 (Bankr. S.D. Tex. 1989); see also In re George Worthington Co., 913 F.2d 316, 325 (6th Cir.) (statutory language is clear requiring substantial contribution by indenture trustees), rev’d granted, vacated, 921 F.2d 635 (6th Cir. 1990); In re Revere Copper and Brass, Inc., 60 Bankr. 892, 895 (Bankr. S.D.N.Y. 1986) (substantial contribution test is independent of any contractual right to reimbursement contained in an indenture).
One district court in the First Circuit, however, required "a measurable and valuable benefit to the Debtor's estate" before it would award compensation to an indenture trustee. This apparent refinement of the test seems to be simply another articulation of the same standard. This court found that the claimant's "watchdog services... perceptibly benefited the entire estate," and therefore aided the administration of the estate.

An example of the nuances between the various benefit tests is the application of the actual-direct-and-demonstrable-benefit test to the question of whether Section 503(b)(3)(D) authorizes reimbursement of either the expenses of a creditors' committee or of the expenses of an individual member of such a committee. Following this test, one court denied...
compensation for failure of the applicant, an individual creditor, to "demonstrate that its services benefited the debtor's estate."141 Like courts employing other benefit tests,142 courts applying this test have yet to define an actual, direct and demonstrable benefit. The definitional requirements of the test suffer from imprecision. While offering somewhat more guidance than the benefit-to-the-estate test by describing the type of benefit required, the actual-direct-and-demonstrable-benefit test fails to offer the would-be applicant certainty of result.

Finally, the role of judicial discretion complicates any attempt at a universal view of an actual, direct or demonstrable benefit. The more conservative view143 declines to interpret Section 503(b) broadly, and refuses to grant an application for allowance, "despite the very substantial human benefit effected"144 when an applicant fails to demonstrate a direct benefit to the estate.145

C. Tangible-Benefit Test

A somewhat more widely used test or definition of substantial contribution requires a contribution that "provides tangible benefits to the bankruptcy estate and to other unsecured creditors."146 While similar to

of § 503, however, "the proper interpretation is allowance of reimbursement ...." Id. at 326 (Jones, J. dissenting).

141. In re Moore, 109 Bankr. 777, 784 (Bankr. E.D. Tenn. 1989). "Actual value or benefit to the estate and not a 'reasonable value' should be the appropriate measure of compensation." Id. at 783. In addition, the court stated that "[r]ather than allow an administrative expense claim where the claimant shows a benefit to the estate, [a more conservative] approach disallows such a claim where no benefit to the estate is established by the movant." Id. at 784.

142. Other benefit tests include the benefit-to-the-estate test and the tangible-benefit test.

143. Applicants often interpret § 503(b) creatively in order to circumvent other Bankruptcy Code provisions. Courts routinely impose limits on these creative interpretations. For example, the District Court for the Northern District of Georgia rejected an attempt to circumvent the requirements of § 327(a) of title 11 of the United States Code, which prohibits conflicts of interest among representatives of a debtor's estate through the use of a § 503(b) claim. See In re Southern Diversified Properties, Inc., 110 Bankr. 992, 995 (Bankr. N.D. Ga. 1990). The court could find "no statutory or case law authority permitting an allowance for unauthorized legal services 'as if' the law firm represented one of the entities specified in section 503(b)(3)(D)." Id. at 995. Another court stated that "Congress cannot have intended that a professional person could sidestep the specific requirements set forth and come in later and claim payment under the general provisions of § 503(b)(1)(A) ...." In re Cutler Mfg. Corp., 95 Bankr. 230, 231 (Bankr. M.D. Fla. 1989); accord In re Channel 2 Assoc., 88 Bankr. 351, 352 (D.N.M. 1988); see also In re Rakosi, 99 Bankr. 47, 50-51 (Bankr. S.D. Cal. 1989) (denial of fees under § 330(a), only to sanction fees under § 503(b), is contrary to intent of Bankruptcy Code).


145. See St. Mary, 97 Bankr. at 203.

the benefit-to-the-estate test, the tangible-benefit test appears more closely related to the actual-direct-and-demonstrable-benefit test because of its requirement of material benefit. This test does not rely on synonyms, however, as does the actual-direct-and-demonstrable-benefit test, and provides courts more leeway to determine what constitutes a material benefit to the estate.

Because determinations of substantial contribution must be made on a case-by-case basis, rigid requirements serve no function in such an analysis. Although one court claimed that the integrity of Section 503 can only be sustained "by strictly limiting compensation to extra ordinary creditor actions which lead directly to significant and tangible benefits," all the benefit tests are loosely based on cases decided under Section 77B of the Bankruptcy Act, and therefore should produce similar results. Any strict interpretation of Section 503 of the Bankruptcy Code would appear to contradict congressional intent and Supreme Court precedent. Instead, based on the informed discretion of the court, all reasonable services that confer a benefit should be reimbursed.

Indus., Inc. v. James A. Phillips, Inc. (In re Phillips, Inc.), 29 Bankr. 391, 394 (S.D.N.Y. 1983)). The Bankruptcy Court for the Northern District of Ohio applied this tangible-benefit test when it awarded administrative expense priority to a bank's loan, which had been used to restructure the debtor's working capital. This court found that the loan had made a substantial contribution to the estate because it had resulted in savings of up to $250,000. See Ohio Ferro, 96 Bankr. at 798; see also In re W.T. Grant Co., 85 Bankr. 250, 257 (Bankr. S.D.N.Y. 1988) (case decided under the Bankruptcy Act discussing three-factor test that includes conferring a tangible benefit on all creditors as one prong), aff'd in part, rev'd in part sub nom. United States Trust Co. v. Pardo (In re W.T. Grant), 119 Bankr. 898 (S.D.N.Y. 1990).


148. Catalina Spa, 97 Bankr. at 21. The court also mentions that compensation must be preserved for instances when involvement "fosters and enhances" the estate. See id. Thus, it appears that there is some overlap among the several tests.

149. See supra notes 45-46 and accompanying text; see also Christian Life Center Litig. Defense Comm. v. Silva (In re Christian Life Center), 821 F.2d 1370, 1373 (9th Cir. 1987) (benefit-to-the-estate was and continues to be the principal test of substantial contribution under the Bankruptcy Act and the Bankruptcy Code).

150. See supra notes 44, 51-52 and accompanying text; see also Kelly v. Robinson, 479 U.S. 36, 43 (1986) ("[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221 (1986)).

151. Compensation for any benefit conferred seems to be in keeping with the spirit of the benefit-to-the-estate test, although no court has articulated this approach to compensable services.
The foster-and-enhance-rather-than-retard-or-interrupt-the-reorganization-process test signifies a judicial reaction to the lack of congressional guidance in the statutory language of Section 503. This test created equally vague terminology\textsuperscript{152} that lacks clear definition. According to a broader, more liberal interpretation of the role of judicial discretion, courts may employ notions of equity, fairness and judicial independence to interpret the text of Section 503 and develop standards to judge or justify questionable or controversial fee and expense awards or to support a claim of fostering and enhancing the process of reorganization.\textsuperscript{153} A more conservative approach would limit a court's reasonable discretion to the "well-established construction of the statute."\textsuperscript{154} This view reasons that Congress intended to limit judicial discretion in the interpretation of Section 503 as compared with the more liberal interpretation of its predecessors.\textsuperscript{155}

In \textit{In re Consolidated Bancshares, Inc.},\textsuperscript{156} a frequently cited case, the Fifth Circuit defined services that substantially contribute to a bankruptcy case as those that "foster and enhance, rather than retard or interrupt."\textsuperscript{157} In \textit{In re Baldwin-United Corp.},\textsuperscript{158} the court added to the test by

\begin{itemize}
  \item For example, terms such as "foster," "enhance," "demonstrable," "indirect," "incidental," "minimal" and "benefit" offer little guidance to an applicant. See, e.g., Pierson & Gaylen v. Creel & Atwood (\textit{In re Consolidated Bancshares, Inc.}), 785 F.2d 1249, 1253 (5th Cir. 1986) (foster and enhance); \textit{In re} 9085 E. Mineral Office Bldg., Ltd., 119 Bankr. 246, 251 (Bankr. D. Colo. 1990) (incidental); \textit{In re Texaco, Inc.}, 90 Bankr. 622, 630 (Bankr. S.D.N.Y. 1988) (demonstrable); \textit{In re Baldwin-United Corp.}, 79 Bankr. 321, 341 (Bankr. S.D. Ohio 1987) (indirect benefit).
  \item In determining whether to compensate a debtor's president for his efforts, one court stated that "it would be inequitable and unfair to deny him any compensation from the debtor's estate" even though the Bankruptcy Code does not explicitly authorize his compensation. \textit{In re} Glade Springs, Inc., 77 Bankr. 184, 196 (Bankr. E.D. Tenn.), vacated by, 826 F.2d 440 (6th Cir. 1987). The \textit{Glade Springs} court discussed fostering and enhancing in the context of § 503 as one possible basis for compensation. See id. at 194; see also \textit{In re K-FAB, Inc.}, 118 Bankr. 240, 242 (M.D. Pa. 1990) (fee determination based on "overall fairness and reasonableness").
  \item Courts have broad discretion to determine the allowance of attorneys' fees and "that exercise of discretion is not to be interfered with absent a showing that it has been abused." Roberts v. Petroleum World, Inc. (\textit{Ex parte Roberts}), 93 Bankr. 442, 445 (D.S.C. 1988) (quoting \textit{Jefferson v. Miss. Gulf Coast YMCA, Inc.}, 73 Bankr. 179, 183 (S.D. Miss. 1986)). A court's evaluation of services rendered during a Chapter XI proceeding along with services provided during a Chapter X proceeding is one example of broad judicial discretion. See \textit{In re Continental Inv. Corp.}, 28 Bankr. 972, 978 (D. Mass. 1982). The court there deemed the Chapter X proceedings to relate back to the beginning of the bankruptcy and thus found the services to be compensable where they ordinarily would not have been. See id. at 978.
  \item See id.
  \item 785 F.2d 1249 (5th Cir. 1986).
  \item Pierson & Gaylen v. Creel & Atwood (\textit{In re Consolidated Bancshares, Inc.}), 785 F.2d 1249, 1253 (5th Cir. 1986) (quoting \textit{In re White Motor Credit Corp.}, 50 Bankr. 885,
considering the following factors, which seem to echo other tests: (1) whether the services were rendered "solely to benefit the client, or to benefit all of the parties to the case;" (2) whether the services provided "a direct, significant and demonstrable benefit to the estates;" and (3) whether the services rendered duplicated "services rendered by attorneys for the committee, the committees themselves, or the debtor and its attorneys." The court concluded its foster-and-enhance test discussion by stating that "[u]ltimately, what constitutes a substantial contribution must be left to the informed discretion of the Court based upon the time sheets and other relevant evidence . . . ." Although it appears that the foster-and-enhance test begins with some vague notions of significant conduct, it actually rests almost entirely on the court's discretion.

**E. But-For Test**

Judicial reactions to the lack of consensus regarding the characterization of substantial contribution have varied. Some courts have resorted to definitional exercises to resolve the impasse. For example, one court seems to have borrowed from tort law and created a but-for test: "involvement takes the form of constructive contributions in key reorganizational aspects, when but for the role of the creditor, the movement towards final reorganization would have been substantially diminished." Unfortunately, the but-for test illustrates the lack of unity in the standards and creates a possibility of unjust results because of the emphasis on different factors. Moreover, only one court has used this test.

**F. Uniform Approaches—What Courts Have In Common**

Although courts apply different tests in determining what conduct is to be reimbursed, courts share certain fundamental views. With uniformity, courts limit compensation when there has been obvious, unnecessary duplication of efforts. This limitation is based on decisions
rendered under the Bankruptcy Act and continues under the Bankruptcy Code. Courts' refusal to reimburse applicants for duplicative services assures that the estate is not unnecessarily depleted of its limited resources. In addition, this policy promotes efficiency and communication between members of the bankruptcy proceeding.

Like the near universal rejection of compensation for duplicative services, courts also agree that each applicant bears "the burden of proof to establish the beneficence and propriety of his services..." Noting the difficulty in evaluating services, courts accord the bankruptcy judge "substantial latitude... in the drawing process because he is best able to observe and evaluate..." Adopting this deferential attitude, the

See, e.g., In re Cutler Mfg. Corp., 95 BAnkr. 230, 231 (Bankr. M.D. Fla. 1989) (claimant was not disinterested party and therefore "§ 503 is an inappropriate mechanism" for compensation); In re D.W.G.K. Restaurants, Inc., 84 BAnkr. 684, 689 (Bankr. S.D. Cal. 1988) (self-interested and duplicative services do not make a tangible benefit); In re Boston and Me. Corp., 62 BAnkr. 199, 203 (D. Mass. 1986) (services "must not be merely duplicative").


165. See, e.g., In re Buttes Gas & Oil Co., 112 BAnkr. 191, 195 (Bankr. S.D. Tex. 1989) (claimant failed to satisfy necessary showing that its contribution was not duplicative); In re Wonder Corp. of Am., 72 BAnkr. 580, 585 (Bankr. D. Conn. 1987) (successor counsel performed valuable services with minimal duplication and avoided costly overlap).

166. The First Circuit recognized the efficiency of consulting and conferring with other participants in the bankruptcy proceedings which avoids duplication of services between the claimants. See In re Boston and Me. Corp., 62 BAnkr. 199, 201 n.5 (D. Mass. 1986); see also In re Meade Land and Dev. Co., 527 F.2d 280, 285 (3d Cir. 1975) ("the estate must not be depleted through a possible duplication of [services]"); In re Cascade Oil Co., Inc., 51 BAnkr. 877, 881 (Bankr. D. Kan. 1985) ("policy of economy in the administration of bankruptcy cases"). Nonduplication of services is still of concern in § 503 analyses. See, e.g., Sakowitz, Inc. v. Chase Bank Int'l (In re Sakowitz, Inc.), 110 BAnkr. 268, 272 (Bankr. S.D. Tex. 1989) ("duplicative services may be taken into account in appraising the extent of value of the services reasonably necessary"); In re Wonder Corp. of Am., 72 BAnkr. 580, 585 (Bankr. D. Conn. 1987) (commending valuable services with minimal duplication); In re Windsor Communications Group, Inc., 54 Bankr. 504, 510 (Bankr. E.D. Pa. 1985) (applicant "must actively participate in the reorganization process in a manner which is not duplicative").

167. "Thus, Congress focused on the need for flexibility and speed and economy in order to obtain optimum results in reorganization cases." 5 Collier, supra note 6, § 1100.01, at 1100-14.

168. In re Yale Express Sys., Inc., 366 F. Supp. 1376, 1381 (S.D.N.Y. 1973) (citing Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268 (1941)). Woods was decided under § 77B of the Bankruptcy Act and thus a more stringent standard was employed. See Woods, 312 U.S. at 268. This has remained the standard under § 503. See, e.g., Pierson & Gaylen v. Creel & Atwood (In re Consolidated Bancshares, Inc.), 785 F.2d 1249, 1257 (5th Cir. 1986) ("burden on the applicant to establish the value of his services"); In re Packard Properties, Ltd., 118 BAnkr. 61, 63 (Bankr. N.D. Tex. 1990) (applicant carries burden of proof throughout proceeding); In re D.W.G.K. Restaurants, Inc., 84 BAnkr. 684, 689 (Bankr. S.D. Cal. 1988) (burden on party making administrative claim).

169. In re Meade Land and Dev. Co., 527 F.2d 280, 285 (3d Cir. 1975); see also In re Pacific Homes, 20 BAnkr. 729, 737 (Bankr. C.D. Cal. 1982) (court refusing to place monetary value on the lives of 1,800 elderly persons).
court “can reverse a fee award only if [it] find[s] the District Court abused its discretion.”

Some courts have been reluctant to deny applicants recovery for their services rendered and expenses incurred. One alternative has been to deny reimbursement under Section 503(b), but then grant it on a contractual theory. “[E]ntitlement to reimbursement for expenses incurred and services rendered under Code § 503(b)(3), (4) and (5) does not depend on, and is independent of, any contractual entitlement to reimbursement.”

Despite these few areas of agreement, the absence of a uniform judicial approach to an indenture trustee’s application for reimbursement under Section 503 results in highly uncertain outcomes. While one court might engage in a liberal benefit analysis using its judicial discretion, another court might reject an application based on the same factual circumstances if it decides that the indenture trustee did not confer a demonstrable benefit on the entire estate. Courts define benefits differently, exercise discretion differently and interpret similar facts differently. Without a framework within which to analyze Section 503 applications, confusion and inconsistent results will continue.

IV. PROPOSED GUIDELINES

All applications for reimbursement for services and expenses, regardless of the applicant’s status, must be analyzed pursuant to Section 503(b) of the Bankruptcy Code. In order to understand the unique situation of indenture trustees, it is useful to distinguish between applications made by other applicants and those made by indenture trustees fulfilling their prescribed duties pursuant to the Trust Indenture Act of 1939.

The interaction between the Bankruptcy Code and the Trust Indenture Act is historic; Congress considered both the Trust Indenture Act and the predecessors to the Bankruptcy Code at a time when the SEC Report and its recommendations were available. Trustees acting under the “prudent-man” standard of the Trust Indenture Act must first and foremost protect debenture holders. No other potential applicant under

173. Part 6 of the SEC Report, entitled “Trustees Under Indentures,” was submitted to Congress in 1936 and therefore was available when Congress enacted both the Chandler Act and the Trust Indenture Act. See also H.R. Rep. No. 1016, 76th Cong., 1st Sess. 5, 23 (1939) (implicitly acknowledging influence of Bankruptcy Act and any amendments thereto on Trust Indenture Bill and also interaction between SEC Report and Trust Indenture bill); supra notes 48 and 53 (discussing impact of SEC Report).
Section 503(b) has statutorily prescribed duties. If indenture trustees are to be compensated for their services and those of their attorneys, they must contribute to the resolution of the bankruptcy in the absence of any contractual provision to that effect. By reviewing "substantial contribution" decisions, criteria can be assembled on which to build a fair and legitimate framework for deciding whether an indenture trustee's contribution justifies compensation.

* No distinction should be made between situations in which the indenture trustee confers a benefit on the entire estate and in which the indenture trustee confers a benefit only on one party to the bankruptcy, such as a creditor or a debenture holder. Any benefit conferred will aid the larger process of reorganization. Thus, even in situations in which the trustee provides a benefit to a party whose interests conflict with those of the estate, the indenture trustee should be reimbursed.

* The reorganization process is designed to be just and fair. A policy geared toward awarding an estate more than it is rightfully entitled to defeats Congress' goal of justice and deprives other parties of their rightful positions. The indenture trustee's actions, no matter whom they benefit, advance the aims of the reorganization—to make the estate viable and to put all parties to the bankruptcy in their rightful positions. Thus, the presumption should be that indenture trustee expenses are administrative priorities.

* Indenture trustees are required to act in accordance with the Trust

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175. See supra notes 38 and 86.
176. Perhaps trust indentures should contain provisions providing reimbursement for services and expenses and even attorneys' fees in the event of a bankruptcy proceeding.
177. Since the enactment of § 77 of the Bankruptcy Act in 1933, consummation of a plan of reorganization has not been a precondition to reimbursement. See supra notes 33-34 and accompanying text.
179. "[T]he purpose of according priority in these cases is fulfillment of the equitable principle of preventing unjust enrichment of the debtor's estate rather than the compensation of the creditor for the loss to him." American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119, 126 (2d Cir. 1960).
180. "[T]he twin policy goals of . . . reorganization, [are] rehabilitation of a going enterprise, and fair and equitable distribution to creditors." H.R. Rep. No. 686, 94th Cong., 1st Sess. 23 (1975); see supra notes 76-77 and accompanying text.
Indenture Act’s prudent-man standard. Applications by indenture trustees for reimbursement for services rendered and expenses incurred must also be analyzed in light of this criterion. If the application satisfies the prudent-man standard, reimbursement should be awarded.

* The strict standard developed by certain courts allowing reimbursement only for services that confer an actual, direct and demonstrable benefit or tangible benefit on the estate should be discarded as contrary to Section 503(b)’s legislative history and to the recommendations of the SEC in its SEC Report. Instead, conduct that enhances the reorganization process should be compensable.

* Services that provide a benefit, whether direct, indirect or incidental, should be compensable. Valuation of these services should be based on the cost of securing comparable services in the marketplace, the applicant’s normal fees for like services and recommendations from other parties involved in the reorganization.

* Finally, courts, employing their equity powers, should be encouraged to look beyond time and expense reports and grant or deny applications based on their informed discretion in light of the appli-

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181. See 15 U.S.C. § 77ooo (c) (1988); see also supra note 12 and accompanying text (discussing Trust Indenture Act requirements to protect investors).
182. See supra notes 134-145 and accompanying text.
183. See supra notes 146-148 and accompanying text.
184. The Supreme Court granted compensation to those participants who rendered a benefit to the estate; the Court required nothing more. See supra note 45 and accompanying text; see also supra note 53 and accompanying text (SEC proposals that were to influence the Chandler Act).
185. By borrowing from both the actual-direct-and-demonstrable-benefit test, the tangible-benefit test, and the foster-and-enhance-rather-than-retard-or-interrupt-the-reorganization-process test, a more consistent standard of conduct of assisting in the reorganization-process with a minimum of duplication can be achieved. See supra notes 134-48, 152-60 and accompanying text. Conduct considered to enhance the reorganization process might include objecting to the disposition of certain estate assets, negotiating various agreements necessary for the estate to operate or to settle, investigating the reasons for the debtor’s collapse, assisting in trial preparation, attending creditor committee meetings, or examining the debtor’s affairs. The Bankruptcy Code is structured to encourage participation of creditors in the reorganization process. See, e.g., In re General Oil Distrib., 51 Bankr. 794, 805 (Bankr. E.D.N.Y. 1985) (policy aimed at “promot[ing] meaningful creditor participation”); In re Calumet Realty Co., 34 Bankr. 922, 926 (Bankr. E.D. Pa. 1983) (encourage creditor action). “It is in this context that knowledgeable creditors should take an active role in determining the course that the reorganization case should take. . . .” In re Automotive Nat’l Brands, Inc., 65 Bankr. 412, 414 (Bankr. W.D. Pa. 1986) (quoting Toy & Sports Warehouse, Inc., 38 Bankr. 646, 648 (Bankr. S.D.N.Y. 1984)).
186. For example, one court ignored a rigorous benefit-to-the-estate test and based reimbursement on the moral and legal nature of the obligation to the residents of a nursing home. See In re Pacific Homes, 20 Bankr. 729, 750 (Bankr. C.D. Cal. 1982).
187. See supra note 74.
188. See, e.g., In re 9085 E. Mineral Office Bldg., Ltd., 119 Bankr. 246, 249 (Bankr. D. Colo. 1990) (testimony of disinterested party has proven decisive); In re Kaiser Steel Corp., 74 Bankr. 885, 887 (Bankr. D. Colo. 1987) (court considers objections to claimant’s application for reimbursement).
189. See In re White Motor Credit Corp., 50 Bankr. 885, 908 (Bankr. N.D. Ohio
V. CONCLUSION

Currently, indenture trustees face little prospect of recouping their expenses for services provided in a bankruptcy proceeding. As a result, indenture trustees are unlikely to perform valuable services that, at the very least, provide the estate with an incidental benefit. If this situation continues, Congress will be faced with a situation similar to that which existed at the time of the enactment of the Chandler Act in 1938. Today's allowance decisions discourage participation by those entities with minor interests in bankrupt estates, a situation that the Chandler Act, and later the Bankruptcy Code, was meant to cure.

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1985). Court recognized the indenture trustee's contributions, which included developing consensual plan, assisting in compromise, and aiding in litigation strategies, as beneficial and compensable based on its intense participation in the proceedings. See id.

Bankruptcy proceedings often last several years. During the duration of the case, courts develop first-hand knowledge of the participants' contribution or lack thereof. See, e.g., Iannotti v. Manufacturers Hanover Trust Co. (In re New York, N. H. & H. R.R.), 567 F.2d 166, 168 (2d Cir.) (judge presided over case for nearly 16 years), cert. denied, 434 U.S. 833 (1977); In re Yale Express Sys., Inc., 366 F. Supp. 1376, 1381-82 (S.D.N.Y. 1973) (court has first-hand knowledge of applicants' work over seven years); In re Penn-Dixie Indus., Inc., 18 Bankr. 834, 836 (Bankr. S.D.N.Y. 1982) (court had almost daily involvement for two years).