

---

# *SIMON, GALASSO & FRANTZ, PLC*

## *BANKING UPDATE*

---

A Newsletter for Banking Clients of Simon Galasso & Frantz, PLC

November, 2003

---

## RECOVERY OF ACTUAL ATTORNEY FEES!

---

By Frank Simon

Most loan documents provide for the recovery of costs and fees, including attorney fees, in enforcing the lender's remedies after default. Many form documents will actually specify that the lender is entitled to reasonable attorney fees. In light of a recent Michigan Court of Appeals opinion, lenders may wish to look again at the attorney fee provisions in their documents.

On July 24, 2003, the Michigan Court of Appeals, in the *Estate of Cargas v Bednarsh*, Case No. 239421, Oakland County Circuit Court Case No. 01-007603-AV, ruled that where a contract provides for the recovery of "actual attorney fees" the court will enforce the contract language as it is written. In a precise and straightforward manner, the court went on to state that if the contract provides for the recovery of "attorney fees" or "legal fees," the court will construe that language to mean recovery of reasonable attorney fees only.

In this case, plaintiffs sued in the district court and the district court awarded plaintiffs reasonable attorney fees of \$5,000 where the contract called for the recovery of "actual attorney fees." The circuit court reversed the district court ruling and awarded actual attorney fees of approximately \$43,000 to the plaintiff.

The question of whether attorneys fees are reasonable is often contentious. Debtors who force a lender to resort to litigation will frequently take any

steps necessary to delay or frustrate the proceedings, resulting in additional time and expense for the lender and its counsel. A judge looking at the final statement may compare it to the amount of the debt rather than the effort expended and conclude that the hours spent or fees charged were unreasonable. As a result, it is our experience that in the majority of cases where the reasonableness of fees are contested, lenders recover less than their actual attorneys fees. If the *Cargas* case holds up on appeal, however, this result may be avoided by appropriate language in the loan or workout documents.

*"where a contract provides for the recovery of 'actual attorney fees' the court will enforce the contract language as it is written"*

There is a lesson here. LENDERS SHOULD NOW CONSIDER INCLUDING PLAIN AND UNAMBIGUOUS LANGUAGE IN ALL LOAN AND WORKOUT DOCUMENTS FOR THE RECOVERY OF "ACTUAL ATTOR-

NEY FEES." If the debtor accepts the language in the loan documents, a court may be willing to award actual attorney fees even if the fees are considered unreasonable or disproportionate to the value of the case. However, since this case is unpublished by the Court of Appeals as of this writing, *Estate of Cargas v Bednarsh* is only persuasive and not precedent.

Should you have a question relating to this court opinion or the right to attorney fees or should you wish to receive a copy of the opinion, please call Frank Simon or one of the other legal professionals at Simon, Galasso & Frantz, PLC.



**Frank R. Simon**

**Position:** Managing Member; Financial Institution/Litigation Team Leader.

**Admitted to bar,** 1996, Michigan and U.S. District Court, Eastern District of Michigan, U.S. District Court, Western District of Michigan.

**Education:** Graduate Degree in Banking, Graduate School of Banking, University of Wisconsin (8/2003); University of Detroit Mercy School of Law (J.D., 1995). Managing Editor, Michigan Business Law Journal, 1994-1995, University of Michigan (B.A., with distinction, 1991).

**Member:** State Bar of Michigan. American Bankruptcy Institute

**Practice Areas:** Commercial Litigation; Bank Foreclosure and Collection; Creditors Rights; Banking Litigation; Uniform Commercial Code (UCC); Insolvency Proceedings; Workouts; Loan Documentation, and Negotiable Instrument Law (check cases). Mr. Simon has practiced before nearly all of the district and circuit courts in Southeastern Michigan. He is a member of the State Bar of Michigan. He is also a member of the Michigan Bankers Association, the Michigan Association of Community Bankers, and Commercial Law League of America.

**Author:** "The Unique Approach to Bank Litigation, Foreclosures, Collections, and Insolvencies—Gets Results", the Michigan Bankers Magazine.

## **Simon, Galasso & Frantz, PLC**

<http://www.sgfattorneys.com>

2401 W. Big Beaver Road

Suite 520

Troy, MI 48084

Phone: (248) 649-1400

Fax: (248) 649-9949

**RESULTS with a cost-effective approach!**

*This publication is designed to familiarize the reader with matters of general interest relating to commercial finance, banking law and litigation. It is distributed for informational purposes and is not intended to constitute legal advice or solicitation or to create an attorney-client relationship. Legal counsel should be consulted with regard to specific application of the information on a case-by case basis. Simon, Galasso and Frantz, PLC assumes no liability whatsoever in connection with the use of the information contained in the publication. ©2003*