

Justices Project Uncertainty On Bankruptcy Meta-Fees

By **Andrew Scurria**

Law360, New York (February 25, 2015, 7:51 PM ET) -- U.S. Supreme Court justices considering whether bankruptcy professionals should be reimbursed for defending fee applications appeared divided Wednesday on whether allowing so-called meta-fees was necessary to ensure that restructuring lawyers aren't unfairly penalized for a step necessary to getting paid.

Depending on how the nation's top justices rule on Baker Botts LLP's quest for \$5 million spent securing core fee applications in the Asarco LLC bankruptcy, law firms may have to swallow the cost of the fee disputes that pop up in corporate bankruptcies. The justices heard oral arguments on whether the coal miner must cover Baker Botts' costs of defending itself in a drawn-out billing argument.

Law firms have mostly avoided the costs associated with fee disputes despite the pay-your-own-freight rule that governs most of the U.S. legal system. But some courts, including the Fifth Circuit, have held that defending fees does not count as a "service" eligible for reimbursement under Section 330(a) of the U.S. Bankruptcy Code.

On one side of the debate are legal associations, ex-judges and trade groups saying that prohibiting reimbursements for fee disputes would subject lawyers to meritless fee objections. On the other side are critics who say that lawyers should not win fees for work that, if successful, diminishes the funds available for creditors.

Adopting Asarco's position risks encouraging more tactical fee litigation, but the justices also appeared uncomfortable with the idea that all such fees are automatically compensable, according to Mayer Brown LLP partner and Supreme Court practitioner Brian Netter. Unlike other areas of the law, bankruptcy practitioners must win court approval for every penny they receive and can face fee objections from parties other than their clients.

The Obama administration has offered a middle ground, taking the position that supports Baker Botts but would allow meta-fees only when those payments are necessary to keep the recipient compensated at a reasonable rate.

"There were a fair number of questions designed to get at what's reasonable and what's going to achieve that objective," Netter said. "There were a bunch of different paths to get to the same outcome, which is compensating bankruptcy lawyers for what's reasonable."

The brawl traces back to Baker Botts' \$124 million fee award for its representation of the mining giant during what was considered a wildly successful Chapter 11. In an odd twist, the one objecting to Baker Botts' meta-fees is the reorganized Asarco, taking aim at the lawyers credited with saving it from ruin. The firm billed the \$5 million cost of defending earlier fee applications, which Asarco refused to pay.

The Fifth Circuit upheld the firm's base fee in April but would not award the additional cost of defending the application, saying that Section 330(a) of the U.S. Bankruptcy Code "does not authorize compensation for the costs counsel or professionals bear to defend their fee applications."

Asarco's lawyer Jeffrey L. Oldham of Bracewell & Giuliani LLP told the high court justices that lawyers can get paid for work that is necessary for the administration of the case and likely to benefit the debtor's estate. But defending a fee application, he said, does not meet either specification since it necessarily depletes estate assets.

"When professionals have hired their own lawyers or happen to be lawyers and are litigating adverse to the estate ... they're not on the same team anymore," Oldham said.

Clearly unconvinced, Justice Elena Kagan repeatedly asked why the expense of defending a fee application should not be considered a reasonable part of an attorney's total compensation package and fall within the power of bankruptcy courts to award.

"What we're trying to do is to get a reasonable rate for the services that clearly have been authorized, and the question is, what's a reasonable rate?" Justice Kagan said. "This is just an expense of your work, is having to go after the fees. So why doesn't that get into the mix too?"

Justice Sonia Sotomayor, meanwhile, made the point that defending fees involved "acting for yourself," as opposed to other compensable work that benefits the bankruptcy estate.

"There is a self-interest involved because you could just give up on the objections and walk away," Justice Sotomayor said.

"The only reason you're fighting them is because it puts more money in your pocket."

The case could turn on how closely the high court links the act of preparing a fee application with that of defending it. Lawyers can get paid for preparing an application, but comments from some on the bench — Justices Sotomayor and Anthony Kennedy in particular — suggested they would distinguish between the two.

"If Asarco's going to win, they're going to need to benefit from some kind of distinction," Netter said.

Baker Botts is represented by its own Aaron M. Streett, Evan A. Young, Omar J. Alaniz, G. Irvin Terrell and Shane Pennington.

Asarco is represented by Jeffrey L. Oldham, Bradley Jason Benoit, Bryan S. Dumesnil, Heath Aaron Novosad and Ralph D. McBride of Bracewell & Giuliani LLP.

The case is Baker Botts LLP et al. v. Asarco LLC, case number 14-103, in the U.S. Supreme Court.

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