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Lawyers React To Justices' Ruling In Baker Botts Fees Case

Law360, New York (June 15, 2015, 7:25 PM ET) -- The U.S. Supreme Court on Monday ruled that bankruptcy attorneys cannot recover money spent on defending their fee requests from challenges. Here, attorneys tell Law360 why the decision in Baker Botts LLP et al. v. Asarco LLC is significant.

Michael L. Bernstein, Arnold & Porter LLP

"Whatever the merits of the opposing statutory construction arguments made by the court and by the dissent, a practical consequence of the decision will be the one predicted by the government in its amicus brief: that fee-defense litigation, when it occurs, will dilute the compensation of bankruptcy lawyers and result in bankruptcy lawyers receiving less compensation than non-bankruptcy lawyers would receive when doing comparable work. That is, as the dissent points out, at odds with Congressional intent. It may also create an incentive for the 'tactical' use of fee objections by parties seeking to achieve other objectives in the case, which would be unfortunate. Of course, if Congress wanted to clarify that the Bankruptcy Court has the discretion to award compensation for the defense of a fee application, it would be easy to amend Section 330 to expressly so provide."

G. Eric Brunstad Jr., Dechert LLP

"The court today decided an important issue in the administration of bankruptcy matters: whether court-appointed counsel in bankruptcy cases may get their fees for defending their fee applications. ... When Congress updated the bankruptcy laws in 1978, it clearly wanted bankruptcy lawyers who represent debtors to be compensated fairly for their work, and abandoned the old idea that such lawyers should be compensated at less than market rates. Among other things, this was to help encourage skilled counsel to work in the bankruptcy area to help salvage viable business enterprises. In deciding that bankruptcy courts lack the statutory authority to approve compensation for necessary work performed in defending a fee application, the court relies heavily on its general jurisprudence in the fee-shifting area that statutes that authorize fee-shifting should be construed narrowly, and authority for the recovery of fees for defending a fee applications should ordinarily be explicit. The difficulty is that bankruptcy is a highly specialized context and reliance on general fee-shifting principles is at odds with the purpose, policy, and reality behind the supervision and award of fees in Chapter 11 cases. Unfortunately, this decision will create problems in the administration of Chapter 11 matters."

Benjamin Feder, Kelley Drye & Warren LLP

"This is not a good decision. The statutory language of Section 330(a) of the Bankruptcy Code is nowhere near as clear and unambiguous as the majority claims; the alternative reading offered by the dissent is both equally plausible and more consistent with the understanding of most bankruptcy lawyers. The requirement that fees only be allowed after a 'hearing' necessarily implicates a contested process, for

which 'reasonable compensation' should be provided. Baker Botts v. Asarco will needlessly encourage more litigation challenges to the allowance of professional fees and substantially increase overall Chapter 11 costs. This case blithely ignores the realities of large corporate bankruptcy cases and long-standing commercial practice."

Robbin L. Itkin, Liner LLP

"The Baker Botts decision has far reaching ramifications. It does not just adversely affect the ability of the debtor's bankruptcy lawyers to be paid, but all professionals involved in bankruptcy cases whose fees need to be approved by the bankruptcy court, including financial consultants, accountants, creditors committee lawyers and professionals. If debtors or other parties attack the fees of these professionals, for no valid reason or an improper purpose, and the professionals prevail, there is no reason they should not be compensated for those out of pocket fees incurred. Such ability to be paid should also help promote efficient resolution of these matters and avoid unnecessary and protracted litigation."

Alisa Lacey, Stinson Leonard Street

"The Supreme Court's decision in Baker Botts demonstrates a misunderstanding of the bankruptcy system. Baker Botts, et al., represented the debtor in possession. That entity is the 'bankruptcy estate's administrator' as that term is used by the Supreme Court. Post plan confirmation, Asarco was no longer the debtor in possession, but became what is commonly known as the 'reorganized debtor' controlled by Asarco's parent company. A 'reorganized debtor' is not the bankruptcy estate's administrator under Section 327. A 'reorganized debtor's' powers and authority are controlled by the confirmed plan of reorganization. The decision is narrow and should be applied accordingly. A bankruptcy court could well decide that fees for defense of fee applications are 'reasonable compensation' when the debtor in possession or a creditor's committee supports the work performed and defense of a fee application, or if the plan of reorganization itself declares that fees incurred in fee disputes are awardable to the successful party with respect to any fee objections pursued by the reorganized debtor."

Seth H. Lieberman, Pryor Cashman LLP

"Today's decision will cause estate professionals to sound the alarm. On the one hand, some might be incentivized to threaten fee litigation, understanding that the estate cannot compensate for the time spent defending those fees. On the other hand, bankruptcy professionals are clever if nothing else, and this could motivate Congress to revisit the limitations of Section 330 if appropriate."

Chris Mirick, Pillsbury Winthrop Shaw Pittman LLP

"Forcing debtor's counsel to bear the costs of defending its fees provides other parties with the ability to try to force a reduction in those fees, without worrying that the dispute will end up reducing creditors' recoveries because the costs will come out of the estate. From the perspective of the debtor's counsel, this creates a risk that parties will challenge your fees not because of a legitimate concern about the amounts (although any challenge would have to meet Rule 11 standards), but in order to gain leverage to use in connection with other aspects of the case."

Brian Netter, Mayer Brown LLP

"The court's decision makes it harder for bankruptcy attorneys to get paid. Under the incentive structure created by today's opinion, reorganized companies can be expected to challenge the compensation of the law firms who made it possible for them to emerge from bankruptcy."

Joel L. Perrell Jr., Miles & Stockbridge PC

“Denying professionals the ability to recover reasonable fees in defending fee applications in bankruptcy cases because such time is not properly categorized as a 'service' appears to create imbalance in the fee application process, opening the door for tactical objections. Although the case presented a dispute with debtor’s counsel, the holding will have application beyond ... those specific parties before the court. Section 330(a), the Bankruptcy Code section in at issue, applies to all professional persons employed in a case including committee counsel, trustee counsel, and others. The majority’s view not only prohibits fees for time defending fee applications — it may curb compensation for time spent in other situations, like negotiating fee application disputes informally and attending hearings on uncontested fee applications if required by the court. As recognized by the dissent, compensation for fee-defense work should be compensable, because such fees relate to an underlying service in the bankruptcy proceeding.”

Steven J. Reisman, Curtis Mallet-Prevost Colt & Mosle LLP

“The Supreme Court’s decision leaves professionals open to wasteful challenges and may be used by some as leverage in the underlying case. One hopes that this decision will be limited to true fee-defense litigation between the professionals and the administrator of the bankruptcy estate. Estate professionals are complying with the Bankruptcy Code by filing and defending their fee applications. The Supreme Court has now made defending the fee application a non-compensable cost of practicing bankruptcy law — and, in my view, is not what Congress had intended.”

Brett Scher, Kaufman Dolowich & Voluck

“The Supreme Court’s ruling in Baker Botts may raise new implications for attorneys’ fee awards outside the bankruptcy world. In light of the holding, look for more defendants to argue that prevailing plaintiffs’ counsel in fee shifting cases under the Fair Credit Reporting Act, Fair Debt Collection Practices Act, and the Fair Labor Standards Act should be barred from recovering fees related to preparing fee petitions, especially when the amount of those fees is heavily disputed. We anticipate that this decision will be used as a countermeasure by defense counsel who have long feared putting their clients at risk of incurring additional attorneys’ fees when they challenge opposing counsels’ fee petition.”

Aaron Streett, Baker Botts LLP

“While we are of course disappointed in the holding that bankruptcy attorneys may not be compensated under Section 330(a) for defeating meritless objections to their fee applications, we respect the court’s conclusion. We are gratified that the court recognized Baker Botts’ exceptional performance in the Asarco bankruptcy, which led to the Fifth Circuit affirming a $4.1 million bonus for Baker Botts’ extraordinary performance and results — an outcome that remains undisturbed by the Supreme Court’s opinion.”

Mark D. Taylor, VLP Law Group

“The statutory interpretation is defensible. The policy is not. Most debtors are not multi-billion dollar businesses. Even in small cases, debtor representation is challenging and often requires an extraordinary effort to extricate a debtor trapped in a financial wreck. To creditors seeking leverage, the fees of debtor’s professionals are often an easy target. Now, the second guessing will become routine. Debtor’s professionals, who often receive less than full compensation, are now being asked to be the volunteer firefighters of the bankruptcy world. Debtors will say, 'Please send the jaws of life, but staff it with volunteers.'”

Gregory W. Werkheiser, Morris Nichols Arsht & Tunnell LLP

“According to the [Baker Botts] majority opinion, bankruptcy professionals’ concerns about uncompensated fee litigation are just 'unsupported predictions of how the statutory scheme will operate in practice ….' Yet, even before today, it was not uncommon for retained professionals to be confronted with tactically motivated threats to file fee objections from other case stakeholders. Reluctance by such risk-adverse professionals to engage in open courtroom warfare over their fees, together with the prospect of fee litigation further eroding creditor recoveries, frequently promoted resolution of many such disputes before they landed in court. That dynamic has now changed, and not for the better.”

--Editing by Emily Kokoll.
