

BURR ALERT

Can Attorneys Get Paid for Defending Their Right to Get Paid?

Supreme Court Set to Decide in *Baker Botts, L.L.P. v. ASARCO, L.L.C.*

by Hanna Lahr¹

Currently before the Supreme Court is *Baker Botts, L.L.P. v. ASARCO, L.L.C.*,² in which the Court will determine whether bankruptcy judges have discretion to award compensation for the defense of a fee application under 11 U.S.C. § 330(a). The decision in *Baker Botts* will likely resolve a circuit split and make clear whether a defense of a fee application is necessary to the administration of the case and, therefore, compensable. This decision could impact how practitioners approach and oppose fee applications.

Relevant Bankruptcy Code Provision

The provision at issue is Section 330(a)(1), which provides that bankruptcy judges are given discretion to award fees based on “(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.”³

Circuit Split

According to *Baker Botts*, there is currently a circuit split as to whether an award of fees incurred in defending fee applications is permitted under the Bankruptcy Code. The Fifth Circuit noted a split of authority and held that “Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications” because such a defense never benefits the debtor’s estate.⁴ The Ninth Circuit, however, has routinely awarded fees for successful defense of fee applications on the grounds that such a defense is “reasonable and necessary work.”⁵

ASARCO, however, argues that no material circuit split exists on the issue.⁶ What *Baker Botts* views as a circuit split, ASARCO argues is only a difference in facts. The Ninth Circuit has allowed recovery for defense of fee applications when the opposition was frivolous and in bad faith.⁷ ASARCO stresses that the Ninth Circuit’s decision did not involve an interpretation of Section 330(a) when bad faith is not present.

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² U.S., No. 14-103 (*cert. granted* Oct. 2, 2014).

³ 11 U.S.C. § 330(a)(1)(A)–(B).

⁴ *In re ASARCO, L.L.C.*, 751 F.3d 291, 299 (5th Cir. 2014).

⁵ Petition for Writ of Certiorari, *Baker Botts, L.L.P. v. ASARCO, L.L.C.*, U.S. No. 14-103, at 15.

⁶ Brief for the Respondent in Opposition, *Baker Botts, L.L.P. v. ASARCO, L.L.C.*, U.S. No. 14-103, at 9–11.

⁷ *In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002).

The Fifth Circuit’s decision below was not based on bad faith. That court specifically noted that “courts should not hesitate to implement the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”⁸

Potential Effects of Holding

Section 330 was enacted in part to ensure the availability of capable and effective practitioners in bankruptcy proceedings.⁹ Accordingly, ensuring compensation for bankruptcy practitioners should be one of the Court’s central concerns in deciding this case. If the Court finds that an award of fees for the successful defense of a fee application is not within a bankruptcy court’s discretion under Section 330(a), there will likely be an increase in oppositions to fee applications because of the potential to minimize fee awards without additional cost to the debtor’s estate. This will place a significant burden on attorneys and other professionals of having to expend in some cases substantial resources in defending their fee applications, as was the case in *Baker Botts*, and will potentially be a deterrent to bankruptcy practitioners. Allowing the bankruptcy court discretion to award fees for the defense of fee applications will ensure that bankruptcy practitioners are fully compensated for their work in the bankruptcy case without having their fees diluted with defense costs.

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⁸ *In re ASARCO, L.L.C.*, 751 F.3d at 302.

⁹ Petition for Writ of Certiorari, *supra* note 5, at 13 (citing H.R. Rep. No. 95-595, at 330 (1977)).