Getting Paid (or Not): Professional Fee Issues

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Miscellaneous Fee Issues – Compliance with Bankruptcy Rule 2016, Larger Case Fee Guidelines, and National Billing Rates in Non-National Cases

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Getting paid as an estate professional in cases under the United States Bankruptcy Code is not for the faint of heart, the sloppy, or the unprepared, particularly in chapter 11 reorganization cases. Though Congress tried to make clear in the Bankruptcy Reform Act of 1978 that professionals are to be compensated in bankruptcy cases much as other professionals are in non-bankruptcy cases, the obstacles that have been created to reach that parity are challenging to traverse successfully.[1]

Over the years since 1979, courts have sometimes struggled to apply the professional compensation sections of the Bankruptcy Code and Bankruptcy Rules in a way that meets this intended treatment of bankruptcy professionals. Bankruptcy courts' far-flung consideration and approval of fee applications is an unusual, almost unique process. Different approaches have developed over the years to determine what is "reasonable compensation for actual, necessary services rendered" by professionals employed by debtors in possession, trustees, and creditors' committees. Many bankruptcy courts adopted the twelve factors first enumerated by the Fifth Circuit Court of Appeals in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th

[1] Under the earlier Bankruptcy Act, professionals in consumer and small business liquidation and reorganization cases under Chapters VI, XI, and XII were hampered in being compensated by considerations of economy, conservation of the estate, and returns to creditors. 3A James William Moore, ed., COLLIER ON BANKRUPTCY ¶ 62.12[5] at 1483 (14th ed. rev. 1988) ("*Economy* is the most important principle, [though] "economical" is by no means synonymous with parsimonious" . . .); Timothy S. Springer, *Damned if You Do, Damned if You Don't – Current Issues for Professionals Seeking Compensation in Bankruptcy Cases under 11 U.S.C. § 330*, 87 AM. BANKR. L.J. 525, 528-29 (2013). This notion of economy did not apply to professionals acting in railroad, municipal, and complex corporate reorganizations under Chapters XIII, IX, and X of the Bankruptcy Act. 11 U.S.C. § 491-98 (repealed 1978), Fed. R. Bankr. P. 10-215 (repealed 1978); Springer, *Damned if You Do*, at 528-29. Congress sought to modify this position in its enactment of the Bankruptcy Reform Act in 1978. 124 CONG. REC. 33,994 (1978).

Cir. 1974), in a civil rights case.[2] Others have not liked the *Johnson* test and have followed the so-called "lodestar" approach developed by the Third Circuit Court of Appeals. The lodestar approach involves multiplying the number of hours reasonably spent on a case by a reasonable hourly rate and then adjusting for the contingent nature of a case and the quality of the work performed as evidenced by a number of factors. Finally, courts follow a hybrid approach, making an initial determination by the lodestar method, then considering the *Johnson* factors in deciding whether to adjust the initial determination up or down. *Pennsylvania v. Del. Valley Citizens' Counsel for Clean Air*, 478 U.S. 546, 565 (1986) (environmental fee shifting case). About the same time as the Supreme Court's decision in *Citizens' Counsel for Clean Air*, bankruptcy courts began applying a similar hybrid approach.

The 1994 amendments to the Bankruptcy Code included some of the *Johnson* factors in a new subsection (a)(3) to section 330, including the time spent on services, the rates charged for the services, whether the services were necessary to the administration of, or beneficial to, the case at the time they were rendered, whether the time incurred in the services was reasonable "commensurate with the complexity, importance, and nature of the problem, issue, or task addressed," the demonstrated skill, experience, or board certification in bankruptcy of the professional performing the services, and whether the compensation is reasonable "based on the customary compensation charged by comparably skilled practitioners" in non-bankruptcy

[2] The twelve factors were: the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or other circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the "undesirability" of the case, the nature and length of the professional relationship with the client, and awards in similar cases. Id. The Fifth Circuit then adopted the *Johnson* factors in a bankruptcy case on the eve of the enactment of the Bankruptcy Reform Act. *Am. Benefit Life Ins. Co. v. Baddock* (*In re First Colonial Corp. of America)*, 544 F.2d 1291, 1298-99 (5th Cir. 1977), *cert. denied*, 431 U.S. 904 (1977).

matters. 11 U.S.C. § 330(a)(3); *In re Recycling Industries, Inc.*, 243 B.R. 396, 400 n. 2 (Bankr. D. Colo. 2000) (the court reviewed the *Johnson* factors, noting that many had been incorporated into section 330(a)). The 1994 amendments also added two further provisions, one that forbade bankruptcy courts from allowing compensation for "(i) unnecessary duplication of services; or services that were not – (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A).[3] Finally, the 1994 amendments made clear, resolving a split in courts, that a bankruptcy professional could be compensated for the preparation of a fee application, though that compensation is to "based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). The Tenth Circuit Court of Appeals appears to follow an "adjusted lodestar" analysis when reviewing fee requests in bankruptcy cases, which it describes as including analysis of factors set forth in section 330(a)(3) "plus additional relevant factors," identified as the *Johnson* factors. *Houlihan Lokey Howard & Zukin Capital v. Unsecured Creditors' Liquidating Trust* (*In re Commercial Financial Services, Inc.*), 427 F.3d 804, 811 (10th Cir. 2005) (incorporating the standards the Court of Appeals had previously applied to trustee fees under section 330 in *In re Miniscribe Corp.*, 309 F.3d 1234, 1243-44 (10th Cir. 2002)).

The Federal Rules of Bankruptcy, the United States Trustee's office, and courts have addressed allowance of professional fees in bankruptcy cases in a variety of ways. Three relevant approaches are addressed here – the requirements of Fed. R. Bankr. P. 2016, the United States Trustee's guidelines for reviewing fee applications in "larger chapter 11 cases," and bankruptcy court rulings on what constitutes "reasonable compensation," particularly with

[3] The 1994 amendments to section 330 also removed the ability of the Court to approve reasonable compensation and reimbursement of expenses for "the debtor's attorney" for postpetition services.

respect to billing rates. Rule 2016 addresses employment and fee applications, the larger case guidelines govern the United States Trustee's review of fee applications in large chapter 11 cases, and decisional law on billing rates provide professionals with helpful information regarding appropriate rates. Carefully following the Bankruptcy Rules, preparing sufficient fee applications, and making sure billing rates match the type of case in which the professional is acting will facilitate successfully getting paid.

Rule 2016

Fed. R. Bankr. P. 2016 is important to estate professionals because it dictates, in subpart (a), the form and required information to be included in fee applications, and it implements, in subpart (b), the disclosure requirements of section 329 of the Bankruptcy Code.[4]

Rule 2016(a). Fed. R. Bankr. P. 2016(a) regulates fee applications submitted for approval under sections 330 and 331 of the Bankruptcy Code, which provide for compensation of professionals on final and interim bases. It requires that an application set forth a "detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." It goes on to require that applications include a statement of what payments have been paid or promised for services rendered or to be rendered, the source of the compensation so paid or promised, "whether any compensation previously received has been shared and whether an agreement or understanding between the applicant and any other entity for the sharing of compensation received or to be received for services in or in connection with the case, and the particulars of" any such fee-sharing agreement or understanding. While quite straightforward in

[4] Subpart (c) of Rule 2016 governs disclosure of compensation paid or promised to a petition preparer and will not be addressed in this outline.

its language, Rule 2016 is often not fully followed and has created some controversy over practices of bankruptcy professionals and courts.

Most if not all bankruptcy courts generally require detailed descriptions of services expended, broken down into tenths of an hour, to be included in fee applications. According to a Utah bankruptcy court decision, "[p]rofessional persons who intend to seek compensation from debtors' estates should maintain meticulous contemporaneous time records and such records should reveal sufficient data to enable the Court to make an informed judgment about the specific tasks and hours allotted." *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557,582 (Bankr. D. Utah 1985). There are many decisions reducing fees for insufficient or vague descriptions of services performed and for "lumping" different tasks together in relatively large time periods. Courts have sometimes given investment bankers a bit of a pass on contemporaneous time records because of the customary manner in which investment bankers bill outside of bankruptcy. However, a 2005 Tenth Circuit decision described below affirmed lower courts' decisions requiring an investment banker to keep and disclose detailed time records by the hour, when the banker proposed to bill on a fixed monthly fee basis. *Commercial Financial Services*, 427 F.3d 804 (10th Cir. 2005).

In applying section 330(a)(3) and the "adjusted lodestar" analysis described above, courts also generally expect a fee application to include the applicant's qualifications, which implicates several of the *Johnson* factors. Because one of the requirements of Rule 2016(a) is the amount of fees for which approval has been requested, it is also normally necessary to include hourly billing rates.

Information regarding amounts received prepetition can be relevant to a determination of whether a professional has received a preference or other type of avoidable transfer which might

affect the professional's disinterestedness or the determination of whether the professional holds an interest adverse to the estate. The source of the compensation can be important to a consideration of whether a professional has a conflict in its representation of the estate party if the source of the compensation is other than the debtor or the estate.

Several issues that can arise under Rule 2016(a), particularly in large chapter 11 cases, have been identified as controversial. The requirement in the Rule to disclose agreements or "understandings" for the sharing of compensation with parties not in the same firm seems odd in light of the prohibition of fee sharing contained in Section 504(a) of the Bankruptcy Code. On close analysis, however, the Rule refers to sharing of compensation "received or to be received," which may provide some sense to the provision. Gadfly Professor Lynn Lopucki has pointed out that at least some fee applications state only that no agreement or understanding exists for sharing of compensation *to be received*, thus avoiding disclosure of potential fee sharing for referrals that might have been "received" prior to the filing of the bankruptcy case. Lynn M. Lopucki and Joseph W. Doherty, *Routine Illegality Redux*, 85 AM. BANKR. L.J. 35, 49 (2011).[5]

Professor Lopucki has raised other issues with respect to "illegal" practices in relation to Rule 2016(a). Many of these involve practices which are time-honored in many jurisdictions, including payment of "ordinary course" professionals, illegal in Professor Lopucki's view because such professionals may never be required to submit a fee application as required by Rule 2016, failure of professionals to include disclosures in final fee applications of prior payments made to them in connection with the case, even though those payments may have been made in

[5] Lopucki and Doherty's first *Routine Illegality* article cited below prompted a response by Martin Bienenstock and some of his colleagues. Martin J. Bienenstock, Sarah L. Trum, Jeffrey Chubak, and Tevia Jeffries, *Response to "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*," 83 AM. BANKR. L.J. 549 (2009). Lopucki and Doherty welcomed the response and published *Redux* in reply.

the debtor's statement of financial affairs or in the attorney's disclosures under Rule 2016(b), and orders authorizing monthly payment of a large portion of fees and expenses prior to the submission and court review of formal fee applications. Lynn M. Lopucki and Joseph W. Doherty, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 Am. Bankr. L.J. 423 (2009).

The lesson to be learned from Rule 2016 is that disclosure, meticulous record keeping, careful, discrete time entries organized by matter and individual professional, and scrupulous conforming to the Rule are practices that should be followed by those who wish to avoid trivial objections to their fees. Given that professionals may no longer be compensated for defending their fee applications under *Baker Botts v. ASARCO*, 135 S.Ct. 2158 (2015), these practices will facilitate avoidance of unnecessary disputes over fees and expenses.

Rule 2016(b). Fed. R. Bankr. P. 2016(b) serves a different function from Rule 2016(a), although it contains the same requirement to disclose fee sharing agreements. Section 329 requires attorneys (not non-lawyer professionals) to file a statement disclosing compensation paid or agreed to be paid within one year before bankruptcy for services rendered or to be rendered "in contemplation of or in connection with the case" and the source of the compensation. The section goes on to authorize the Court to cancel such an agreement or order the return of payments if they are excessive. Rule 2016(b) requires attorneys to file their section 329 statements within fourteen days of the order for relief, and also requires the attorney to disclose fee sharing agreements. Courts have required lawyers to disclose all payments received in the year before bankruptcy, construing "in contemplation of or in connection with a case" broadly. Lopucki and Doherty, *Routine Illegality* , 83 AM. BANKR. L.J. at 444 n. 86. The Rule

also requires supplements to disclose information within fourteen days of payment or agreement not previously disclosed, although this reference appears to be to fee sharing agreements.

United States Trustee "Larger Case" Guidelines

In the 1994 amendments to the Bankruptcy Code, Congress gave the United States Trustee Program ("USTP") the task of preparing guidelines for review of fee applications. In 1996, the USTP issued its first set of guidelines. In 2013, the USTP issued new guidelines for use in "larger chapter 11 cases" (the "Larger Case Guidelines") which it defined as those with $50 million or more in assets and $50 million or more in liabilities, aggregated for jointly administered cases.[6] Single asset real estate cases, even ones with asset value and liabilities above the thresholds, are excluded. Appendix B at 36248.

The Larger Case Guidelines are extraordinarily detailed and are intended for use by United States Trustees ("UST") in reviewing interim and final fee applications "filed by attorneys employed under sections 327 and 1103 . . .."[7] Though the "general information" notes that the Larger Case Guidelines "express the USTP's policy positions," they are not intended to "supersede local rules, court orders, or other controlling authority." United States Trustees are not limited in seeking changes to such controlling authority, however.

Though the Larger Case Guidelines are demanding in the information sought, most of them are not particularly surprising. Perhaps the largest burden on a law firm seeking payment

[6] Appendix B–Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. 330 by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36248 (June 27, 2013) (to be codified at 28 CFR Part 58, Appendix B). I will refer to the Federal Register notice of the 2013 Larger Case Guidelines as "Appendix B."

[7] Like section 329, the 2013 Larger Case Guidelines apply on their face only to attorneys. Non-lawyers' fee applications continue to be reviewed by UST's under the USTP's 1996 guidelines. Appendix B, 78 Fed. Reg. 36248.

of fees in a large chapter 11 case is the amount of information from the firm regarding blended billing rates in nonbankruptcy or, for firms specializing in bankruptcy, in nonbankruptcy estate matters. As discussed below, the Guidelines seek an unusual amount of information regarding "blended" rates, both for the fees sought in the application but also in the firm's rates in nonbankruptcy or non-estate services. In addition, the proposed extensive use of budgets and staffing plans, with comparisons of actual fees and expenses to budgeted ones in fee applications and an explanation for material variances, could be challenging for professionals. Set forth below are summaries of what appear to be the more important provisions of the Larger Case Guidelines.

Goals of the Guidelines. In effectuating the Large Case Guidelines, the USTP identified and listed goals for UST's to apply in reviewing attorneys' fee applications, including ensuring that bankruptcy professionals are subject to market-driven forces and accountability as non-bankruptcy professionals are; to ensure adherence to section 330 requirements, particularly that fees are reasonable and necessary; to increase disclosure and transparency; to increase clients' accountability for overseeing fees of their professionals; to encourage budgets and staffing plans; to facilitate the efficient review of fee applications; to assure that applicants have the burden of proof even in the absence of objection; and to increase public confidence in the bankruptcy compensation process. Appendix B at 36249.

Considerations on Fees. Under the Larger Case Guidelines, there is plenty for larger-case bankruptcy attorneys to concern themselves with. The UST is to consider the "section 330 factors" – time spent, rates charged, necessity of the services to the administration of the case or beneficial to the completion of the case, whether the services took a reasonable time given the complexity, importance, and nature of issues addressed, the skill and experience in bankruptcy of

the professional, and whether the compensation is comparable to compensation charged by comparably skilled professionals in non-bankruptcy legal matters. The Larger Case Guidelines expect that applicants will provide "sufficient information in the application" to establish that compensation is reasonable compared to the market and also expect the applicant firm to provide information regarding what its own billing practices and the practices of its "peers" are in non-bankruptcy matters. "Staffing inefficiencies" such as duplicative or overlapping services or utilizing professionals whose skill is not "commensurate with the task" performed is a basis for objection. Non-disclosed rate increases are an item for consideration and objection. "Transitory professionals," *i.e.*, those who spend little time in the case, are frowned upon. Sloppy billing practices, such as lumping and vague or repetitive entries attract objection. The UST is to object if it appears that charges that should be part of overhead are included in the application or if professionals' non-working travel time is billed at full rates. Charging rates different from rates charged by the applicant in its primary office is objectionable, even when those rates may be lower. Variances from submitted budgets and staffing plans need to be sufficiently explained or face objection. Certain services are not compensable, mostly relating to revising time records, preparing invoices (as opposed to fee applications), and spending too much time on final fee applications when they consist mostly of information from interim fee applications. Based on the Supreme Court's *ASARCO* decision, defending fee applications is also not compensable and the UST will surely object to those who try to be paid for their services in that area.[8] The Larger Case Guidelines also consider whether expenses for which reimbursement is sought are

[8] Appendix B at 36249-51. The Larger Case Guidelines, which predate *ASARCO*, suggest that fees for "explaining or defending monthly invoices or fee applications that normally not be compensable outside of bankruptcy" typically should not be compensable. *Id.* at 36250.

reasonable, customary, actual, unusual, and whether they should properly be included in overhead. Appendix B at 36251.

Fee Application Organization and Content. The Larger Case Guidelines also provide a detailed outline for the fee application, including rudimentary information about the case and its status such as cash on hand, unencumbered assets, and accrued administrative expenses; detailed information regarding the professionals providing the services, a review of the budget and staffing plans (with comparisons between the budget and requested fees and expenses and an explanation of discrepancies greater than 10%); and detailed time and service entries, which are to be provided in searchable electronic format. Other information to be included includes prior and cumulative fees and expenses and prior interim awards. An extensive list of over twenty billing categories is provided. The Guidelines also propose that applications include a narrative for each category, describing the services in that category, the necessity and benefit of those services, and a summary of time and fees by professional. Recommended expense categories are also set forth and information describing details about the expenses is proposed. Finally, a cover summary containing an unusual amount of information is also required. Appendix B at 36253-54. All of this is very helpful as a guide, but brings to mind the judicial view expressed by bankruptcy judges in Colorado that courts "should not impose 'slavish and overburdensome record keeping requirements' which result in fee applications of enormous length enumerating every minuscule task." *In re Recycling Industries, Inc.*, 243 B.R. 396, 407 (Bankr. D. Colo. 2000), *quoting In re Frontier Airlines, Inc.*, 74 B.R. 973, 976 (Bankr. D. Colo. 1987).

The Larger Case Guidelines also contemplate a good deal of information being provided in applications on blended rates, and not just the overall blended rate of professionals in the fee application. The Guidelines propose that "full service" firms provide a blended rate of all of

their domestic timekeepers (except those who practice in bankruptcy) or at least the timekeepers in those offices whose professionals billed at least 10% of the hours in the bankruptcy case during the application period. This blended rate is to be based on either the firm's prior fiscal year or on a rolling twelve-month year. Firms specializing in bankruptcy are to provide blended rates excluding estate work. Pro bono hours may be excluded but alternative fee arrangements which are tracked by the hour and revenues by the hour are to be included. Applicants are authorized to propose alternative methods of providing intensely detailed disclosures. The Guidelines require not only a blended rate of all professionals, they also seek to have firms provide blended billing rates for various categories of timekeepers (partner/counsel/associate/ paralegal) whose billings are included in the application. Appendix B at 36251-52.

Budgets and Staffing Plans. The Guidelines propose a rather flexible approach to budgets and staffing plans. Either parties and professionals are to consent to the use of budgets and staffing plans or the UST will request that the Court order their use. Clients and their professionals are to agree on budgets and staffing plans, which can provide for any period of time, from monthly to 120-day periods or any other time. The form of budget attached to the Guidelines contemplates that the budget be broken down by billing category. Budgets and staffing plans can and should be modified to reflect developments in the case. The budgets and staffing plans do not need to be disclosed except in the retrospective context of a fee application, except debtors and committees are to exchange them once they are agreed to between the professionals and their clients. Appendix B at 36255, 36258-60.

Co-Counsel. The Larger Case Guidelines have a separate section addressing issues related to co-counsel and their compensation. When more than one firm is engaged as bankruptcy counsel under section 327(a), they need to designate which is lead counsel and

clearly delineate "secondary counsel's responsibility." The presumption is that lead counsel will handle matters unless the retention application of secondary counsel assigns certain matters to secondary counsel. Secondary counsel is not to perform general case administrative duties unless that is directly related to its assigned duties. If secondary counsel is engaged in part to save fees, the application should compare the billing rates of lead and secondary counsel and identify other factors that make engagement of secondary counsel appropriate. Instructions are also set forth regarding the engagement of conflicts counsel to handle matters on which lead counsel has a conflict. The Guidelines focus attention on review of fee applications of lead and secondary counsel to avoid duplication and overlap. Appendix B at 36255-56.

Fee Reviewers. The UST is charged by the Larger Case Guidelines to seek appointment of a "special fee review entity, such as a fee review committee or an independent fee examiner" to aid the court and parties in reviewing fee applications. The Guidelines suggest that such a special fee review entity should have the rights of a party in interest and be authorized to retain professionals. Appendix B at 36256-57.

Forms. Included with the Guidelines are a number of forms that can be used in meeting their requirements. The forms can be used to disclose some of the proposed blended rates, for information regarding timekeepers, for budgets and staffing plans, and for summaries of requested compensation and expenses by category. A proposed a summary cover sheet is also included. Appendix B at 36257-62.

Conclusions Regarding Larger Case Guidelines. The Larger Case Guidelines provide a significant number of recommendations to follow. They constitute helpful proposals in accounting for fees and expenses and presenting fee applications. Many of the suggestions would help most bankruptcy lawyers in preparing thorough fee applications. Perhaps the

Guidelines make sense in large chapter 11 cases where significant fees will be sought, but they seem a bit overwhelming, particularly because they require a good deal of information the accumulation of which may not be compensable under the Guidelines.

Court Decisions in the Tenth Circuit on Reasonable Compensation, with Emphasis on Billing Rates

Section 330(a)(1)(A) authorizes the Court to approve a "reasonable compensation" to a professional employed under section 327 or section 1103. Not surprisingly, given the numerous issues related to the allowance of professional fees discussed above, courts have utilized a wide range of analyses in determining reasonable compensation. In the Tenth Circuit, there is older case law supporting professionals being allowed fees at prevailing local rates where the court sits "absent more unusual circumstances than we see in this case." *Ramos v. Lamm*, 713 546, 555 (10th Cir. 1983) (civil rights case), cited favorably in *Miller v. United States Trustee*, 288 B.R. 879, 882 (10th Cir. BAP 2003). There are also well-written, well-thought-out bankruptcy court decisions approving national billing rates in local cases, particularly when those are large, complex cases. *See*, *for example*, *In re Frontier Airlines, Inc.*, 74 B.R. 973, 977 (Bankr. D. Colo. 1987); *In re Rocky Mountain Helicopters*, 186 B.R. 270, 273 (Bankr. D. Utah 1995).

The potential for a bankruptcy court denying fees at national rates (or denying employment of professionals who will bill at national rates) remains and is supported in the right case by some of the *Johnson* factors, the 1994 amendments to the Bankruptcy Code,a nd Tenth Circuit case law. The issue generally comes down to whether the case is one that justifies higher billing rates than the usual local market rates. The Tenth Circuit Court of Appeals has weighed in in several instances.

For example, in 2009, the Tenth Circuit let stand the Northern District of Oklahoma bankruptcy court's denial of a creditors' committee's proposed national counsel. *Official*

Committee of Unsecured Creditors v. Harris (*In re Southwest Food Distributors, LLC*), 561 F.3d 1106 (10th Cir. 2009). In that case, the bankruptcy court denied the committee's application to employ Chicago counsel as its lead attorneys, focusing on the large differential between local billing rates and Chicago rates and on the court's impression that the regional firm engaged as local counsel for the committee was fully capable of providing competent representation.

In a case involving allowance of investment banking fees, which is often a complicated matter in bankruptcy court, the Court of Appeals let stand the Bankruptcy Court's decision (which had been affirmed by the Bankruptcy Appellate Panel) to cut the proposed fees by more than half. *Houlihan Lokey Howard & Zukin Capital v. Unsecured Creditors' Liquidating Trust* (*In re Commercial Financial Services, Inc.*), 427 F.3d 804 (10th Cir. 2005). The *Houlihan Lokey* decision highlights tensions in payment of professional fees in bankruptcy but particularly when it comes to compensating financial advisers. The Bankruptcy Court imposed fee guidelines requiring professionals to provide billing by the hour and informed professionals that it intended to apply the UST guidelines to fee applications. The creditors' committee's application to employ Houlihan Lokey indicated that it would charge $200,000 per month and more if it believed it appropriate. Parties objected and the Bankruptcy Court ordered the financial adviser to maintain contemporaneous time records and to provide evidence of the reasonableness of its hourly rates. The financial adviser filed a final fee application of approximately $1.9 million, based on monthly fees. The fees were objected to and Houlihan Lokey filed two supplements. In the second supplement, it provided an analysis of time expended, which showed a blended hourly rate of approximately $750. The Bankruptcy Court then required Houlihan Lokey to provide information respecting fees in prior bankruptcy cases and also reviewed fees charged by other financial advisers in the case. Based on this information, the Court constructed hourly

rates for the financial adviser's professionals and reduced the fee award to about $900,000. On appeal, the Tenth Circuit began its analysis by stating that it applies "an adjusted lodestar analysis to determine the reasonableness of a requested professional fee within the context of § 330," taking into account the factors set forth in section 330(a)(3) and additionally, the factors articulated in the *Johnson* case. Houlihan Lokey argued that monthly billing for financial advisers "is a common marketplace practice." The Court did not buy this argument, however, stating that, of the five factors enumerated in section 330(a)(3), four go to time spent on a project. Although the Court of Appeals acknowledged that "the statute does not specify a unit of time to be used," it found utilizing an hourly basis made sense. The Court approved the Bankruptcy Court's creation of a constructive hourly rate, found the ruling well within the Bankruptcy Court's discretion, and affirmed the Order.

Lower courts in the Tenth Circuit have also reduced requested fees. In *In re Millennium Multiple Employer Welfare Benefit Plan*, 470 B.R. 203 (Bankr. W.D. Okla. 2012), the Court utilized the adjusted lodestar and *Johnson* factors to reduce special counsel's requested fees. The special counsel, Dewey & LeBoeuf's Washington, D.C. office, provided highly-specialized tax and insurance representation. The Court noted that the threshold issue was whether the professional services conferred a benefit on the estate, and acknowledged that they had. D&L's blended rates were much higher than other professionals in the case. The Court compared D&L's fees with other firms in the case, including at least one other Washington, D.C.-based firm and found D&L's billing rates much higher. The Court also found a disproportionately high percentage of the fees involved the preparation and defense of D&L's fee application. The Court was impressed by the firm and its lawyers, but was also impressed by other counsel in the case. The Court found the blended rate was too high, and reduced, with many comments but few

precedential findings (other than that the 9% of the fee application incurred in preparing and defending the fee application was much higher than the 3%-5% it should have been), the proposed fees from approximately $2.1 million to about $1.8 million. As a footnote, part of the basis for the Court's reduction was the question of whether professionals could be compensated for time spent defending their fee applications. Now, much of the $183,000 expended by D&L preparing and defending its final fee application would not be compensable under *ASARCO*.

Judge Brooks reduced fees for a New York City firm in *In re Recycling Industries, Inc.*, 243 B.R. 396 (Bankr. D. Colo. 2000). Although the case was more about sloppy billing practices, taking too much time to complete projects, and bad billing judgment, the Court did take a swipe at billing rates and provided an important object lesson. In the case, Kramer Levin was lead counsel for the committee and Block Markus Williams was local counsel. In the fee application, summer clerks' billing rate was higher than or equivalent to the rates of Howard Tallman, Jim Markus, and John Young, three prominent Denver lawyers, and the New York firm's fees were reduced, including specifically, the summer clerks' fees. The Court counseled the committee to use "more experienced, skilled, knowledgeable, and highly regarded" lawyers from the local firm rather than summer clerks from the lead firm. *Id.* at 404. An interesting query arises in the context of the Larger Case Guidelines, which presume that lead general bankruptcy counsel is responsible for most matters in the case, if local "secondary" counsel is better equipped and more economical than lead counsel.

This brings up still another important lesson: if a firm is billing at higher rates ostensibly on the basis of experience, skill, and knowledge, it needs to make certain that it displays its superior traits. As some of the decisions cited above make clear, the courts were impressed by

the work of the lawyers billing at higher national rates, but they were also impressed by local or regional professionals billing at a much lower rate.[9]

Even in cases in which bankruptcy courts have expressly permitted national billing rates, the courts have made clear that they expect more from higher-compensated professionals. In *Rocky Mountain Helicopters*, Judge Clark approved national billing rates, on the basis that he expected lawyers billing at those rates to "work smarter, better, and faster." 186 B.R. at 273. Based on the "sheer number of hours" in the application, the Court ruled that that firm "was not consistently accomplishing its tasks smarter, better, or faster" and reduced the fees by 12%. *Id.* In *Frontier Airlines*, Judge Matheson approved national billing rates, recognized that there would be some duplication with national and local counsel representing a single party, and was generous compensating travel time, but reduced the fees of New York counsel for the committee more than any other professionals. At 74 B.R. at 980.

Courts in the Tenth Circuit have approved national billing rates (and higher local billing rates) in cases that warrant high levels of expertise. But there is ample precedent here for bankruptcy courts to reduce fees and billing rates in these cases. Professionals billing at higher rates should expect to be held to a high standard of services.

[9] As the Court noted in *Millennium Multiple Employer Welfare Benefit Plan,* "The court is most impressed with the qualifications and experience of the D & L attorneys who provided services for the Debtor. They are highly-skilled and competent tax counsel. However, the court is also impressed with the skills and competence of the attorneys in the eight firms in the comparative analysis." 470 B.R. at 216.

DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR U.S. TRUSTEES
2013 FEE GUIDELINES FOR ATTORNEYS IN LARGER CHAPTER 11 CASES:
SUMMARY OF MATERIAL DIFFERENCES FROM 1996 GUIDELINES

1. **CUSTOMARY AND COMPARABLE COMPENSATION DISCLOSURES**
   a. Disclose firm's non-bankruptcy blended hourly rates by category of timekeeper
   b. Limited "safe harbor" from USTP objection

2. **BUDGETS AND STAFFING PLANS**
   a. By consent or court order
   b. Hours and fees per task code; no narrative or description
   c. Disclosed with fee application
   d. If fee application exceeds budget by 10%, explain why

3. **ELECTRONIC BILLING DATA**
   a. Provide billing data as maintained by firm to court, USTP, and major parties; other parties on request
   b. Virtually all firms and clients use LEDES (legal electronic data exchange standard) data (LEDES.org)

4. **CLIENT AND APPLICANT STATEMENTS**
   a. Applicant with retention application
   b. Client with retention application (verified)
   c. Applicant with fee application

5. **RATE INCREASE DISCLOSURES AND CALCULATIONS**
   a. Questions on disclosure and approval of rate increases in applicant statement (4 above)
   b. Disclose initial rate and current rate for each timekeeper
   c. Disclose number of rate increases since case inception for each timekeeper
   d. Calculate total compensation requested with and without rate increases

6. **EFFICIENCY CO-COUNSEL RETENTION AND BILLING GUIDANCE**
   a. Encouraged for routine work at lower cost
   b. Compare billing rates and terms with lead counsel; demonstrate projected savings to estate
   c. Avoid duplication

7. **FEE EXAMINER AND FEE COMMITTEE MODELS**
   a. Three models
      i. Fee examiner (not § 1104)
      ii. Fee committee with independent chair
      iii. Fee committee
   b. Experienced bankruptcy professional
      i. Not a prohibited special master; court must still adjudicate issues and award fees
      ii. More than fee auditor focused solely on numbers

8. **FIVE MODEL FORMS** (PDF fillable model forms will be available on USTP website)
   a. Exhibit A: Customary and Comparable Compensation Disclosures
   b. Exhibit B: Summary of Timekeepers Included in this Application
   c. Exhibit C: Budget and Staffing Plan
   d. Exhibit D: Summary of Compensation by Project Category
   e. Exhibit E: Summary Cover Sheet of Fee Application

EXHIBIT A

CUSTOMARY AND COMPARABLE COMPENSATION DISCLOSURES WITH FEE APPLICATIONS

(*See* Guidelines ¶ C.3. for definitions of terms used in this Exhibit.)

	CATEGORY OF TIMEKEEPER (using categories already maintained by the firm)	BLENDED HOURLY RATE	
		BILLED OR COLLECTED Firm or offices for preceding year, excluding bankruptcy	BILLED In this fee application
Delete	Sr./Equity Partner/Shareholder		
Delete	Jr./Equity Partner/Shareholder		
Delete	Counsel		
Delete	Sr. Associate (7 or more years since first admission)		
Delete	Associate (4-6 years since first admission)		
Delete	Jr. Associate (1-3 years since first admission)		
Delete	Staff Attorney		
Delete	Contract Attorney		
Delete	Paralegal		
Delete	Other (please define)		
Add	*Click Add button to add additional timekeeper category*		
	All timekeepers aggregated		

Case Name: _____
Case Number: _____
Applicant's Name: _____
Date of Application: _____
Interim or Final: _____

UST Form 11-330-A (2013)

EXHIBIT B

SUMMARY OF TIMEKEEPERS INCLUDED IN THIS FEE APPLICATION

	NAME	TITLE OR POSITION	DEPARTMENT, GROUP, OR SECTION	DATE OF FIRST ADMISSION[1]	FEES BILLED IN THIS APPLICATION	HOURS BILLED IN THIS APPLICATION	HOURLY RATE BILLED		NUMBER OF RATE INCREASES SINCE CASE INCEPTION
							IN THIS APPLICATION	IN FIRST INTERIM APPLICATION	
Delete									
Delete									
Delete									
Delete									
Delete									
Delete									
Delete									
Delete									
Delete									
Delete									
Add	*Click Add button to add additional timekeeper*								

[1] If applicable

Case Name: _____
Case Number: _____
Applicant's Name: _____
Date of Application: _____
Interim or Final: _____

UST Form 11-330-B (2013)

EXHIBIT C-1

BUDGET

If the parties consent or the court so directs, a budget approved by the client in advance should generally be attached to each interim and final fee application filed by the applicant. If the fees sought in the fee application vary by more than 10% from the budget, the fee application should explain the variance. *See* Guidelines ¶ C.8. for project category information.

	PROJECT CATEGORY	ESTIMATED HOURS	ESTIMATED FEES
	Asset Analysis and Recovery		
	Asset Disposition		
	Assumption and Rejection of Leases and Contracts		
	Avoidance Action Analysis		
	Budgeting (Case)		
	Business Operations		
	Case Administration		
	Claims Administration and Objections		
	Corporate Governance and Board Matters		
	Employee Benefits and Pensions		
	Employment and Fee Applications		
	Employment and Fee Application Objections		
	Financing and Cash Collateral		
	Litigation: Contested Matters and Adversary Proceedings (not otherwise within a specific project category) - identify each separately by caption and adversary number, or title of motion or application and docket number		
Add	*Click Add button to add a litigation entry*		
	Meetings and Communications with Creditors		
	Non-Working Travel		
	Plan and Disclosure Statement		
	Real Estate		
	Relief from Stay and Adequate Protection		
	Reporting		
	Tax		
	Valuation		
	TOTAL		

Case Name: _____
Case Number: _____
Applicant's Name: _____
Date of Application: _____
Interim or Final: _____

UST Form 11-330-C (2013)

EXHIBIT C-2

STAFFING PLAN

If the parties consent or the court so directs, a staffing plan approved by the client in advance should generally be attached to each interim and final fee application filed by the applicant. If the fees are sought in the fee application for a greater number of professionals than identified in the staffing plan, the fee application should explain the variance.

	CATEGORY OF TIMEKEEPER [1] (using categories maintained by the firm)	NUMBER OF TIMEKEEPERS EXPECTED TO WORK ON THE MATTER DURING THE BUDGET PERIOD	AVERAGE HOURLY RATE
Delete	Sr./Equity Partner/Shareholder		
Delete	Jr./Non-equity/Income Partner		
Delete	Counsel		
Delete	Sr. Associate (7 or more years since first admission)		
Delete	Associate (4-6 years since first admission)		
Delete	Jr. Associate (1- 3 years since first admission)		
Delete	Staff Attorney		
Delete	Contract Attorney		
Delete	Paralegal		
Delete	Other (please define)		
Add	*Click Add button to add an additional timekeeper category*		

[1] As an alternative, firms can identify attorney timekeepers by years of experience rather than category of attorney timekeeper: 0-3, 4-7, 8-14, and 15+. Non-attorney timekeepers, such as paralegals, should be identified by category.

Case Name: _____
Case Number: _____
Applicant's Name: _____
Date of Application: _____
Interim or Final: _____

UST Form 11-330-C (2013)

EXHIBIT D -1

SUMMARY OF COMPENSATION REQUESTED BY PROJECT CATEGORY

(*See* Guidelines ¶ C.8. for project category information.)

	PROJECT CATEGORY	HOURS BUDGETED[1]	FEES BUDGETED[1]	HOURS BILLED	FEES SOUGHT
	Asset Analysis and Recovery				
	Asset Disposition				
	Assumption and Rejection of Leases and Contracts				
	Avoidance Action Analysis				
	Budgeting (Case)				
	Business Operations				
	Case Administration				
	Claims Administration and Objections				
	Corporate Governance and Board Matters				
	Employee Benefits and Pensions				
	Employment and Fee Applications				
	Employment and Fee Application Objections				
	Financing and Cash Collateral				
	Litigation: Contested Matters and Adversary Proceedings (not otherwise within a specific project category) - identify each separately by caption and adversary number, or title of motion or application and docket number				
Add	*Click Add button to add a litigation entry*				
	Meetings and Communications with Creditors				
	Non-Working Travel				
	Plan and Disclosure Statement				
	Real Estate				
	Relief from Stay and Adequate Protection				
	Reporting				
	Tax				
	Valuation				
	TOTAL				

[1] If applicable

Case Name: _____
Case Number: _____
Applicant's Name: _____
Date of Application: _____
Interim or Final: _____

UST Form 11-330-D (2013)

EXHIBIT D -2

SUMMARY OF EXPENSE REIMBURSEMENT REQUESTED BY CATEGORY

(*See* Guidelines ¶ C.8. for project category information.)

	CATEGORY	AMOUNT
	Copies	
	Outside Printing	
	Telephone	
	Facsimile	
	Online Research	
	Delivery Services/Couriers	
	Postage	
	Local Travel	
	Out-of-Town Travel:	
	(a) Transportation	
	(b) Hotel	
	(c) Meals	
	(d) Ground Transportation	
Delete	(e) Other (please specify)	
Add	*Click Add button to add an out of town travel category*	
	Meals (local)	
	Court Fees	
	Subpoena Fees	
	Witness Fees	
	Deposition Transcripts	
	Trial Transcripts	
	Trial Exhibits	
	Litigation Support Vendors	
	Experts	
	Investigators	
	Arbitrators/Mediators	
Delete	Other (please specify)	
Add	*Click Add button to add another category*	

Case Name: _____
Case Number: _____
Applicant's Name: _____
Date of Application: _____
Interim or Final: _____

UST Form 11-330-D (2013)

EXHIBIT E

SUMMARY COVER SHEET OF FEE APPLICATION

Name of applicant	
Name of client	
Time period covered by this application	Start End
Total compensation sought this period	
Total expenses sought this period	
Petition date	
Retention date	
Date of order approving employment	
Total compensation approved by interim order to date	
Total expenses approved by interim order to date	
Total allowed compensation paid to date	
Total allowed expenses paid to date	
Blended rate in this application for all attorneys	
Blended rate in this application for all timekeepers	
Compensation sought in this application already paid pursuant to a monthly compensation order but not yet allowed	
Expenses sought in this application already paid pursuant to a monthly compensation order but not yet allowed	
Number of professionals included in this application	
If applicable, number of professionals in this application not included in staffing plan approved by client	
If applicable, difference between fees budgeted and compensation sought for this period	
Number of professionals billing fewer than 15 hours to the case during this period	
Are any rates higher than those approved or disclosed at retention? If yes, calculate and disclose the total compensation sought in this application using the rates originally disclosed in the retention application	◉ yes ○ no

Case Name: _____
Case Number: _____
Applicant's Name: _____
Date of Application: _____
Interim or Final: _____

UST Form 11-330-E (2013)

DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR U.S. TRUSTEES
2013 FEE GUIDELINES FOR ATTORNEYS IN LARGER CHAPTER 11 CASES:
RESOURCES FOR BENCH, BAR, AND PUBLIC

MATERIAL	LOCATION
Home page: ▪ Added "Fee Guidelines" navigation to left that links to a new "Fee Guidelines" only page ▪ Added box for "Fee Guidelines for Larger Chapter 11 Cases" that links to the new "Fee Guidelines" only page but goes directly to Appendix B materials	http://www.justice.gov/ust/
"Fee Guidelines" page: ▪ Guidelines ▪ Fillable Forms ▪ Related documents: ○ One Page Summary of Appendix B Guidelines ○ Analysis of Comments Received and Summary of Significant Changes in Response to Comments ○ Frequently Asked Questions ○ Statement of the Director Announcing the Appendix B Guidelines ○ Remarks of the Director at the 2012 Annual Meeting of the National Bankruptcy Conference ○ Transcript of Public Meeting ○ Remarks of the Director at the 2011 Annual Meeting of the National Bankruptcy Conference ▪ Link to Public Comments on Proposed Appendix B Fee Guidelines	http://www.justice.gov/ust/eo/rules_regulations/guidelines/index.htm

BAKER BOTTS, LLP v. ASARCO, LLC:

NO FEES FOR DEFENDING FEES

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These materials are not legal advice.

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INTRODUCTION

In *Baker Botts, LLP v. ASARCO, LLC*, _____ U.S. ____, *slip op*. June 15, 2015, the United States Supreme Court held, 6-3, that attorneys for a bankruptcy trustee cannot recover fees for defending against objections to their fee application. That holding altered a widespread, but largely unreported, practice to the contrary and will permanently affect the tactical environment for both seeking, and objecting to, a trustee's attorneys' fees.

FACTS AND PROCEDURAL HISTORY

ASARCO, LLC ("ASARCO") was a copper mining, smelting and refining company that filed a chapter 11 case in 2005. *Slip Op.*, at 1. Relying on §327(a) of the Bankruptcy Code,[1] which applies to debtors in possession by reason of §1107(a), ASARCO obtained the Bankruptcy Court's authorization to hire two law firms (the "Firms"): Baker Botts, LLP ("Baker Botts") and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. ("Jordan, Hyden").

The ASARCO chapter 11 case proved fantastically successful. The two firms successfully prosecuted, and recovered from ASARCO's parent, fraudulent conveyances of approximately $9 billion. As a result, all creditors were paid in full, and ASARCO still emerged from bankruptcy in 2009 with $1.4 billion in cash. *Slip Op*., at 2. Additionally, all of ASARCO's environmental liabilities had

[1] 11 U.S.C. §101 *et seq*. References to stand-alone section numbers refer to that section of the Bankruptcy Code. References simply to the "Code" mean the Bankruptcy Code.

been resolved. *Id.* The extraordinary nature of this outcome, and the superb quality of legal services leading to that outcome were extolled in the opinion below by the United States Court of Appeals for the Fifth Circuit, *see, In re ASARCO, L.L.C.*, 751 F.3d 291 (2014) (Per Jones, Circuit Judge).

The two Firms sought compensation under §330 of the Bankruptcy Code. ASARCO's parent, from whom the fraudulent conveyances had been recovered, objected. *Slip Op.*, at 2. After a 6-day trial, the Bankruptcy Court awarded the Firms approximately $120 million, plus a fee enhancement of $4.1 million, plus $5 million for litigating the defense of their fee applications. *Id.* The District Court affirmed. *Id.* at 3.

However, the Court of Appeals for the Fifth Circuit reversed. In an opinion by Judge Edith Jones, that Court, after noting that under the American Rule[2] each side must pay its own attorneys' fees absent explicit statutory authority, held in relevant part, "the Code contains no statutory provision for the recovery of attorney fees for *defending* a fee application." 751 F.3d 291, 301.

DECISION

The Supreme Court upheld the decision of the Fifth Circuit Court of Appeals and denied the recovery of any fees for defending a fee application.

[2] The rule that each side pays its own attorneys' fees is widely called the "American Rule" as distinguished from the "English Rule," under which the loser generally pays the winner's fees.

In a nutshell, the majority decision, authored by Justice Thomas, took it as a "bedrock principle" that "[e]ach litigant pays his own attorneys' fees, win or lose, unless a statute or contract provides otherwise." *Slip Op*., at 3 (internal citation omitted). The Court then reasoned that, as a matter of statutory construction, §330(a)(1) of the Code does not permit fees for defending fees. The majority noted that §330(a)(1)(A) permits "reasonable compensation for actual, necessary services rendered by the . . . professional person . . ." but found that the phrase 'services rendered' necessarily means 'labor performed for another' and that "[t]ime spent litigating a fee application against the administrator of a bankruptcy estate cannot be fairly described a labor performed for . . . that administrator.'" *Slip Op*., at 5-6.

The Court then rejected any argument that defending fee litigation benefits, is a service to the estate. The Court noted that the "service" (i.e., labor or work) exists even if the fee defense is unsuccessful; and declined any interpretation that would "allow courts to pay professionals for arguing for fees they were found never to have been entitled to in the first place." *Slip Op.*, at 8.

Next, the majority dispatched with the Government's argument that defending fees is 'properly viewed as compensation for the underlying services in the bankruptcy case.' *Slip Op*., at 8 (quoting from amicus brief for the United States). The Court found that reading the Government's reading cannot be

reconciled with the statutory text, *Slip Op*., at 9. The Court further rejected as "flawed and irrelevant" the government's policy argument that allowing fees for defending fees was necessary to the proper functioning of the Bankruptcy Code. *Slip Op*., at 11. The Court thought the policy argument weak in part because the government took the *opposite position* below, see *Slip Op*., at 12, but also because the Court lacked authority to rewrite the statute even if the Court thought it was a harsh result for the bankruptcy bar. *Id.*

Justice Sotomayor concurred specially, and solely, on the grounds that the statute was too clear to allow for policy considerations. *Opinion of Sotomayor, J.* at 1.

Justices Breyer, Ginsburg and Kagan dissented. Most fundamentally, the dissent argues that, properly construed, the statute *does* allow fees for defending fees. "Where a statute provides for reasonable fees, a court may take into account factors other than hours and hourly rates." *Dissenting Op.*, at 2. The dissent constructed a hypothetical of an attorney who earns fees of $50,000, but has to spend $20,000 defending meritless objections. According to the dissent, a bankruptcy court might conclude that the resulting $30,000 net is not reasonable. *Id.* The dissent went on to argue that a contrary interpretation would undercut a "basic objective" of "comparable compensation" for bankruptcy practitioners as compared to non-bankruptcy practitioners. *Id.* at 3. The dissent noted that in non-

bankruptcy contexts, fee disputes would involve only the client and not necessarily impose litigation costs, while in bankruptcy there are multiple possible objectors and usually litigation costs. *Id.*, at 3-4. Finally, the dissent noted that the "American Rule" is a default rule that should not itself dictate statutory construction. *Id*., at 4.

DISCUSSION

1. A Tighter Statutory Construction Argument for the Majority Opinion.

The majority opinion's statutory construction argument seems driven by the phrases "services rendered" in §330(a)(1), where "services rendered" is thought to linguistically imply services rendered for the benefit of someone else, as opposed to for the benefit of the service provider.

A study of the interplay between §327(a) and §330 based on their plain meaning may offer a more direct and compelling statutory construction argument. Section 327(a) specifies the scope of a professional's retention or engagement is "to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. §327(a). Section 330(a)(1), in turn, and in relevant part, authorizes compensation "for a person employed under §327." 11 U.S.C. §330(a). As a result, one can *only* be compensated for services within the scope of §327 namely, "assisting the trustee in carrying out his duties." But defending a fee application does not represent or assist the trustee in his duties; it merely represents

and assists the fee applicant. Further, nowhere does the trustee have a statutory duty to seek or defend fees for its own counsel. Accordingly, defending one's own fee application is simply outside the scope of services for which compensation can be sought under §330.[3]

2. Is There a Pathway Under §503(b)(3)(D)?

In substance, §503(b)(3)(D) authorizes "actual, necessary expenses incurred by . . . a creditor . . . making a substantial contribution in a case under chapter . . . 11 of this title." The Firms were undeniably creditors, and one could argue that resolution of the fee objection, which was necessary to complete the chapter 11 and was thus a "substantial contribution."

The strength of the argument is that it takes the argument wholly outside of construing §327 and §330 to deal with fees for defending fees. And, since the argument was not addressed by the Court, it may be a fruitful avenue for pursuing the defense of fee litigation even in wake of the Court's decision. Certainly, all of the fairness arguments advanced by Justice Bryer could be brought to bear in support of an argument under §503(b)(3)(D).

However, an argument that §503(b)(3)(D) allows fees for defending fees is probably an uphill fight. There is a substantial body of cases requiring that the

[3] This argument was advanced to the Court in *ASARCO* in the *Brief of Amici Curiae Professors Richard Aaron, et al. In Support of Respondent*. The author of these materials was Of Counsel on that amicus brief, in his capacity as an adjunct professor of law in the Bankruptcy LLM Program at St. John's Law School in New York. Counsel of record was Richard Lieb, Research Professor of Law at St. John's Law School.

whole estate, not just one creditor, benefit from the services in order for there to be a valid compensation claim under §503(b)(3)(D) for such services. *See*, *generally, In re Envirodyne Industries, Inc.*, 176 B.R. 815 (Bankr. N.D. Ill., 1995); *In re Alumni Hotel Corp*., 203 B.R. 624 (Bankr. E.D. Mich., 1996).

3. Is There a Contractual Way Out?

As the majority noted, the American Rule applies unless a statute *or contract* provides otherwise. *See, Slip. Op.* at 3, quoting *Hardy v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010). Therefore, could there be a way around the Court's decision by means of an engagement-of-counsel contract that provides for recovery of fees for defending fees?

One obvious limitation of this approach is that it directly contravenes the Supreme Court's construction of §330(a) which requires that services be rendered *for another* (i.e., not for the benefit of the fee applicant). A court could very easily hold that there simply is no statutory authority under §330 to permit or allow fees under such a contract.

On the other hand, an applicant could argue that such a contract is completely outside §330(a), but rather is an authorization under §363(b)(1) for the trustee to use property (cash) outside the ordinary course of business (to pay for objections to fee applications). Here again Justice Bryer's fairness arguments can be readily invoked.

In a similar vein, a contract could be negotiated pre-petition containing a clause that counsel can be compensated for defending its fee application. Immediately after filing its bankruptcy petition, the debtor in possession could move to assume it as an executory contract under Code §365.[4] At least one case has permitted the assumption of a prepetition contract between a chapter 13 debtor and an attorney, *In re Busetta-Silvia*, 308 B.R. 537 (D.N.M., 2004), although that case did not involve a provision to receive compensation for defending fees.

One problem with such an approach is whether a pre-petition contract is really just an evasion of the statutory compensation scheme established by §327 through 330. Perhaps more importantly, it seems that a debtor could seldom (if ever) satisfy the standard "best interests of the estate" test for assuming executory contracts. For a discussion of that test, *see, generally, In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 687 (Bankr., S.D.N.Y., 1992). Why or how would assumption of a pre-petition contract that provides for defense of fee applications (ever?) be in the best interests of the estate when the exposure to such fees can be eliminated by a post-petition retention to which *ASARCO* applies? The economic impact on the estate would usually militate against a court approving assumption of such a contract.

[4] Section 365(a) provides in relevant part, " . . . the trustee, subject to the Court's approval, may assume or reject any executory contract . . . of the debtor."

4. Are Fees Governed Exclusively by §330?

Lurking beneath contract arguments which rely on §363 or §365 of the Code, and also lurking beneath the "substantial contribution" argument, which invokes §503(b)(3)(D), is the question of whether professional fees are exclusively governed by §330. The very existence of §330 seems to make it implicitly the exclusive route for allowance of fees, a conclusion buttressed by the general rule of statutory construction that general language in one part of a statute does not apply to matters dealt with specifically elsewhere. *See, e.g., Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957). *Cf.*, *Lamie v. United States Trustee*, 540 U.S. 526 (2004) (forbidding payment of counsel unless counsel is retained under §327). If fee allowance is exclusively governed by §330, then the only way around the Court's decision in the *ASARCO* case is by statutory amendment.

5. Are "Premium" Fees the Answer?

Fee premiums are sometimes sought and occasionally granted for extraordinary results. It seems unlikely that a premium will be awarded merely for even successfully defending a fee application. However, §328(a) permits a court to award compensation "different from the terms and conditions [approved at the time of engagement under §327] if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time

of the fixing of such terms and conditions." Note that "different from" can mean less or more. "Improvident" is *not* qualified or limited regarding for *whom* the terms of engagement were improvident. This statute might be plastic enough to allow a bankruptcy judge to increase fees for a debtor's counsel caught in Justice Bryer's hypothetical – or even worse. If counsel has to spend $40,000 of her time to recover $50,000 in fees, perhaps the initial terms of her engagement were "improvident." Her rate could then be retroactively adjusted to create a fair outcome.

6. Changes in the Tactical Landscape Regarding Fee Application and Objections.

Clearly, a trustee's counsel's inability to recover fees for defending a fee application aids the objecting party by enabling it to inflict litigation costs on trustee's counsel. If the objector is willing and able to absorb such costs, while the trustee's counsel has no hope of recovering its such costs, the situation becomes unbalanced in a way that puts trustee's counsel at a serious – and potentially crippling – disadvantage. The risk is particularly acute whether the objector can be underwritten by the estate, as is clearly the case with an oversecured creditor proceeding under §506(b),[5] and is likely the case with a committee proceeding

[5] Section 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest

under §1103.[6] The radical asymmetry of this situation is quite disturbing and is deeper than anything explicitly recognized in Judge Bryer's dissent.

Before the Fifth Circuit Court of Appeals, Baker Botts argued that a rule against recovering defense fees would invite frivolous (or purely tactical or vengeful) objections. The Fifth Circuit's opinion noted a suspected "conspiracy of silence" among bankruptcy professionals to not object to each other's fees, and then noted the existence of remedies for frivolous applications.

Whether a "conspiracy of silence" did or does exist, and its scope if it does exist, is subject to highly varying opinions, all of which derive from different practice experiences and differing rumors which one may choose to trust (or not). The argument is thus susceptible to either anecdotal support or refutation and will not be analyzed further. It may be noted, however, that the creation of the Office of the U.S. Trustee and conferring on it of vigilance over fee applications[7] may have been partially motivated to overcome a perceived reluctance by bankruptcy professionals to object to each other's fee applications.

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on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

[6] Section 330 applies to compensation for persons retained "under section 327 or 1103." A committee counsel prosecuting a fee objection would clearly be rendering services to a committee; i.e., to another and not for itself. Thus, *ASARCO's* statutory construction which prohibits recovery of defense fees does not appear to apply to recovery of fees for prosecuting an objection.

[7] *See* 28 U.S.C. §586(a)(3)(A), and *see* H.R. No. 109-31, Pt. 1, 109th Cong., 1st Sess. (2005).

The remedies for frivolous fee objections mentioned by the Fifth Circuit would likely apply to only a tiny minority of fee objections – namely, those violating Fed.R.Civ.P.11, or violation of 28 U.S.C. §1927, or constituting a common law abuse of process. It need hardly be pointed out to experienced practitioners how hard it is to obtain those types of remedies. Further, the existence of those remedies in the limited instances to which they apply is not a cure for the general imbalance that will exist if objectors who can pay litigation costs versus defenders who cannot.

7. How Did It Ever Come to This?

The world of fee applications seemed relatively fine before the *ASARCO* decision. In my own practice, I was routinely compensated for presenting fee applications and for their defense on rare occasions when objections were filed. I saw a practice of compensating for defense of fee applications occur in many commercial jurisdictions, including the Northern District of Illinois, the Southern and Eastern Districts of New York, the District of Delaware, and the Central District of California.

However, in none of the instances in which I participated or observed was anyone seeking *$5 million* for the defense of fee objections, much less seeking that on top of a *nine figure* fee award plus *over $4 million* in premium compensation.

Neither the Fifth Circuit nor Supreme Court opinions really explain how the Firms arrived at their $5 million figure for defending the fee application. It does appear, at least from the petition for *certiorari*, that extensive and burdensome discovery was taken in connection with the fee objection. Still, $5 million is a lot of money. While the record is not clear, one surmises that the Firms simply multiplied the hours expended by standard rates. Note that $5 million would buy 12,500 hours at an average (blended) rate of $400; at $500/hr., it buys 10,000 hours; and at $750/hr., it still buys 6,666 hours (and 40 minutes). That's a lot of time.

The Firms may very well have had to expend every hour leading to the $5 million figure. I am *not* questioning the integrity of the billing or the efficiency of their services. But I do suspect that the $5 million size of the request may have stunned the Court of Appeals, given that over $124 million in other compensation was allowed. And while there are strong abstract fairness arguments, as articulated in Justice Breyer's dissent, for allowing defense costs, it is very hard to feel *in this specific case* that the Firms were treated unfairly.

Further, unless the time spent defending the fee applications was completely preclusive of paying work, the Firms had not really lost $5 million in revenue, nor were they out of pocket $5 million as would be the case for paying third party professionals. One could argue that the correct measure of self-staffed defense for

a law firm is the cost of sales for the time expended (i.e., retail value of time less earnings margin). Whatever that number is, it is significantly less than $5 million.

All of which is to say – the Firms were not in a very sympathetic position. Had the actual facts been those in Justice Bryer's hypothetical, ($20,000 expended to protect $50,000 in fees) the Court might have been more receptive to a different outcome. And, had Petitioners created pathways beyond the interpretation of section 330, the Court might have found its way to a different outcome. At the end of the day, plain meaning seems to have driven the outcome in a case where the Firms already were handsomely compensated.

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