Southeast Bankruptcy Workshop

Skills Track

Pitch Perfect: Various Perspectives on How to Get the Gig

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I. Getting the Gig – Strategies for Seeking Employment as Creditors' Committee Counsel

Bankruptcy Code Section 1103(a) authorizes a creditors' committee in a Chapter 11 bankruptcy case to employ counsel. Any counsel hired by the committee, however, must comply with Section 1103(b) which prohibits the professional from "represent[ing] any other entity having an adverse interest in connection with the case." 11 U.S.C. § 1103(b). Section 1103(b) specifies that "[r]epresentation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest." *Id.* Additionally, while Section 1103 does not require that creditors' committee counsel be disinterested, Section 328(c) permits the court to deny compensation to a professional employed under Section 1103 that is not disinterested. Although indirect, therefore, creditors' committee counsel must be disinterested and avoid adverse interests to be compensated for their work. For that reason, it may be advisable for counsel to avoid representing an individual creditor within the same class as the committee members as such representation could demonstrate the opportunity for preferential treatment. *See* WESTLAW, PRACTICAL LAW BANKR. & RESTRUCTURING, PITCHING ATTORNEY SERVICES TO THE CREDITORS' COMMITTEE (last updated 2022).

Prior to the pitch itself, prospective creditors' committee counsel must commit time and energy to preparing the "pitch book" and pitch presentation. While it may be common knowledge that certain businesses are preparing to file a Chapter 11 bankruptcy, practitioners must often rely on notices of a debtor's petition to learn of a potential representation opportunity. The Chapter 11 petition and schedules will provide the debtor's operating name, contact information for its counsel, and information regarding the current financial situation. FED. R. BANKR. P. 1007(a)–(b). Furthermore, voluntary Chapter 11 debtors must also file a list of creditors holding the twenty largest unsecured claims, excluding those held by insiders. *Id.* 1007(d). This list can provide critical information to prospective creditors' committee counsel about the nature and identity of the creditors and whether counsel has any pre-existing relationships with the largest creditors. These pre-existing relationships can be critically important when prospective counsel seeks to

contact potential committee members because of potential conflicts with the rules of professional conduct.

While every state bar has adopted its own rules of conduct, they often reflect the American Bar Association Model Rules of Professional Conduct. Under the Model Rules, "solicitation" refers to "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide . . . legal services for that matter." MODEL RULES OF PRO. CONDUCT § 7.3(a) (AM. BAR ASS'N 2020). Attorneys may not solicit to potential clients through "live person-to-person contact" unless the contact is a "person who has a family, close personal, or *prior business or professional relationship with the lawyer or law firm*; or person who routinely uses for business purposes the type of legal services offered by the lawyer." *Id.* § 7.3(b)(2)–(3). Under the official comments to the Model Rules, "live person-to-person contact" includes not only in-person meetings but also "live telephone and other real-time visual or auditory person-to-person communications." *Id.* § 7.3 cmt. 2. Attorneys, therefore, may not cold call a creditor unless the parties have a pre-existing relationship. *Id.* They may, however, mail written materials to creditors believed to be candidates for the creditors' committee in accordance with the Model Rules. *Id.* § 7.3 cmt. 3.

Once prospective creditors' committee counsel has identified the debtor and corresponding creditors, it will likely be served well by preparing a "pitch book," a term used to describe written materials presented to a creditors' committee to demonstrate that the committee should hire the respective counsel. While the pitch book may be mailed to creditors prior to an interview in accordance with the Model Rules, prospective counsel often decline to send materials until the date of the interview for fear they will otherwise be seen by competitors. Jeffrey N. Pomerantz, *The Committee's Action Plan: Organizing Itself and Retaining Counsel*, THE ROLE OF CREDITORS' COMMITTEES IN CHAPTER 11 BANKRUPTCIES, 2008 WL 5689265 (2008). The pitch book often contains attorney biographies of primary contacts in the case including partners, associates, and experts in niche issues. PITCHING ATTORNEY SERVICES TO THE CREDITORS' COMMITTEE, *supra*. Practical guidance advises that these biographies should limit themselves to one page, include a recent photograph and contact information, and include short summaries of similar cases in which counsel has experience. *Id.* Additionally, the pitch book should include firm experience in similar matters or in the industries in which creditors' committee members operate. Overall, "[t]he pitch book should be representative of the quality of work the committee can expect to receive if counsel is selected." *Id.*

Finally, prospective committee counsel must deliver the pitch. Each pitch attendee should be familiar with not only the current Chapter 11 case but also the debtor's industry and history. *Id.* Additionally, prospective firms must determine whether to designate a sole representative to speak on behalf of the firm or engage in a collaborative presentation with several of the firm's attorneys. *Id.* Regardless of the option chosen, each attendee should be prepared to speak for the firm and market its services to the creditors' committee. In delivering the initial pitch, prospective counsel should discuss several matters including: (1) experience in similar cases or in a similar industry; (2) proposed staffing strategies; (3) any pre-existing relationships with committee members; (4) factors that make the respective firm the optimal choice for the committee; and (5) counsel's strategy for maximizing value for the committee members. Pomerantz, *supra*.

Prospective counsel should also keep in mind areas of concern to the committee, including: whether counsel can commit the requisite time and attention to properly represent the committee; whether counsel has demonstrated knowledge of the case and developed a strategy to represent the committee; and whether counsel is free from conflicts that would interfere with representation. *Id.* By focusing on these areas of concern and performing diligent background research, prospective creditors' committee counsel can enhance their chances of success in the committee pitch process.

II. Approving Employment – Retroactive Employment after *Acevedo*

A. Employment as Counsel Generally

Under Bankruptcy Code Section 327(a), an attorney or other professional person who is disinterested and does not hold or represent an interest adverse to the estate may be employed with court approval. 11 U.S.C. § 327(a). Bankruptcy Rule 2014 governs the process for seeking employment under Section 327. FED. R. BANKR. P. 2014. Under Rule 2014, the trustee, debtor in possession, or committee must file an application with the bankruptcy court stating: (a) "the specific facts showing the necessity for the employment;" (b) "the name of the person to be employed;" (c) "the reasons for the selection;" (d) "the professional services to be rendered;" (e) any proposed arrangement for compensation;" and (f) "all of the person's connections with the debtor, creditors, [or] any other party in interest." *Id.* Furthermore, the person to be employed must include a verified statement "setting forth the person's connections with the debtor, creditors, [or] any other party in interest." *Id.*

Additionally, attorneys seeking employment in larger Chapter 11 cases should be mindful of the United States Trustee Guidelines. These Guidelines, published in 2013, apply to Chapter 11 cases with $50 million or more in both assets and liabilities. Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36248 (June 17, 2013), https://www.justice.gov/ust/fee-guidelines. Under these guidelines, the United States Trustee has identified several areas of focus when it reviews fee applications, including: Section 330(a)(3) factors; whether the applicant provided sufficient information regarding comparable market billing rates; whether the matter was efficiently staffed; whether the applicant sufficiently explained rate increases (other than typical increases due to advanced seniority and promotion); whether billed activities are those which are routinely billed outside of bankruptcy; block-billing; whether the applicant seeks compensation for litigating objections to the fee application; and vague or repetitive entries. *Id.* An attorney seeking employment in large Chapter 11 cases, therefore, may be well served by providing information regarding these areas of focus in her employment application to help allay concerns before the United States Trustee makes an objection.

An attorney cannot be compensated for her actual, necessary services or expenses unless she has complied with Section 327. 11 U.S.C. § 330(a). Any fees due to an attorney who fails to file for employment under Section 327 may be forfeit and a court may require any collected fees to be disgorged. 3 COLLIER ON BANKRUPTCY ¶ 327.03[c] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2021). While it is generally advisable to file a contemporaneous motion for employment under Section 327 when filing the bankruptcy petition, bankruptcy courts have often struggled with the inherent time delay between a motion for employment under Section 327 and

an order granting such motion. *See* FED. R. BANKR. P. 6003(a) (prohibiting a court from granting a motion for employment under Rule 2014 within 21 days of filing the petition). In the weeks between the motion and approval, critical work may need to be completed by counsel and yet, without an order approving employment, counsel bears a risk that services provided before the order will not be compensated.

Some jurisdictions have enacted local rules to help mitigate this risk. In the District of South Carolina Bankruptcy Court, Local Rule 2014-1 provides that "[u]pon entry of an order approving an application for employment, employment is effective from the date of the filing of the application, unless otherwise ordered by the Court." Bankr. D.S.C. R. 2014-1. While this rule helps bridge the practical risk between an application and order, attorneys who completed a substantial amount of work prior to filing an application for employment, or in jurisdictions without such a rule, must rely on retroactive employment.

Furthermore, even if counsel files a contemporaneous motion for employment with the petition, retroactive employment is necessary to account for pre-petition services. Prior to *Acevedo*, described below, this retroactive employment generally took the form of *nunc pro tunc* employment orders which would retroactively apply to the date of filing the application or the date on which the attorney began providing services.

B. *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*

Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, 140 S. Ct. 696 (2020) – In *Acevedo*, active and retired employees of several Catholic school who were participants in a trust established to administer a pension plan for the employees filed suit alleging that the trust eliminated the pension plan and, by extension, their pension benefits. *Id.* at 697. After several appeals to the Puerto Rico Court of Appeals and Puerto Rico Supreme Court on different questions of legal personality, the Archdiocese petitioned the Supreme Court of the United States for writ of certiorari on questions regarding the Free Exercise and Establishment Clauses of the First Amendment. *Id.* at 698–99. The Court instead looked to an issue of jurisdiction.

Earlier in the case, the trial court denied a preliminary injunction requiring the trust to pay pension obligations. After an appeal to the Puerto Rico Supreme Court, the Court determined the participating employers of the pension trust would be required the pay the pension obligations if the trust lacked sufficient assets and remanded the suit back to the trial court. On February 6, 2018, the Archdiocese removed the case to the U.S. District Court for the District of Puerto Rico, arguing the trust had filed for Chapter 11 bankruptcy protection and that the pension benefits litigation was sufficiently related to confer jurisdiction over the pension dispute. The bankruptcy court dismissed the trust's bankruptcy proceeding on March 13, 2018 and the Puerto Rico trial court issued three orders from March 16 to March 27, 2018, requiring the Roman Catholic Church in Puerto Rico to pay employee pension benefits or suffer seizure of assets by the sheriff. At issue for the trial court's jurisdiction, however, the U.S. District Court did not remand the case to the Puerto Rico trial court until August 20, 2018. The trial court, therefore, lacked jurisdiction at the time it issued the payment and seizure orders.

The District Court attempted to remedy the jurisdiction error by issuing a *nunc pro tunc* judgment declaring the order effective as of March 13, 2018. The Supreme Court of the United States, however, found this was insufficient to confer jurisdiction back to the trial court for the respective orders. In vacating the Puerto Rico Supreme Court's judgment that upheld the trial court's payment and seizure orders, the United States Supreme Court stated "[f]ederal courts may issue *nunc pro tunc* orders . . . to 'reflect the reality' of what has already occurred." *Id.* at 700–01 (citing *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990)). "Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court." *Id.* at 701 (citing *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 390 (1912)).

"Put colorfully, '[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating "facts" that never occurred in fact.'" *Id.* (citing *United States v. Gillespie*, 666 F. Supp. 1137, 1139 (N.D. Ill. 1987)). "Put plainly, the court 'cannot make the record what it is not.'" *Id.* (citing *Jenkins*, 495 U.S. at 49). Here, as the U.S. District Court did not actually remand the case back to the trial court until August 20, 2018, the District Court could not resolve the jurisdiction issue by way of a *nunc pro tunc* order. *Id.* The Court, therefore, remanded the case back to the trial court for further proceedings.

C. Illustrative Cases

The Supreme Court's ruling in *Acevedo* brought many questions for bankruptcy courts as they "frequently approved [attorney retention orders] *nunc pro tunc*." *Haigler v. High Tension Ranch, LLC*, No. 3:20-CV-00564, 2021 WL 3622149, 2021 U.S. Dist. LEXIS 153278 (W.D.N.C. Aug. 16, 2021). While some courts have re-evaluated the manner in which they grant orders for employment, believing *Acevedo* prohibited almost all retroactive orders, the majority of bankruptcy courts in the Fourth and Eleventh Circuits have concluded *Acevedo*'s holding is more limited. For these courts, the use of *nunc pro tunc* was merely imprecise nomenclature and the use of retroactive employment orders was neither prohibited by the Code or Bankruptcy Rules. *Id.*

1. Fourth Circuit

In re Wellington, 628 B.R. 19 (Bankr. M.D.N.C. 2021) – The Debtor filed a petition under Chapter 11 on January 24, 2020. Forty days after filing the petition, the Debtor filed an application under Section 327 to employ Special Counsel to represent the Debtor in state court litigation in New York. The Court approved the application. As neither the application nor the approving order specified the date upon which Special Counsel was considered "employed," the Court considered the date the Debtor filed the application as the effective date of employment. When the Debtor filed the initial motion for compensation of Special Counsel, however, the Court questioned whether to award fees incurred prior to the date of filing the employment application. While the Bankruptcy Administrator did not oppose the requested fees as they were unanticipated and of an emergency nature, the Court considered whether it could approve the request in light of *Acevedo*.

The Court found that "[w]hile *Acevedo* may have eliminated *nunc pro tunc* retention orders . . . courts are not prohibited from compensating professionals under Section 330 for work performed prior to an effective date of employment." *Id.* at 25 (citing *In re Miller*, 620 B.R. 637, 641–42 (Bankr. E.D. Cal. 2020); *In re Roberts*, 618 B.R. 213, 217 (Bankr. S.D. Ohio 2020); *In re*

Benitez, No. 8-19-70230, 2020 WL 1272258, 2020 Bankr. LEXIS 661 (Bankr. E.D.N.Y. Mar. 13, 2020)). As "[t]he language of Section 330 and Federal Bankruptcy Rule 2014 does not explicitly preclude compensation prior to the effective employment date . . . the 'single temporal limitation' [is] that a professional must have been successfully employed pursuant to Section 327 before obtaining a court award of compensation." *Id.* (citing *In re Benitez*, 2020 WL 1272258, 2020 Bankr. LEXIS 661). The Court, therefore, held that it had "discretion to award pre-employment fees and expenses as part of its determination of the amount of a professional's reasonable compensation under Section 330." *Id.* at 26.

In determining whether to award pre-employment compensation under Section 330, the Court established a three-step process. First, the Court asked "whether the fees and expenses are sought by one of the court-approved professionals enumerated in Section 330(a)(1)." Second, the Court stated that a "professional employed under Section 327 must demonstrate the fees and expenses derive from actual, necessary services rendered by the professional." Third, the Court "must determine the reasonable amount of compensation for the actual, necessary services that were performed by the professional" in line with Section 330(a)(3). As part of the factors weighed under Section 330(a)(3), the Court found it would consider an additional factor of "whether all or some of the fees and expenses sought are for work performed prior to a professional's effective date of employment and, if so, whether the professional has provided a reasonable justification for why services were performed prior to the employment effective date." To determine whether pre-employment compensation is reasonably justified, the Court described six considerations:

> (i) the reasons for the delay in filing an application to employ;
> (ii) whether the applicant or some other person bore responsibility for applying for approval;
> (iii) whether the applicant was under time pressure to begin service without approval;
> (iv) the amount of delay after the applicant learned that initial approval had not been granted;
> (v) the extent to which compensation to the applicant will prejudice innocent third parties; and
> (vi) other relevant factors [namely, 'extraordinary circumstances'].

Mere negligence or forgetfulness, however, would not be a satisfactory justification to approve pre-employment fees.

Here, while the Court found the 40-day delay in seeking employment was cause for concern and "pushe[d] the boundaries of reasonableness," the Court agreed the services performed were of an emergency nature. The Court, therefore, approved the request for Special Counsel fees, albeit with a 10 percent reduction for the Debtor's failure to disclose Special Counsel to the Court on two separate occasions.

In re Grinding Specialists, LLC, 625 B.R. 6 (Bankr. D.S.C. 2021) – The Debtors originally filed petitions under Chapter 11 on October 15, 2018. In March of 2019, the cases converted to ones under Chapter 7 and the Trustees were appointed. In March of 2020, counsel for the Trustee sought approval of a settlement in each bankruptcy case, and the Court approved the settlement agreement on April 16, 2020. On October 9, 2020, a complaint was filed seeking avoidances and

recovery of transfers of over $16 million. The defendants filed a motion to dismiss on January 5, 2021, alleging that counsel did not have authority to sign the complaint on behalf of the Trustees as he had not been employed according to Section 327. The Trustees then moved the Court to approve an application to employ local counsel retroactive to the date of the settlement agreement order, April 16, 2020.

Considering whether to approve the motion to employ as of April 16, 2020 rather than the date of the application in 2021, the Court reasoned that "*Acevedo* curtails only the inherent authority of federal courts to grant retroactive relief by *nunc pro tunc* orders which purport to create facts or rewrite history to support the retroactive relief granted." *Id.* (citing *In re Miller*, 620 B.R. 637, 641 (Bankr. E.D. Cal. 2020)). Here, however, the Court found no evidence that the Trustees sought approval to employ local counsel at the April 14, 2020 hearing or that an attorney-client relationship had yet formed. As the Trustees failed to present evidence showing that *nunc pro tunc* relief was appropriate, i.e., that a mistake or omission occurred requiring the Court's correction, the Court denied the Trustee's request and approved employment of local counsel only as of the application date. While the Court did not discuss any potential circumstances justifying retroactive employment, it did appear to interpret *Acevedo*'s holding to be limited to the prohibition of rewriting history. This interpretation may permit an attorney to seek retroactive employment if the attorney began working by the time such retroactive employment is sought, particularly if facts exist showing a form of excusable neglect preventing a contemporaneous motion to employ.

Haigler v. High Tension Ranch, LLC, No. 3:20-CV-00564, 20201 WL 3622149, 2021 U.S. Dist. LEXIS 153278 (W.D.N.C. Aug. 16, 2021) – The facts here are identical to those of *In re Grinding Specialists, LLC*, 625 B.R. 6 (Bankr. D.S.C. 2021) as they arise in the same case.

In determining whether the Trustees lacked jurisdiction to adjudicate the complaint because their local counsel had not yet been employed under Section 327 at the time he signed the complaint, the Court looked to persuasive authority on attorney compensation for services performed prior to employment. The Court noted that "until a recent ruling from the Supreme Court of the United States, bankruptcy courts throughout the country frequently approved attorneys *nunc pro tunc*."

After the Supreme Court's ruling in *Acevedo*, "courts to analyze this issue . . . have simply recognized that the '*nunc pro tunc*' nomenclature was imprecise—not that retroactive approval of attorneys violates the statute or the relevant rules." *Id.* (citing *In re Roberts*, 618 B.R. 213, 216–17 (Bankr. S.D. Ohio 2020)). "Thus, the vast array of caselaw where courts previously approved attorneys *nunc pro tunc*, which supports that the services rendered prior to approval are not invalid, has not been contravened by *Acevedo Feliciano*." The Court concluded, therefore, that while the bankruptcy court had denied the request for *nunc pro tunc* employment, "courts do not find invalid services rendered by an attorney prior to receiving court approval." Thus, the Trustees did not lack jurisdiction in the instant complaint.

While the Court noted that it was not, in this case, approving *post facto* employment for the attorney, but was merely discussing that the attorney's signature was valid on behalf of the Trustees, this reasoning is likely persuasive for bankruptcy courts in the Fourth Circuit seeking to interpret retroactive employment post-*Acevedo*.

2. Eleventh Circuit

Smith v. Meredith (In re Smith), 637 B.R. 758 (Bankr. S.D. Ga. 2022) – The Debtors jointly filed a case under Chapter 13 on November 10, 2015, and the Court confirmed their plan on April 11, 2016. Just a few weeks after confirmation, the Debtors were injured in a car accident and hired a personal injury attorney to represent them. The attorney settled the male Debtor's claim first on July 17, 2017, and sought approval from the Bankruptcy Court for both the settlement and the attorney's employment. On August 24, 2018, the attorney settled the female Debtor's claim for $45,000.00. In the second settlement, however, the attorney failed to seek approval of the settlement or employment from the Bankruptcy Court. He also disbursed the proceeds, giving the female Debtor $32,500.00 and paying himself $11,414.71 for fees and expenses. It was not until May 12, 2021, nearly three years after the female Debtor's settlement, that the Debtors filed a motion with the Bankruptcy Court to employ the personal injury attorney and a subsequent motion to approve settlement on May 26, 2021.

Considering whether to approve the motion to employ the personal injury attorney *nunc pro tunc*, the Court concluded that *Acevedo* did not prohibit granting such relief. The Court found that "[n]otwithstanding . . . *Acevedo*, many bankruptcy courts continue to grant *nunc pro tunc* employment applications. . . . Because 'there is no requirement that compensated services must have been performed only after the effective date of an employment order,' . . . courts reason that there is no need to create facts or rewrite history when granting such an application."

Although it ruled that *Acevedo* did not prevent the Court from issuing *nunc pro tunc* employment orders, it proceeded to determine whether such relief was appropriate in this case. The Court employed a two-part test: "a movant seeking retroactive approval of a professional's employment must demonstrate [(1)] that the professional would have been qualified for employment at the onset, and throughout the period of time for which the services are to be compensated; and [(2)] that the movant's failure to obtain prior approval at an earlier time is excusable." *Id.* (citing *In re Fisher*, No. 16-1911, 2019 WL 1875366, 2019 Bankr. LEXIS 1325 (Bankr. S.D. Ala. Mar. 27, 2019)).

Here, the Court found the personal injury attorney satisfied the first prong of the test but failed the second prong. The Court noted that the attorney had over twenty years of experience practicing law and had maintained a personal injury practice for several years. This demonstrated that he would have been qualified to prosecute the female Debtor's personal injury action from the onset of employment throughout the life of the case. On the second prong's necessity for excusable neglect, the Court found that the attorney "simply forgot that this was a joint bankruptcy case by the time he settled" the female Debtor's case. While the Court did not find any intentional misconduct by the attorney, it did not find his neglect to be excusable as he had substantial experience requesting bankruptcy court approval and had shown that experience in performing for the male Debtor. The Court, therefore, denied the Debtor's motion to employ the attorney *nunc pro tunc*.

In re McLemore, No. 20-32131, 2022 WL 362915, 2022 Bankr. LEXIS 308 (Bankr. M.D. Ala. Feb. 7, 2022) – The Debtor filed a petition on October 13, 2020 under Chapter 13. Within

two months, on December 8, 2020, the Debtor filed an amended Chapter 13 plan to include a pending personal injury claim, the proceeds of which could be used to pay unsecured creditors. In July of 2021, after the Court confirmed the Debtor's plan, the debtor amended his Schedules A/B and C to include the personal injury cause of action and exempt up to $5,000.00 of the proceeds. The Trustee filed a motion to dismiss the bankruptcy case with a bar to re-filing, alleging that a firm representing the Debtor had settled the personal injury claim in June of 2021 for $40,000.00 and distributed $16,788.26 directly to the Debtor. In September of 2021, the Debtor again amended his Schedules A/B and C to reflect the $16,788.26 disbursement and exempt up to $6,490.00 of the settlement proceeds.

On September 28, 2021, the Debtor filed an application to employ special counsel *nunc pro tunc* in the representation of his personal injury case. The Trustee and Bankruptcy Administrator both objected and alleged that this particular firm had repeatedly entered into settlements on debtors' behalf and "disbursed funds in bankruptcy cases without court approval." At a hearing on September 20, 2021, the Debtor's personal injury attorney admitted he did not conduct any PACER searches to determine whether the debtor was in an active bankruptcy case.

Considering whether to grant the Debtor's motion for retroactive employment of his personal injury attorney, the Court reasoned that *Acevedo* did not bar the use of retroactive employment orders so long as the "movant can show the professional seeking employment would have been qualified for appointment and excusable neglect for failing to file a timely application. To find excusable neglect, the Court consider[ed] other circumstances surrounding the omissions or negligence, including 'prejudice to the debtor, the length of the delay and the potential impact on the judicial proceedings, the reason for the delay, . . . and whether the movant acted in good faith.'"

Here, the Court denied the application for retroactive employment because the personal injury attorney failed to conduct a PACER search, waited two months after discovering the bankruptcy case to file the application, and disbursed proceeds to the Debtor. The personal injury attorney, therefore, failed to demonstrate excusable neglect. Accordingly, the Court determined it also had to deny the professional's application for approval of attorney fees and expenses because the Court never approved the professional's employment. While the Court granted the Debtor's motion to approve settlement agreement, the attorney was denied all fees and expenses due to this neglect.

Middle District of Georgia Local Bankruptcy Rule, cited as Bankr. M.D. Ga. R. 2014-1 – 2014-1(c) Nunc Pro Tunc Application

(1) If an application for approval of employment of a professional person is made within 14 days after the filing of the case or within 14 days of commencement of the professional's services, it shall be deemed contemporaneous.

(2) If an application for approval of the employment of a professional person is made more than 14 days after the filing of the case or more than 14 days after commencement of the professional's services, and the application requests that the approval be nunc pro tunc, the following information shall be required:

(A) An explanation of why the application was not filed earlier;

(B) An explanation of why the order authorizing employment is required nunc pro tunc; and
(C) An explanation, to the best of the applicant's knowledge, how the approval of the application will or will not prejudice any parties in interest.
(3) Applications to approve the employment of professional persons nunc pro tunc shall be approved only on notice and opportunity for hearing. All parties in interest in the case shall be served with notice of the application. The notice shall substantially comply with the provisions of LBR 9004-1 and 9007-1.

III. Fee Applications

A. General Standards for Fee Applications

Bankruptcy Code Section 330 provides that attorneys employed under Section 327 may be awarded "reasonable compensation for actual, necessary services . . . ; and reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1)(A)–(B). The attorney seeking compensation bears the burden to show the bankruptcy court that any requested compensation is reasonable. *See In re Sugarloaf Ctr.*, No. 15-58442, 2020 Bankr. LEXIS 3226 (Bankr. N.D. Ga. Nov. 17, 2020). In determining reasonable compensation, courts must consider the factors listed in Section 330(a)(3), including:

> (A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Courts, however, are not limited to these factors alone as indicated by the use of the term "including" in Section 330(a)(3). Furthermore, courts cannot permit compensation for "(i) unnecessary duplication of services; or (ii) services that were not (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." *Id.* § 330(a)(4)(A).

Courts in the Fourth and Eleventh Circuits employ the lodestar analysis to calculate an award of reasonable attorneys' fees. *See, e.g.*, *In re Howard Ave. Station, LLC*, 568 B.R. 146 (Bankr. M.D. Fla. 2017); *In re Broughton*, 619 B.R. 596 (Bankr. E.D.N.C. 2020). "In determining the lodestar figure, [courts] should consider whether the rate and the number of hours are reasonable, through the application of the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). . . ." *Id.* The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee

> for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Although *Johnson* was a non-bankruptcy case, bankruptcy and restructuring attorneys can best advocate for their own fees by providing evidence to the bankruptcy court in accordance with these twelve factors.

Finally, for attorneys in large Chapter 11 bankruptcy cases with the debtor's petition listing liabilities and assets each in excess of $50 million, attorneys should also focus on the billing guidelines set by the United States Trustee. *See* 78 Fed. Reg. 36248, https://www.justice.gov/ust/fee-guidelines, *supra*. Briefly, attorneys seeking to submit fee applications in these cases should demonstrate efficient staffing, the reasons for rate increases other than typical annual increases for seniority and promotion, comparable rates in similar cases, clear and comprehensible time entries, and that all fees charged are for services performed or expenses incurred. *Id.*

B. Common Pitfalls Leading to Reductions by the Court

With dozens of factors to consider in drafting fee applications, it may become overwhelming to determine what evidence should be presented to the bankruptcy court. A few areas of fee applications, however, can cause a bankruptcy court or the United States Trustee to heighten its scrutiny. First, while round numbers (entries ending in 0.5 or 1.0) in timekeeping can and do occur when done accurately, a high frequency of such entries can raise suspicion because it "is statistically unlikely" that 80% of tasks take exactly 30 minutes or one hour. J. Scott Bovitz, *Billing Tips from a Fee Examiner*, XL AM. BANKR. INST. J. 16 (Feb. 2021).

Second, block-billing, or the practice of "lumping" time entries for several tasks into a single time entry, can lead to reductions for these time entries. *See U.S. Bank, N.A. v. Tara Retail Grp., LLC (In re Tara Retail Grp., LLC)*, 636 B.R. 439 (Bankr. N.D. W. Va. 2021) (noting one significant example of block-billing when an attorney billed 9.9 hours and wrote "Prepare for and participate in deposition of diminunition [sic] expert Dawson. Conference call with E. Murarova re: preparation points for standard of care expert and review of report re: same. Emails re: expert reports." and reducing block-billed entries by 10%). While attorneys may consider a 10% reduction in fees to be a worthwhile trade-off to more loosely track their time, instances of block-billing can raise scrutiny over the entire fee application and lead to more significant deductions or the denial of fees altogether.

Third, attorneys should double-check their fee applications against submitted time entries to ensure that billing entries match with the requested total in the fee application. If any discrepancies exist, the court is likely to force the attorneys to bear the cost of any mistakes. *See id.*

Fourth, attorneys should put forth evidence of prior rates approved within the district in which fees are sought. In this instance, geography matters and courts will only consider relevant evidence of rates within the court's jurisdiction or in highly similar locales. For example, evidence of market rates in the Eastern District of Virginia, which includes Richmond and Alexandria, will not be persuasive to a court standing in the Western District of Virginia, an area with a lower average cost of living. Evidence of rates in the Northern District of West Virginia, however, may provide more persuasive evidence towards approving an attorney's billing rate in the Southern District of West Virginia as the districts generally have a similar cost of living. Evidence of rates within the court's jurisdiction will likely be the most persuasive when an attorney's requested rate appears, at first glance, high for the district. *Id.* (approving a rate of $775 per hour in the Northern District of West Virginia after counsel put forth evidence of an approved rate of $685 per hour three years prior).

Attorneys employing good billing practices will not only likely experience less scrutiny in their fee applications but will likely experience less stress over potential reductions and any questions of unethical billing.

IV. Compensation for Non-Standing Subchapter V Trustees

The Small Business Reorganization Act of 2019 ("SBRA"), enacted on August 23, 2019 and effective on February 19, 2020, established a new, streamlined Chapter 11 system for small businesses. *See* 11 U.S.C. §§ 1181–1195. Under the recent Bankruptcy Threshold Adjustment and Technical Corrections Act, signed on June 21, 2022, debtors with less than $7.5 million in aggregate noncontingent liquidated secured and unsecured debts are eligible for Subchapter V. *Id.* § 1182(1)(A). Subchapter V appears to be a popular option for eligible debtors to seek reorganization. Essential to the reorganization process is the Subchapter V trustee, a disinterested party appointed by the United States Trustee in a Subchapter V case to facilitate the debtor, creditors, and other parties of interest towards a consensual plan of reorganization. *Id.* § 1183(a), (b)(7).

Currently, the United States Trustee has not appointed any standing Subchapter V trustees, instead choosing to appoint trustees on a case-by-case basis under Section 1183. *Private Trustee Locator*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/private-trustee-locator (last updated Jan. 21, 2022). The Bankruptcy Code provides for non-standing Subchapter V trustee compensation through Section 330.[1] Section 330 provides that a court may award to the trustee "reasonable compensation" for "actual, necessary services" and "reimbursement for actual, necessary expenses" subject to Sections 326, 328, and 329 and the limitations provided in Section 330(a)(2)–(7). Sections 326(a), 328, and 329 are inapplicable to a Subchapter V trustee, leaving only Section 326(b) to govern non-standing Subchapter V trustee compensation.

Under Section 326(b):

[1] For an excellent walk-through of Subchapter V trustee compensation, *see* Cameron Murray, *Compensation of the Nonstanding Subchapter V Trustee*, XLI AM. BANKR. INST. J. 60 (Jan. 2022). As the United States Trustee has not appointed any standing Subchapter V trustees at this time, only non-standing trustee compensation will be discussed here.

> In a case under subchapter V of chapter 11 . . . , the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, but may allow reasonable compensation under section 330 . . . of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

First, Section 326(b) prohibits compensation for *standing* Subchapter V trustees. *See id.* As the United States Trustee has not appointed any standing Subchapter V trustees, this compensation prohibition is inapplicable. Second, Section 326(b) caps a non-standing trustee's compensation to 5% of all payments under the plan. Section 326(b), however, only lists trustees appointed under Chapter 12 or 13, leaving Subchapter V trustees with no cap on compensation. *See id.* Some consider the exclusion of Subchapter V trustees appointed under Section 1183(a) from Section 326(b) to be a drafting error as Section 326(b) does not provide for non-standing Subchapter V trustee compensation at all. *See* 8 COLLIER ON BANKRUPTCY ¶ 1183.04[3]. As it stands, therefore, bankruptcy courts must use their authority under Section 105 to award reasonable compensation to a non-standing Subchapter V trustee. *Id.*

If Congress amends Section 326(b) to fix the alleged drafting error, Subchapter V trustees may become subject to the 5% plan payment compensation cap. Currently, however, the only limitation for non-standing Subchapter V trustee compensation is that the compensation be reasonable and comply with Section 330(a)(1)–(7).

V. "No Money Down" Bankruptcies? The Standard for Bifurcated Fee Agreements in Consumer Chapter 7 Cases

A. Bifurcated Fee Agreements Generally

Consumer bankruptcy attorneys have long sought a solution for consumers who cannot afford to file bankruptcy. A typical Chapter 7 fee may run as high as $2,000.00, a difficult proposition for a low-income individual. As courts have held that a debt for pre-petition attorneys' fees is subject to the automatic stay and the bankruptcy discharge, attorneys generally require clients to pay the fee prior to filing the petition. *See, e.g.*, *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125 (7th Cir. 2003). Adding to the problem, courts have ruled that attorneys cannot advise debtors to take on additional debt to pay their fees under Section 526(a)(4). *Cadwell v. Kaufman*, 886 F.3d 1153 (11th Cir. 2018). Requiring that debtors proceed *pro se* is also likely not a viable solution as some studies have found that *pro se* debtors are up to nine times less likely to receive a discharge as compared to parties represented by counsel. THE ABI COMM'N ON CONSUMER BANKR., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 90, n.1 (2019). Finally, individuals who cannot afford an upfront Chapter 7 filing fee may be steered towards a Chapter 13 bankruptcy which permits the payment of attorneys' fees over time. This solution creates issues, however, as the debtor will be forced to pay more over time or risk dismissal and denial of discharge along with the loss of any paid fees. Some bankruptcy attorneys, therefore, have sought to implement the creative solution of "bifurcated fee agreements" in Chapter 7 cases.

Bifurcated fee agreements operate by the individual first entering into a pre-petition agreement with the attorney at low to no cost that covers only minimal pre-petition services. After filing the petition, the individual then enters into a second, post-petition agreement with the attorney to cover post-petition services. The post-petition agreement is not subject to either the automatic stay or the bankruptcy discharge, and the attorney can therefore demand payment without fear of violating the discharge injunction or the stay. The American Bankruptcy Institute, however, has identified at least five issues with these agreements. THE ABI COMM'N ON CONSUMER BANKR., *supra* at 91.

> First, local rules or practices may not allow the unbundling of postpetition services. Second, even if unbundling is allowed, the court may find that the fees allocated to prepetition services are unreasonably low and the fees for postpetition services are unreasonably high. Third, the client may decline to enter into the second fee agreement, requiring the attorney to withdraw from representation, leaving the debtor unrepresented and leaving the attorney with no ability to obtain additional payment for the services already rendered. Fourth, where the client enters into a postpetition contract, there is no incentive for the client to pay for the postpetition services other than a threat of collection action, which the attorney may be reluctant to engage in, both because of its expense and because it may generate unfavorable reviews of the attorney, online and otherwise. Fifth, the attorney may assign the right to be paid under the postpetition agreement to a third-party collector, incurring significant charges and increasing the fee charged to the client to offset these charges.

Id. Two other concerns include whether the services provided pre- and post-petition match up with the fees charged under each agreement and the possibility that debtors can incur additional debt to pay the post-petition fees. Daniel Gill, *Cash-Strapped Chapter 7 Debtors Get Lift in New Ruling Over Fees*, BLOOMBERG LAW (Apr. 27, 2022).

B. Case Illustrations

Walton v. Clark & Washington, P.C., 469 B.R. 383 (Bankr. M.D. Fla. 2012) – Clark & Washington, a law firm representing Chapter 7 debtors, offered a fee arrangement allowing clients to sign two separate agreements, one for pre-petition services and another for post-petition services. The debtor made a small payment under the pre-petition agreement and made further payments under the post-petition agreement that were automatically debited from his bank account. The United States Trustee objected to this procedure as a violation of the automatic stay and discharge injunction.

Upon review of counsel's bifurcated fee arrangement, the Bankruptcy Court overruled the U.S. Trustee objection subject to several modifications of the firm's procedure. First, the Court noted several aspects of the procedure that properly protected debtors, including: (1) the pre-petition agreement "fully set out the costs and fees associated with filing the [debtor's] case;" (2) the agreements specified that the debtor had three options for post-petition legal services: (a) the debtor can proceed *pro se*, (b) the debtor can retain the current firm, or (c) the debtor can retain a

different law firm; (3) the debtor was given a 14-day "cooling off" period to make a decision on post-petition legal services.

Second, the Court ruled that counsel must implement new measures to properly implement a bifurcated fee agreement, including: (i) the firm's Rule 2016 disclosure must be moved from the end of each contract to a separate cover page; (ii) debtors must acknowledge "they have received and read the 'two-contract procedure' disclosure;" (iii) debtors "must execute the pre-petition agreement before the bankruptcy case is filed and the post-petition agreement after the bankruptcy case is filed;" (iv) the post-petition agreement must specify that the debtor has 14 days to make a decision regarding post-petition legal services; and (v) counsel must include language in its Rule 2016 disclosure that, should the client decide to proceed *pro se* or retain a different law firm for post-petition services, the firm will continue to represent the debtor until the Court approved the withdrawal. With these procedures, the Bankruptcy Court approved the firm's bifurcated fee agreement procedure.

In re Prophet, No. 3:21-cv-01080, 2022 WL 766350, 2022 U.S. Dist. LEXIS 44520 (D.S.C. Mar. 14, 2022) – Due to financial struggles caused by COVID-19, counsel representing Chapter 7 debtors began to offer a bifurcated fee agreement option to clients. This option became popular among clients and the attorney filed over one hundred such Chapter 7 cases. Under this option, the client could enter into pre-petition and post-petition agreements.

The pre-petition agreement specified that it only covered pre-petition services and gave the client three options after the attorney filed the debtor's petition: "(1) You can represent yourself in your bankruptcy case (called proceeding *pro se*); (2) You can hire another attorney to represent you in your bankruptcy case; or (3) *Within ten (10) days after your case is filed*, you can enter into a Post-Filing Agreement with us." Furthermore, the pre-petition agreement included a provision titled "Unbundling or Limited-Scope Representation" in which the client acknowledged that the firm represented that it was "ready, willing and able" to represent the client throughout the entire bankruptcy case. In order to fund the post-petition agreement, the attorney entered into a line of credit agreement in which a third-party financier advanced 75% of the post-petition fee and kept 25% as its own fee. Although the bifurcated agreement option was more expensive for clients overall, the attorney earned less because of the third-party charge. The United States Trustee objected to these fee agreements as violations of Local Bankruptcy Rule 9011-1(b) which prohibits unbundling of legal services and the bankruptcy court agreed, ruling that bifurcated fee agreements were impermissible under LBR 9011-1(b). The attorney then appealed to the United States District Court.

The District Court reversed the bankruptcy court and found the bifurcated fee agreements did not violate LBR 9011-1(b). LBR 9011-1(b) provides:

> Except as may be provided in a written agreement with the debtor concerning appeals and adversary proceedings, the law firm/attorney which files the bankruptcy petition for the debtor shall be deemed the responsible attorney of record for all purposes including the representation of the debtor at all hearings and in all matters arising in conjunction with the case, including service, notice and communication via CM/ECF and the Federal Rules of Bankruptcy Procedure.

Holding that bifurcated fee agreements did not violate LBR 9011-1(b), the Court found persuasive a decision on a similar local rule in *In re Hazlett*, No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019). In *In re Hazlett*, the court noted that debtors were free to end the attorney's employment at any time and proceed *pro se*. Permitting a debtor to enter into a bifurcated fee agreement that allows the debtor to end representation, therefore, was similar and was not prohibited by the local rule. Here, the Court reasoned that "[l]ike debtors in Utah, South Carolina debtors are free to terminate an attorney's services at any time." Additionally, even if the attorney wished to withdraw from the case, he was required to seek prior permission from the bankruptcy court. Finally, the Court found that "[r]eading SC LBR 9011-1(b) as a total bar to bifurcated agreements would undermine the very purpose of the Rule . . . [which] is to maintain the integrity and efficient handling of matters before the bankruptcy court. . . . Bifurcated agreements, when utilized properly and with sufficient safeguards, enable debtors who otherwise could not afford counsel to obtain legal services of an attorney to aid them in navigating the complex bankruptcy process." The Court, therefore, held that bifurcated fee agreements did not violate the bankruptcy court's local rule.

Faculty

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Hon. Paul M. Black is a U.S. Bankruptcy Judge for the Western District of Virginia in Roanoke, appointed in 2014. He previously practiced law in Richmond for several years, then returned to his native Roanoke and joined Spilman Thomas & Battle, PLLC, where he co-chaired its Bankruptcy and Creditor's Rights practice group and focused his practice on commercial litigation, bankruptcy, and banking and finance law. Judge Black was named to *The Best Lawyers in America* in multiple areas related to finance and insolvency, to "Virginia's Legal Elite" by *Virginia Business* magazine in both Civil Litigation and Bankruptcy Law, and as a *Virginia Super Lawyer* in the field of Bankruptcy Law. For many years, he was an active participant in the Boyd-Graves Conference of the Virginia Bar Association, which studies and makes recommendations to the Virginia legislature on improvements to civil practice in Virginia. Judge Black is a past chair of the Litigation Section of the Virginia State Bar, and also chaired the Bankruptcy Section of the Virginia Bar Association. In addition, he served as a member of the Virginia State Bar Disciplinary Board from 2007-13, and for the last several years, he has co-chaired the Legislative Committee of the National Conference of Bankruptcy Judges. In addition, he is a frequent speaker to insolvency professionals on matters pertaining to bankruptcy, litigation and ethics. Judge Black received his undergraduate degree from Washington and Lee University in 1982, studied at Cambridge University in England, and received his J.D. from the University of Richmond in 1985, after which he clerked for Hon. Blackwell N. Shelley of the U.S. Bankruptcy Court for the Eastern District of Virginia.

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Edward E. Neiger is a co-managing partner at ASK LLP in New York, where his practice focuses on representing unsecured trade creditors in complex bankruptcy cases and prosecuting and defending large preferences and fraudulent conveyance actions. Prior to joining ASK, he founded Neiger LLP, where he represented clients in the bankruptcy cases of Lehman Brothers, American Airlines and General Motors, among others. Previously, Mr. Neiger was in the bankruptcy group of Weil, Gotshal & Manges LLP, where he worked on behalf of such debtors as Enron, Lehman Brothers, GM and PG&E, and he represented thousands of victims of Boy Scout sexual abuse and more than 100,000 victims of Purdue Pharma. He is on the board of 2EndTheSitgma and works to help those suffering from addiction, including those incarcerated, get the help they need. At the same time, he fights to hold those responsible for the opioid crisis, especially governments and elected officials, accountable. In the past, Mr. Neiger helped Holocaust survivors recover monetary damages from the German government, including his own grandfather (all of his grandparents are Holocaust survivors and came to the U.S. as refugees after the Second World War). He is a member of the New York City Bar Association's Imperfect History Committee, which explores and uncovers the racist roots of the NYC Bar Association, and in 2020, he was honored as one ABI's "40 Under 40." Mr. Neiger is the author of the *New York Law Journal*'s "Mass Torts Roundup" and "Bankruptcy Update" columns. He received his J.D. in 2004 from Fordham University, where he served on its law review.