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BUSINESS

High Court to Rule on Bankruptcy Fees Awarded to Lawyers

Bankruptcy Lawyers and Others Want to Get Paid for Time Spent Defending Their Fee Applications

By SARA RANDAZZO

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The U.S. Supreme Court agreed on Thursday to delve into an issue dear to bankruptcy professionals—how much they can get paid.

Later this term, the high court will hear arguments in a case that questions whether bankruptcy lawyers and other advisers can be compensated for time spent defending their own fee applications. In bankruptcy proceedings, courts have the final say on how much advisers are paid in a case when the funds come out of money that could go to creditors, and anyone is allowed to challenge the fees.

Some lower courts, including the Fifth U.S. Circuit Court of Appeals, have said the Bankruptcy Code prohibits payments for the defense of fees because the work offers no benefit to the bankrupt entity and its creditors. Other courts have found that paying for such defense is appropriate, particularly if the attorneys win the challenge, and helps prevent frivolous fee objections.

The case at issue stems from the bankruptcy of copper producer Asarco LLC, which sought Chapter-11 protection in 2005 faced with a labor strike and billions of dollars in environmental, asbestos and toxic-tort claims.

The contentious Chapter-11 case ended with Asarco's owner, a division of Grupo Mexico, agreeing to pay all creditors in full after getting stuck with a judgment of more than \$6 billion for improperly transferring Asarco's main asset to its parent in the run-up to the bankruptcy.

Baker Botts, as lead counsel to Asarco, received \$113 million in fees and \$6 million in expenses for its work on the bankruptcy. In awarding the fees in 2011, a bankruptcy judge in Texas also gave Baker Botts a \$4 million enhancement, or bonus, and praised the firm's work as "instrumental in producing the exceptional results that were unanticipated at case commencement."

At the same time, the judge said Baker Botts deserved \$5 million in fees and nearly half a million dollars in expenses for defending against an onslaught of fee objections raised by Asarco that the judge ultimately overruled.

The Grupo Mexico division, which reacquired Asarco as part of the bankruptcy proceedings, appealed the \$4 million bonus and the \$5 million awarded for the defense of the fees. A U.S. District Court upheld

the awards, and Asarco's owner appealed again. This time, the Fifth Circuit ruled in the mining company's favor on the defense costs.

In its April ruling, the Fifth Circuit said litigation over fee applications "may become substantial, costly and time-consuming if counsel can be compensated for their self-interested efforts" and that such payments aren't allowed under the Bankruptcy Code.

Jeff Oldham, a partner at Bracewell & Giuliani who represents Asarco, on Thursday said his client believes the Fifth Circuit correctly decided the issue "and we look forward to presenting the case to the Supreme Court."

Aaron Streett, a Baker Botts partner who will argue the case for the firm, said its position is that "bankruptcy courts have the discretion to award fees," including those incurred to defend an application. "This is a really important question for the bankruptcy system."

Robert Keach, an attorney who has served as a fee examiner in large bankruptcy cases, said he was surprised the Supreme Court took up the case and will be watching it closely. "If the Supreme Court were to adopt the Fifth-Circuit view of the world, most bankruptcy professionals would find that very troubling, to be honest," he said.

The Supreme Court hasn't set a timeline for the case, but it will likely be argued and decided before the court's new term ends in June 2015.

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