

## High Court's Fee Ruling Disarms Debtor Attorneys

By Jonathan Randles

*Law360, New York (June 15, 2015, 8:42 PM ET)* -- In deciding that bankruptcy lawyers can't get reimbursed for the time they spend defending the fees they charge, the U.S. Supreme Court has put debtors' attorneys in a bind by giving their adversaries a powerful new tool to obstruct restructurings or liquidations they don't like.

Justices ruled 6-3 that bankruptcy courts are not allowed to award fees to lawyers for the time they spend defending the rates they charge. The decision goes against megafirm Baker Botts LLP, which had been seeking \$5 million it spent securing core fee applications in mining giant Asarco LLC's Chapter 11.

It's an outcome lawyers and other legal professionals have worried about because it may give parties the green light to initiate costly and time-consuming litigation over fees regardless of whether there are legitimate reasons to do so. An objection could be used to knock down legal bills or simply to gain more leverage at the negotiating table — either way, it puts debtors and their attorneys in a more difficult position, experts said.

Ultimately, experts say Monday's ruling could lead to the filing of a new layer of objections during the course of bankruptcy proceedings that soak up additional time and resources. And while the does not expressly apply to any other areas of law besides bankruptcy, a plausible argument can be made that the court's reasoning could extend to probate matters where fee structures are similar.

The Baker Botts case gets at a unique aspect of the nation's bankruptcy policy that is intended to attract top attorneys to the field. Unlike other types of civil litigation where lawyers can squabble with clients over the rates they charge, attorneys representing parties in a bankruptcy must gain court approval for the fees they're paid because the expense is covered by the debtor.

"The whole purpose of the fee payment provisions in the Bankruptcy Code is to ensure that attorneys representing debtors are paid the same as other types of attorneys practicing in different areas of law so that the highest caliber attorneys and firms will agree to represent debtors in bankruptcy," Weil Gotshal & Manges LLP partner Ronit Berkovich said. "Debtors and creditors benefit from having the most talented attorneys handle a bankruptcy because they'll maximize recoveries."

The Supreme Court ruled that the costs associated with preparing a fee application are covered under Section 330(a) of the U.S. Bankruptcy Code but that the costs associated with defending fee applications don't qualify as a "service" eligible for reimbursement. Writing for the majority, Justice Clarence Thomas said that in the context of so-called "meta-fees," the Bankruptcy Code doesn't override the "American

rule," by which each party is required to bear the cost of their own attorneys' fees.

"In our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization," Justice Thomas wrote. "Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers."

The case traces back to Baker Botts' \$124 million fee award for its representation of Asarco during what was considered a wildly successful Chapter 11. In an odd twist, the objector to Baker Botts' meta-fees is the reorganized Asarco, taking aim at the lawyers credited with saving it from ruin. The firm billed the \$5 million cost of defending earlier fee applications, which Asarco refused to pay.

Bracewell & Giuliani LLP's Jeff Oldham, who argued the case in the Supreme Court on behalf of Asarco, told Law360 that concerns about the ruling resulting in the increased filing of meritless fee objections are overblown and said there is "no evidence" to suggest such a phenomenon has happened in other types of civil litigation where the same rules apply.

Oldham said it's unlikely that parties would rush to file fee objections just to do so since the parties bringing the objections also have to pay out of pocket.

"It's not like someone can mount an extensive litigation for free," Oldham said.

Instead, Oldham said if the Fifth Circuit was reversed, it would have created a chilling effect on creditors to legitimately challenge fees, which he said Asarco did in this case.

Despite Asarco's position in the Supreme Court, the case elicited several briefs in support of Baker Botts from legal associations, former judges and trade groups saying that prohibiting reimbursements for fee disputes would subject lawyers to meritless fee objections.

"The bottom line is this: Here, although Baker Botts superintended an incredibly successful and complex reorganization, and then successfully defended its fees against all challenges, it took a \$5 million hit," said Charles Tabb, a professor at the University of Illinois College of Law and of counsel at Foley & Lardner LLP. "They should have been allowed to recover compensation for that defense. Not allowing that compensation is unfair to estate professionals and weakens the incentives for the best and brightest professionals to work in the bankruptcy arena."

And it's not just bankruptcy attorneys that could be put in a difficult position as a result of the Supreme Court's decision — the ruling impacts all professionals who must have their fees approved by a judge, said Liner LLP partner Robbin Itkin.

That would include accountants, financial consultants and attorneys representing official creditors committees that are paid by the debtor, she said.

"[The decision] is not favorable for a lot of reasons," Itkin said. "You can have a disgruntled party in the case upset at what's going on and just to cut the fees of the professionals."

Itkin and Berkovich said it's likely that law firms will now put contractual language in retention agreements that would require debtors to cover costs associated with defending fee applications. Because debtors' retention of counsel is subject to court review, it's likely that bankruptcy judges will

eventually have to consider how contract language complies with the Supreme Court's ruling, they said.

"The next step in this battle is whether you can contract around Justice Thomas' decision in Baker Botts," Berkovich said.

Baker Botts is represented in-house by Aaron M. Streett, Evan A. Young, Omar J. Alaniz, G. Irvin Terrell and Shane Pennington.

Asarco is represented by Jeffrey L. Oldham, Bradley J. Benoit, Bryan S. Dumesnil, Heath A. Novosad and Ralph D. McBride of Bracewell & Giuliani LLP.

The case is Baker Botts LLP et al. v. Asarco LLC, case number 14-103, in the Supreme Court of the United States.

--Editing by Katherine Rautenberg and Patricia K. Cole.

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