Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 11
Issue 1 *SYMPOSIUM: The Role of Technology in Compliance in Financial Services: An Indispensable Tool as well as a Threat?*

Article 10

12-1-2016

Bankruptcy: Where Attorneys Can Lose Big Even If They Win Big

Stanislav Veyber

BANKRUPTCY: WHERE ATTORNEYS CAN LOSE BIG EVEN IF THEY WIN BIG

ABSTRACT

Historically, bankruptcy attorneys received the short end of the stick and were paid less for their services than attorneys in other fields of law. With the Bankruptcy Reform Act of 1978, Congress attempted to reduce the discrepancy in compensation. However, after the Supreme Court's decision in Baker Botts v. ASARCO, L.L.C., the playing field remains unequal for bankruptcy attorneys. Following this decision, if a debtor disputes their attorney's fee application, attorneys are at a disadvantage and cannot recover fees for defending their fee application. As a result, bankruptcy attorneys take an effective pay cut if they are faced with a fee application dispute, because they must either settle or litigate. Without adequate safeguards in place, the Supreme Court has left bankruptcy attorneys defenseless. This Note argues that creating a higher standard for disputing fee applications, one involving the United States Trustee's Office more, would protect bankruptcy attorneys from prejudicial treatment and fix the unfair situation they are currently placed in.

INTRODUCTION

Attorneys, like all professionals, expect to get paid for their work. Attorneys are compensated a number of different ways—for example, on a contingency basis, statutory basis, or on an hourly or flat rate basis.[1] Attorney compensation varies across different fields of law as well. Historically, bankruptcy attorneys would receive the short end of the stick and would not receive reasonable compensation for their services.[2] With the enactment of the Bankruptcy Reform Act of 1978, Congress intended to compensate bankruptcy attorneys similarly to attorneys in other fields.[3]

In a bankruptcy proceeding, professionals employed by the debtor—including attorneys—are compensated using the statutory framework

---

1. *See, e.g.*, 18 U.S.C. § 3006A(d)(1) (2012); MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2013).

2. *See* 2 COLLIER ON BANKRUPTCY § 328.02 (Lawrence P. King et al. eds., 15th ed. 1996); *see also* ASARCO L.L.C. v. Barclays Capital, Inc., 702 F.3d 250, 258 (5th Cir. 2012) (section 328(a) attempts to define compensation at the beginning of a professional's engagement, and "eliminate the previous uncertainty associated with professional compensation in bankruptcy proceedings, even at the risk of potentially underpaying, or, conversely, providing a windfall to, professionals retained by the estate.").

3. *See* 124 CONG. REC. 33,994 (1978) ("[T]he policy of this Section is to compensate attorneys and other professionals serving in a case under title [11] at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title [11]."); *see also In re* UNR Indus., Inc., 986 F.2d 207, 209 (7th Cir. 1993) ("In [Section] 330 and its legislative history Congress expressed its intent that compensation in bankruptcy matters be commensurate with the fees awarded for comparable services in non- bankruptcy cases.").

provided in Sections 330 and 328 of the Bankruptcy Code.[4] However, determining what constitutes reasonable compensation for a bankruptcy attorney, as well as the possible adjustments to that compensation (i.e., fee enhancements), has resulted in much debate when dealing with Section 330.

Unlike attorneys in other fields, bankruptcy attorneys are required to prepare "fee applications" for review by the parties, the court, and the United States Trustee, in order to receive compensation from the debtor's estate.[5] Attorneys' fees are classified as an administrative expense and receive priority in a bankruptcy proceeding, right after secured claims, domestic support obligations, and inadequate protection claims.[6] The fees are subject to reduction if the court or trustee believes them to be excessive and to not meet the statutory requirements of "reasonable" and "actual and necessary." These terms are not congressionally defined and, instead, have been judicially interpreted by case law.[7]

Any party involved may challenge an attorney's fee application, which forces the attorney to either concede and receive a reduction in fees, or incur costs to defend the fee application. Courts were previously split as to whether the attorney may be compensated for expenses incurred during the defense of a fee application.[8] On June 15, 2015, in *Baker Botts v. ASARCO LLC*,[9] the Supreme Court addressed the issue of compensation for fee application defenses and decided to prohibit the reimbursement of attorneys' fees in such circumstances.[10] As a result, debtors are armed with an advantage when negotiating for a reduction in attorneys' fees, leaving attorneys without proper protections. Justice Breyer's dissent in *Baker Botts* presented an example: "Consider a bankruptcy attorney who earns $50,000—a fee that reflects her hours, rates, and expertise—but is forced to spend $20,000 defending her fee application against meritless objections."[11] As a result, if the bankruptcy court decides not to reimburse the $20,000 incurred for defending the fee application, the attorney is effectively paid only $30,000, which makes the $50,000 initial award artificial and insufficient.

This Note addresses the issues attorneys face with their fee applications subsequent to the Supreme Court's *Baker Botts* decision. Part I briefly reviews the history of compensation in bankruptcy and explains Section 330

4. *See* 11 U.S.C. §§ 330 and 328 (2012) (section 328 governs only compensation where there was a prior agreement including a retainer or an hourly rate.); *see* Caleb J. Bartel, *Professional Compensation in Bankruptcy: Using Contract Law Principles to Interpret Ambiguous Retention Orders*, 9 TRANSACTIONS: TENN. J. BUS. L. 149, 177 (2007).

5. *See* 11 U.S.C. § 330(a).

6. *See id*. § 507.

7. *See id.* § 330(a)(1)–(4).

8. *Compare* Boyd v. Engman, 404 B.R. 467, 488 (W.D. Mich. 2009) (allowing compensation for fee defense), *with* Frazin v. Haynes & Boone, L.L.P. (*In re* Frazin), 413 B.R. 378, 437–38 (Bankr. N.D. Tex. 2009) (disallowing compensation for fee defense).

9. *See generally* Baker Botts L.L.P. v ASARCO L.L.C., 135 S. Ct. 2158 (2015).

10. *See id.*

11. *Id.* at 2170 (Breyer, J., dissenting).

of the Bankruptcy Code. Part II examines the "American Rule," which was essential to the Court's decision, and points out the problems when applying that rule to cases defending fee applications. Part III analyzes the Court's *Baker Botts* decision and its negative implications for the bankruptcy system. Part IV provides possible amendments to Section 330 and proposes judicial solutions that would protect attorneys from frivolous fee-defense litigation, by stipulating certain standards a debtor must meet before challenging a fee application.

I. THE COMPENSATION SCHEME IN BANKRUPTCY PROCEEDINGS

Before 1978, bankruptcy professionals were compensated "on a strictly quantum meruit basis."[12] Quantum meruit is defined as: "[t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship[;]" or "[a] claim or right of action for the reasonable value of services rendered."[13] However, bankruptcy attorneys were historically compensated on the "lower end of the spectrum of reasonableness."[14] The courts explained that "[s]ince attorneys assisting the trustee in the administration of a bankruptcy estate are acting not as private persons but as officers of the court, they should not expect to be compensated as generously for their services as they might be were they privately employed."[15]

Congress enacted the Bankruptcy Reform Act of 1978, in an attempt to reform the bankruptcy system and, in the process, Congress readjusted how bankruptcy professionals were compensated.[16] Congress explained that since professionals would earn less in bankruptcy than in other fields, it would result in a lack of bankruptcy professionals, because they would leave bankruptcy to enter into more profitable fields.[17] Congress sought to prevent attorney attrition from the bankruptcy practice and, as a result, overruled prior justifications, such as conservation of the estate and economy of administration, when determining compensation. Thus, Congress allowed bankruptcy professionals to be compensated comparably to professionals in other fields.[18]

---

12. COLLIER ON BANKRUPTCY, *supra* note 2.
13. *Quantum meruit*, BLACK'S LAW DICTIONARY (10th ed. 2014).
14. *See* Am. Benefit Life Ins. Co. v. Baddock (*In re* First Colonial Corp. of Am.), 544 F.2d 1291, 1289–99 (5th Cir. 1977), *superseded by statute*, 11 U.S.C. § 330 (2012) (internal quotation marks omitted).
15. *Id.*; *see also* Mass. Mut. Life Ins. Co. v. Brock, 405 F.2d 429, 432–33 (5th Cir. 1968) (holding that the interest of the public—especially the debtor and creditors—could limit compensation to a debtor's counsel), *superseded by statute*, 11 U.S.C. § 330 (2012).
16. *See* COLLIER ON BANKRUPTCY, *supra* note 2.
17. *See* H.R. REP. NO. 598, at 329–30 (1977); *see also* S. REP. NO. 989, at 40–41 (1978).
18. *See* H.R. REP. NO. 598; S. REP. NO. 989.

There are four Bankruptcy Code provisions that regulate the employment and compensation of professionals.[19] Section 327 authorizes the trustee to "retain or replace" professionals.[20] Section 328 authorizes employment of a professional on reasonable terms and conditions including: "on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis."[21] This Section provides a professional with a sense of certainty due to the pre-approved fee.[22] Section 330, subject to Sections 326, 328, and 329, allows for "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses."[23] Lastly, Section 331 allows a court to grant interim compensation or reimbursements.[24] An analysis of Section 330 will show that the Supreme Court erred in their decision in *Baker Botts*.

A. "REASONABLENESS" UNDER SECTION 330

In 1976, prior to reforming the Bankruptcy Code, Congress enacted the Civil Rights Attorney's Fees Awards Act (CRAFAA), which authorized district courts to grant attorneys' fees to prevailing parties in civil rights litigation.[25] CRAFAA contained a reasonableness test that was adopted from the Fifth Circuit decision, *Johnson v. Georgia Highway Express, Inc*.[26] In a later case, while struggling to define "reasonable" during a bankruptcy proceeding, the Fifth Circuit applied the factors from *Johnson* and CRAFAA.[27] Courts continued to use the *Johnson* and CRAFAA factors, even after the Bankruptcy Reform Act of 1978.[28] Further, with the 1984 amendments, the legislature and the courts define reasonable compensation under Section 330(a)(1) as: "the nature, the extent, and the value of such

19. *See* Bartel, *supra* note 4, at 153.
20. 11 U.S.C. § 327(b).
21. *Id.* § 328(a).
22. *See* Donaldson Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co. (*In re* Nat'l Gypsum Co.), 123 F.3d 861, 862 (5th Cir. 1997).
23. 11 U.S.C. § 330(a)(1); *see* COLLIER ON BANKRUPTCY, *supra* note 2, § 330.01.
24. *See* 11 U.S.C. § 331.
25. *See generally* Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 1, 90 Stat. 2641, 2641 (codified as amended at 42 U.S.C. § 1988 (2012)).
26. *See* Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974) (providing the factors for the reasonableness test which are: (1) time and labor required; (2) novelty and difficulty of the questions; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by the attorney due to acceptance of the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) amount involved and the results obtained; (9) experience, reputation, and ability of the attorneys; (10) undesirability of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases).
27. *See* Am. Benefit Life Ins. Co. v. Baddock (*In re* First Colonial Corp. of Am.), 544 F.2d 1291, 1298–99 (5th Cir. 1977).
28. *See, e.g.*, *In re* Lloyd, Carr & Co., 2 B.R. 714, 716–17 (Bankr. D. Mass. 1979); *In re* Arlan's Dept. Stores, Inc., 462 F. Supp. 1255, 1260–61 (S.D.N.Y. 1978) (applying *First Colonial*).

services, the time spent on such services, and the *cost of comparable services* other than in a case under this title."[29]

In a 1983 civil rights case, *Hensley v. Eckerhart*,[30] the Supreme Court implemented the "lodestar method."[31] The Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*[32] summarized the lodestar method:

> In discussing the proper standards which would govern the award of fees in a case of this sort, . . . the first inquiry of the Court should be into the hours spent by the attorneys, including how many hours were spent in what manner by which attorneys. After determining the time spent, the district court should then undertake to fix an hourly rate of compensation to be applied to the hours worked. While the amount thus found to constitute reasonable compensation should be the "lodestar" of the Court's fee determination, at least two other factors should be taken into account in computing the value of attorneys' services, namely the contingent nature of success and the extent, if any, to which the quality of an attorney's work mandates either increasing or decreasing the amount to which the Court has found the attorney reasonably entitled.[33]

In addition, the figure arrived at using the lodestar method is subject to modification: the Supreme Court warned that the calculation was merely an "initial estimate," and that "other considerations" may lead courts to "adjust the fee upward or downward," depending on the "results obtained."[34] The Supreme Court's adoption of the lodestar method did not eliminate the CRAFAA factors, but instead merged the two methods.[35] Thereafter, bankruptcy courts used the lodestar method to calculate fees, and adjusted the fees upward or downward after considering the CRAFAA factors.[36]

---

29. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 433, 98 Stat. 333, 370 (1984) (codified as amended at 11 U.S.C. § 330 (2012)) (emphasis added).

30. *See generally* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

31. *Id.* ("[T]he most useful starting point for [court determination of] the amount of a reasonable fee [payable by the losing party] is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.").

32. *See generally* Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976).

33. *Id.* at 108 (citing Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 382 F. Supp. 999, 1003 (E.D. Pa. 1974) (internal citations omitted)).

34. Pennsylvania v. Del. Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 564–65 (1986). "[T]he rare case where the fee applicant offer[ed] specific evidence to show that the quality of service rendered was superior to that one reasonably would expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 556 (quoting Blum v. Stenson, 465 U.S. 886, 899 (1984)).

35. *See id.* at 564–65 ("We there adopted a hybrid approach that shared elements of both *Johnson* and the lodestar method of calculation.").

36. *See, e.g.*, Transamerican Nat. Gas Corp. v. Zapata P'ship, Ltd. (*In re* Fender), 12 F.3d 480, 487 (5th Cir. 1994); *In re* El Paso Refinery, Inc., 257 B.R. 809, 828–29 (Bankr. W.D. Tex. 2000); *In re* Pub. Serv. Co., 160 B.R. 404, 420 (Bankr. D.N.H. 1993).

In 1994, Congress enacted the Bankruptcy Reform Act of 1994 and amended Section 330(a)(3) to add a non-exhaustive list of factors, including some of the *Johnson* factors, to aid courts in assessing the reasonableness of fees.[37] Additionally, the Bankruptcy Reform Act of 1994 added Section 330(a)(4)(A), which placed limitations on certain fees.[38] Also, Congress specifically allowed for professionals to be "awarded [fees] for the preparation of a fee application" under Section 330(a)(6).[39] It appears that Congress intended to impose the holdings of *In re Nucorp Energy*[40] and *In re Manoa Finance*[41] to reimburse bankruptcy attorneys for actions that their non-bankruptcy counterparts do not undertake, such as filling out a detailed fee application.[42] The fee for preparing the application has typically been limited to no more than five percent of the total fees and expenses requested.[43] When applying adjustments, courts continue to use the lodestar method when they deem necessary.[44]

B. ACTUAL AND NECESSARY SERVICES

1. Actual and Necessary

Section 330(a)(1) allows for the reimbursement of fees and expenses if they meet the "actual" and "necessary" standards.[45] The terms "actual" and "necessary" have been defined by case law. For example, the Fifth Circuit defined "actual" and "necessary" in its decision in *In re Pro-Snax*,[46] and proposed a tougher requirement than stated in the statute.[47] In *In re Pro-Snax*, the debtor's attorney was seeking to be compensated from the estate for work performed after the appointment of a Chapter 11 trustee.[48]

---

37. *See* 11 U.S.C. § 330(a)(3) (2012) ("In determining the amount of reasonable compensation to be awarded . . . the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors.").

38. *See id.* § 330(a)(4)(A) (Not allowing compensation for: "unnecessary duplication of services" or "services that were not—reasonably likely to benefit the debtor's estate; or necessary to the administration of the case.").

39. *Id.* §330(a)(6).

40. *See generally In re* Nucorp Energy, Inc., 764 F.2d 655, 658–59 (9th Cir. 1985).

41. *See generally In re* Manoa Fin. Co., Inc., 853 F.2d 687, 692 (9th Cir. 1988).

42. *See* 11 U.S.C. § 330; *see also In re Manoa*, 853 F.2d at 692; *In re Nucorp*, 764 F.2d at 658–59.

43. *See, e.g.*, *In re* New Bos. Coke Corp., 299 B.R. 432, 446 (Bankr. E.D. Mich. 2003) ("Time spent generating fee applications is generally limited to 5% of the total fees requested."); *see also In re* Bass, 227 B.R. 103, 109 (Bankr. E.D. Mich. 1998) ("Absent exceptional circumstances, fees for the preparation of fee applications should be limited to 5% of the total fees requested."); *In re* Heck's, Inc., 112 B.R. 775, 793 (Bankr. S.D.W.Va. 1990) (imposing a 3% cap).

44. *See e.g.*, Perdue v. Kenny A., 559 U.S. 542, 554–56 (2010); *In re* Se. Banking Corp., 314 B.R. 250, 269–70 (Bankr. S.D. Fla. 2004).

45. 11 U.S.C. § 330(a)(1).

46. *See generally* Andrews & Kurth L.L.P. v. Family Snacks, Inc. (*In re* Pro-Snax Distrib., Inc.), 157 F.3d 414 (5th Cir. 1998).

47. *See id.*

48. *See id.* at 425.

The court in *Pro-Snax* upheld the "hindsight approach," which as the name suggests, only looks to the time at which the services were rendered and whether an attorney's services resulted in an "identifiable, tangible, and material benefit to the [bankruptcy] estate."[49] Essentially, courts must evaluate attorneys' fees with a two-step analysis: "[f]irst, the court must determine, under § 330(a)(1)(A), whether an attorney's services were 'actual' and 'necessary,'"[50] and hence compensable; second, the court must determine whether the services "result in an identifiable, tangible, and material benefit to the estate."[51] The Fifth Circuit emphasized that "the chances of success must outweigh the costs of pursuing the action."[52] However, as the cliché goes, hindsight is always twenty-twenty. The Fifth Circuit held that the debtor's attorney could only recover for work that resulted in a "material benefit to the estate," and significantly cut the attorney's fees.[53]

In 2015, the Fifth Circuit overruled *Pro-Snax* with its decision in *Barron & Newburger, P.C. v. Tex Skyline, Ltd*.[54] The court acknowledged that "[i]n light of the plain language of 330(a)(4)(A) after the 1994 amendments, the Second, Third, and Ninth Circuits have rejected the actual-benefit test [or hindsight approach] in favor of a prospective standard."[55]

The court held that the proper standard for determining what fees attorneys are entitled to is the "hybrid approach," which looks at the "prospective, reasonable at the time" standard.[56] This "hybrid approach" includes both the prospective and hindsight views of the effects of the services.[57] The court explained that the standard set in Section 330 is "one that looks to the necessity or reasonableness of legal services at the time they were rendered."[58] Therefore, "if a fee applicant establishes that its services were 'necessary to the administration' of a bankruptcy case or 'reasonably likely to benefit' the bankruptcy estate 'at the time at which [they were] rendered,' then the services are compensable."[59]

Although the court overruled the method adopted in *In re Pro-Snax*, the court was careful to note that the decision "is not intended to limit courts' broad discretion to award or curtail attorney's fees under § 330."[60] The Fifth

---

49. *Id.* at 426.

50. Kaye v. Hughes & Luce L.L.P., No. 3:06-CV-01863-B, 2007 WL 2059724, at *9 (N.D. Tex. July 13, 2007).

51. *Id.* (quoting *In re Pro-Snax*, 157 F.3d at 426).

52. *In re Pro-Snax*, 157 F.3d at 426.

53. *See id*. (reduced debtor attorney's fees by more than 30%).

54. *See generally* Barron & Newburger, P.C. v. Texas Skyline, Ltd. (*In re* Woerner), 783 F.3d 266, 277 (5th Cir. 2015).

55. *Id.* at 275.

56. *Id.* at 277.

57. *In re* Spillman Dev. Grp. Ltd., 376 B.R. 543, 550 (Bankr. W.D. Tex. 2007).

58. *In re Woerner*, 783 F.3d at 276.

59. *Id.* (alteration in original) (citation omitted).

60. *Id.* at 277 (emphasis added).

Circuit's new standard for interpreting "actual" and "necessary" is synthesized as:

> A bankruptcy court's analysis of attorney fee awards ordinarily should begin and end by applying the statutory language in 11 U.S.C. § 330. This analysis usually can be reduced as follows: (1) a court is permitted, but not required, to award fees under § 330 for services that could reasonably be expected to provide an identifiable, material benefit to the estate at the time those services were performed (or contributed to the administration of the estate); and (2) courts may consider all other relevant equitable factors, as stated in § 330(a)(3), including as one of those factors, when appropriate, whether a professional service contributes to a successful outcome [meaning, an enhancement of fees.].[61]

2. Services

Section 330 requires the fee to have been a "service" to the estate. When the Supreme Court in *Baker Botts* determined that fee-defense work should not be reimbursed, the Court argued that such work is not a "service" to the estate as required under Section 330.[62] However, the Supreme Court attained their definition of "service" through outdated precedent and dictionaries instead of recent case law from the relevant circuit court.

The Fifth Circuit explained "service":

> In assessing the likelihood that *legal services would benefit the estate*, courts adhering to a prospective standard ordinarily consider, among other factors, the probability of success at the time the services were rendered, the reasonable costs of pursuing the action, what services a reasonable lawyer or legal firm would have performed in the same circumstances, whether the attorney's services could have been rendered by the Trustee and his or her staff, and *any potential benefits to the estate (rather than to the individual debtor)*.[63]

Contrary to the Supreme Court, the Fifth Circuit emphasized *any* benefit to the estate, which presumably would include, as Justice Breyer explained in his *Baker Botts* dissent, *any underlying benefit* the estate received.[64] However, instead of using recent case law, the Supreme Court used precedent addressing Section 330(a)'s predecessor.[65] The precedent the Court used referred to a Bankruptcy Code that was solely concerned with preserving the estate, and not the current Bankruptcy Code that is concerned with

---

61. *Id.* at 278 (Jolly, J., concurring).

62. *See* 11 U.S.C. § 330(a)(1) (2012); *see also* Baker Botts L.L.P. v. ASARCO L.L.C., 135 S. Ct. 2158, 2161 (2015) ("[T]he phrase 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of a client.").

63. *In re Woerner*, 783 F.3d at 276 (emphasis added).

64. *See id.*; *see also Baker Botts L.L.P.*, 135 S. Ct. at 2169 (Breyer, J., dissenting).

65. *See Baker Botts L.L.P.*, 135 S. Ct. at 2165 (citing Woods v. City Nat'l Bank & Tr. Co., 312 U.S. 262, 268 (1941); *accord* Am. United Mut. Life Ins. Co. v. City of Avon Park, Fla., 311 U.S. 138, 147 (1940)).

compensating bankruptcy attorneys similarly to the way they would be compensated in other fields.

Furthermore, the Supreme Court used dictionaries to define the term "service."[66] Between 1958 and 1983, "the Court cited dictionaries only 125 times – an average of five times per Term. Prior to 1980, in fact, the word 'dictionary' never appeared more than fifteen times in a single volume of the *Supreme Court Reporter*."[67] Throughout the years, "[t]heorists of statutory interpretation . . . explained the use of dictionaries as a 'nice' way to identify permissible meanings. By contrast, the Court in recent cases has frequently employed dictionaries as the focal point of the interpretive inquiry and relegated arguments about policy, history, or structure to a secondary role."[68] Further, the Court began using "dictionary definitions [as] the primary determinant of the ultimate outcome [in each case]."[69]

The use of dictionaries has been heavily criticized. The Court's use of dictionaries creates issues of statutory interpretation and linguistics.[70] Additionally, "[a] 1988 survey of the lexicographic staffs of five publishers concluded that 'the "polite press," with *The New York Times* at its pinnacle' is 'the single most powerful influence in constituting the record of the English lexicon.'"[71] Therefore, citing a dictionary has the association of citing *The New York Times*, and should not have definitive legal impact on a case.

Dictionaries struggle to capture statutory context:

> One of the most significant flaws of dictionaries as interpretive tools is the imperfect relationship of dictionaries to statutory context. The essence of words can never be described fully in the absence of contextual cues; in fact, many theorists have argued that meaning, as we understand it, does not exist without context. Consequently, no dictionary can completely capture the particular historical and textual framework of a statutory term. Nor does any dictionary claim to do so. According to Hart and Sacks's *Legal Process* materials, dictionaries, like canons of construction, "simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it." Dictionaries are only starting points, organized according to rough analogies and dependent on evidence that "the context warrants" application of their definitions.[72]

---

66. *See id.* at 2165 (citing *Service*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) ("labor performed for another"); *Service,* BLACK'S LAW DICTIONARY (10th ed. 2014) ("duty or labor to be rendered by one person to another"); *Service*, OXFORD ENGLISH DICTIONARY (1933) ("action of serving, helping, or benefitting; conduct tending to the welfare or advantage of another").

67. Kevin Werbach, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994).

68. *Id.* at 1439–40.

69. *Id.*

70. *See id.* at 1449.

71. Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES (June 13, 2011), www.nytimes.com/2011/06/14/us/14bar.html?_r=0.

72. Werbach, *supra* note 67, at 1449–50; *see also* Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1247 (1990) ("Because of the context, words sometimes have a meaning quite

Therefore, the Supreme Court's use of dictionaries to define the term "service" is unfounded and, instead, the Court should have used the Fifth Circuit's and Justice Breyer's definition of "service" as anything that provides an "underlying benefit" to the estate.

As a result, the Supreme Court removed the possibility of an attorney recovering fees for defending his or her fee application, by asserting that the act of defending a fee application is not a "service" to the estate. It did this simply through dictionary definitions of the term, while ignoring relevant case law. However, the Court does not consider that the initial reason there is a fee application is because of the services rendered by the attorney. Thus, any legal work performed in relation to a fee application should be considered a "service" to the estate, because that is what the fee application represents.

3. Summary

If the attorneys' fees are "reasonable," "actual," and "necessary" at the time the "service" is completed for the estate, then the fees are acceptable under Section 330. The issue becomes whether the fees incurred for defending a fee application and fee enhancements, which were initially fees granted for the services conducted for the debtor, are still considered a service to the estate. If we accept the argument of the Supreme Court, and do not consider the defense of a fee application a "service," this would leave the attorney to hold the bill, even if he or she successfully defends the application. Moreover, legislative intent requires bankruptcy practitioners to be subject to the same scrutiny as non-bankruptcy practitioners when compensated for their work.[73] Non-bankruptcy practitioners do not have to create fee applications, they are reimbursed for whatever costs they incur from their client.

C. ENHANCEMENT OF FEES

Fee enhancements are not defined in Section 330; they are defined merely by case law.[74] After the Supreme Court's decisions in *Hensley v. Eckerhart, Blum v. Stenson,*[75] and *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*,[76] it was possible for bankruptcy courts to award

---

different from what might be found in *Webster's* or the *Oxford English Dictionary*. Courts do not and should not 'make a fortress out of the dictionary.'"); *see also* William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 122 (1992) ("In statutory interpretation, then, the dictionary may be a starting point, but it is the relation of the word to other words, by grammatical conventions, that does much of the work of establishing meaning.").

73. *See* H.R. REP. NO. 598, at 329–30 (1977).

74. *See* 11 U.S.C. § 330(a) (2012).

75. *See generally* Blum v. Stenson, 465 U.S. 886 (1984).

76. *See generally* Pennsylvania v. Del. Valley Citizens' Counsel for Clean Air, 478 U.S. 546 (1986).

enhanced fees for an attorney's rare and exceptional work.[77] The Supreme Court held that:

> only [the following] three rare and exceptional circumstances could justify a fee enhancement based on superior performance: (1) when the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value; (2) if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; and (3) when there is an exceptional delay in the payment of fees, [especially] where the delay is unjustifiably caused by the defense.[78]

For example, in a Florida bankruptcy proceeding where creditors were expected to receive five cents on the dollar, the attorney displayed rare and exceptional work when improving creditor reimbursement to 100 percent payment to all creditors, as well as post-petition interest.[79] The attorney received a $1.6 million fee enhancement for such exceptional work.[80] Seemingly, courts find "rare and exceptional" work when attorneys surpass creditor recovery expectations.[81]

However, the extent to which fee enhancements are permissible became unclear after the Supreme Court decided *Perdue v. Kenny A*.[82] In *Perdue*, the Court limited the ability of lower courts to enhance fees in civil rights cases by suggesting that the "lodestar figure was reasonable" under Section 1988(b) and no fee enhancement was warranted.[83] After *Perdue*, courts continued to allow fee enhancements. The Fifth Circuit gave a detailed analysis of fee enhancements in its opinion in *In re Pilgrim's Pride Corp*., where the court allowed an additional $1 million fee enhancement over the almost $6 million lodestar fee.[84] In *In re Pilgrim's Pride Corp*., CRG Partners, L.L.P., the debtor's attorney, helped complete a successful restructuring, where the pre-petition shareholders expected to be left empty-handed, but instead received $450 million in new equity interests.[85] The Fifth

---

77. *See* Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); *see also Del. Valley Citizens' Counsel*, 478 U.S. at 565; *Blum* 465 U.S. at 899; *In re* Pilgrim's Pride Corp., 690 F.3d 650, 666 (5th Cir. 2012) ("In these rare cases, the professionals may potentially receive an enhancement only after transforming a carcass into a cheetah, soto [sic] speak thereby enlarging the pie that is shared by all of the debtor's creditors."); Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088, 1090–92 (5th Cir. 1980) (The court affirmed the bankruptcy court's award of a 16% fee enhancement because the debtor's attorney: (1) provided "excellent services" that produced an "unusually good result;" (2) "evidenced a very high degree of expertise and competence in various areas of law;" and (3) displayed "outstanding results" with a 100% dividend to all creditors.).

78. *In re Pilgrim's Pride*, 690 F.3d at 662 (citing Perdue v. Kenny A., 559 U.S. 542, 554–56 (2010)).

79. *In re* Se. Banking Corp., 314 B.R. 250, 256–70 (Bankr. S.D. Fla. 2004).

80. *Id.* at 274–75.

81. *See, e.g.*, ASARCO L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (*In re* ASARCO L.L.C.), 751 F.3d 291, 296 (5th Cir. 2014).

82. *See generally* Perdue v. Kenny A., 559 U.S. 542, 554–56 (2010).

83. *Id.*

84. *See In re* Pilgrim's Pride Corp., 690 F.3d 650, 653, 667 (5th Cir. 2012).

85. *See id.* at 653.

Circuit held that "[t]he [*Perdue*] opinion relied solely on its prior fee-shifting jurisprudence to support its holding" and the "opinion neither explicitly touched on bankruptcy law nor indicated that the Supreme Court intended *Perdue* to extend to non-fee-shifting cases," and therefore the court, "decline[d] to extend [*Perdue*] further."[86]

Courts have continued to grant fee enhancements to debtors' attorneys after the *Perdue* decision.[87] Courts have had no issues granting enhancements to fee applications in bankruptcy cases, and there has been no mention of this having a negative impact to the debtor's estate, presumably because the debtor's estate would be significantly worse off had the debtor's attorney not performed such exceptional work. Although the estate is required to pay higher attorneys' fees, which in turn results in less money for the estate, the Supreme Court allowed fee enhancements. Fee enhancements are a perfect example of when Section 330 is ambiguous, but where courts continue to allow for modifications to attorneys' fees recovery.

D. COMPENSATION FOR THE DEFENSE OF A FEE APPLICATION

Until the decision in *Baker Botts*, courts split on whether attorneys' fees incurred during the defense of a fee application could be reimbursed under Section 330(a). The vast majority of courts have allowed compensation for a successful defense of a fee application.[88] However, a minority of courts agree with the Supreme Court majority in *Baker Botts* and do not permit compensation for the defense of a fee application, claiming that the compensation would benefit the law firm instead of the estate and that the "American Rule" applies.[89]

In *In re Smith*, the Ninth Circuit determined that recovering fees for a successful defense of a fee application was warranted.[90] Courts continued to gauge the grant or denial of fee-defense costs by the success of the attorney

86. *Id.* at 664–65.

87. *See, e.g., In re* Stelera Wireless, L.L.C., No 13-13267, 2014 WL 8850092 (Bankr. W.D. Okla. 2014) (enhancing fees by $150,000); *In re* Mkt. Ctr. E. Retail Prop., 730 F.3d 1239, 1247 (10th Cir. 2013) (asserting that "the enhancement of attorney's fees under Section 330 should be restricted to the three limited exceptions that the Supreme Court identified in *Perdue*," and allowed otherwise.); *In re* Janata, 395 B.R. 496 (Bankr. S.D. Fla. 2008) (allowing a $30,000 fee enhancement); *In re* Nucentrix Broadband Networks, Inc., 314 B.R. 574 (Bankr. N.D. Tex. 2004), *rev'd on other grounds*, 333 B.R. 114 (N.D. Tex. 2005) (allowing a $800,000 fee enhancement).

88. *See, e.g.*, *In re* Manoa Fin. Co., 853 F.2d 687, 692 (9th Cir. 1988); Boyd v. Engman, 404 B.R. 467, 483 (W.D. Mich. 2009); Nunley v. Jessee, 92 B.R. 152, 154 (W.D. Va. 1988); *In re* Hers Cosmetics Corp., 114 B.R. 240, 244 (Bankr. C.D. Cal. 1990).

89. *See, e.g.*, Frazin v. Haynes & Boone, L.L.P. (*In re* Frazin), 413 B.R. 378, 402–03 (Bankr. N.D. Tex. 2009); *In re* JNS Aviation, L.L.C., No. 04-21055-RLJ-7, 2009 WL 80202, at *9 (Bankr. N.D. Tex. Jan. 9, 2009); *In re* Teraforce Tech. Corp., 347 B.R. 838, 866–67 (Bankr. N.D. Tex. 2006); *In re* DN Assocs., 165 B.R. 344, 354–55 (Bankr. D. Me. 1994).

90. *See* Smith v. Edwards & Hale, Ltd. (*In re* Smith), 317 F.3d 918, 928 (9th Cir. 2002).

in defending his or her fee application.[91] As a result, courts have continued to grant fees for a successful defense of a fee application.[92] Likewise, courts have reduced fees where attorneys failed to defend their fee applications.[93]

The policy justifications for allowing the recovery of fees for a successful defense of a fee application are "similar policy arguments to those pre-dating the 1994 Amendments—namely, the equal pay concept that not granting defense costs would 'dilute fee awards' below compensation available to attorneys generally."[94] The result is a "no-win" policy situation, "where a bankruptcy attorney must file a publicly available fee application, a party in interest objects to extract an unwarranted fee reduction, and the attorney faces a defense that will cost more than the value of the reduction sought by the objector."[95]

A minority of courts prohibits recovery of costs sustained when defending a fee application, regardless of the success of the defense. The minority courts look at comparable non-bankruptcy litigation and how a dispute for attorneys' fees would be handled in such cases.[96] The only comparable non-bankruptcy counterpart is the American Rule, where "each party must pay its own attorney's fees and expenses."[97] The courts therefore prevent such reimbursement, "[b]ecause skilled practitioners outside bankruptcy would customarily receive no compensation for the additional time spent litigating a fee dispute."[98]

The minority courts' comparison of bankruptcy fee application disputes to the American Rule is defective. There is no non-bankruptcy counterpart to Section 330(a)(1), where non-bankruptcy professionals are required to submit fee applications for approval by courts and trustees, and have those fees subjected to reduction.[99] Additionally, Section 330(a)(6) acknowledges that the task of preparing a fee application is not customary for other legal

---

91. *Compare* Big Rivers Elec. Corp. v. Schilling, 252 B.R. 670, 675 (W.D. Ky. 2000), *and In re DN Assocs.*, 165 B.R. at 355 *with* Hennigan Bennett & Dorman LLP v. Goldin Assocs. L.L.C. (*In re* Worldwide Direct Inc.), 334 B.R. 108, 111–12 (D. Del. 2005).

92. *See, e.g.*, Grant v. George Schumann Tire & Battery Co., 908 F.2d 874, 877 (11th Cir. 1990); Boyd v. Engman, 404 B.R. 467, 482–83 (W.D. Mich. 2009); *In re Worldwide Direct Inc.*, 334 B.R. at 111–12; *In re* Buckridge, 367 B.R. 191, 206 n.26 (Bankr. C.D. Cal. 2007); *In re* Atwell, 148 B.R. 483, 491–92 (Bankr. W.D. Ky. 1993); *In re* Hutter Constr. Co., 126 B.R. 1005, 1013 (Bankr. E.D. Wis. 1991).

93. *See Big Rivers Elec. Corp.*, 252 B.R. at 675; *In re DN Assocs.*, 165 B.R at 355; *In re* Great Sweats, Inc., 113 B.R. 240, 245–46 (Bankr. E.D. Va. 1990); *In re* Watervliet Paper Co., 109 B.R. 733, 735 (Bankr. W.D. Mich. 1989).

94. 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, 539 (2013); *see In re Smith*, 317 F.3d at 928.

95. Springer, *supra* note 94, at 539.

96. *See id*. at 540 (citing *In re* St. Rita's Assocs. Private Placement, L.P., 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001)).

97. Perdue v. Kenny A., 559 U.S. 542, 550 (2010).

98. *In re St. Rita's Assocs.*, 260 B.R. at 652.

99. *See In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 853–56 (3rd Cir. 1994).

professionals, and requires bankruptcy professionals to be compensated for it. Thus, the fee application is not comparable to what attorneys deal with outside of bankruptcy and, moreover, places bankruptcy professionals at a disadvantage.

Furthermore, if the defense of the fee application is successful and fees are not awarded for such a defense, the result is a reduction in the fees the attorney would have received had he or she not needed to defend the application. Essentially, not reimbursing the fees results in a compensation cut in bankruptcy attorneys' fees.[100] This is inherently contrary to the legislative intent of the Bankruptcy Reform Act of 1994, where the legislature wanted to enable equal compensation for bankruptcy attorneys.

Now attorneys face the possibility of entering frivolous and disadvantageous litigation because they will not be reimbursed, even if their fee application was proper. Particularly after the *Baker Botts* decision, there is a lack of adequate safeguards to protect attorneys from frivolous fee-defense litigation.[101] As the example provided by Justice Breyer, discussed supra, explained,[102] the attorney is left to suffer for doing no wrong. The debtor is allowed to challenge an attorney's fee application at any point in time[103] and the attorney has to bear the expenses. Attorneys are at a disadvantage after performing services for a debtor if their fee application is challenged. A more viable option would be to follow the Fourth Circuit's holding in *Shammas v. Focarino*,[104] where the court determined that "the American Rule [ ] applies only where the award of attorneys fees turns on whether a party seeking fees has prevailed to at least some degree."[105] The Supreme Court in *Baker Botts* incorrectly used the American Rule as an invalid justification to allow for such inequity.

II. THE AMERICAN RULE

The American Rule requires that each party pay its own attorneys' fees, unless there is an applicable exception.[106] The origin of the American Rule is

100. *See* Smith v. Edwards & Hale, Ltd. (*In re* Smith), 317 F.3d 918, 928 (9th Cir. 2002). The court stated that a "[f]ailure to grant fees for successfully defending challenges to an authorized fee application would dilute fee awards, in violation of Section 330(a), and this would reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." *Id.* at 928 (citing *In re* Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985)).

101. *See generally* Baker Botts L.L.P. v ASARCO L.L.C., 135 S. Ct. 2158, 2169 (2015) (where the court did not allow recovery for fees incurred when defending a fee application).

102. *See generally id.* at 2170 (Breyer, J., dissenting) (for convenience: "Consider a bankruptcy attorney who earns $50,000—a fee that reflects her hours, rates, and expertise—but is forced to spend $20,000 defending her fee application against meritless objections.").

103. Explained *infra* Part III.C (The only safeguard is Federal Rule of Civil Procedure 11, which has little effect in protecting attorneys.); *see also* FED. R. CIV. P. 11.

104. *See generally* Shammas v. Focarino, 784 F.3d 219 (4th Cir. 2015).

105. *Id.* at 223.

106. *See generally* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 13 (1984).

not entirely clear. However, it appears that the legislature wanted each party's legal expenses to reflect their decisions on how they wanted to litigate, and to not make the other party liable for those decisions.[107] The Supreme Court gave two reasons for the American Rule: parties should not fear punishment for bringing a lawsuit; and "litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration."[108]

A. BRIEF HISTORY OF THE AMERICAN RULE

The American rule emerged in the early nineteenth century due to attorneys pushing to recover fees from the defeated party, and as a result, parties would pay more in the form of attorneys' fees than for damages to the prevailing party.[109] There is much confusion regarding how or where the rule was formed; yet it continues to exist. The reason for attorneys' fees being so disproportionate to damages was that juries considered attorneys' fees when they assessed damages,[110] as they similarly do today.[111] The American Rule's cross-Atlantic counterpart, the English Rule, requires the defeated party to pay the prevailing party's attorneys' fees.[112] The English rule sought to reduce frivolous litigation, because of the fear of covering the prevailing party's legal fees upon defeat of meritless claims.[113] However, the English Rule also risks eliminating meritorious lawsuits where the plaintiff fears losing, because of the inability to pay the opposing party's legal fees.[114]

Currently, there are fee-shifting statutes that "overrule" the American Rule and allow reimbursement of legal fees to the prevailing party.[115] Another exception to the American Rule occurs when a party acts in bad faith. "The threshold for invoking this [bad faith exception] is high, [] and the Court should invoke it only when it finds that 'a fraud has been practiced upon it or that the very temple of justice has been defiled.'"[116]

---

107. *See* Oelrichs v. Spain, 82 U.S. 211, 230–31 (1872).

108. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (citing *Oelrichs* 82 U.S. at 231).

109. *See* Leubsdorf, *supra* note 106, at 13.

110. *See id.* at 14.

111. *See id.*

112. *See* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 327 (2013).

113. *Id.* at 335.

114. *Id.* at 335–36.

115. *See, e.g.*, Equal Access to Justice Act, Pub. L. No. 96-481, § 203, 94 Stat. 2321 (1980) (codified as amended at 5 U.S.C. § 504 (2012)).

116. Frazin v. Haynes & Boone, L.L.P. (*In re* Frazin), 413 B.R. 378, 402–03 (Bankr. N.D. Tex. 2009) (quoting Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1005 (5th Cir. 1995)).

B. SHIFTS AWAY FROM THE AMERICAN RULE

"There are six general categories of exceptions to the 'American rule:' (1) Contracts; (2) Bad Faith; (3) Common Fund; (4) Substantial Benefit; (5) Contempt; and (6) Fee-shifting statutes."[117] A key exception to the American Rule is where a statute explicitly states that fees can be rewarded to the prevailing party.[118] One example is the Equal Access to Justice Act (EAJA), under which a party is allowed to recover its attorneys' fees when the government loses a case against the party and the government cannot show that its position was substantially justified.[119] It is important to note that the EAJA allows recovery of fees when the party prevails against the government, whether the party was the plaintiff or the defendant.[120] This demonstrates a shift from the typical pro-plaintiff approach of the American Rule, towards the English rule under which the losing party pays the attorneys' fees. Congress, through the EAJA and other acts, has emphasized a concern for relatively poor litigants prevailing against wealthy parties, such as corporations or governments.[121] Oddly enough, the EAJA was enacted to incentivize businesses to sue the government.[122] The government provided funding to help poor parties prevail against rich parties, and as a result, shifted away from the American Rule.[123]

C. BAD FAITH EXCEPTION TO THE AMERICAN RULE

The bad faith exception "awards attorney fees against parties who litigate in bad faith, for the obvious purpose of deterring illegitimate behavior in the courtroom, and sometimes, outside it."[124] The Supreme Court implemented the bad faith exception in *Hall v. Cole*[125] and explained that when applying the bad faith exception in certain cases, "the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant."[126] The bad faith exception only grants attorneys' fees

---

117. David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule*," 15 IND. INT'L & COMP. L. REV. 583, 585 (2005).

118. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260–61 (1975).

119. *See* Equal Access to Justice Act § 203.

120. *Id.*

121. *See id.*

122. *See Award of Attorney's Fees Against the Federal Government: Hearings before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Judiciary Comm.*, 96th Cong., 15–29, 56–58 (1980).

123. *See* Leubsdorf, *supra* note 106, at 32; *see generally* Phyllis A. Monroe, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148, 154 (1981).

124. Leubsdorf, *supra* note 106, at 29.

125. *See generally* Hall v. Cole, 412 U.S. 1 (1973).

126. *Id.* at 5.

in exceptional cases and only when the "opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[127]

The majority opinion in *Baker Botts* explains that the bad faith exception to the American Rule—or the exception's bankruptcy counterpart, Rule 9011 of the Bankruptcy Code[128]—will work to exempt frivolous litigation against the debtor's attorney.[129] The Court noted that "any concerns about the possibility of frivolous objections to fee applications" will be protected by court-imposed "sanctions for bad-faith litigation conduct, which may include 'an order directing payment . . . of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.'"[130] However, courts have been reluctant to apply the bad faith exception to the American Rule.[131]

D. INEQUITY PRESENTED BY THE AMERICAN RULE IN BANKRUPTCY

The American Rule in the context of the defense of fee applications would result in attorneys losing even if they successfully defended their fee application. First and foremost, there is no comparable practice for non-bankruptcy professionals, because they do not have to submit fee applications. Attorneys in other fields do not have to thoroughly explain their work and have it reviewed by the United States Trustee and the court before they can receive their compensation. Furthermore, there is no safeguard for bankruptcy practitioners to avoid oppressive tactics by debtors, because of courts' rare use of Bankruptcy Rule 9011 and FRCP Rule 11.

By assuming that the American Rule is the non-bankruptcy counterpart of reimbursing fee-defense expenses, the Supreme Court has once again left bankruptcy professionals on an uneven playing field. The ultimate result: attorneys pay the price even if they provide exceptional work. Therefore, attorneys need some way to get their backs off the wall and make sure that when a debtor challenges the fee application, it is done with the utmost good faith and through a more complex process than simply filing a complaint in a courtroom.

---

127. United States v. Standard Oil Co., 603 F.2d 100, 103 (9th Cir. 1979) (quoting *Hall*, 412 U.S. at 5).

128. *See* FED. R. BANKR. P. 9011 (this rule is analogous to Rule 11 of the Federal Rules of Civil Procedure (FRCP)); *see* FED. R. CIV. P. 11(b)(1) (enforcing that the litigation "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.").

129. *See* Baker Botts L.L.P. v. ASARCO L.L.C., 135 S. Ct. 2158, 2168 n.4 (2015).

130. *Id.* (quoting Law v. Siegel, 134 S. Ct. 1188, 1198 (2014)).

131. *See* Leubsdorf, *supra* note 106, at 29; *see generally* Jacob Singer, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?*, 84 ST. JOHN'S L. REV. 693, 701–13 (2010).

III. *BAKER BOTTS* ANALYSIS

The *Baker Botts* decision overturned a strong majority of decisions allowing compensation for successful fee-defense litigation.[132] With the ability to receive compensation for the successful defense of a fee application, bankruptcy attorneys were not placed at a disadvantage if the debtor filed a lawsuit against the attorney's fee application. The courts and United States Trustee already review fee applications;[133] now, a legal challenge by a debtor adds an additional obstacle in the way of a bankruptcy attorney's path to receiving compensation. The *Baker Botts* facts display a scenario where attorneys are in dire need of safeguards to avoid frivolous litigation.

A. BACKGROUND AND PROCEDURAL HISTORY

ASARCO LLC filed a Chapter 11 bankruptcy petition in 2005.[134] ASARCO was represented by Baker Botts LLP as primary counsel, and Jordan, Hyden, Womble, Culbreth, & Holzer, PC as co-counsel.[135] During the bankruptcy case, Baker Botts pursued fraudulent transfer claims against ASARCO's parent company,[136] for the transfer of a controlling interest in Southern Copper Corporation (SCC).[137] Baker Botts successfully obtained a $6-$10 billion[138] judgment against the parent, which was, at the time, "the largest fraudulent transfer judgment in Chapter 11 history."[139] As a result, the bankruptcy court awarded Baker Botts "approximately $120 million for their work in the bankruptcy proceeding plus a $4.1 million enhancement for exceptional performance. The court also awarded the firms over $5 million for time spent litigating in defense of their fee applications."[140]

132. *See, e.g.*, Grant v. George Schumann Tire & Battery Co., 908 F.2d 874, 877 (11th Cir. 1990); Boyd v. Engman, 404 B.R. 467, 482–83 (W.D. Mich. 2009); Hennigan Bennett & Dorman LLP v. Goldin Assocs. L.L.C. (*In re* Worldwide Direct Inc.), 334 B.R. 108, 111–12 (D. Del. 2005); *In re* Buckridge, 367 B.R. 191, 206 n.26 (Bankr. C.D. Cal. 2007); *In re* 14605, Inc., No. 05-11910, 2007 WL 2745709, at *8–9 (Bankr. D. Del. Sept. 19, 2007); *In re* Atwell, 148 B.R. 483, 491–92 (Bankr. W.D. Ky. 1993); *In re* Hutter Constr. Co., 126 B.R. 1005, 1013 (Bankr. E.D. Wis. 1991).

133. *See* 11 U.S.C. § 330(a) (2012).

134. *Baker Botts L.L.P.*, 135 S. Ct. at 2163.

135. *Id.*

136. *See id.* at 2163 (ASARCO L.L.C. is owned by ASARCO Incorporated, which is owned by Americas Mining Corporation, which is in turn owned by Grupo Mexico (collectively, ASARCO's "Parent")).

137. *See id.*

138. The range in the value of the judgment is due to the changing valuation of the SCC stock and dividends that ASARCO received from its parent. When ASARCO initially transferred the stock and dividends it was worth over $10 billion, but after the fraudulent transfer proceeding and when ASARCO was returned the stock and dividends, they were valued at over $6 billion. *See In re* ASARCO L.L.C., No. 05-21207, 2011 WL 2974957, at *5-7 (July 20, 2011).

139. *Id.*

140. *Baker Botts L.L.C.,* 135 S. Ct. at 2163.

"ASARCO is an integrated copper mining, smelting, and refining company [that] entered Chapter 11 in 2005,"[141] as a result of "billions of dollars worth of environmental, asbestos, [tax,] and toxic tort liabilities."[142] "Creditors were expecting to recover only cents on the dollar."[143] The entire board and the CEO of ASARCO resigned shortly after filing for bankruptcy. "In February 2007, ASARCO filed suit against two of its parent entities," and "sought damages for fiduciary duty breaches and to avoid the fraudulent transfer," explained supra, for the sale of SCC.[144] After Baker Botts successfully avoided the transfer of SCC, ASARCO was left "with minimal debt, $1.4 billion in cash, and liberated from its massive environmental, asbestos and toxic tort liabilities."[145] The bankruptcy court described the reorganization as "probably the most successful Chapter 11 of any magnitude in the history of the Code."[146]

On February 8, 2010, Baker Botts sought final approval of its fee application, including "a 20 percent premium (about $22.6 million)."[147] Until the lawsuit by ASARCO, there was no objection to the final fee application. After exiting bankruptcy, ASARCO was again under the control of its parent, and objected to over $20 million in fees, including the $22.6 million fee enhancement.[148] The lawsuit required Baker Botts to produce every document it had accumulated over the four-year bankruptcy proceeding, "resulting in the production of 2,350 boxes of hard copy documents and 189GB of electronic data."[149]

The bankruptcy court held that ASARCO's claims were meritless. The bankruptcy court concluded that it had the power to grant such fees under Section 330(a) and determined that the fees were reasonable under the lodestar method.[150] The bankruptcy court noted that it "should reward rare and exceptional work and should be tied to both the effort and the outcome."[151] The court granted fees of only $5 million, instead of the requested $8 million,[152] without much explanation as to their reasoning.[153] Subsequently, ASARCO appealed to the district court, but this time around,

---

141. ASARCO, L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (*In re* ASARCO L.L.C.), 751 F.3d 291, 293 (5th Cir. 2014).

142. Gregory W. Werkheiser, *ASARCO and the High Cost of Getting Paid in the Fifth Circuit (And Maybe Everywhere)*, AM. BANKR. INST. J., Jan. 2015 at 64.

143. *In re ASARCO L.L.C.*, 2011 WL 2974957, at *4.

144. Werkheiser, *supra* note 142, at 12.

145. *Id.* at 12.

146. *In re ASARCO L.L.C.*, 2011 WL 2974957, at *22.

147. Werkheiser, *supra* note 142, at 12.

148. *See* ASARCO, L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (*In re* ASARCO L.L.C.), 751 F.3d 291, 293–94 (5th Cir. 2014).

149. *Id.* at 293.

150. *See In re ASARCO L.L.C.*, 2011 WL 2974957, at *17.

151. *Id.* at *37.

152. *See* Werkheiser, *supra* note 142, at 13.

153. *See In re ASARCO L.L.C.*, 2011 WL 2974957, at *42.

the court did not object to the fees in the application, and instead, objected to the fee enhancements and the fees for defending the fee application.[154] The district court affirmed the bankruptcy court.

Once again, ASARCO appealed to overturn the fee enhancements and the fees for defending the fee application. The Fifth Circuit continued to analyze the bankruptcy court's ability to authorize fee enhancements and the recovery of fees for defending fee applications under Section 330(a).[155] The Fifth Circuit affirmed the fee enhancements in their entirety, using the lodestar method and the argument presented in *Pilgrim's Pride*, which explicitly stated "that *Perdue* did not overrule this circuit's bankruptcy precedent authorizing fee enhancements . . . pursuant to Section 330(a)."[156] Additionally, the Fifth Circuit considered the fraudulent transfer litigation as a rare and exceptional circumstance, which should be considered as a "once in a lifetime result."[157]

The Fifth Circuit thoroughly analyzed the fees awarded for the defense of the fee application. The Fifth Circuit reasoned that "Section 330(a)(3) instructs the court to consider 'all relevant factors' concerning the professional services rendered, including 'whether their services were necessary for the administration of, or beneficial . . . toward the completion of a case . . .' and 'whether the compensation is reasonable' based on charges by comparable practitioners in non-bankruptcy cases."[158] However, the court acknowledged that Section 330(a)(4) does not allow compensation for services that were not reasonably likely to benefit the debtor's estate or necessary to case administration.[159] Further, the court acknowledged that "[t]he primary beneficiary of a professional fee application, of course, is the professional. While the debtor's estate or its administration must have benefitted from the services rendered, the debtor's estate, and therefore normally the creditors, bear the cost."[160] The court concluded that Baker Botts could recover fees for defending its fee applications, suggesting that "bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications . . . courts should not hesitate to implement the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[161]

---

154. *See id.*

155. *See* ASARCO, L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (*In re* ASARCO L.L.C.), 751 F.3d 291, 293 (5th Cir. 2014).

156. *Id.* at 296.

157. *Id.*

158. *Id.* at 299; *see also* 11 U.S.C. § 330(a)(3) (2012).

159. *See ASARCO L.L.C.*, 751 F.3d at 299; *see also* 11 U.S.C. § 330(a)(4).

160. *ASARCO L.L.C.*, 751 F.3d at 299; *see also* Grant v. George Schumann Tire & Battery Co., 908 F.2d 874, 877 (11th Cir. 1990).

161. *ASARCO L.L.C.*, 751 F.3d at 302.

B. SUPREME COURT ANALYSIS

ASARCO appealed the Fifth Circuit's decision to the Supreme Court and the Court granted certiorari.[162] The Supreme Court took the minority approach towards the recovery of fees for defending fee applications. Justice Thomas went into detail about the American Rule and stated that it was the Court's "basic point of reference."[163] The Court explicitly stated that it would not deviate from the American Rule.[164] Also, the Court noted that fee-shifting statutes that displace the American Rule "tend to authorize the award of a 'reasonable attorney's fee,' 'fees,' or 'litigation costs,' and usually refer to a 'prevailing party' in the context of an adversarial 'action.'"[165] The Court held that Section 330(a)(1) does not act as a fee-shifting statute that would displace the American Rule, because "the phrase 'reasonable compensation for actual, necessary services rendered' neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other."[166]

The Court rejected Baker Botts's argument that "fee-defense litigation is part of the 'services rendered' to the estate administrator under § 330(a)(1)," and instead emphasized the analysis of the words "services rendered" in Section 330(a)(1).[167] The Court explained that the "word 'services' ordinarily refers to 'labor performed for another.'"[168] Therefore, the phrase "necessarily implies loyal and disinterested service in the interest of a client."[169] The Court concluded that the term "services" "cannot be read to encompass adversarial fee-defense litigation."[170] Further, the Court concluded that "[t]ime spent litigating a fee application against the administrator of a bankruptcy estate cannot be fairly described as 'labor performed for'—let alone 'disinterested service to'—that administrator."[171]

C. JUSTICE BREYER'S DISSENT

Justice Breyer, joined by Justices Ginsburg and Kagan, acknowledged "that a professional's defense of a fee application is not a 'service' within the meaning of the Code," but then supported the government's argument, presented in its amicus brief, "that compensation for fee-defense work 'is properly viewed as part of the compensation for the underlying services in

---

162. *See generally* Baker Botts L.L.P. v. ASARCO L.L.C., 135 S. Ct. 2158 (2015).
163. *Id.* at 2164.
164. *See id.*
165. *Id.* at 2165.
166. *Id.* at 2166.
167. *Id.*
168. *Id.* at 2165 (quoting *Services*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934)).
169. *Id.* (quoting Woods v. City Nat'l Bank & Tr. Co., 312 U.S. 262, 268 (1941)) (internal quotation marks omitted).
170. *Id.* at 2166.
171. *Id.*

[a] bankruptcy proceeding.'"[172] Justice Breyer explained that "[t]he [Bankruptcy] Code provides that a 'court shall consider the nature, the extent, and the value of . . . services [rendered], taking into account *all relevant factors*.'"[173] Further, Justice Breyer asserted that "[t]he Bankruptcy Code affords courts broad discretion to decide what constitutes 'reasonable compensation,'" and that "it may take into account the expenses that a professional has incurred in defending his or her application for fees."[174] Moreover, the dissent asserted that "the extensive process through which a bankruptcy professional defends his or her fees may be so burdensome that additional fees are necessary in order to maintain comparability of compensation [with non-bankruptcy professionals]."[175] When a non-bankruptcy professional is subject to a fee-objection process, generally, only their client can make that objection, and the process is "comparatively simple, involves fewer parties in interest, and does not necessarily impose litigation costs."[176] Therefore, it is "necessary to account for the relatively burdensome fee-defense process required by the Bankruptcy Code."[177]

Justice Breyer disputed the majority's American Rule argument by suggesting that Section 330 need not explicitly permit a court to award fees. "To the extent that the majority intends to impose a requirement that a statute must explicitly mention fee defense in order to provide compensation for that work . . . [makes it] difficult to reconcile with the Court's decision in *Jean*."[178] In *Commissioner v. Jean*,[179] the Court held that "the Equal Access to Justice Act authorizes compensation for fee-defense work,"[180] despite the fact that the statute did not explicitly state anything about fee-defense work. Additionally, Justice Breyer argued that "the majority asserts that a fee application, unlike fee defense, can be construed as a 'service' to the bankruptcy estate," but "[a] bill prepared by an attorney, or another bankruptcy professional, is not a 'service' to the bankruptcy estate."[181]

Regardless of the excellent points that Justice Breyer made in his dissent, the majority's opinion is still the law of the case. Attorneys need to be protected against frivolous litigation and ensure that bankruptcy attorneys are still compensated equally to attorneys in other fields of law.

172. *Id.* at 2169 (Breyer, J., dissenting); *see also* Kenneth N. Klee, *Prof. Kenneth N. Klee on the Supreme Court's Holding in Baker Botts L.L.P. v. ASARCO L.L.C.,* 2015 EMERGING ISSUES 7344 (2015).

173. *Baker Botts L.L.P.*, 135 S. Ct. at 2169 (Breyer, J., dissenting) (alteration in original) (quoting 11 U.S.C. § 330(a)(3) (2012)).

174. *Id.* (Breyer, J., dissenting).

175. *Id.* at 2171–72.

176. *Id.* at 2171.

177. *Id.*

178. *Id.* (citing Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154, 160–66 (1990)).

179. *See generally Comm'r, Immigration & Naturalization Serv.*, 496 U.S at 154.

180. *Baker Botts L.L.P.,* 135 S. Ct. at 2171 (Breyer, J., dissenting).

181. *Id.* at 2172.

D. IMPACT OF BAKER BOTTS

"For bankruptcy practitioners, the textual literalism of the *Baker Botts* decision reaches a strikingly bad policy result, which incentivizes destructive fee litigation designed to 'hold up' the professionals for discounts on fees against the threat of continued litigation in which the estate professionals bear only downside risk, costs, and delay."[182] The Fifth Circuit offered two suggestions for professionals when deciding *Baker Botts* and proposed: "They can anticipate the possibility of not being reimbursed for defending fee applications by (1) adjusting upward their hourly rates and (2) more thoroughly documenting their fee applications.[183] A concern with those suggestions is that the United States Trustee Program

> has implemented revised standards requiring professionals in larger chapter 11 cases 'to establish that the compensation sought is reasonable as compared to the market measured by the billing practices of the applicant and its peers for bankruptcy and non-bankruptcy engagements,' and has a stated policy to 'ordinarily object to fees that are above the market rate for comparable services."[184]

Another concern is that requiring professionals to document fee applications more thoroughly "will simply increase the cost to estates of fee application preparation across the board" and is unlikely to "reduce objections, which . . . are almost always tactically motivated, or eliminate costly proceedings to resolve them."[185]

The *Baker Botts* decision has serious repercussions for all attorneys in the bankruptcy field, from large law firms like Baker Botts, to sole practitioners that represent individuals in Chapter 12 and 13 cases. In *In re Huepenbecker*,[186] the court acknowledged how the recent *Baker Botts* decision reduced the attorney's fees from $250 per hour to approximately $146 per hour—a whopping $104 per hour cut for all of the work the attorney conducted as a result of defending his fee application.[187] The court suggested for other courts to invoke Rule 9011 more frequently; however, as discussed earlier,[188] there is no precedent for the effective use of Rule 9011 in bankruptcy courts for this particular issue.[189] The *Baker Botts* decision will negatively affect the original intentions of the Bankruptcy Reform Act of 1978, in that it may cause a lack of bankruptcy professionals to enter the field

---

182. Klee, *supra* note 172.

183. Werkheiser, *supra* note 142, at 65 (citing ASARCO, L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (*In re* ASARCO L.L.C.), 751 F.3d 291, 301 n.7 (5th Cir. 2014)).

184. *Id.* at 66 (citing 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. 36,248, 36,250 (June 17, 2013)).

185. Werkheiser, *supra* note 145, at 66.

186. *See generally In re* Huepenbecker, 546 B.R. 381 (Bankr. W.D. Mich. 2015).

187. *See id.* at 385.

188. *See supra* Part III.C & Part III.D.

189. *See id.*

knowing that their fees have the potential to be reduced every time they represent their client—even if successful.

IV. SOLUTIONS TO FIX THE INEQUITY

Baker Botts has already begun stirring commotion in bankruptcy courts. Courts have differentiated cases in order to allow attorneys to recover fees from defending fee applications. For example, in *In re Hibbard*,[190] the U.S. Bankruptcy Court for the Middle District of Florida allowed the attorney to recover fees from fee-defense work and distinguished the case from *Baker Botts*.[191] Also, in *SC Real Estate, LLC v. Acevedo*,[192] the U.S. District Court for Northern District of Illinois found that Section 362 should not receive the same treatment as Section 330, because it does not contain the terms "actual, necessary services rendered" and "reasonable attorney's fees," and departs from the American Rule, because Section 362(k) specifically mentions the phrase "attorney's fees."[193] Therefore, the district court granted the recovery of legal fees the attorney incurred for defending his fee application.[194] Seemingly, courts are attempting to fight against the unfair result of *Baker Botts* by either distinguishing cases from the Supreme Court precedent or threatening to sanction debtors who file in bad faith, although there has not yet been an instance where a debtor was actually sanctioned.[195]

As mentioned earlier, neither Bankruptcy Rule 9011,[196] nor FRCP Rule 11,[197] are adequate safeguards against frivolous litigation, because courts have not been known to enforce sanctions against bad faith litigation.[198] It is surprising that the Supreme Court even argued for such a safeguard when they did not find any sort of bad faith in *Baker Botts*. Outrageously, in *Baker Botts,* ASARCO's parent company was the party advocating the lawsuit against Baker Botts for excessive fees. If the court did not find ASARCO to have conducted their lawsuit in bad faith—a case with the highest fraudulent transfer recovery in history—then the standard is practically useless.[199] This

---

190. *See generally* Herendeen v. Gen. Elec. Credit Union (*In re* Hibbard), No. 8:12-bk-10473-KRM, 2015 WL 7251535 (Bankr. M.D. Fla. Nov. 13, 2015).

191. *See id.* at *4 ("In [*Baker Botts*], the Supreme Court declined to award fees-on-fees under § 330(a)(1) of the Bankruptcy Code. The FCCPA's language explicitly provides for the recovery of 'court costs and reasonable attorney's fees . . . .' Therefore, the Plaintiff [] also recover[ed] reasonable fees for litigating the amount of the fee award.").

192. *See generally* SC Real Estate, L.L.C. v. Acevedo, No. 15 C 1104, 2015 U.S. Dist. LEXIS 99066 (N.D. Ill. July 1, 2015).

193. *Id.* at n.9.

194. *See id.*

195. *See In re* Huepenbecker, 546 B.R. 381, 385 (Bankr. W.D. Mich. 2015).

196. *See generally* FED. R. BANKR. P. 9011.

197. *See generally* FED. R. CIV. P. 11(b)(1).

198. *See* Leubsdorf, *supra* note 106, at 29; *see generally* Singer, *supra* note 131, at 701–13 (discussing the confusion in courts when applying the bad faith exception); *see also* Frazin v. Haynes & Boone, L.L.P. (*In re* Frazin), 413 B.R. 378, 402–03 (Bankr. N.D. Tex. 2009) (explaining when courts should allow the bad faith exception).

199. *See* Baker Botts L.L.P. v. ASARCO L.L.C., 135 S. Ct. 2158, 2169 (2015).

is especially so when considering that the fraudulent transfer was directed at the parent company, and the parent company is the reason the lawsuit was initiated, possibly as a form of revenge.[200] If that is not frivolous, spiteful, or bad faith litigation, then it is hard to imagine what would be. Unless the Supreme Court outright overturns its decision, a unique solution must be implemented to fix this inequity towards bankruptcy attorneys.

A. CONTRACT AROUND THE DECISION

One possible solution, according to Gregory Werkheiser, is to "seek approval under § 328(a) at the time of retention of engagement terms authorizing a professional to seek reimbursement of fees and expenses incurred in successfully defending its fee application."[201]

However, Werkheiser acknowledges that the solution is vulnerable and courts are unlikely to allow attorneys to circumvent the Supreme Court's decision in *Baker Botts* by adding contractual language in their retainer agreements. Furthermore, the idea was proposed in *In re Boomerang Tube, LLC*, "where committee counsel sought to write exceptions to the American Rule as applied to fee-defense litigation in their retention agreements."[202] However, "the [United States Trustee] objected to the inclusion of the fee defense provisions," and the court sustained the Trustee's objection.[203]

A similar method—that would not require leaving Section 330—was proposed by G. Christopher Meyer of Squire Patton Boggs to contract around the issue presented by the *Baker Botts* decision.[204] Meyer suggests including express language about reimbursement in the engagement documents between the attorney and the debtor.[205] However, Meyer acknowledges that there "cannot be a contracted exception to the American Rule when one did not otherwise exist in the statute," leaving no solution for attorneys.[206] Moreover, the *Baker Botts* decision has negatively affected bankruptcy professionals other than attorneys as well.[207]

---

200. *See* Klee, *supra* note 172 ("The reorganized debtor's extensive challenge to the Firms' fees has the appearance of a vindictive attempt to exact a token of revenge by the parent.").

201. Werkheiser, *supra* note 142, at 66.

202. Mark D. Taylor, *Baker & Botts: Efforts Continue to Define Its Scope*, INSIDE COUNS. (Oct. 21, 2015), http://www.insidecounsel.com/2015/10/21/baker-botts-efforts-continue-to-define-its-scope; *see also In re* Boomerang Tube, Inc., 548 B.R. 69, 71 (Bankr. D. Del. 2016).

203. *In re Boomerang*, 548 B.R. at 71.

204. *See* G. Christopher Meyer, *Baker & Botts – Is the Second Shoe About to Drop?*, ESQUIRE GLOBAL CROSSINGS (Sept. 2, 2015), http://www.esquireglobalcrossings.com/2015/09/baker-botts-is-the-second-shoe-about-to-drop/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+EsquireGlobalCrossings+%28eSQUIRE+Global+Crossings%29.

205. *See id.*

206. *Id.*

207. *See In re* Walker Land & Cattle, L.L.C., 535 B.R. 348, 358 (Bankr. D. Idaho 2015) (where an accountant who filed a fee application failed to be reimbursed for legal expenses he incurred when defending his fee application because the expenses were held to not be "reasonable and necessary").

Currently, there is no solution, aside from the rare instances of bad faith litigation, to how attorneys should handle fee applications. Bankruptcy professionals are placed at a disadvantage as soon as the debtor decides to litigate for a fee reduction.

B. LEGISLATIVE CHANGE TO SECTION 330

The simple, although lengthy, solution to the disparity created for bankruptcy practitioners as a result of the *Baker Botts* decision would be to amend Section 330. Congress has the opportunity to either amend current sections of Section 330 or add an entirely new section in regards to defending fee applications.

One suggestion made by Timothy Springer for how Congress can incorporate a rule to reimburse attorneys for fee applications is to amend the language of § 330(a)(6) to read: "Any compensation awarded for the preparation or the defense of a fee application shall be based on the level and skill reasonably required to prepare or to defend the application."[208] This method would easily resolve the issue presented and seems like a likely solution since the United States government expressed interest in the *Baker Botts* case by submitting an amicus brief.[209] However, it may take Congress years to amend the Bankruptcy Code—if they decide to amend it at all—and in the meanwhile, there are no safeguards in place.

C. PREREQUISITES BEFORE DISPUTING A FEE APPLICATION

Another viable solution may be to implement a standard that the debtor must meet before he or she can dispute a fee application—essentially challenging the idea at the outset, instead of waiting until it is too late. This way, not only will the attorney be put in a position to carefully decide whether to settle or litigate, but the debtor will also be put in that same position. Since bankruptcy court opinions should only be overturned for an abuse of discretion,[210] the debtor should emphasize a good faith reason as to why the fee application is still excessive—after review by the United States Trustee and the court—therefore, putting the burden on the debtor.

Furthermore, bankruptcy courts can require debtors to first handle the issue with the Trustee. Instead of immediately litigating, the debtor would have to take the time to deal with the Trustee—since the Trustee initially approved the fee application—and get approval to litigate. These responsibilities are well in line with what the Trustee does on an ordinary basis, as well as the Trustee's mission statement: "[t]he mission of the United

208. Springer, *supra* note 94, at 556 (also explaining the unlikely possibility that if Congress decided to adopt the opposite approach, then Congress can amend Section 330(a)(4) to explicitly "disallow fees and expenses incurred in defending a fee application under § 330(a)(2)").

209. *See generally* Baker Botts L.L.P. v. ASARCO L.L.C., 135 S. Ct. 2158 (2015).

210. *See id.*; Barron & Newburger, P.C. v. Texas Skyline, Ltd. (*In re* Woerner), 783 F.3d 266, 277 (5th Cir. 2015).

States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public."[211] Therefore, the Trustee would act almost as an arbitrator prior to allowing a debtor to sue their attorney in court.

Additionally, courts can also be more stringent on arguments against fee applications at confirmation hearings. Although this allows judges much discretion on the overall fee application, there may not be a better person to justify a fee application than the trial judge who heard the case and dealt with the parties first hand. Alternatively, judges can request for the parties to arbitrate instead of litigate fee applications to lower costs.

As a result, with these limitations on the debtor prior to litigating against a fee application, they may have to think whether they have enough resources to carry the burden and prove to the Trustee and the courts that the fee application is truly excessive. If nothing else, this may limit the total number of fee application disputes due to the stringent standard.

CONCLUSION

Bankruptcy professionals must be protected to uphold Congress's desire to keep professionals in the bankruptcy field.[212] Since the *Baker Botts* decision, the playing field is no longer even, and debtors gain the upper hand on attorneys—similar to before the Bankruptcy Act of 1978. Debtors can litigate against their attorneys if they want to reduce their legal fees and without effective safeguards, attorneys are left defenseless. By evening the playing field once again, and placing a higher burden on plaintiffs to challenge the integrity of attorneys' fee applications, bankruptcy professionals can continue to strive. Attorneys cannot sit around and hope that Congress quickly passes legislation (if it passes legislation at all) fixing the negative effects of *Baker Botts*, while they are forced to receive less compensation if their clients sue them. In the interim, the U.S. Trustee Offices can be more effective than the currently feeble safeguards of Bankruptcy Rule 9011 or FRCP 11. The United States Trustee Offices can create a barrier for frivolous litigation and become the first line of review on appeal. Attorneys will no longer have to worry about an effective pay cut due to incurring additional costs when defending their fee applications in court. The higher standard will result in courts and Trustees having greater control in the faith of fee applications and remove the current lose-lose situation for bankruptcy attorneys.[213]

---

211. *U.S. Trustee Program, About the Program,* U.S. DEP'T OF JUST., (May 12, 2016) http://www.justice.gov/ust/about-program.

212. *See* H.R. REP. NO. 598, at 329–30 (1977); *see also* S. REP. NO. 989, at 39–40 (1978).

213. Even where an attorney is successful in defending his fee application, this success is limited because he still suffers the costs of defending the application, which results in a loss for the attorney. The only alternative is to settle with the debtor and discount the attorney fees. On the contrary, if

Stanislav Veyber[*]

the attorney is unsuccessful in defending his fee application, he will suffer both a reduction in fees and litigation expenses.

* B.B.A., CUNY Baruch College; J.D. Candidate, Brooklyn Law School, 2017. This work is dedicated to my loving parents, Elina and Alexander Veyber, and my brother, Edward Veyber, for always inspiring and encouraging me to work hard and reach for the sky. Special thanks to Elina Manakhimova for her endless love and support. Lastly, I would like to sincerely thank the entire staff of the Brooklyn Journal of Corporate, Financial & Commercial Law for all of their time and effort polishing this Note, especially Jordan Meddy and Alissa Cardillo.