BANKRUPTCY LAW SECTION
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BANKRUPTCY BRIEFS

NEWSLETTER OF THE BANKRUPTCY SECTION OF THE FEDERAL BAR ASSOCIATION

Marc Taubenfeld, Editor *February 2015*

LETTER FROM THE CHAIR

We hope that you enjoy the latest edition of *Bankruptcy Briefs*, the newsletter of the Bankruptcy Section of the Federal Bar Association. Once again, the editor of *Bankruptcy Briefs*, Executive Committee member Marc Taubenfeld, and all of the contributing authors have done an excellent job. From bankruptcy cases that the United States Supreme Court will determine in the near term, including the propriety of fees for defending fee applications and the ability of litigants to consent to jurisdiction, to in depth analyses of the Fifth Circuit's hindsight standard for determining attorney compensation and the ability to appeal an order denying confirmation (which issue will also be before the United States Supreme Court), the newsletter is chock full of timely information and useful scholarship. Please join me in thanking Marc and all of the contributing authors for their fine work and devotion to the Bankruptcy Section and its members.

Among other things this year, the Bankruptcy Section is looking for more input and help from you our members. To facilitate such involvement, the Executive Committee has authorized the formation of the following committees: communication, chaired by Robert Weber (Robert.Weber@skadden.com); membership, chaired by Michael Hammer (mhammer@dickinson-wright.com); publications, co-chaired by Chris Sullivan (csullivan@diamondmccarthy.com) and Marc Taubenfeld (mtaubenfeld@mcslaw.com); and CLE planning, co-chaired by Judge Alan Trust (alan_trust@nyeb.uscourts.gov) and chair-elect, Lisa Lambert (Lisa.L.Lambert@usdoj.gov).

"We need the active engagement of our members to continue to have an effective and responsive Bankruptcy Section"

We need the active engagement of our members to continue to have an effective and responsive Bankruptcy Section and to build on the strong foundation laid by the efforts of those members, officers, and Executive Committee members who have come before us. Therefore, I urge you to offer whatever time and effort you can to the Bankruptcy Section. If you have any interest in serving on any of the committees above, please reach out to the chair identified above, or contact me.

The FBA and your Bankruptcy Section provide an excellent opportunity not only to hone your skills and acquire knowledge (through FBA and Bankruptcy Section sponsored CLE and through publications like this newsletter, the *Federal Lawyer*, and the Circuit Writer project), but also to get to know your fellow bankruptcy lawyers and the judges in front of whom you appear. Please let us know what we can do to help you get the most from your Bankruptcy Section membership.

In closing, I thank you again for the opportunity to serve the Bankruptcy Section and thank the other officers and the members of the Executive Committee for their hard work and dedication. As always, we welcome your comments and suggestions.

Regards,

Mark L. Desgrosseilliers
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INTERRUPTION OR PRESERVATION?

Supreme court to review appellate jurisdiction over interlocutory orders in bankruptcy in *BULLARD V. HUDE PARK SAVINGS BANK*

The Supreme Court recently granted certiorari to review *Bullard v. Hyde Park Savings Bank* (*In re Bullard*), 752 F.3d 483 (1st Cir. 2014).[1] *Bullard* concerns whether a bankruptcy court's order sustaining an objection to confirmation is a final order for the purposes of appeal. While some courts consider denials of confirmation to be final and appealable, others will only review a confirmed plan and consider earlier denials to be interlocutory orders. The Supreme Court's forthcoming decision in *Bullard* may add some clarity in this area and perhaps cure a divide among the circuits on this issue.

BACKGROUND

Although the *Bullard* decision is now a dispute about appellate jurisdiction, the underlying facts of the bankruptcy case, the procedural history in the bankruptcy court, and the resulting appeal to the Bankruptcy Appellate Panel will be useful to understand the First Circuit's decision.

The controversy in *Bullard* began as a dispute over Bullard's proposed plan treatment for one of his secured creditors.[2] Bullard owned and lived in a residential property subject to a mortgage with Hyde Park.[3] Bullard filed a petition for bankruptcy relief under Chapter 13 of the Bankruptcy Code.[4] Both Hyde Park and Bullard agreed that the residence was worth less than the amount of Hyde Park's claim.

In Chapter 13 bankruptcy cases, the goal is to confirm a plan to restructure a debtor's finances and maximize repayment to creditors. With secured claims, a debtor generally has to choose either to (1) cure any pre-petition arrearages and continue payments under the original mortgage agreement,[5] payments which may continue for as long as the original agreement contemplated, or (2) modify the rights of a secured claimant but also pay the claim in full during the course of the plan.[6]

In his third amended plan, Bullard offered to continue making monthly payments in the amounts agreed to in the original mortgage for the original life of the mortgage, more than twenty years. Bullard also proposed to strip off a portion of Hyde Park's lien to the current value of the underlying property. This "hybrid plan" combined the two different treatments for secured claims offered in Chapter 13 of the Code. Hyde Park objected to confirmation of Bullard's plan because of its proposed hybrid treatment of Hyde Park's lien. The bankruptcy court sustained Hyde Park's objection, reasoning that a debtor should have to pick either of the two treatments provided in Section 1322(b) of the Code respecting secured claims, not both.[7]

When a debtor proposes a plan and the court denies con-

firmation, a debtor may file a motion to modify the proposed plan to attempt to remedy the plan's deficiencies.[8] Bullard, however, took a different approach—he sought to appeal the bankruptcy court's order sustaining Hyde Park's objection.[9]

Bullard argued to the Bankruptcy Appellate Panel that if denials of confirmation are considered interlocutory, appellate rules discouraging review of interlocutory orders would create a lack of "appellate guidance" on the issue of hybrid plans.[10] Bullard's arguments convinced the BAP to hear his case.[11] However, once he went before the BAP, the panel affirmed the decision of the bankruptcy court that hybrid plans were not permissible in the First Circuit. Bullard filed a notice of appeal with the BAP and requested a certification of his appeal to the First Circuit.[12] The BAP denied Bullard's request for certification of his appeal but Bullard, undeterred, pursued his case to the First Circuit Court of Appeals.

DISCUSSION

The question of whether an order denying confirmation may be appealed prior to confirmation has arisen in most of the federal circuit courts, with a significant split among them.[13] The First Circuit became the latest circuit court to wade into these uncertain waters when it decided the *Bullard* appeal.

The First Circuit began with a discussion of the statutory authority under which courts of appeal may review the decisions of lower courts. Circuit courts' reviewing authority differs from the reviewing authority congress granted to lower appellate courts. District courts and bankruptcy appellate panels have authority to review (1) final judgments, orders and decrees; (2) interlocutory orders issued under Code section 1121(d); and (3) with leave of the bankruptcy court, from other interlocutory orders and decrees.[14] Courts of Appeals have similar jurisdiction to review appeals from all final decisions, judgments, orders and decrees entered by bankruptcy courts, district courts, and appellate panels.[15]

For a court of appeals to review an interlocutory order in a bankruptcy matter, different procedures must be followed.[16] The court from which the appeal emanates must certify that the appeal concerns a novel issue, an issue on which there is conflicting authority, or an issue that, upon resolution with appellate review, will advance the case.[17] Any party to the dispute may request a certification and the court may act on its own to certify an issue.[18]

Here, since the BAP denied Bullard's request for a certification, the First Circuit began by noting that the court would have "jurisdiction only if the BAP's order rejecting Bullard's proposed plan is a final order."[19] In turn, a BAP's order can only be final if the underlying bankruptcy court's order is final.[20] An order in bankruptcy may be final only if it "finally dispose[s] of all the issues pertaining to a discrete dispute within the larger proceeding."[21] For instance, if an intermediate appellate court remands for further proceedings—except if those proceedings are only "ministerial," or rote, in nature—then its order is not final and therefore not appealable.[22]

The court recognized that there is a split among the circuits as to the proper classification of orders denying confirmation.[23] Joining the majority of circuits, the First Circuit held that a denial of confirmation is not a final order because the plan proponent remains free to modify the plan and offer the modified plan for confirmation.[24] The court observed that upon offering a modified plan, Bullard's creditors would be given a new opportunity to object and the court would have to rule on the new objections.[25] These rulings would not have been ministerial and therefore the appealed order could not be considered final.[26]

Bullard argued that absent an appeal of the denial of his plan's confirmation, he was left with inefficient and undesirable options. He could either (1) propose an unwanted plan modification, object to the modified plan, confirm the modified plan, then appeal the confirmation of the modified plan, or (2) allow his petition to be dismissed and appeal the dismissal.[27] The First Circuit focused on Bullard's failure to pursue appellate certification that would have been more appropriate to achieve circuit-level review while avoiding the inefficiencies Bullard described.[28] The court observed that if appeals like Bullard's are more difficult in the future, that would encourage more negotiated agreements to plan disputes.[29] As to Bullard's argument that his appeal brought new legal issues before the court, the court refused to bend the finality rule to hear any potentially novel issues.[30]

The First Circuit then examined a recent case Bullard cited to illustrate the inefficiency of treating denials of confirmation as interlocutory.[31] In *Zahn v. Fink*,[32] the Eighth Circuit BAP refused to review a denial of confirmation, so the debtor filed an unwanted modified plan for confirmation and objected to the modified plan she proposed. The bankruptcy court confirmed the unwanted, modified plan. The BAP then refused to hear arguments related to the original plan, explaining that it never became final and that the debtor lacked standing to appeal her own confirmed plan, even if she had never wanted it in the first place.[33]

The Eighth Circuit overturned the BAP on both holdings

and remanded to the BAP, which then overturned the denial of confirmation of the original plan in the bankruptcy court, vacated the confirmation of the unwanted plan, and remanded to the bankruptcy court to confirm the original plan. Only then, after having been through seven distinct proceedings, did the bankruptcy court confirm the debtor's desired plan. Unmoved, the First Circuit explained Zahn's torturous experience as simply a failure to pursue certification, noting that a single request for certification would have skipped several intervening steps.[34]

The First Circuit concluded its analysis with a restatement of the principle that its goal was to promote judicial efficiency by declaring that "an intermediate appellate court's affirmance of a bankruptcy court's denial of confirmation of a reorganization plan is not a final order appealable under § 158(d)(1) so long as the debtor remains free to propose an amended plan."[35] The First Circuit's decision left the circuits split, six in favor of classifying denials of confirmation as interlocutory and three in favor of classifying them as final.[36]

CONCLUSION

The Supreme Court has a difficult issue to resolve when *Bullard* arrives. The focus of the Court will likely be whether an order denying confirmation is final or interlocutory. The Court may also consider whether there is a difference between cases like *Bullard*, in which a party opposed to the plan objected, and cases like *Mort Ranta*, in which the bankruptcy court denied confirmation not because of an objection but because of infeasibility. Classifying the order as final in the latter case may make more sense than in the former. Of course, special certification is the best option and lawyers should always pursue it for interlocutory appeals before seeking to appeal under "final order" authority. Ultimately, the upcoming *Bullard* decision should help to define the rules of the game for bankruptcy appellants, hopefully giving litigants some guidance about when they may appeal bankruptcy court orders. ■

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Footnotes:

1 The petition for certiorari was docketed as 14-116. Certiorari was granted on December 12, 2014. The First Circuit opinion will hereinafter be referred to as "*Bullard Cir. Op.*"

2 Unless otherwise noted, the facts of the case are drawn primarily from the original opinion of the bankruptcy court, *In re Bullard*, 475 B.R. 304 (Bankr. D. Mass. 2012) [hereinafter *Bullard Bankr. Op.*].

3 The building also contained a separate unit that was not part of Bullard's residence. *Bullard v. Hyde Park Savings Bank*, 494 B.R. 92, 97 (1st Cir. B.A.P. 2013) [hereinafter *Bullard BAP Op.*]. The non-residential character of a portion of the property is important only in that it grants a debtor access to the provisions of Code section 1322(b)(2).

4 "Code" and "Bankruptcy Code" will hereinafter refer to Title 11 of the United States Code.

5 11 U.S.C. § 1322(b)(5).

6 11 U.S.C. § 1322(b)(2); see also *Bullard Bankr. Op.*, 475 B.R. at 306.

7 *Bullard Bankr. Op.*, 475 B.R. at 314.

8 *See* 11 U.S.C. § 1323 (allowing a debtor to make plan modifications any time prior to confirmation).

9 On appeal to the BAP, the National Association of Consumer Bankruptcy Attorneys (NACBA) filed an amici brief in support of Bullard's position. *Br. of the Amicus Curiae Nat'l Assoc. of Consumer Bankr. Att'ys in Support of the Debtor Appellant and Seeking Reversal of the Bankr. Court's Decision*, Nov. 20, 2012, available at www.ncbrc.org/wp-content/uploads/Bullard-NACBA-amicus1.pdf. The amicus brief does an excellent job of presenting the arguments in favor of permitting Hybrid Plans, which, while fascinating, are beyond the scope of this article.

10 *Bullard BAP Op.*, 494 B.R. at 95.

11 *Id.*

12 *Bullard Cir. Op.*, 752 F.3d at 485. See also 28 U.S.C. § 158(d).

13 The Second, Sixth, Eighth, Ninth and Tenth Circuits all consider orders denying confirmation to be interlocutory. *See Maiorino v. Branford Sav. Bank*, 691 F.2d 89 (2d Cir. 1982); *Lindsey v. Pinnacle Nat'l Bank* (*In re Lindsey*), 726 F.3d 857 (6th Cir. 2013); *Lewis v. United States, Farmers Home Admin.*, 992 F.2d 767, 773 (8th Cir. 1993); *In re Lievsay*, 118 F.3d 661 (9th Cir. 1997); *In re Simons*, 908 F.2d 643 (10th Cir. 1990). The Third, Fourth and Fifth Circuits consider such orders to be final for appeal purposes. *See In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005); *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000). See also Lewis et al. *Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases, Volume II of II: Preclusion*, 67 OKLA. L. REV. Vol. 3, Sec. II.B.2 (2015), *forthcoming*.

14 28 U.S.C. § 158(a)(1), (2), & (3).

15 28 U.S.C. § 158(d)(1).

16 *See* 28 U.S.C. § 158(a), (d)(2).

17 28 U.S.C. § 158(d)(2)(A).

18 *Id.* Several other procedures are given in this section to achieve certification with the cooperation of the appellee, though that circumstance did not exist here. *See, e.g.*, 28 U.S.C. § 158(d)(2)(A) (providing certification if requested by all appellants and appellees acting jointly) and 28 U.S.C. § 158(d)(2)(B)(ii) (providing that a court shall issue the certification if requested by majorities of appellants and appellees).

19 *Bullard Cir. Op.*, 752 F.3d at 485. In the note accompanying this text, the court discussed a controversy over a vaguery of the statute, possibly a simple drafting error, which casts some doubt as to whether an appeal from an interlocutory decision of a BAP under 28 U.S.C. § 158(d)(2) is permissible. Since Bullard's appeal was taken under 28 U.S.C. § 158(d)(1), however, the

court did not address the issue.

20 *Id.*

21 *Id.* at 485-86 (quoting *Perry v. First Citizens Fed. Credit Union* (*In re Perry*), 391 F.3d 282, 285 (1st Cir. 2004)).

22 *Id.* at 486.

23 *Id.* For a list of the cases illustrating the split, see *supra* note 13.

24 *Bullard Cir. Op.*, 752 F.3d at 486.

25 *Id.* at 487.

26 *Id.*

27 *Id.* (noting disparaging commentary on these options from *Mort Ranta*, 721 F.3d at 248 and *Bartee*, 212 F.3d at 282-83 & n. 6).

28 *See* 28 U.S.C. § 158(d)(2).

29 *Bullard Cir. Op.*, 752 F.3d at 487.

30 *Id.* at 488.

31 *Id.* at 488-89.

32 *Zahn v. Fink* (*In re Zahn*), 367 B.R. 654 (8th Cir. BAP 2007). S*ee also Zahn v. Fink* (*In re Zahn*), 526 F.3d 1140 (8th Cir. 2008) and *Zahn v. Fink* (*In re Zahn*), 391 B.R. 840 (8th Cir. BAP 2008).

33 *See Bullard Cir. Op.*, 752 F.3d at 489 n.8. Though not directly stated, the tone of the discussion indicates that the First Circuit would agree with the dissent from the Fourth Circuit's *Mort Ranta* opinion that an appellant seeking to appeal her own unwanted plan would have standing to contest a denial of confirmation of a previously proposed plan.

34 *Bullard Cir. Op.*, 752 F.3d at 489.

35 *Id.* at 489.

36 *See supra* note 13.

BANKRUPTCY LAW SECTION

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FEDERAL BAR ASSOCIATION / FBA BANKRUPTCY SECTION

UPCOMING EVENTS

March 25, 2015

2015 Mid-year meeting: Westin Arlington Gateway; Arlington, VA

June 24, 2015

Bankruptcy Litigation Skills Seminar
U.S. Bankruptcy Court, Southern District of New York,
One Bowling Green, New York, New York

- Hon. Laura Taylor Swain, U.S. District Judge, Southern District of New York
- Hon. Martin Glenn, U.S. Bankruptcy Judge, Southern District of New York
- Hon. Alan S. Trust, U.S. Bankruptcy Judge, Eastern District of New York

September 10-12, 2015

FBA Annual Meeting and Convention in Salt Lake City, Utah

September 11, 2015

(A) Time TBA
Bankruptcy Section Annual Meeting to Elect New Officers, at the FBA Annual Meeting

(B) Time TBA
Reception for Bankruptcy Judges and Practitioners, at the FBA Annual Meeting

FIVE MORE BANKRUPTCY CASES GRANTED CERTIORARI BEFORE THE UNITED STATES SUPREME COURT IN 2014

WELLNESS INT'L NETWORK, LTD. V. SHARIF, 727 F.3D 751 (7TH CIR. 2013) *CERT. GRANTED IN PART*, 134 S. CT. 2901 (2014).

On July 1, 2014, the United States Supreme Court granted certiorari to consider two issues on appeal from the United States Court of Appeals for the Seventh Circuit.[1] The first issue is whether the presence of a subsidiary state property law matter in an adversary proceeding, brought under 11 U.S.C. § 541, means that a bankruptcy court has no constitutional authority to enter a final order on that matter.[2] The second issue is whether Article III of the Constitution permits a bankruptcy court to exercise the judicial power on the basis of litigant consent; and if so, whether a litigant's consent may be implied.[3]

Prior to the bankruptcy case and subsequent appeals, Wellness International Network, Ltd. ("Wellness") obtained a judgment and attorneys' fees against Richard Sharif ("Sharif") in Texas federal courts.[4] However, when Wellness tried to collect against Sharif, Sharif filed chapter 7 bankruptcy in the Northern District of Illinois.[5] Wellness pursued Sharif in bankruptcy court, filing a § 727 objection to his discharge and seeking a declaratory judgment that certain assets Sharif claimed in trust were actually part of the estate.[6] The bankruptcy court entered a default judgment against Sharif after he failed to respond to discovery requests by Wellness and discovery orders by the court.[7] The default judgment found that the assets held by Sharif were property of the estate.[8] Sharif appealed, but the district court affirmed the bankruptcy court.[9]

Sharif then appealed to the United States Court of Appeals for the Seventh Circuit, finally arguing that the bankruptcy court lacked constitutional authority to declare whether certain assets were property of Sharif's bankruptcy estate, despite the language in § 541 of the Bankruptcy Code.[10] The Seventh Circuit affirmed the judgment denying Sharif a discharge, but held that the bankruptcy court did not have constitutional authority to decide whether assets in the debtor's possession were property of the bankruptcy estate, as property determinations involve questions of state law.[11] The Seventh Circuit further held that Sharif could not have waived his constitutional objection to the court's judicial power, since the ability of bankruptcy courts to wield judicial power implicates separation of powers principles that are not waivable.[12]

Central to the Seventh Circuit's discussion was the United States Supreme Court's 2011 holding in *Stern v. Marshall*[13] that § 157(b)(2)(C) unconstitutionally permitted the bankruptcy court to enter final judgment on a state counterclaim. Though the Seventh Circuit acknowledged the Supreme Court's previous rulings do provide for concepts of consent and waiver under Article III, § 1, they denied that consent and waiver were available under Article III, § 2.[14] Central to the Seventh Circuit's consideration was the Supreme Court's opinion in *Commodity Futures Trading Comm'n v. Schor*,[15] in which a party effectively waived his right to an Article III court and consented to adjudication of its claims before an Article I tribunal.[16] The Seventh Circuit observed that the Supreme Court explained in its decision that consent and waiver were not dispositive to the issue, however, due to structural interests protected by Article III, § 1. The Seventh Circuit then considered the opinions of two other circuits that had taken up the issues of waiver and consent after the *Stern* opinion. The court noted that both opinions had relied upon *Schor*, yet with diverse outcomes.[17]

Thus, the Seventh Circuit first reviewed the Sixth Circuit's interpretation of *Schor* in light of *Stern*, in which it held that and objection to the bankruptcy court's constitutional authority is a structural principle and therefore not waivable.[18] The Seventh Circuit then compared that analysis to one performed by the Ninth Circuit, which interpreted the *Schor* decision in light of *Stern* to mean that, even if a litigant has the right to have an Article III judge decide a matter, such right can be waived under Article III, § 1.[19] The Seventh Circuit decided that the Sixth Circuit possessed the better view,[20] accepting the idea that Stern represents a departure from interpretations of *Schor* which previously held that the statutory scheme granting bankruptcy judges authority to enter final judgment in core proceedings did not implicate structural concerns where the core proceeding at issue was based on common law.[21] The Seventh Circuit consequently held that a party may not waive a *Stern* objection and consent to final adjudication of a core proceeding by a bankruptcy court, and that a bankruptcy court lacks constitutional authority to enter final judgment on a state law claim.[22] ■

ASARCO, L.L.C. V. BAKER BOTTS, L.L.P. (IN RE ASARCO, L.L.C.), 751 F.3D 291 (5TH CIR.) *CERT. GRANTED SUB NOM. BAKER BOTTS, L.L.P. V. ASARCO, L.L.C.*, 135 S. CT. 44 (2014).

The United States Supreme Court granted certiorari on October 2, 2014 to decide whether 11 U.S.C. § 330(a) grants a bankruptcy judge discretion to award compensation for the costs counsel or professionals bear to defend their fee applications in bankruptcy.[23] The petition for certiorari filed by Baker Botts, L.L.P. ("Baker Botts") came after the United States Court of Appeals for the Fifth Circuit held that a bankruptcy court is prohibited by the "American Rule" from awarding fees to a prevailing party absent statutory authority, contractual authorization, or special circumstances.[24] Baker Botts argues that the Bankruptcy Code specifically grants bankruptcy courts broad discretion to award professional compensation, displacing the American Rule.[25]

The case revolves around the debtor ASARCO, LLC ("ASARCO"), an integrated copper mining, smelting, and refining company, and its parents ASARCO Incorporated, Americas Mining Corporation, and Grupo Mexico (collectively, ASARCO's "Parents").[26] In 2005, ASARCO entered into chapter 11 bankruptcy in the Southern District of Texas facing cash flow deficiencies, various environmental liabilities, and tax and labor problems.[27] During the bankruptcy, Baker Botts successfully prosecuted a complex fraudulent transfer claims suit, obtaining a judgment against ASARCO's Parents valued between $7 and $10 billion, the largest in chapter 11 history at the time.[28] Additionally, Baker Botts and co-counsel helped ASARCO emerge from bankruptcy pursuant to the plan of reorganization with little debt, $1.4 billion in cash, and the successful resolution of its other problems.[29]

In their fee applications, Baker Botts and co-counsel sought lodestar fees, expenses, a 20% fee enhancement, and fees and expenses for preparing and litigating their final fee applications.[30] ASARCO, now controlled by its Parents and not joined by the United States Trustee, challenged the fees.[31] After a six-day fee trial, the bankruptcy court rejected all of ASARCO's objections, awarding Botts over $113 million and $7 million to co-counsel for core fees and expenses.[32] The court then awarded Baker Botts and co-counsel an enhancement for part of the case, and authorized fees and expenses for the firms' litigation in defense of their attorneys' fee claims.[33] ASARCO appealed to the district court, which affirmed the fees to defend core fees; however, the district court held that attorneys' fees were improperly awarded for any pursuit of the fee enhancement, and remanded back to the bankruptcy court to determine whether any part of Baker Botts' defense-fee award related to its enhancement.[34] The bankruptcy court concluded that the entirety of the defense-fee award compensated Baker Botts solely for defending core fees, and the district court affirmed the final award.[35] ASARCO subsequently appealed to the Fifth Circuit.[36]

There, ASARCO argued that the precedent set forth by the Supreme Court's opinion in *Perdue v. Kenny A. ex rel Winn*[37] prohibits court-awarded fee enhancements subject to only three exceptions, not applicable here.[38] The Fifth Circuit, reiterating its previous holding in *CRG Partners Group, L.L.C. v. Neary* (*In re Pilgrim's Pride*),[39] reaffirmed that *Perdue* did not overrule the circuit's bankruptcy precedent authorizing fee enhancements

under other circumstances pursuant to § 330(a). The court noted its opinion in *Pilgrim's Pride* did not indicate that the *Perdue* opinion had removed the bankruptcy court's discretion to award a fee enhancement in rare and exceptional circumstances.[40]

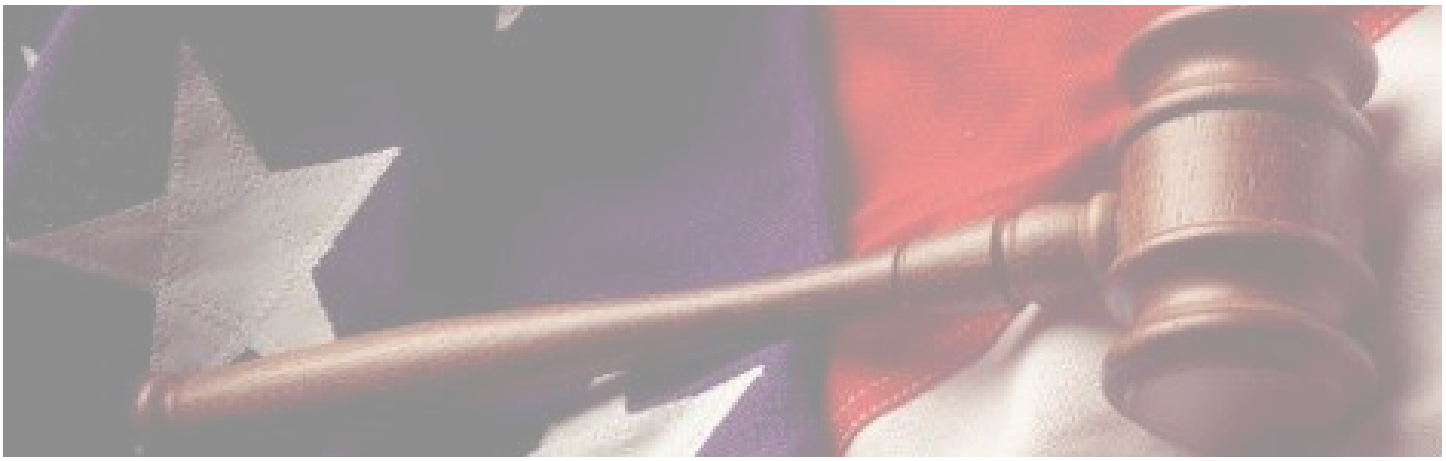
However, the Fifth Circuit held that Baker Botts was still not entitled to its fee defense fees, relying upon the language of subsection (3) of § 330(a).[41] The Fifth Circuit observed that the bankruptcy court must consider "all relevant factors" concerning professional services rendered, including whether the services were necessary for the administration of—or beneficial toward the completion of—the case, and whether the compensation is reasonable based on charges by comparable practitioners in non-bankruptcy cases.[42] Here the Fifth Circuit noted that compensation is not allowed for services not reasonably likely to benefit the debtor's estate or necessary to case administration,[43] and that any compensation awarded for the preparation of a fee application must be based on the level and skill reasonably required to prepare the application.[44] The court concluded that a straightforward reading of the statute strongly suggests that fees for defense of a fee application are not compensable from the debtor's estate.[45] The Fifth Circuit bolstered its opinion by pointing to the Eleventh Circuit's holding in what it felt was a factually similar case, *Grant v. George Schumann Tire & Batt. Co.*[46] ■

VIEGELAHN V. HARRIS (IN RE HARRIS), 757 F.3D 468 (5TH CIR. 2014) *CERT. GRANTED SUB NOM. HARRIS V. VIEGELAHN*, NO. 14-400, 2014 WL 5148211 (U.S. DEC. 12, 2014).

On December 12, 2014, the Supreme Court granted certiorari to decide whether, when a debtor in good faith converts a bankruptcy case to chapter 7 after confirmation of a chapter 13 plan, undistributed funds earned post-petition and held by the Chapter 13 trustee are refunded to the debtor or distributed to creditors.[47] The case centers around Charles E. Harris, III ("Harris"), who successfully converted his chapter 13 bankruptcy case in the Western District of Texas to chapter 7 in November of 2011.[48] Harris then sought to have the chapter 13 trustee, Mary Viegelahn ("Viegelahn"), turn over the $4,319.22 of garnished post-petition wages in her possession that had not been distributed to creditors as of the date of the conversion.[49] Notwithstanding the conversion, Viegelahn distributed the wages to creditors. Harris then sought and obtained an order requiring Viegelahn to refund the money distributed to creditors, and Viegelahn appealed.[50]

The district court affirmed the bankruptcy court's order requiring Viegelahn to refund the money.[51] Viegelahn then appealed to the United States Court of Appeals for the Fifth Circuit, who ultimately reversed both lower courts and remanded the case to the district court.[52] The Fifth Circuit pointed out that there is no provision requiring that undistributed payments made pursuant to a confirmed Chapter 13 plan be returned to the debtor upon conversion.[53] Instead, the court noted that while the Chapter 13 plan was no longer in force after conversion, the plan wasn't unraveled back to the beginning of the case either.[54] Thus, the trustee was permitted to distribute cash she had received pursuant to the plan up until the time of conversion.

Both the Fifth Circuit and Harris in his Petition acknowl-



edge that the outcome in this case conflicts with the Third Circuit's *In re Michael* opinion issued in 2012.[55] In that case, the court held that "undistributed plan payments held by a chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith."[56] The critical divergence is due to the Fifth Circuit's rejection of the Third Circuit's conclusion that property held by the Chapter 13 trustee after plan confirmation is under the control of the debtor as of the date of conversion for the purposes of § 348(f)(1).[57] ■

BANK OF AM., N.A. V. CAULKETT (*IN RE CAULKETT*), 566 F. APP'X 879 (11TH CIR. 2014) *CERT. GRANTED SUB NOM. BANK OF AM., N.A. V. CAULKETT*, NO. 13-1421, 2014 WL 2207208 (U.S. NOV. 17, 2014); CONSOLIDATED WITH *BANK OF AM., N.A. V. TOLEDO-CARDONA* (*IN RE TOLEDO-CARDONA*), 556 F. APP'X 911 (11TH CIR. 2014) *CERT. GRANTED SUB NOM. BANK OF AM., N.A. V. TOLEDO-CARDONA*, NO. 14-163, 2014 WL 3965212 (U.S. NOV. 17, 2014).

On Nov. 17th, 2014, the United States Supreme Court granted certiorari in and consolidated two cases involving lien stripping: *Bank of Am., N.A. v. Caulkett*[58] and *Bank of Am., N.A. v. Toledo-Cardona*.[59] Pursuant to the dual cases from the United States Court of Appeals for the Eleventh Circuit, the Supreme Court will decide whether a Chapter 7 debtor is allowed to "strip off" a second priority lien on his home, when the first priority lien exceeds the current value of the property. Though it appears on first glance that there is a circuit split on the issue in which the Eleventh Circuit has gone one way and the Fourth, Sixth, and Seventh Circuits have gone the other, the debtors in the cases now before the Supreme Court have proposed to reconcile all of the holdings with existing Supreme Court precedent.

BANK OF AM., N.A. V. CAULKETT (IN RE CAULKETT)

In June 2006, David Caulkett ("Caulkett") and his wife (together, the "Caulketts") purchased their home for $249,500, financing $199,600 through one mortgage and $49,000 through a second, with both mortgages issued by different divisions of Countrywide Financial. Shortly after the Caulketts purchased their home, petitioner (Bank of America, NA, referred to as "Bank of America") acquired Countrywide Financial and the rights to both mortgages. In 2013, the Caulketts filed for bankruptcy under chapter 7 and filed a motion to strip Bank of America's junior lien pursuant to 11 U.S.C. § 506 (a) and (d). The Caulketts, in doing so, relied heavily on the Eleventh Circuit's decisions in *McNeal v. GMAC Mortg., LLC* (*In re McNeal*)[60] and *Folendore v. United States Small Business Admin.*[61] At the time of the filing the home held as collateral possessed a value of $98,000, while the outstanding balances owed on the first and second mortgages were $183,264 and $47,855, respectively.

The bankruptcy court granted the motion to strip the junior lien, and the district court affirmed. The Eleventh Circuit agreed with the lower courts that, pursuant to 11 U.S.C. §§ 506(a) and (d), an entirely underwater second mortgage is voidable as a wholly unsecured junior lien.[62] The court likewise reiterated its line of opinions under *McNeal* and *Folendore*.[63] Bank of America acknowledged that this was well-established precedent in the Eleventh Circuit, but reserved the right to seek reconsideration of the issue.[64]

BANK OF AM., N.A. V. TOLEDO-CARDONA (IN RE TOLEDO-CARDONA)

Like the debtor in *Caulkett*, Edelmiro Toledo-Cardona possessed property subject to two liens and filed a bankruptcy

case under chapter 7. The value of the first lien likewise exceeded the fair market value of the property.[65] Bank of America's junior lien was wholly "underwater," and so Mr. Toledo Cardona moved to strip the junior lien. The bankruptcy court granted; on appeal the district court affirmed. Bank of America then appealed to the United States Court of Appeals for the Eleventh Circuit, seeking to overturn the court's precedent set forth in *McNeal*[66] and *Folendore*[67] in light of the United States Supreme Court's ruling in *Dewsnup v. Timm*,[68] which held that a chapter 7 debtor could not "strip down" a creditor's lien on real property where the value of the property is less than what is due to be paid to the creditor.[69] In affirming the lower courts, the Eleventh Circuit pointed out that it was bound to follow its decision in *McNeal*, which had reaffirmed *Folendore* despite the holding in *Dewsnup*.[70]

While both *Caulkett* and *Toledo* involve debtors who have successfully avoided (stripped down) a second priority lien on a property in chapter 7 bankruptcy, the other courts of appeal have been divided on this issue for some time. The Fourth, Sixth and Seventh circuits have taken the stance of applying *Dewsnup*. Specifically, the Fourth Circuit in *Ryan v. Homecomings Financial Network* (*In re Ryan*) embraced *Dewsnup*'s articulation that "a lien passes through bankruptcy unaffected … [and] any increase in value of the real property should accrue to the benefit of the creditor" instead of the debtor.[71] Likewise, the Sixth Circuit in *Talbert v. City Mortgage Services* pointed out that in the "case of strip down, to permit a strip off would mark a departure from the pre-Code rule that real property liens emerge from bankruptcy unaffected."[72] And in 2013, the Seventh Circuit, in its opinion in *Palomar v. First Am. Bank*, expressed that "section 506(d) is best interpreted as confirming the venerable principle … that bankruptcy law permits a lien to pass through bankruptcy unaffected."[73]

However, as previously mentioned, both Caulkett and Toledo-Cardona propose that the Eleventh Circuit's *McNeal* opinion is not in tension with *Dewsnup* and the other circuits that have issued opinions denying lien stripping. Caulkett, echoing Toledo-Cardona, points out in his *Brief in Opposition* (the "Brief") to Bank of America's Petition for Certiorari that the afore-mentioned decisions of the other circuits do not address cases dealing with wholly underwater junior liens, and thus are not in conflict with the Eleventh Circuit's line of opinions.[74] Caulkett finds it significant that in both the *Talbert* and *Ryan* cases, the second mortgages were only slightly underwater.[75] In Caulkett's Brief, he also notes that the Supreme Court has already denied certiorari this year to the petitioner in *Bank of Am. v. Sinkfield*,[76] an almost identical Eleventh Circuit decision.[77] Regardless of the outcome, it is almost certain that Caulkett and Toledo-Cardona would have preferred that the United States Supreme Court had done the same with their cases. ■

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Footnotes:

1 *Wellness Int'l Network, Ltd. v. Sharif*, 134 S. Ct. 2901 (2014).
2 *Petition for a Writ of Certiorari, Wellness Intern. Network, Ltd. v. Sharif*, No. 13-935, 2014 WL 466827 at ii (U.S. Appellate Petition Feb. 5, 2014).
3 *Id*.
4 *Id*. at 5.
5 *Id*.
6 *Id*. at 6. Sharif refused to cooperate with the chapter 7 trustee who was seeking information as to assets of the estate. Sharif insisted that many of the assets identified as subject to his possession and control were in fact owned by various trust entities.
7 *Id*.
8 *Id*.
9 *Id*. at 7.
10 *Id*.
11 *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 782 (7th Cir. 2013).
12 *Id*. at 771.
13 131 S. Ct. 2594, 2608, 180 L. Ed. 2d 475 (2011).
14 *Sharif*, 727 F.3d at 768.
15 *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-57, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986).
16 *Schor*, 478 U.S. at 847-57, 106 S. Ct. at 3254-60; *accord Sharif*, 727 F.3d at 769-770.
17 *Sharif*, 727 F.3d at 770.
18 *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 1604, 185 L. Ed. 2d 581 (2013).
19 *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 567 (9th Cir. 2012) *cert. granted sub nom. Executive Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880, 186 L. Ed. 2d 908 (2013) *and aff'd sub nom. Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014).
20 *Sharif*, 727 F.3d at 771.
21 "[W]e cannot agree with our colleagues on the Ninth Circuit that the allocation of authority between bankruptcy courts and district courts with regard to core proceedings does not implicate structural interests." *Sharif*, 727 F.3d at 771-72.
22 *Id*. at 773-76.
23 S*ee Baker Botts, L.L.P. v. ASARCO*, L.L.C., 135 S. Ct. 44 (2014).
24 *ASARCO, L.L.C. v. Baker Botts, L.L.P.* (In re ASARCO, L.L.C.), 751 F.3d 291, 302 (5th Cir.).
25 *See Brief for Petitioners, ASARCO L.L.C. v. Baker Botts, L.L.P. (In re ASARCO)*, No. 14-103, 2014 WL 6845689 at *15-41 (U.S. Appellate Brief Dec. 3, 2014).
26 *ASARCO*, L.L.C., 751 F.3d at 293.
27 *Id*.
28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*. at 293-94.
32 *Id*. at 294.
33 *Id*.
34 *Id*.
35 *ASARCO L.L.C., v. Baker Botts, L.L.P (In re ASARCO, L.L.C)*, No. 2:11-CV-290, 2013 WL 1292704, at *1 (S.D. Tex. Mar. 26, 2013).
36 *ASARCO*, L.L.C., 751 F.3d at 294.
37 *Perdue v. Kenny A. ex rel. Winn (In re Perdue)*, 559 U.S. 542, 554-56 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).
38 *ASARCO, L.L.C.*, 751 F.3d at 296; such exceptions include: 1) where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value; 2) when an attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; and 3) in extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. *Perdue*, 559 U.S. at 554-55.
39 *CRG Partners Group, L.L.C. v. Neary (In re Pilgrim's Pride Corp.)*, 690 F.3d 650 (5th Cir. 2012).
40 *Id*.
41 § 330(a)(3) provides a non-exclusive list of factors that bear upon a court's determination of the reasonable compensation for actual, necessary services and expenses rendered by attorneys and other court-supervised bankruptcy professionals. ASARCO, L.L.C., 751 F.3d at 295; *see* 330(a)(1).
42 *ASARCO, L.L.C.*, 751 F.3d at 299-300; *see* 11 U.S.C. §§ 330(a)(3)(C) and (F).
43 *See* § 330(a)(4).
44 *See* § 330(a)(6).
45 *ASARCO, L.L.C.*, 751 F.3d at 330.
46 *Grant v. George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882–83 (11th Cir.1990).
47 *Harris v. Viegelahn,* No. 14-400, 2014 WL 5148211, at *1 (U.S. Dec. 12, 2014); *Petition for Writ of Certiorari, Harris v. Viegelahn*, No. 14-400, 2014 WL 5019826 (U.S. Appellate Petition Oct. 6, 2014) (hereinafter "Petition").
48 *Petition*, at 4-5.
49 *Petition*, at 5-6.
50 *Petition*, at 6.
51 *Viegelahn v. Harris (In re Harris)*, 491 B.R. 866, 876 (W.D. Tex. 2013).
52 *Viegelahn v. Harris (In re Harris)*, 757 F.3d 468, 481 (5th Cir. 2014).
53 *Viegelahn*, 757 F.3d at 473.
54 *Id*. at 477.
55 *In re Michael*, 699 F.3d 305 (3d Cir. 2012)
56 *Michael*, 699 F.3d at 316.
57 *Id*., at 310.
58 No. 13-1421, 2014 WL 2207208 (U.S. Nov. 17, 2014); appealed from *Bank of Am., NA v. Caulkett (In re Caulkett)*, 566 Fed. Appx. 879 (11th Cir, Mem. Op.).
59 No. 14-163, 2014 WL 3965212, at *1 (U.S. Nov. 17, 2014); appealed from *Bank of Am., NA v. Toledo-Cardona (In re Toledo-Cardona)*, 556 F. App'x 911 (11th Cir. 2014).
60 *McNeal vv. GMAC Mortg.., LLC (In Re McNeal)*, 735 F.3d 1263, 1265-66 (11th Cir. 2012).
61 *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir.1989).
62 *Caulkett*, 566 F. App'x at 880.
63 *Id*.
64 *Id*.
65 *Toledo-Cardona*, 556 F. App'x at 912.
66 *Supra*.
67 *Supra*.
68 *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L. Ed. 2d 903 (1992).
69 *Toledo-Cardona*, 556 F. App'x at 912; *Dewsnup*, 502 U.S. at 417, 112 S. Ct. at 778.
70 *Toledo-Cardona*, 556 F. App'x at 912.
71 *Ryan v. Homecomings Financial Network (In re Ryan)*, 253 F.3d 778, 782-83 (4th Cir. 2011).
72 *Talbert v. City Mortgage Services, (In re Talbert)*, 344 F.3d 555, 561 (6th Cir. 2012).
73 *Palomar v. First Am. Bank, (In re Palomar)*, 722 F.3d 992, 993-94 (7th Cir. 2013).
74 *Brief in Opposition, Bank of Am, NA v. Caulkett*, No. 13-1421, 2014 WL 5077231 at *8 (U.S. Appellate Petition, Oct. 6, 2014).
75 *Id*. at *9.
76 *Bank of Am., N.A. v. Sinkfield*, 134 S. Ct. 1760, 188 L. Ed. 2d 593 (2014).
77 *Brief in Opposition,* 2014 WL 5077231 at *7.

FIFTH CIRCUIT QUESTIONS THE HINDSIGHT APPROACH ASSESSING ATTORNEY COMPENSATION IN *IN RE WOERNER*

OVERVIEW OF THE FIFTH CIRCUIT'S DECISION

- The Fifth Circuit found that the bankruptcy court applied the proper standard for awarding attorney fees by using the "hindsight" or "material benefit" test expressed in *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distributors, Inc.)*, 157 F.3d 414 (5th Cir. 1998).
- Additionally, the Fifth Circuit held that the bankruptcy court did not abuse its discretion in substantially reducing the requested attorney's fees from a failed chapter 11 case.
- In a concurrence, Judge Prado invited the court to take the case en banc to reconsider the *Pro-Snax* standard.

FACTUAL BACKGROUND

Clifford Woerner, in the midst of a state court suit for breach of a partnership agreement and fiduciary duty, met with Barron & Newburger ("B&N") to discuss filing for bankruptcy. B&N agreed to the representation and filed Woerner's voluntary chapter 11 petition the night before Woerner was to appear in the state court for a hearing on the remedies portion of the lawsuit. In the succeeding eleven months, B&N provided normal debtor representation it claimed was worth about $134,000. Included in these services was an investigation of concealed assets, subsequent amendments to certain filings as a result of the investigation, and unsuccessful efforts to defend Woerner in adversary proceedings. The concealment of assets prompted a creditor to move to convert the case to a chapter 7. B&N opposed the motion to convert and, in response, moved for the approval of a settlement agreement between Debtor and creditors.

The bankruptcy court denied the motion to approve the settlement and granted the motion to convert Woerner's chapter 11 to a chapter 7. After the conversion, B&N filed a fee application for approximately $134,000, pursuant to Section 330 of the Bankruptcy Code. In response to a US Trustee objection, B&N offered a small voluntary reduction, but the U.S. Trustee renewed its objection. At the hearing on the fee request, the court took the application under advisement. The court, citing *Pro-Snax*, explained that to receive compensation under Section 330, fee applicants must prove the service resulted in an "identifiable, tangible, and material benefit to the estate." *In re Woerner*, 758 F.3d at 698 (citing Pro-Snax, 157 F.3d at 426). The court used the "hindsight" test based on the decision in *Pro-Snax* rejecting B&N's proposed alternative tests: the "business judgement approach" or the "prospective approach." Applying the hindsight standard, the bankruptcy court awarded all expenses but granted only

15 % of the requested fees, after separately considering each category of fees. B&N's lack of success and failure to demonstrate identifiable benefit to the estate was cause for the disallowance of the majority of the fees requested. The bankruptcy court made note of Woerner's own bad conduct, which conduct the bankruptcy court held should have caused B&N to withdraw from the case sooner. On appeal ,the district court affirmed the bankruptcy court's ruling.

THE FIFTH CIRCUIT APPEAL

On further appeal, B&N argued that the bankruptcy court applied the wrong standard for awarding attorney's fees. A review of the statutory guidelines, as well as Circuit opinions, is instructive.

A. COMPENSATION – STATUTORY FRAMEWORK

An attorney, employed under Section 327(a), may request "reasonable compensation for actual, necessary services rendered." 11 U.S.C. § 330(a)(1)(A). The bankruptcy court has the discretion to "award compensation that is less than the amount requested." *Id*. at § 330(a)(2). Section 330(a)(3) further directs courts to "consider the nature, extent, and the value" of the services provided when determining the amount of legal compensation to award. Section 330(a)(3) goes on to list factors that may be taken into account when determining compensation such as time spent, rate charged, and whether the service was beneficial at the time rendered. The court may not grant compensation for services that are duplicative or not reasonably likely to benefit the debtor's estate or necessary to case administration. *Id*. at § 330(a)(4)(A).

B. COMPENSATION – FIFTH CIRCUIT CASE LAW

In *Pro-Snax*, the debtor's case was converted from a chapter 7 to a chapter 11. The bankruptcy court awarded compensation for legal services for the periods both before and after the case was converted to chapter 11. On appeal, the district court remanded the case to the bankruptcy court for a recalculation of compensation for work performed before the chapter 11 trustee was appointed, holding that was the only compensation to which the attorneys were entitled. On further appeal to the Fifth Circuit, the Circuit considered two possible tests for evaluating the fee application: the reasonableness test and the hindsight approach. The attorney appellants favored the reasonableness test, which evaluates "whether the services were objectively beneficial toward the completion of the case at the time they were performed." *Pro-Snax*, 157 F.3d at 426. The objecting creditors, not surprisingly, were proponents of the hindsight approach, which looks at "whether the services result[ed] in an identifiable, tangible, and material benefit to the bankruptcy estate." *Id*. (internal quotation omitted). The Fifth Circuit adopted the stricter hindsight test, reasoning that it was reluctant "to hold that any service performed at any time need only be reasonable to be compensable." *In re Woerner*, 758 F.3d at 701 (citing *In re Melp, Ltd.*, 179 B.R. 636, 640 (E.D.Mo. 1995)).

C. COURT OF APPEALS ANALYSIS

Using the prior P*ro-Snax* decision as its framework, the Fifth Circuit held that B&N did not qualify for compensation related to their representation of Woerner, agreeing with the bankruptcy court that upon the Debtor's discovery of the concealment, B&N should have withdrawn, and, thus, the estate should not be required to pay for Woerner's misconduct. The panel held that until there is a change in the law, *Pro-Snax* is still the governing standard and, therefore, the bankruptcy court was correct in applying that standard and had not abused its discretion.

DISCUSSION

Perhaps the most notable portion of the Fifth Circuit's ruling in *In re Woerner*, was Judge Prado's concurrence, in which he urged the Fifth Circuit to reconsider the "*Pro-Snax* standard" en banc. Judge Prado noted the standard may be "misguided" and that it conflicted with the language and legislative history of Section 330 as well as with decisions from other circuits. Section 330 gives the bankruptcy court discretion to determine the amount of realistic compensation and lists factors that may be considered in its analysis, including "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." 11 U.S.C. § 330(a)(3)(C). The Code also provides certain factors that will disallow an award for compensation including services that "were not reasonably likely to benefit the debtor's estate or necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A)(ii)(I). The concurrence pointed out that using the words "not reasonably likely to…" in describing when compensation should be awarded signified a prospective approach of what is expected to result in the future not a hindsight test of what actually occurred.

Additionally, Judge Prado noted in his concurrence that the statute's language allows the court to "compensate an attorney for services that are reasonably likely to benefit the estate and adjudge that reasonableness at the time at which the service was rendered." *In re Woerner*, 758 F.3d at 703. Strictly interpreting the statute requires the court to concentrate on whether the choice to pursue the course of action was reasonable at the time the action was taken, and not whether the actual end result was beneficial, i.e. the hindsight approach. A hindsight approach may result in attorneys being more conscious in their choice of action and decisions made on behalf of clients; however, the attorney, hired to ethically fight as hard as possible for the client, may not fight as hard or be as creative if compensation is based solely on successful outcomes. Thus, the hindsight approach could possibly punish attorneys for taking an action that did not pan out as expected, or reward a successful unreasonable action.

While hindsight approach would discourage the filing of frivolous motions and proceedings, freeing up the court's resources, attorneys are already subject to sanctions for these types of actions. Federal Rule of Bankruptcy Procedure 9011, a rule equivalent to Federal Rule of Civil Procedure 11, is used by bankruptcy judges to impose sanctions on various conduct and pleadings that violate the rule's prohibition against filing frivolous or baseless pleadings or using the bankruptcy process for improper purposes. The objective of the rule is to deter abusive practices and encourage the filing of documents that are well grounded in law and fact. FED. R. BANKR. P. 9011(a), (c). There appears to be no need for a fee review standard to do what the Code has already taken care of.

Furthermore, use of the hindsight test in awarding compensation puts the Fifth Circuit in conflict with its sister circuits. Other circuits have used a test that more closely conforms to section 330's language, and several have outright rejected the hindsight approach, leaving the Fifth Circuit on its own. In fact both the Second and Third Circuits have specifically rejected an actual benefits test in assessing fees.

The Fifth Circuit granted a rehearing of *Woerner* en banc to be heard the week of January 19, 2015. And, recently, the U.S. Supreme Court granted cert. in No. 14-103, *Baker Botts, LLP v. ASARCO, LLC* ("ASARCO") wherein the Fifth Circuit's decision was based on one of the multiple rationales of *Pro-Snax*. The issue before the U.S. Supreme Court is whether an attorney may recover fees for defending a fee application or are the fees just a cost of doing business. In ASARCO, the Fifth Circuit denied cost of defense fees. The Circuit found that Section 330 required the services to likely benefit the estate or be necessary to the administration of the estate, an interpretation consistent with the statute. That the ASARCO case was granted cert. by the Supreme Court may encourage the Fifth Circuit to reevaluate its aggressive *Pro-Snax* standard. Attorneys and judges will undoubtedly be paying close attention to the Supreme Court's rulings in ASARCO, as well as the Fifth Circuit's en banc rehearing of *In re Woerner*, since both cases involve an important aspect of representation: compensation. ■

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Footnotes:

1 *Barron & Newburger, P.C. v. Tex. Skyline Ltd.* (*In re Woerner*), 758 F.3d 693, No. 13-50075, 2014 WL 3443653 (5th Cir. July 15, 2014) (Prado, J., concurring).

2 11 U.S.C. §§101 *et. seq.* (the "Code").

3 *In re Ames Department Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996) (disapproving an approach that required the award of attorney's fees to be contingent on a showing of actual benefit to the estate); *In re Top Grade Sausage, Inc.*, 227 F.3d 123 (3d Cir. 2000) *abrogated on other grounds by Lamie v. United States Tr.*, 540 U.S. 526, 124 S.Ct. 1023 (rejecting *Pro-Snax* because it departed from section 330 by establishing a higher standard and requiring evaluation by hindsight); *In re Taxman Clothing Co.*, 49 F.3d 310 (7th Cir. 1995) (finding that the bankruptcy court abused its discretion by awarding attorneys' fees when the action did not have a reasonable likelihood of benefiting the estate); *In re Smith*, 317 F.3d 918 (9th Cir. 2002) (finding that section 330(a)(4)(A) requires only that the services rendered be reasonably likely to benefit the estate and not that the services actually provide an identifiable, tangible, and material benefit).

4 *In re Ames Department Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996); *In re Top Grade Sausage, Inc.*, 227 F.3d 123 (3d Cir. 2000) *abrogated on other grounds by Lamie v. United States Tr.*, 540 U.S. 526, 124 S.Ct. 1023.