

***DOES IT PAY TO BE A BANKRUPTCY
LAWYER ANYMORE?
BAKER BOTTS L.L.P. V. ASARCO LLC***

In re ASARCO LLC

- Baker Botts represents Debtor in fraudulent transfer action against parent, which had spun off Asarco pre-petition.
- Results in multi-billion dollar judgment.
- Parent has little choice but to fund a 100% chapter 11 plan.
- Parent re-gains control of ASARCO post-confirmation.

Baker Botts Fee Applications

- Interim fee applications, no objections.
- Final Fee Application seeks \$113 Million in fees, \$6 Million in expenses, 20% fee enhancement.
- Reorganized ASARCO Objects.
 - Voluminous discovery.
 - 6 day trial.
 - Baker Botts incurs \$5 million in defense costs.

Lower Court Rulings

- Bankruptcy Court
 - Full Award of Fees and Costs, including \$4.1 million fee enhancement and defense costs.
- District Court
 - Reorganized ASARCO appeals enhancement and defense costs.
 - Rules that enhancement was appropriate as were defense costs, except any defense costs specifically associated with the enhancement request.
- Fifth Circuit
 - Appeal regarding enhancement and authority to award defense fees generally.
 - Affirms enhancement but holds no authority to award defense fees.

Supreme Court

- *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158 (2015).
 - Justice Thomas writes for the Court, joined by Roberts, Scalia, Kennedy, Alito and Sotomayor.
 - Justice Breyer writes dissent, joined by Ginsburg and Kagan.
 - Section 330(a)(1) does not permit bankruptcy courts to award fees to Section 327(a) professionals for defending fee applications.

Opinion

- American Rule, No Fee Shift in the statute.
- Fee defense litigation cannot constitute "services."
- Section 330(a)(6) provides for compensation only for preparation of the fee application.

Potential Workarounds

- Contract, Section 328(a).
- Settlement / Plan Exculpation.
- Sanctions, Rule 9011.
- Summary Proceedings for Fee Objections.
- Fee Examiners.

Contract, Section 328(a)

- American Rule does not apply where contract provides otherwise.
- *Baker Botts* does not address 328(a).
- Courts often approve indemnification provisions for other professionals.
- Pending Case *Boomerang Tube*. Also raised in *Baha Mar*.

Settlement / Plan Exculpation

- Include indemnification/fee defense provisions as part of a chapter 11 plan or other settlement agreement.
- Approval under business judgment standard.
- Attempt to avoid post-confirmation fee objections.

Sanctions, Rule 9011

- Judges may impose sanctions for frivolous objections.
- Might actually increase the amount of work required.
- Courts typically hesitant to award sanctions.
- Most objections are not entirely frivolous.

Summary Proceedings

- Court may streamline litigation over fees.
- Require parties to raise certain objections on interim applications.
- Local Rules may address fee disputes.

Fee Examiner

- Court may appoint examiner to review fees.
- Responding to examiner may be considered services.
- Examiner's approval evidence to support award, deter objections.
- Approval by examiner may not deter other objections.