

**CASE NOTES**

**Fifth Circuit Affirms Fee Enhancement, Reverses Fees Incurred in Defending Fee Application**

By Marcos Ramos

*In re Asarco, L.L.C.*, --- F.3d ---, 2014 WL 1698073 (5th Cir. May 2, 2014)

In *In re Asarco*, the Fifth Circuit held that 11 U.S.C. § 330 permits the bankruptcy court to enhance the fees of counsel but does not permit the bankruptcy court to award attorney fees incurred by counsel in defending its fee application.

ASARCO was a copper mining, smelting and refining company. Two years before it commenced its bankruptcy case, ASARCO's parent company directed ASARCO to transfer a controlling interest in the Southern Copper Corporation to the parent company. After ASARCO filed its bankruptcy petition, bankruptcy counsel prosecuted fraudulent transfer and related litigation against the parent company. The litigation against the parent company was successful and resulted in the recovery of funds sufficient (among other things) to fund a reorganization plan that included full payment to ASARCO's creditors and a reorganized ASARCO that emerged from bankruptcy with \$1.4 billion in cash.

Counsel fee applications were opposed by the parent company (through ASARCO, as its parent company again controlled ASARCO post-emergence) but not by the U.S. Trustee. Extensive discovery ensued, including the production by counsel of 2,350 boxes of hard copy documents and 189 gigabytes of electronic information. The bankruptcy court conducted a six-day evidentiary hearing.

The bankruptcy court approved the fee applications. In addition to the award of fees and expenses for core work related to the bankruptcy case, the bankruptcy court also approved the award of (1) a fee enhancement for work performed by counsel and related to the fraudulent transfer litigation against the parent company and (2) fees and expenses incurred by counsel in defending against ASARCO's and its parent company's objections to counsels' fee applications.

The Fifth Circuit held that 11 U.S.C. § 330 supported the fee enhancement but did not provide a basis for awarding fees incurred in defense of the underlying fee application.

With regard to its review of fee awards, the Fifth Circuit noted that the lower court's determination is reviewed for abuse of discretion and abuse of discretion may be found where the court applied the wrong law, procedures or otherwise committed clear error.

With regard to the fee enhancement, the Fifth Circuit noted that: (1) Section 330(a) provides a non-exclusive list of factors that bear on the court's award of reasonable compensation for actual

and necessary services and expenses; and (2) bankruptcy courts use the lodestar method but retain the discretion to adjust the lodestar depending on its consideration of the factors outlined in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), including the nature of the dispute, its complexity, customary fees and the outcome. Here, the bankruptcy court based its enhancement of the fee award to counsel for services related to the fraudulent transfer litigation against the parent company on (a) the exceptional nature of the result, (b) counsel's below-market rates, and (c) the integral nature of counsel's performance to the ultimate result. The Fifth Circuit found that the bankruptcy court's conclusions were supported by substantial evidence (and an 85-page opinion on fees), and in this case, where the bankruptcy creditors' claims were paid in full, the bankruptcy court was justified in awarding the fee enhancement to counsel.

With regard to the award of fees incurred in defense of the underlying fee application, the Fifth Circuit noted that Section 330(a) governs the question, but there is a divergence of opinion among courts that have considered whether fees may be awarded for the defense of fee applications. “[C]orrectly read,” according to the Fifth Circuit, “Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications.” The Fifth Circuit reached this conclusion because (a) Section 330 speaks to expenses that benefit the estate, but the award of fees to counsel or other professionals quintessentially is for the benefit of such professionals; (b) preparing an application is a different process from defending an application, and while fees incurred in preparing an application are directly contemplated for reimbursement by the statutory language, fees incurred in defending an application are not; and (c) the potential dilution of the professional's aggregate fees by the cost of defending a fee application is not reason enough to allow the award of fees; instead, the bankruptcy court should police this issue (including the potential for the tactical abuse of fee objections) through the award of fees and costs under the exception to the American Rule that allows fee shifting in response to bad faith or vexatious litigation

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