

*Baker Botts, L.L.P. v. ASARCO, L.L.C.: Allowance/Disallowance of Fees
Incurred in Defending Fee Applications in Bankruptcy Court*

A Presentation to the Bankruptcy Bar Association (Baltimore Chapter)
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I. OVERVIEW

Baker Botts L.L.P. (“Baker Botts”) and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (“Jordan Hyden”; with Baker Botts, the “Firms”) served as counsel to the debtor, ASARCO LLC (“ASARCO”), during its Chapter 11 bankruptcy. ASARCO confirmed its reorganization plan that proposed to pay all creditors in full. ASARCO contested, among other things, the Firms’ requests for allowance of fees incurred in litigating their fee applications. The bankruptcy and district courts allowed the requested fees; the Fifth Circuit did not. The Firms appealed the issue to the U.S. Supreme Court. The matter has been briefed fully, and oral argument took place on February 25, 2015. A decision is expected by June.

II. FACTUAL BACKGROUND AND BANKRUPTCY
AND DISTRICT COURT PROCEEDINGS

ASARCO, an integrated copper mining, smelting and refining company, entered Chapter 11 bankruptcy in 2005 facing cash flow deficiencies, various environmental liabilities and tax and labor problems. Two years before the bankruptcy, ASARCO’s parent directed ASARCO to transfer a controlling interest in a related company to the parent despite ASARCO’s financial distress. The Firms successfully prosecuted complex fraudulent transfer claims against the parent and obtained a judgment against ASARCO’s parent valued at \$7 to \$10 billion, the largest fraudulent transfer judgment in Chapter 11 history. After more than four years in Chapter 11, ASARCO confirmed its plan of reorganization (funded by its parent) with little debt, plenty of cash and the successful resolution of its environmental, asbestos and toxic tort claims.

In their final fee applications, the Firms sought allowance of their fees and expenses incurred in representing ASARCO, a twenty percent (20%) fee enhancement and fees and expenses for preparing and litigating their final fee application (referred to throughout the proceedings as “defense fees”). ASARCO, once again controlled by its parent, aggressively challenged the fees. Discovery was a massive undertaking, resulting in the Firms’ production of 2,350 boxes of documents and 189 GB of electronic data. Notably, the U.S. Trustee did not join in the objection.

The United States Bankruptcy Court for the Southern District of Texas held a six-day trial on the fees. The bankruptcy court approved all of the Firms’ fees and expenses incurred in representing ASARCO and a portion of the requested fee enhancements. In total, the bankruptcy court approved more than \$117 million for Baker Botts and \$7 million for Jordan Hyden. The bankruptcy court concluded that the Firms’ performance and results were “rare and exceptional” and that the standard rates charged by Baker Botts were approximately twenty percent (20%) below the appropriate market rate. The bankruptcy court also authorized fees and expenses for

the Firms' litigation in defense of their fee applications, resulting in an additional \$5 million to Baker Botts and \$15,000 to Jordan Hyden (not including expenses).

ASARCO appealed the fee enhancements and defense fees to the district court, and the appeal was assigned to the district judge who presided over the fraudulent transfer litigation. The district court affirmed the fee enhancements and allowance of the fees to litigate the fee applications. The district court also held that the Firms' appellate fees would be allowed, though a determination of those fees was premature at the time.

III. FIFTH CIRCUIT PROCEEDINGS

ASARCO appealed the fee enhancements and defense fees to the Fifth Circuit. The Fifth Circuit flatly rejected ASARCO's attacks on the bankruptcy court's decision to award fee enhancements. However, the Fifth Circuit entertained ASARCO's objections to the Firms' defense fees and ultimately held that Section 330(a) does not authorize compensation for the costs professionals bear to defend their fee applications.

The Fifth Circuit, relying on Section 330(a)(3), considered "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. 11 U.S.C. § 330(a)(3)(C) and (F). The court examined whether the compensation was for services that were reasonably likely to benefit the debtor's estate or necessary to administration of the case. 11 U.S.C. § 330(a)(4). The court also noted that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). The court read this subsection as carving out one narrow exception to its ruling.

Ultimately, the court concluded that possible fee litigation is implicit in the notice requirement in Section 330(a)(1). The primary beneficiary of a fee application is the professional. Although the debtor's estate or its administration must have benefited from the services rendered, the debtor's estate (*i.e.*, the creditors) bears the cost. This rationale, coupled with the court's "straightforward" reading of Section 330, "strongly suggests" that fees for defense of a fee application are not compensable from the debtor's estate.

IV. SUPREME COURT PROCEEDINGS

The Firms appealed to the U.S. Supreme Court and framed the issue as follows: whether Section 330(a) grants bankruptcy judges discretion to award compensation for the defense of a fee application.

On appeal, the Firms argued that the Fifth Circuit's decision failed on every level possible – text, structure, history, purpose and public policy. The Firms argued that Section 330(a) affords bankruptcy judges the broadest grant of discretion in considering fee awards, with the rare limits on that discretion appearing expressly in the text of the statute. The Firms further cautioned the Court that disallowing "defense fees" will encourage meritless objections as a tactic, causing rational practitioners to consent to fee reductions even when objections are wholly

meritless. The Firms argued that leaving compensation to the court's discretion, however, discourages improper fee requests and improper objections.

The following filed amicus briefs in support of the Firms' position:

- National Association of Bankruptcy Trustees
- Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, Business Law Section of the Florida Bar, Bankruptcy Law Section of the Louisiana State Bar Association and Bankruptcy Law Section of the Beverly Hills Bar Association
- National Association of Consumer Bankruptcy Attorneys
- United States (with the Executive Office of United States Trustees on the brief)
- "Bankruptcy Law Scholars" (comprised of nine law professors)
- National Association of Chapter 13 Trustees
- State Bar of Texas Bankruptcy Law Section
- Former Bankruptcy Judges Leif Clark (W.D. Tex.) and Judith Fitzgerald (W.D. Pa.)

ASARCO argued that the American Rule is paramount and is not affected by Section 330. Seizing on the Fifth Circuit's rationale, ASARCO argued that "reasonable compensation for ... necessary services rendered by" professionals cannot possibly include collateral litigation that is adverse to the estate and performed for the benefit of the professionals. ASARCO also relied on the limited scope of Section 330(a)(6), which allows fees for the preparation of fee applications but does not include defense of fee applications.

Seven law professors filed a brief in support of ASARCO's position.

A group of "Neutral Fee Examiners" filed a brief supporting neither position and advocating for bankruptcy courts to exercise discretion in awarding fees when a fee application is successfully defended.

The Solicitor General was granted leave to participate in the oral argument for the United States.

Oral argument took place on February 25, 2015. According to a blog posted on www.scotusblog.com, the Firms' argument was not well received. The justices peppered the Firms' counsel with questions but sat quietly during long portions of the argument from ASARCO's counsel. It is widely believed that a decision will be issued quickly in favor of ASARCO.

V. PRACTICAL CONSIDERATIONS

Should the result be different in cases in which there is a 100% payout (like in *ASARCO*)?

Without reimbursement for “defense fees,” will a firm’s compensation be unfairly diluted below what comparably skilled practitioners receive in non-bankruptcy cases? (In *ASARCO*, the “defense fees” were approximately 4.4% of the “core fees.”)

Does the purported fee shifting in Section 330 override the American Rule in bankruptcy proceedings?

If “defense fees” are not allowable under Section 330, then will this provide an incentive for parties in interest to mount meritless objections to extract fee reductions?

Will this holding cause counsel for a debtor and a committee, who share the mutual goal of securing approval for their fees, to enter into a conspiracy of silence with regard to contesting each other’s fee applications?

Will this holding discourage competent counsel from representing debtors and committees?

What can a firm do to best position itself in the event that a party in interest objects to its fees? If *ASARCO* wins on appeal, how can a firm adapt its practices to the new reality that it will not be compensated for successfully defending its fee applications?

VI. ADDITIONAL INFORMATION

For additional information, see the following:

- *ASARCO, L.L.C. v. Baker Botts, L.L.P. (In re ASARCO, L.L.C.)*, 2011 WL 2974957 (Bankr. S.D. Tex. July 20, 2011) (awarding core fees, fee enhancements and fees to litigate fee applications)
- *ASARCO, L.L.C. v. Baker Botts, L.L.P. (In re ASARCO, L.L.C.)*, 477 B.R. 661 (S.D. Tex. 2012) (affirming in part, remanding in part)
- *ASARCO, L.L.C. v. Baker Botts, L.L.P. (In re ASARCO, L.L.C.)*, 2013 WL 1292704 (S.D. Tex. Mar. 26, 2013) (affirming final fee award)
- *ASARCO, L.L.C. v. Baker Botts, L.L.P. (In re ASARCO, L.L.C.)*, 751 F.3d 291 (5th Cir. 2014) (affirming in part, reversing in part)
- <http://www.scotusblog.com/case-files/cases/baker-botts-l-l-p-v-asarco-l-l-c/> (Court’s docket and transcript of oral argument)