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Firms' Fight Against Baker Botts Ruling Looks Futile

By **Jonathan Randles**

Law360, New York (August 28, 2015, 6:14 PM ET) -- Law firms are trying to use contract terms to get around a U.S. Supreme Court ruling that forces bankruptcy attorneys to cover the cost of defending their fee requests, but experts say their strategy, which faces stiff opposition from a U.S. trustee, is unlikely to win over judges.

The Supreme Court's **6-3 ruling** in Baker Botts LLP v. Asarco LLC has **mostly been greeted** with **pessimism by bankruptcy professionals** who say it will likely make Chapter 11 cases more costly and cumbersome. The June decision was a loss for Baker Botts, which had sought $5 million it spent securing core fee applications for massive restructuring work it did for Asarco during the mining company's complex Chapter 11.

After the high court held that law firms can't be reimbursed for such fees, Andrew Vara, acting U.S. trustee for Delaware, has taken a hard line against firms' attempt to incorporate contract terms in employment agreements that are intended to shift costs they'd incur if they were forced to defend the fees and expenses charged to bankruptcy clients.

Vara has pending objections challenging the use of this contract language, which he describes as "fee defense provisions," in two Chapter 11 cases involving the **developer of the Baha Mar mega-resort** and oil and gas piping manufacturer **Boomerang Tube**. He says the Baker Botts ruling expressly forbids this type of fee-shifting.

Moreover, Vara attacks the premise that a fee defense provision can be agreed to be contractual in a retention agreement. The agreement, he argues, is not governed by contracts law and instead must be approved by the court in accordance with the U.S. Bankruptcy Code and other statutes.

"Regardless of how it is titled, the application is not a contract because it is not an agreement," Vara said in court papers filed in the Boomerang case. "It is a request that a judge, acting within the constraints of section 328(a), authorize the term or condition of employment. And what a judge can approve is a matter of federal statutory law, not the law of contract."

The official creditors committee in the Boomerang case has countered that the Baker Botts decision pertains only to Section 330 of the Bankruptcy Code and not 328(a), the section under which it is seeking approval of the retention application. The committee has also argued that the terms it uses in its application are in line with other practice areas and "commonly found in engagement letters outside of bankruptcy."

Stinson Leonard Street LLP's Thomas Salerno said this argument could gain traction if judges agree that the Supreme Court's decision was narrow.

"I would hope that the creditors committee would have the better side of that argument," Salerno said. "It makes sense to me."

Baha Mar's creditors committee, which Vara is challenging for using similar language, has yet to respond to the trustee's objection.

Though the question is far from settled, lawyers told Law360 on Thursday that Vara appears to have the stronger argument against such fee defense provisions than the ones creditors committees have made in support of them.

"I think the trustee's position that you can't contract around the law makes a lot of sense," Pryor Cashman LLP bankruptcy attorney Patrick Sibley said. "You can't contract around the Supreme Court's interpretation of the code, and a judge certainly can't enter an order that's not allowed under it."

Unlike other types of civil litigation, attorneys' fees in bankruptcy cases already face potential opposition from adversarial parties during the dispute. The bankruptcy system also has the U.S. trustee as a watchdog and a mechanism that allows the installation of an independent fee examiner if the need arises.

David Neff, co-chairman of Perkins Coie LLP's financial transactions and restructuring practice, said it's likely that bankruptcy judges will sanction parties that bring frivolous fee challenges. But it's unlikely that the courts will favor the type of contract language floated in the Baha Mar and Boomerang cases because it appears to directly contradict the Baker Botts ruling, he said.

"I think this type of a get-around is too in-the-face of the Supreme Court," Neff said.

Neff added that a possible alternative to a contractual work-around is to get a guarantee from committee members to pay for costs the firm expends in defending fees. It would be akin, he said, to when attorneys get a guarantee on fees up to a certain amount when there's a question as to whether the committee will be paid.

"This definitely adds another element of risk, and you're going to have situations with rapid lenders or new equity owners that are going to take on professionals' fees, and that's not good for leveling the playing field," Neff said.

--Editing by Christine Chun.