

## 5th Circ. Upholds Precedent On Bankruptcy Fee Awards

By Lisa Uhlman — Law360, New York

The Fifth Circuit found in a precedential decision Friday that a [U.S. Supreme Court](#) ruling curtailing district courts' authority to award fee enhancements in fee-shifting cases doesn't apply to bankruptcies, marking one of the first circuit court decisions on a rarely seen area of dispute, experts said.

The decision — which affirmed a Texas bankruptcy court's \$1 million fee enhancement award to CRG Partners Group LLC for its effective work on the restructuring of poultry producer [Pilgrim's Pride Corp.](#) — limits the application of the high court's 2010 ruling in *Perdue v. Kenny A. ex rel. Winn*, which U.S. Trustee William Neary had argued made the fee award improper.

"There may be sound justifications for implementing a *Perdue*-like approach to the compensation of professionals ... but those justifications must be voiced to our en banc court, the Supreme Court or Congress," the three-judge panel wrote. "We hold that *Perdue* did not unequivocally, *sub silentio* overrule our prior precedent, and we are, therefore, bound to apply it."

The case is notable in that fee enhancement applications are rare in bankruptcy because it's normally hard to justify extra awards for professionals in cases where creditors often don't see full recovery, but in this case the recovery was so complete and unexpected that the fact that the three-judge panel upheld the fee ruling was not surprising, experts said.

"It's a very important case, it's one of the most comprehensive circuit court opinions on fee enhancements in bankruptcy, and it thoroughly reviews all of the precedent and broadly stands for the proposition that the bankruptcy courts will be given wide discretion in awarding fee enhancements, particularly where the creditors are paid in full," said James F. Wallack of [Goulston & Storrs PC](#), who represents CRG Partners.

The judges essentially said they would not make a precedent-changing decision as a three-judge panel, and that the U.S. trustee's argument was not enough to compel them to do so. While the next step for the trustee would be to appeal to the en banc court or apply for a writ of certiorari from the Supreme Court, the panel's ruling makes it clear that at least those judges are not inclined to undo precedent, experts said.

"They make a very big point here that, 'We will follow the rule ... and we don't think we could change the precedent of this circuit on fee enhancement by ourselves, once we determined that *Perdue* did not restrict the ability of a bankruptcy judge to grant a fee enhancement,'" said [Shulman Rogers Gandal Pordy & Ecker PA](#) attorney Morton Faller.

According to the opinion, Pilgrim's Pride filed for Chapter 11 protection on Dec. 1, 2008, with very low prospects for a successful reorganization after having lost about \$1 billion in the prior year and operated at a negative annual cash flow of more than \$300 million. Unsecured creditors were, at the time, expected to receive no better than a debt-for-equity swap, with prepetition shareholders to be left empty-handed.

However, after retaining CRG Partners to assist in the restructuring process, Pilgrim's Pride was able to win confirmation in December 2009 of a plan that "was an absolute success," providing for a 100

percent return to secured and unsecured creditors and \$450 million in new equity interests for prepetition shareholders, the opinion says.

CRG then asked for nearly \$6 million in fees based on the lodestar method, as well as a \$1 million fee enhancement recommended by Pilgrim's Pride's board but objected to by the U.S. trustee on the ground that the firm had already received adequate compensation.

The bankruptcy court found that while CRG had provided superior services, it failed to satisfy the strict requirements on fee enhancements laid out in the Perdue ruling. CRG appealed to the district court, which held that the bankruptcy court erred in finding that Perdue was binding authority in a bankruptcy proceeding.

On remand, the bankruptcy court granted the award, relying on a four-factor test laid out in its 2006 decision in *In re: [Mirant Corp.](#)* and certifying its order for direct appeal to the Fifth Circuit.

The trustee argued on appeal that the district court erred in reversing because Perdue narrowly circumscribed the bankruptcy court's discretion to grant fee enhancements and asked the court to reverse the bankruptcy court's Mirant order and reinstate its original denial of the bonus under Perdue. CRG countered that the high court ruling "was not intended to upend our settled precedent concerning fee enhancements in bankruptcy proceedings," according to the opinion.

The appeals court panel first evaluated its framework for analyzing compensation applications under the Bankruptcy Code and case law addressing fee enhancements in bankruptcy proceedings in order to resolve whether Perdue extends to bankruptcy cases.

It explained that, following the enactment of the Bankruptcy Code, the court held that professionals' compensation is determined by a combination of the lodestar method, the 12-factor so-called Johnson test and Section 330(a) of the code.

"In sum, we have consistently held that bankruptcy courts have broad discretion to adjust the lodestar upwards or downwards when awarding reasonable compensation to professionals employed by the estate pursuant to Section 330(a)," the appeals court wrote. "However, this discretion is far from limitless."

Noting that the trustee asks the Fifth Circuit to extend Perdue to cover bankruptcy cases because it "clarifies how to apply the lodestar method, cabins the discretion of bankruptcy judges, and leads to more uniform and predictable results," the judges said they decline that invitation because Perdue did not "unequivocally, sub silentio overrule our legion of precedent in the field of bankruptcy."

Because in the Fifth Circuit, "we abide by the rule of orderliness," the judges said, "a panel of three judges may not unilaterally overrule or disregard the precedent that has been established by our previous decisions."

Since Perdue is a federal fee-shifting case and neither explicitly touched on bankruptcy law nor indicated that the high court intended it to extend to non-fee-shifting cases, "we, therefore, take the Supreme Court at its word when it described Perdue as a federal fee-shifting case, and decline to extend it further," the panel wrote.

According to Ken Russak of [Frاندzel Robins Bloom & Csato](#), the ruling has two significant aspects.

“One is about the method by which courts make decisions,” he said, noting that the panel's refusal to accept the contention that another court's decision requires it to change a long-standing principal is interesting “for judge watchers.”

It's also significant in terms of the case's subject matter, with the panel upholding the distinction between fee-shifting cases and fee enhancement awards in bankruptcy, where it's not a win-lose situation, where the pool of recovery is perceived to be made bigger by the professionals working on it and thus their compensation is largely a direct result of their own work.

“In these rare cases, the professionals may potentially receive an enhancement only after transforming a carcass into a cheetah, so to speak, thereby enlarging the pie that is shared by all of the debtor's creditors,” the panel wrote. “In this parallel universe, there is no settling or losing party to protect from the discretion of the bankruptcy courts.”

Russak echoed that aspect of the ruling, noting that the U.S. trustee was merely seeking to protect a predictable set of rules governing the bankruptcy process.

“Everybody here who might have complained didn't complain, because all of the creditors got paid in full, and the board of directors supported the enhancement,” Russak said. “Nobody's ox was gored by this decision. It's more a decision that has importance when you think about how courts make decisions and the proper role of the office of the U.S. trustee.”

CRG is represented by Joseph M. Coleman and Robert J. Taylor of [Kane Russell Coleman & Logan PC](#) and James F. Wallack, Gregory O. Kaden and Vanessa V. Peck of Goulston & Storrs PC.

U.S. Circuit Judges Carl E. Stewart, Jennifer Walker Elrod and Leslie H. Southwick sat on the panel for the Fifth Circuit.

The case is CRG Partners Group LLC v. Neary, case number 11-10774, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Katherine Rautenberg.