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Fee enhancement limits don't extend to bankruptcy, Fifth Circuit rules

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A recent appellate holding that bankruptcy cases aren't governed by a U.S. Supreme Court ruling limiting district courts' fee enhancement power will help lawyers seek bonus fees when they get good results for creditors, according to practitioners who reviewed the opinion.

The U.S. Court of Appeals for the Fifth Circuit on Aug. 10 affirmed a Northern District of Texas Bankruptcy Judge Russell Nelms April 2011 award of a $1 million fee enhancement to turnaround consulting firm CRG Partners Group LLC.

Circuit Judge Jennifer Walker Elrod wrote the opinion, joined by judges Leslie Southwick and Carl Stewart.

CRG Partners Group LLC v. Neary involved chicken producer Pilgrim's Pride Co., which with six affiliates filed for Chapter 11 bankruptcy protection in December 2008 after losing $1 billion during in the fiscal year. The company hired CRG, which has since been acquired by Deloitte LLP, to help with the restructuring.

The plan confirmed by the bankruptcy court in December 2009 provided for a 100 percent return to all secured and unsecured creditors. The debtors' pre-petition shareholders also received $450 million in new equity.

CRG sought $5.98 million in fees, plus a $1 million fee enhancement recommended by the debtors' board of directors. The U.S. trustee objected, and the bankruptcy court denied the enhancement in June 2010. On appeal, the district court reversed the decision in February 2011 and remanded the case.

That April, the bankruptcy court awarded CRG the fee enhancement but certified its order for direct appeal to the Fifth Circuit. The trustee argued that the Supreme Court's 2010 ruling in *Perdue v. Kenny A. ex rel Winn* sharply curtailed the bankruptcy court's discretion to grant fee enhancements.

Elrod analyzed numerous Fifth Circuit rulings and concluded that "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."

While the courts' "discretion is far from limitless," she wrote, upward adjustments are permissible in rare and exceptional circumstances when "the applicants had provided superior services that produced outstanding results — that are supported by detailed findings from the bankruptcy court and specific evidence in the record."

Perdue, a class action concerning the Georgia foster care system, "was founded primarily upon justifications that are unique" to cases governed by civil rights proceedings under 42 USC 1988 or other fee-shifting cases — or cases in which the losing party paid the winner's fees, Elrod wrote. The precedent "did not unequivocally, sub silentio overrule our legion of precedent in the

field of bankruptcy."

Additionally, because bankruptcy courts have the discretion to enhance fees for professionals' superior performance, "we have affirmed fee awards that would have been proscribed under *Perdue*," she wrote.

Bankruptcy cases are unlike section 1988 cases, in which taxpayers foot the bill for any fee enhancements, she added. "The Debtors are the only party whose bottom-line was reduced by the enhancement and, because their own board of directors recommended paying the enhancement, we can hardly compare the Debtors' situation to that of the non-consenting taxpayers."

The Fifth Circuit was the first to consider whether *Perdue* governs bankruptcy fee enhancements, said Jim Wallack, a partner who heads the bankruptcy and restructuring practice at Boston's Goulston & Storrs and who argued for CRG. "I do think it will have persuasive influence in other circuits, even thought it's not going to be binding on them," he said. "It makes sense for people who generated that extraordinary result to be awarded."

The Executive Office for U.S. Trustees generally does not comment on court rulings, said spokeswoman Jane Limprecht.

Attorneys at Houston's Baker Botts, which filed an amicus brief supporting the enhancement, was pleased that the Fifth Circuit recognized the important differences between bankruptcy cases and fee-shifting cases, partner Aaron Streett said. The ruling should give bankruptcy judges "ample discretion to award appropriate fee enhancements where attorneys' efforts contribute to truly exceptional results," he said.

The ruling will be "very welcomed by bankruptcy professionals of all stripes" — not just lawyers, said Bill Baldiga, a New York lawyer and managing director of Boston-based Brown Rudnick's litigation & restructuring department.

Baldiga's firm wasn't involved in the Fifth Circuit arguments, but CRG is a client and the firm represented the official equity committee in the underlying Pilgrim's Pride bankruptcy. "It gives some clarity to the ability of a district court judge to make a fee enhancement decision," he said.

There have been quite a number of other situations in which professionals have been reluctant to request a premium even after extraordinary service, he continued. "This will give precedent and courage to both law firms and financial advisory firms to request premiums when premiums should be awarded."

Alan Gover, a New York partner in White & Case's financial restructuring and insolvency practice who wasn't involved in the case thought the implications would be limited. Creditors are paid in full in only a handful of Chapter 11 cases, he said. "It's going to be quite seldom where cases are presented to bankruptcy courts that will result in bonuses. I don't think [the ruling is] going to be significant in any practical sense."

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