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Christopher D. Crowell's practice focuses on bankruptcy law. He has substantial experience representing secured and unsecured creditors, trustees, lessors and lessees, debtors, and asset purchasers in all aspects of bankruptcy cases and related proceedings.

BANKRUPTCY PROFESSIONALS

v.

UNSECURED CREDITORS

A Battle Before the Highest Court in the Land

Are bankruptcy professionals entitled to compensation for defending their fee applications? Currently, the Ninth Circuit, which is the circuit in which California sits, answers the question affirmatively – thereby placing a greater value on the economic interests of bankruptcy professionals than those of general unsecured creditors. The Fifth Circuit disagrees. The U.S. Supreme Court has agreed to resolve the issue. If the highest court in the land ultimately adopts the Fifth Circuit's view, it will effectively make more bankruptcy estate assets available for distribution to general unsecured creditors than is currently the case in California.

Background

Under the Bankruptcy Code, allowed fees and expenses of professionals employed by the debtor, a trustee, or a creditors' committee are generally entitled to payment before other unsecured creditors. These so-called administrative expenses can add up quickly and erode or endanger any prospect for recovery by creditors holding general unsecured claims.

To obtain priority status, professionals must submit fee applications to the Bankruptcy Court, which in turn must determine whether the fees and expenses were

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reasonable and necessary for the administration of the bankruptcy case. Where a professional encounters opposition to its fee application, the costs of litigating the reasonableness of the fees can be substantial. The Bankruptcy Code plainly allows professionals compensation for preparing, but is silent as to whether they may be compensated for defending, fee applications.

The Case Before the Supreme Court

The case before the Supreme Court is *Baker Botts v. Asarco* and involves a Texas bankruptcy court's award of approximately \$120 million in core fees for Baker Botts. The Fifth Circuit Court of Appeals reversed the Texas bankruptcy court's allowance of fees and costs *for defending the fee application*. Baker Botts has appealed the reversal to the U.S. Supreme Court, asking it to reinstate the award and arguing that categorically denying compensation for defending fee applications undermines the principle that bankruptcy professionals should be paid comparably to non-bankruptcy professionals for comparable work.

The Supreme Court's decision in this case will determine whether bankruptcy cases pending in California will continue to allow bankruptcy professionals to recover the cost of defending their fee applications ahead of general unsecured creditors. If the Supreme Court reverses Ninth Circuit jurisprudence on this issue, the erosive impact of professionals' fees will be blunted on a going forward basis – to the benefit of general unsecured creditors.

The case has been scheduled for oral argument before the Supreme Court on February 25, 2015. We will be tracking the case closely through oral arguments and the Court's final decision, likely sometime in the spring or early summer.



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