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PERSPECTIVE

Are mega attorney fees in mega Chapter 11s unavoidable?

By Catherine E. Bauer

The recently reported mega attorney fees in the mega NRA and Boy Scout Chapter 11 bankruptcy cases made me think of the end of Charles Dickens' "Bleak House": The estate is gone, eaten up by legal fees. "Bleak House" was not about a bankruptcy case of course, but about real (OK, fictional) people who thought they were going to get money. No. Sorry. Complicated and long case. No money for you.

As a bankruptcy judge, I was never fond of those cases that ended up being all about attorney fees. When the focus shifted from being about a fresh start, equity and the orderly administration of the estate, I wondered why we were there. Of course, counsel deserve to be paid. But what drew me to bankruptcy in the first place were its redemptive aspects. Bankruptcy is about helping people and businesses who have fallen on hard times. It's about the equitable distribution of the estate. We in the United States believe in a civilized approach to debts that can't be paid. You may not know it, but there are countries where they still call for a literal pound of flesh from debtors (echoes of Shakespeare rather than Dickens).

Mega Chapter 11 cases are in a category all their own. These are single cases or jointly administered or consolidated cases that involve 100 million or more dollars, 1,000 or more creditors and that generate much public interest. Some courts have adopted their own definitions of mega cases in their local rules

and set their own procedures for identifying and managing these types of large Chapter 11 case.

Mega cases and mega attorney fees seem to go hand-in-hand. For example, in the NRA case it's reported that lead outside counsel billed \$72.6 million (and the case was dismissed!). In the Boy Scout bankruptcy, the projection is that by August the legal fees could reach \$150 million.

Are mega attorney fees in mega bankruptcy cases justified and inevitable? Obviously, these are complex cases and not just any bankruptcy attorney will do. Indeed, \$1,000 an hour has become a standard fee for partners in these cases (even in the days of Zoom). But the fees can also be in the \$2,000 an hour range for partners and in the \$1,000 an hour range for associates.

Companies routinely file mega bankruptcy cases in venues where they have minimal contacts. The rationale for filing in Delaware, the Southern District of New York and the Southern District of Texas is these bankruptcy courts and judges have superior expertise in mega cases. Two other reasons, not usually stated out loud, are that counsel know they will get paid their hourly rates and sophisticated repeat players in mega cases like the predictability they get in these venues.

Unfortunately, consistency for counsel and repeat players often leads to disenfranchising local stakeholders. Employees, smaller creditors, customers, and the like may find it difficult if not impossible to participate in proceedings taking place over 2,000 miles away and in a different time zone. Not my focus here, but worth mentioning.

Back to attorney fees in mega cases. What would happen if mega cases were filed in places other than the typical venues? Would attorney fees be more reasonable? In the Central District of California there are some amazing bankruptcy attorneys who bill in the \$1,000 an hour range, but we also have some outstanding practitioners who charge less than that. Hypothetically, fees might, and probably would, be less.

So, for the sake of argument, what would it take for mega cases to be filed in the Central District of California? More than once there has been talk that certain judges should be designated as business bankruptcy judges and that they alone should handle these big and important cases. For what it's worth, I would have been fine with this approach when I was on the bench, as long as I did not have to be one of these judges. But, not surprisingly, there are bankruptcy judges who think this would lead to perceptions of a "two-tiered" bankruptcy court and a resulting diminution in collegiality. If some judges work on the big, important and exciting cases that get all the media attention, what does that imply about the other judges? Would the "consumer" bankruptcy judges be perceived as second-class jurists?

It would be easy to say just keep things the way they are now. If mega cases are only filed in certain venues, so what? Well, if I were a sexual assault victim with a claim in the Boy Scout bankruptcy case, I assure you I would care a great deal about the legal fees in that case reducing my potential distribution. I would maybe even speculate

that the fees would be less, and my distribution would be more, if the case had not been filed in Delaware. And if, perchance, the case had been filed near me (and COVID was not an issue), maybe I could even show up in court and watch the proceedings.

Assuming (i) venue rules are not going to change anytime soon and (ii) it would reduce administrative expenses to diversify where mega bankruptcy cases are filed, is the only answer designating certain judges as business bankruptcy judges? If so, then fine. But I challenge my wonderfully smart bankruptcy friends to ponder this question. You are the most creative "think-outside-the-box people" I know. You also care deeply about justice and equity. And you always surprise me with your ability to solve problems. If anyone can figure this one out, it's you. I will happily watch from the sidelines. ■

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