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“Gunning” for a New Disinterestedness Standard for Bankruptcy Professionals

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October 31, 2016 - In order to be retained to provide bankruptcy services to a debtor, most professionals generally need to satisfy the “disinterestedness” requirement of Bankruptcy Code Section 327(a). Typically, in order to be “disinterested,” among other things, the professional in most cases cannot be a creditor of the debtor, have outstanding invoices, at the time of the chapter 11 filing. However, despite this general requirement, a recent memorandum opinion in the U.S. Bankruptcy Court for the Eastern District of North Carolina (Greenville Division) leaves open the door for the possible post-petition payment of pre-petition amounts due to a professional.

In *Gunboat International, Ltd.*, the Bankruptcy Court previously held that counsel may provide post-petition services, be retained under Bankruptcy Code section 327(a) and be considered “disinterested,” while still retaining an approximately \$12,000 pre-petition claim. The Court directed that the pre-petition fees and expenses due be included in the professional’s fee application at which time there would be an opportunity to object to any amounts that did not specifically relate to the chapter 11 filing.[1]

Subsequently, the U.S. Bankruptcy Administrator, the North Carolina equivalent of the Office of the United States Trustee, objected to the counsel’s request as to these pre-petition fees and expenses because many of the time entries supporting the request did not relate to specifically preparing the chapter 11 petition or related first-day motions. The Bankruptcy Court disagreed, finding that preparing a chapter 11 case does not merely relate to “physically preparing initial forms and motions.” It applied a “logical and temporal nexus interpretation” as to whether pre-petition claims may be retained and paid while still preserving “disinterestedness.” It found that all amounts requested in the pre-petition invoice fell within this nexus.[2] The Bankruptcy Court then determined that the pre-petition fees and expenses were entitled to administrative priority under the Bankruptcy Code. However, the Bankruptcy Court sternly warned that it was not “condoning bankruptcy attorneys routinely filing petitions prior to being paid for pre-petition services” and that was not the “preferred practice.”[3]

While this Bankruptcy Court's decision may provide a lifeline to professionals who are left with unpaid invoices prior to a bankruptcy filing, *Gunboat* has yet to be applied in the busy restructuring courts in Delaware and New York.

Footnotes

[1] 2016 Bankr. LEXIS 2935 *6-7 (Bankr. E.D.N.C. Aug. 10, 2016).

[2] *Id.* at 27-28.

[3] *Id.* at 30-31.

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