

Professional Fee Enhancements: Determining whether a Professional is entitled to a Fee Enhancement under Section 330 of the Bankruptcy Code

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Introduction

The Bankruptcy Code governs the compensation of a professional person employed under section 327 or 1103 of the Bankruptcy Code.¹ Under section 330(a), the court may award a professional “reasonable compensation for actual [and] necessary services.”² Section 330 provides a non-exclusive list of factors for a court to consider in determining whether the proposed compensation is reasonable.³ In addition to these statutory factors, courts also analyze the proposed fee by using two methods utilized in pre-bankruptcy code cases⁴; (1) “Lodestar” method and (2) factors from *Johnson v. Georgia Highway Express, Inc*⁵ (the “Johnson Factors”).

The determination of whether the proposed compensation is reasonable can be unpredictable, and bankruptcy courts continue to struggle with the problem of how to fairly compensate attorneys, while simultaneously protecting the bankruptcy estate, its creditors, and other interested parties in cases where the attorney achieved results that were remarkable. In such a

¹ 11 U.S.C. §330 (2012). Unless otherwise indicated all sections in this Article refer to Title 11 of the United States Code.

² *Id.*

³ *Id.*

⁴ See, e.g., *Matter of First Colonial Corp. of Am.*, 544 F.2d 1291, 1299 (5th Cir. 1977) (adopting the *Johnson* factors); *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983) (adopting the lodestar method).

⁵ See, e.g., *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, (5th Cir. 1974) *abrogated* by *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

rare case, some courts have approved a fee enhancement to reward the professionals.⁶ Other courts however, have held that a fee enhancement is permissible when the fees sought by a professional under the traditional “reasonable compensation” calculation are less than what a professional practicing outside of bankruptcy would have received in addition to requiring “rare and exceptional” circumstances.⁷ Moreover, some courts have departed from the above standards and have formulated their own unique analysis.⁸

This Article is separated into three parts that discuss the methods that courts use when determining whether to approve a professionals’ proposed fees, including a proposed fee enhancement. Part I discusses the traditional methods of determining whether the proposed compensation is reasonable under section 330. Part II discusses the requirements for granting fee enhancements. In particular, Part II discusses the case law that addressed whether to approve a fee enhancement. Finally, Part III concludes by examining the practical implications of these courts’ requirements for granting a fee enhancement in bankruptcy cases.

I. Determining Whether a Professional’s Proposed Compensation is “Reasonable” under Section 330

This section discusses reasonable compensation generally under section 330. It also discusses other factors consider by the courts in determining reasonable compensation.

Because section 330 provides a non-exclusive list of factors for the court to consider, many bankruptcy courts have determined the reasonableness of the proposed compensation by considering a combination of the factors included in the statute, the lodestar analysis and the

⁶ See, e.g., *In re Penn-Dixie Indus., Inc.*, 18 B.R. 834, 839 (Bankr. S.D.N.Y. 1982).

⁷ *In re ASARCO, L.L.C.*, 751 F.3d 291, 294 (5th Cir.) cert. *granted sub nom.* Baker Botts, L.L.P. v. ASARCO, L.L.C., 135 S. Ct. 44 (2014). In this case the Supreme Court also granted certiorari on the issue of whether a professional is entitled to receive compensation for defending its fee application. However, this Article will not discuss that issue; see also *Matter of UNR Indus., Inc.*, 986 F.2d 207, 210 (7th Cir. 1993).

⁸ *Matter of First Am. Health Care of Georgia, Inc.*, 212 B.R. 408, 417 (Bankr. S.D. Ga. 1997).

Johnson Factors.⁹ First, courts calculate the fees using the lodestar method, which is discussed below.¹⁰ After applying the lodestar analysis, the court may exercise its discretion to adjust the lodestar fee upward or downward based on the courts consideration of the factors listed in section 330 and the *Johnson* Factors, which are also discussed below.¹¹

a. The “Lodestar” Method

Relying on cases decided under the Bankruptcy Act¹², bankruptcy courts first apply the “lodestar” method for determining whether the proposed compensation is reasonable.¹³ The lodestar method involves a two-step analysis.¹⁴ First, the court will determine the number of hours that the professional expended for actual and necessary services.¹⁵ Then the court will multiply the number of reasonable hours by an appropriate billing rate,¹⁶ usually the prevailing hourly rate in the community for similar work.¹⁷ While courts first applied the lodestar method in cases decided under the Bankruptcy Act, courts have continued to apply that the lodestar method as part of its “reasonable compensation” determination under the Bankruptcy Code.¹⁸ For example, in *In re Boddy*¹⁹, the court rejected the application of a maximum fixed fee and applied the lodestar method.²⁰ In doing so, the *Boddy* court emphasized that the Supreme Court indicated that federal courts should use the lodestar method to determine whether attorney fees are

⁹ See *In re ASARCO, L.L.C.*, 751 F.3d at 295; see also *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 656 (5th Cir. 2012), as revised (Aug. 14, 2012).

¹⁰ *Infra* Part I.A.; see also *In re Pilgrim's Pride Corp.*, 690 F.3d at 656.

¹¹ *Infra* Part I.B; *Infra* Part I.C.; see also *In re Pilgrim's Pride Corp.*, 690 F.3d at 656.

¹² E.g., *Matter of Lawler*, 807 F.2d 1207, 1211 (5th Cir. 1987).

¹³ See *Id.* at 1211; see also *In re Pilgrim's Pride Corp.*, 690 F.3d at 655.

¹⁴ *Collier on Bankruptcy* Colliers ¶ [330.03] (Alan N. Resnick & Henry J. Somme reds., 16th ed. 2014), available at LEXIS, 3 *Collier on Bankruptcy* P 330.03.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ E.g., *In re Pilgrim's Pride Corp.*, 690 F.3d at 655.

¹⁸ *In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991).

¹⁹ *Id.*

²⁰ *Id.*

reasonable under federal statutes that provide for such fees.²¹ Moreover, the *Boddy* court noted that courts generally rely on the lodestar method in bankruptcy cases.²² Therefore, the *Boddy* court held that since the Bankruptcy Code is a federal statute that provides for judicial review of proposed professional fees, such fees should be analyzed under the lodestar method.²³

However, the courts analysis does not end with the lodestar method, as the court will then determine to enhance or reduce the proposed fee.²⁴ Reductions are usually made where the attorney's services were of little to no benefit to the estate while factors used for enhancement are discussed below.²⁵

b. Factors Under Section 330

Section 330 requires that a bankruptcy court review a professional's proposed compensation and determine whether the compensation is reasonable for actual and necessary services provided by the professional.²⁶ The Bankruptcy Code provides guidance to bankruptcy courts considering whether the proposed compensation is reasonable.²⁷ In particular, section 330 provides a non-exclusive list of factors for a bankruptcy court to consider when making such determination, providing in pertinent part that:

the court shall consider the nature, the extent and the value of such services, taking into account all relevant factors including... (A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 11 U.S.C. §330(a)(4)(A) (2012).

²⁵ *In re J. V. Knitting Serv., Inc.*, 22 B.R. 543, 544 (Bankr. S.D. Fla. 1982).

²⁶ 11 U.S.C. §330 (2012).

²⁷ *Id.*

(F) whether the compensation is reasonable based on the customary comparably skilled practitioners in cases other than cases under this title.²⁸

The weight given to each factor in section 330 rests within the broad discretion of the court and because section 330(a) is non-exclusive the court may also take non-listed factors into account.²⁹

c. The *Johnson* Factors

In cases decided under both the Bankruptcy Act³⁰ and the Bankruptcy Code³¹, bankruptcy courts have held that they retain the discretion to adjust the fees calculated under the lodestar method upwards or downwards.³² In exercising such discretion, the courts will consider the *Johnson* Factors.³³

The *Johnson* Factors for determining whether to adjust the professional fee calculated under the lodestar method include:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions presented by the case;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of other employment by the attorney due to acceptance of a case;
- (5) The customary fee for similar work in the community;
- (6) Whether the fee is fixed or contingent;
- (7) Time pressures imposed by the client or the circumstances;
- (8) The amount involved and results obtained as a result of the attorneys' services;
- (9) The experience, reputation and ability of the attorneys;
- (10) the desirability of the case;
- (11) The nature and length of the professional relationship with the client; and
- (12) Awards in similar cases.³⁴

²⁸ *Id.*

²⁹ *In re ASARCO, L.L.C.*, 751 F.3d at 294.

³⁰ Nelson Act, ch. 541, 30 Stat. 544 (1898), amended by Chandler Act, ch. 575, 52 Stat. 840, invalidated by Bankruptcy Reform Act, 11 U.S.C. §§101-1532.

³¹ 11 U.S.C. §§ 101-1532 (2012)

³² *In re Pilgrim's Pride Corp.*, 690 F.3d at 655 (citing to *Lawler* a pre-Bankruptcy Code case and applying the reasoning to a case governed by the Bankruptcy Code).

³³ *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d at 714.

³⁴ *Id.* at 717-719.

The *Johnson* Factors were first extended to bankruptcy in *In re First Colonial Corp. of America*,³⁵ which was decided under the Bankruptcy Act. The *First Colonial* court held that although derived in a non-bankruptcy case, the *Johnson* Factors were equally useful in determining whether the proposed compensation was reasonable under the Bankruptcy Act, which authorized such compensation.³⁶

Although Congress repealed the Bankruptcy Act and replaced it with the Bankruptcy Code, bankruptcy courts continue to apply the *Johnson* Factors.³⁷ Some courts, such as the court in *Grant v. George Schumann Tire & Battery Co.*,³⁸ have suggested that each *Johnson* Factor be considered in light of the other surrounding circumstances and urge the bankruptcy judge to strike a “genuine balance.” Other courts, such as the court in *In re El Paso Refinery, L.P.*,³⁹ have suggested giving the most weight to four of the *Johnson* Factors (novelty and complexity of the issues, the skill and experience of the counsel, the quality of the services rendered, and the results obtained) because these are most consistent with the statute and lodestar analysis.⁴⁰ These courts note that the other eight *Johnson* Factors are given less weight because these factors have little relevance in bankruptcy cases.⁴¹

II. Fee Enhancement Authorization

When enacting the Bankruptcy Code, Congress intended for section 330 to depart from doctrines that strictly limited fee awards under the Bankruptcy Act.⁴² This departure sought to ensure that the compensation in bankruptcy matters is commensurate to the fees awarded for

³⁵ Matter of First Colonial Corp. of Am., 544 F.2d at 1299.

³⁶ *Id.*

³⁷ See, e.g., *In re Lan Associates XI, L.P.*, 192 F.3d 109, 123 (3d Cir. 1999) (“Moreover, in spite of the factors enumerated in § 330, many courts continue to employ the twelve factors set forth”).

³⁸ *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 879 (11th Cir. 1990).

³⁹ *In re El Paso Refinery, L.P.*, 257 B.R. 809, 826 (Bankr. W.D. Tex. 2000).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Matter of UNR Indus., Inc., 986 F.2d 207, 208 (7th Cir. 1993).

comparable services in non-bankruptcy cases.⁴³ Accordingly, section 330 grants bankruptcy courts broad discretion to determine attorney’s fees, as they are most familiar with the services rendered.⁴⁴

Furthermore, since four of the *Johnson* Factors are subsumed into the lodestar calculation, these four factors may only form the basis of an adjustment in “rare and exceptional” cases.⁴⁵ The power to grant fee enhancement generally derives from precedent set by the Supreme Court.⁴⁶ In *Perdue v. Kenny A. ex rel. Winn*⁴⁷, a non-bankruptcy case, the Supreme Court held that “enhancements may be awarded in ‘rare’ and ‘exceptional’ circumstances”, citing to a long line of precedent.

Similarly, bankruptcy courts have also relied on its own precedents in justifying its ability to grant fee enhancements. As pointed out in *In re Pilgrims Pride*, the Fifth Circuit stated “we have consistently held that bankruptcy courts have broad discretion to adjust the lodestar upwards or downwards when awarding reasonable compensation to professionals...”⁴⁸ *In re Pilgrims Pride* also relied on a long line of precedent, citing to multiple cases such as *Rose Pass Mines* and *Lawler*.⁴⁹

a. Cases Granting Fee Enhancements

⁴³ *Id.* at 209.

⁴⁴ *In re ASARCO, L.L.C.*, 751 F.3d at 294.

⁴⁵ *Id.*

⁴⁶ *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 571-72 (2010) (“Our prior cases make clear that enhancements are permitted in “ ‘exceptional’ cases;”).

⁴⁷ *Id.* (citing *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Blum v. Stenson*, 465 U.S. 886, 896–901(1984)).

⁴⁸ *In re Pilgrim's Pride Corp.*, 690 F.3d at 660.

⁴⁹ *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (5th Cir. 1980); *Matter of Lawler*, 807 F.2d 1207 (5th Cir. 1987).

In determining whether a fee enhancement is proper, bankruptcy courts have followed the Supreme Court's ruling *Blum v. Stenson*⁵⁰, a non-bankruptcy case. In *Blum v. Stenson*, the Supreme Court held that where a statute governs the reasonableness of attorney's fees, a fee enhancement is only appropriate in "rare case[s] where the...applicant offers specific evidence show[ing] that the quality of service...was superior...and that the success was 'exceptional.'"⁵¹

Bankruptcy courts have consistently held that fee enhancement are only warranted in "rare and exceptional" circumstances.⁵² Yet, bankruptcy courts have inconsistently applied this standard when reviewing proposed fee enhancements.⁵³

For example, in *In re Apex Oil Co*⁵⁴, the Eighth Circuit determined that despite the fact that the lodestar calculation already accounted for novelty and complexity of the case, the experience and special skill of counsel, the quality of representation, and the results obtained; fee enhancements are permissible in "rare and exceptional" cases.⁵⁵ To obtain a fee enhancement, the Eight Circuit concluded that the applicant must also demonstrate "that the quality of the service rendered and results obtained were superior to what one should expect in light of the hourly rate charged and the number of hours expended."⁵⁶

In *Apex Oil*, the bankruptcy court determined that the quality of the examiners service was of exceptional quality and yielded exceptional results.⁵⁷ The examiner engineered a settlement,

⁵⁰ *Blum v. Stenson*, 465 U.S. 886, 899 (1984); *see also* *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) *supplemented*, 483 U.S. 711 (1987).

⁵¹ *Blum v. Stenson*, 465 U.S. at 899; *see also* *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565.

⁵² *In re Apex Oil Co.*, 960 F.2d 728, 732 (8th Cir. 1992); *In re ASARCO, L.L.C.*, 751 F.3d at 294.

⁵³ *Compare In re Apex Oil Co.*, 960 F.2d 728 (8th Cir. 1992)(holding that a fee enhancement for superior service is permissible even where it has been accounted for in the lodestar calculation) *with* *Matter of UNR Indus., Inc.*, 986 F.2d 207 (7th Cir. 1993) (holding that a fee enhancement for exceptional service is barred where the lodestar calculation has accounted for this).

⁵⁴ *In re Apex Oil Co.*, 960 F.2d 728 (8th Cir. 1992).

⁵⁵ *Id.* at 731-732.

⁵⁶ *Id.* at 732.

⁵⁷ *Id.*

which permitted Apex to avoid expensive protracted litigation that could have destroyed any chance of reorganization.⁵⁸ Further, the examiner developed a procedure for handling hundreds of personal injury suits against Apex, protecting Apex from a potential drain of its resources.⁵⁹ Moreover, the examiner obtained court approval for an asset sale, which gave Apex the chance to satisfy secured creditors as well as preserve value for its unsecured creditors.⁶⁰

The Eighth Circuit in *Apex Oil* held that the bankruptcy courts standard of allowing fee enhancements in “rare and exceptional” circumstances was correct and remanded to the lower court for further fact finding to determine if the services rendered and results obtained were superior to what one would expect at the hourly rate charged.⁶¹

Further, in *In re Asarco*, the Fifth Circuit held that a bankruptcy court did not abuse its discretion in authorizing fee enhancements to two law firms representing a chapter 11 debtor in connection with their remarkably successful fraudulent transfer litigation.⁶² In *In re Asarco*, Baker Botts L.L.P. (“Baker Botts”) and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (“Jordan Hyden”) served as debtor’s counsel and helped the debtor confirm a plan that paid creditors in full.⁶³ In connection with that representation, Baker Botts and Jordan Hyden successfully prosecuted complex fraudulent transfer claims against the debtor’s parent corporation resulting in an unprecedented judgment valued at between \$7 and \$10 billion.⁶⁴

While Baker Botts and Jordan Hyden were compensated pursuant to section 330(a), the bankruptcy court authorized a twenty percent fee enhancement for Baker Botts and a ten percent

⁵⁸ *Id.* at 730.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *In re ASARCO, L.L.C.*, 751 F.3d at 299.

⁶³ *Id.* at 296.

⁶⁴ *Id.* at 293.

fee enhancement for Jordan Hyden.⁶⁵ The bankruptcy court based the authorization of the fee enhancements on the “rare and exceptional” performance of the firms in successfully prosecuting the multi-billion dollar fraudulent conveyance action and the fact that the rates charged by Baker Botts and Jordan Hyden were roughly twenty percent and ten percent, respectively, below market rate.⁶⁶ While the below market rates charged by the two firms was a factor in awarding fee enhancements, the court emphasized that the “once in a lifetime” result in the fraudulent conveyance action that resulted in the creditors being paid in full was the driving force behind the fee enhancement.⁶⁷

b. Cases Denying Fee Enhancement

Currently, no bankruptcy court has held that a fee enhancement is never permissible. While recognizing that fee enhancements are theoretically permissible, some courts have denied applications for fee enhancements.

For example, in *Matter of UNR Industries*, the Seventh Circuit upheld the lower courts’ decision denying chapter 11 debtor’s attorney’s request for a fee enhancement.⁶⁸ In *UNR*, Schwartz, Cooper, Kolb and Graynor (“Schwartz Cooper”) devised an innovative use of bankruptcy in a mass tort case relating to asbestos lawsuits.⁶⁹ In particular, Schwartz Cooper advised their client to file for bankruptcy under chapter 11, which resulted in the bankruptcy court approving a fund that included ninety-two percent of the debtor’s common stock that was

⁶⁵ *Id.* at 294.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Matter of UNR Indus., Inc.*, 986 F.2d at 207.

⁶⁹ *Id.* at 208.

to be used for the benefit of its creditors⁷⁰. The bankruptcy court described this approach as “ingenious.”⁷¹

Schwartz Cooper received more than \$3.2 million in legal fees in connection with its representation of the debtor.⁷² Believing that representation was so superior, Schwartz Cooper requested a twenty-five percent fee enhancement.⁷³ The bankruptcy court, however, denied this request because the court determined that the fees already received by the firm were fair and reasonable.⁷⁴ The district court affirmed on the same grounds.⁷⁵ On appeal, the Seventh Circuit affirmed the lower courts’ decision, agreeing that a fee enhancement was not permitted because the compensation received was already reasonable.⁷⁶

In reaching its decision, the Seventh Circuit stated that in enacting section 330, Congress intended to ensure that bankruptcy attorneys are compensated at the same rate as those outside of bankruptcy in order to encourage talented attorneys to take bankruptcy cases.⁷⁷ The Seventh Circuit also emphasized that non-bankruptcy attorneys bill at an hourly rate and do not regularly receive a fee enhancement for exceptionally representing their clients.⁷⁸ Moreover, the Seventh Circuit reasoned that novelty and complexity of the case, the experience and special skill of counsel, the quality of representation, and the results obtained, were already taken into account as part of the lodestar calculation.⁷⁹ Therefore, the Seventh Circuit concluded that when a fee enhancement is sought for exceptional quality it is only appropriate where such circumstances

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 209.

⁷⁸ *Id.*

⁷⁹ *Id.* at 210.

were not taken into account in lodestar calculation, making the initial rate charged a below market rate.⁸⁰

Turning to the facts of the case, the Seventh Circuit determined that although Schwartz Cooper provided superior service, the bankruptcy court already accounted for superior service as part of the the lodestar calculation.⁸¹ The Seventh Circuit however did not address what exactly would qualify as a “rare and exceptional” circumstance that would permit a court to approve a fee enhancement.⁸² As a result, while the *UNR* court alluded that an attorney might be granted a fee enhancement for simply charging below market rates, it is still unclear when an attorney will be entitled to a fee enhancement based on exceptional work in the Seventh Circuit.⁸³

Similarly, in *Matter of First American Health Care of Georgia*,⁸⁴ the bankruptcy court also denied a chapter 11 debtors’ attorney’s request for a fee enhancement.⁸⁵ However, this bankruptcy court based its denial on its own formulation.⁸⁶ In *First American*, the court analyzed cases in which bankruptcy courts have granted fee enhancements and determined that in each case one of the following factors were present:

(1) unique and unforeseen obstacles which were not anticipated at the time the case was retained; or (2) results which far exceeded reasonable expectations at the outset of the case or (3) consent by the party paying the fee enhancement at the time of application or by contractual agreement.⁸⁷

The *First American* court determined that none of those factors were present.⁸⁸ In particular, the debtor attorneys faced no obstacles that were unique or unforeseen at the time the attorneys

⁸⁰ *Id.* at 211.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 210.

⁸⁴ *Matter of First Am. Health Care of Georgia, Inc.*, 212 B.R. 408, 417 (Bankr. S.D. Ga. 1997).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 416.

⁸⁸ *Id.* at 417.

were retained.⁸⁹ Next, the *First American* court determined that the results obtained by the debtors’ attorneys could have also been achieved by other attorneys of like background who charge a similar rate of compensation.⁹⁰ Last, there was no consent or contractual agreement by the party responsible to pay such enhancement.⁹¹ Because none of these factors were present, the *First American* court denied the fee enhancement.⁹² This case further illuminates the inconsistency in the authorization or denial of fee enhancements.

III. Implications of Fee Enhancement Case Law

An attorney should not go into a case expecting a fee enhancement due to the varying and inconsistent approaches taken by the various courts. A practitioner may be compelled to charge lower rates and thus receive an “enhancement” under the reasoning of the Fifth and Seventh Circuit’s in *Asarco* and *UNR* respectively, where a showing of below market rates was required in addition to exceptional service. However, while fee enhancements are permissible, courts are in general consensus as to how rare authorizations of such enhancements are.⁹³ Moreover, while the Fifth Circuit’s decision required evidence of below market rates, the Fifth Circuit seemed to uphold the fee enhancements based more on the “once in a lifetime result”⁹⁴ obtained by the two firms in the bankruptcy litigation than it was on the fact that the firms charged below-market rates, while the Seventh Circuit based its decision more so on below market rates.⁹⁵ Further, courts have still been unable to formulate a single test or standard for determining what exactly qualifies as “rare and exceptional.”⁹⁶ This standard is seemingly extremely fact specific and up

⁸⁹ *Id.*

⁹⁰ *Id.* at 418.

⁹¹ *Id.*

⁹² *Id.* at 417.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *In re ASARCO, L.L.C.*, 751 F.3d at 299; see also *Matter of UNR Indus., Inc.*, 986 F.2d at 207.

⁹⁶ See *In re ASARCO, L.L.C.*, 751 F.3d at 299; see also *Matter of UNR Indus., Inc.*, 986 F.2d at 207.; see also *In re Apex Oil Co.*, 960 F.2d 728 (8th Cir. 1992).

to each individual bankruptcy court. What qualifies as “rare and exceptional” in the eyes of one court may differ from that of another.

Accordingly, a law firm should not undercut its rates when seeking to represent a debtor or committee solely with the hopes of receiving a fee enhancement for the mere fact that it charged below market rates. This is not to say that there are not reasons for a law firm to charge below-market rates. Law firms are currently faced with more competition for few cases because as with all bankruptcy filings, the number of business chapter 11 filings have decreased recently.⁹⁷ As a result, a law firm may want to undercut the prevailing market rates, which may already be facing downward pressure because of this increased competition for representations, in order to get retained in the first place.

Conclusion

Under section 330, professional fees are calculated by taking certain factors into account such as: time spent on the services, the rates charges for the services, the necessity of the services, the complexity of the questions involved, the skill and experience of the professional and the rate charged in comparison to compensation charged by comparable practitioners outside of bankruptcy.⁹⁸ Additionally, courts also analyze the proposed fees by applying the lodestar method and the *Johnson* Factors.⁹⁹

Furthermore, courts also have the ability to adjust the professional fee upward, resulting in a fee enhancement.¹⁰⁰ In determining if a professional is entitled to a fee enhancement the courts have applied two general approaches; (1) awarding enhancements in “rare and exceptional”

⁹⁷ UNITED STATES COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-bankruptcy-courts.aspx> (last visited Nov. 26, 2014) (Table 7 depicting a 9.7% decrease in chapter 11 cases filed from 2009- 2013).

⁹⁸ 11 U.S.C. § 330 (2012).

⁹⁹ *Matter of First Colonial Corp. of Am.*, 544 F.2d 1291, 1299 (5th Cir. 1977) (adopting the *Johnson* factors); *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983) (adopting the lodestar method).

¹⁰⁰ See, e.g., *In re Pilgrim's Pride Corp.*, 690 F.3d at 656.

circumstances¹⁰¹ and (2) “rare and exceptional” circumstances plus below market rates¹⁰². Moreover, some courts deviate from these general standards and formulate their own test, however, these seem to be outliers.¹⁰³

While there are two general approaches to fee enhancement analysis and while bankruptcy courts generally agree that at least one element of fee enhancement is “rare and exceptional” circumstances, there is still a great amount of variation on what exactly qualifies as “rare and exceptional”. So long as bankruptcy courts are granted the broad discretion to grant or deny fee enhancements, it appears that this trend of ambiguity will continue and each court will apply its own individual analysis on a case by case basis rather than bankruptcy courts adopting an overarching clear cut definition of what exactly is “rare and exceptional.”

¹⁰¹ *In re Apex Oil Co.*, 960 F.2d 728 (8th Cir. 1992).

¹⁰² *See, e.g., In re ASARCO, L.L.C.*, 751 F.3d at 299

¹⁰³ *Matter of First Am. Health Care of Georgia, Inc.*, 212 B.R. 408, 417 (Bankr. S.D. Ga. 1997).