

# Lawyer Insights

## Retail Ruling Clarifies Attorney Fees For Large Ch. 11 Cases

By Jason Harbour and Justin Paget  
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On Sept. 19, the [U.S. District Court for the Eastern District of Virginia](#) entered an order<sup>1</sup> adopting the report and recommendation, or R&R, of the chief bankruptcy judge<sup>2</sup> approving the fee applications of three law firms in the retail group bankruptcy cases, including the requested national rates.

Importantly, the district court's order confirmed that the relevant factors for approving fee applications, including national rates if requested, are those enumerated in Title 11 of the U.S. Code, Section 330(a)(3) and the Johnson factors, which were adopted by the [U.S. Court of Appeals for the Fourth Circuit](#) in *Barber v. Kimbrell's Inc* in 1978.<sup>3</sup>

The R&R and the district court's order also confirm the importance of making an appropriate factual record to support professional fee applications.

As the [U.S. Bankruptcy Court for the Eastern District of Virginia](#) has seen some of the largest and most complex corporate bankruptcies in the last decade — including a string of retail cases, such as [Toys R Us Inc.](#), [Gymboree Group](#), [J. Crew Group Inc.](#), [Pier 1 Imports Inc.](#), Retail Group and [Lord & Taylor LC](#) — the district court's order and the R&R bring welcome certainty to practitioners.

The district court's order and the R&R arose out of the fee applications of three professionals in the bankruptcy cases *In re: Retail Group Inc.*:

- Co-counsel to the debtors;
- Lead counsel for the unsecured creditors' committee; and
- Local counsel for the unsecured creditors' committee.

The R&R was issued in connection with the district court's order that any remaining fee applications in the retail group bankruptcy cases be submitted to the district court.<sup>4</sup>

The fee order had raised questions about the appropriate standard for obtaining approval of fee applications and national rates in the Eastern District of Virginia, which the district court's order and the R&R have now resolved.

Each of the fee applications was timely filed and provided other parties and the Office of the U.S. Trustee an opportunity to review the propriety of the fee applications.

The U.S. Trustee reviewed the fee applications, negotiated reductions based on the reasonableness of

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the underlying itemized bills, and filed a statement that, in light of the negotiated reductions, it had no objection to the fee applications. No other party timely objected to any of the fee applications.

Following a hearing on the fee applications, the bankruptcy court issued the R&R.

Among other things, the R&R thoroughly addresses the history of compensation for bankruptcy professionals, including the transformation from the unfavorable treatment bankruptcy professionals experienced under the Bankruptcy Act of 1898 to a recognition that there is a "a public interest in attracting competent counsel in bankruptcy proceedings" while balancing an equally important public interest in "doing equity to the estate and its creditors."<sup>5</sup>

In particular, the bankruptcy court noted that courts act more as "a surrogate for the estate, reviewing the fee application much as a sophisticated non-bankruptcy client would review a legal bill" such that the "review of fee applications becomes primarily an exercise in fact-finding, with relatively little room for the application of inflexible legal rules."<sup>6</sup>

The R&R and the district court order confirm the well-established principle in the Fourth Circuit that the relevant factors for approving fee applications are those enumerated in Section 330(a)(3) of Title 11 of the U.S. Code and the Johnson factors.

Bankruptcy Code Section 330(a)(3) sets forth the following six nonexclusive factors for courts to consider in evaluating the reasonableness of fee applications:

- The time spent on such services;
- The rates charged for such services;
- 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;
- 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;
- With respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- Whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.<sup>7</sup>

As the Section 330 factors are nonexclusive, courts in the Fourth Circuit also consider the following Johnson factors:<sup>8</sup>

- The time and labor expended;
- The novelty and difficulty of the questions raised;

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- The skill required to properly perform the legal services rendered;
- The attorney's opportunity costs in pressing the instant litigation;
- The customary fee for like work;
- The attorney's expectations at the outset of the litigation;
- The time limitations imposed by the client or circumstances;
- The amount in controversy and the results obtained;
- The experience, reputation and ability of the attorney;
- The undesirability of the case within the legal community in which the suit arose;
- The nature and length of the professional relationship between attorney and client; and
- Attorney fees awards in similar cases.<sup>9</sup>

The bankruptcy court also noted that to determine the reasonableness of retaining out-of-market professionals, courts consider the following factors:

- The specialization of the applicant;
- The urgencies of the debtor's financial condition;
- The regional nature of the debtor's holdings and creditors;
- The fact that a primary creditor may be a national lender;
- The out-of-state locale of some large unsecured creditors;
- The involvement of nonlocal counsel for several creditors;
- The applicant's unique skill set;
- The nature of the work performed; and
- The availability of capable professionals in the local market.<sup>10</sup>

The bankruptcy court applied Section 330 of the Bankruptcy Code factors and the Johnson factors to the factual record and concluded that all of the fee applications were reasonable and warranted approval.

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Specifically, in the R&R, the bankruptcy court found that the rates of the national firms were reasonable under the facts and circumstances of the Retail Group cases, including that the abnormal procedural posture required prompt resolution of complicated issues in a complex Chapter 11 case, that the national firms' expertise, as national bankruptcy practices, was necessary and beneficial to creditors and the estate in resolving the issues, and that the type of work performed by the national firms justified the use of out-of-market rates.<sup>11</sup>

The R&R was adopted as the opinion of the district court, subject only to a limited modification to clarify that for future mega cases, as a result of the amendment to the local rules concerning the district wide assignment of mega cases, the rate analysis should begin with prevailing rates in the Eastern District of Virginia.<sup>12</sup>

Then, as the bankruptcy court did in the R&R and as bankruptcy courts across the country have done for years, the factors set forth in Section 330(a)(3) of the Bankruptcy Code and the Johnson factors should be applied to the factual record before the court to determine the appropriateness of fee applications.

Together, the R&R and the district court's order provide clarity to practitioners in large Chapter 11 cases with respect to the factual record necessary to support their fee applications. Specifically, fee applications and supporting evidence, including supporting declarations, should clearly address the factors set forth in Section 330(a)(3) of the Bankruptcy Code and the Johnson factors.

Additionally, if appropriate, the evidence should support factual findings that the work performed during a case was sufficiently complex to warrant rates in excess of the rates in the district.

The R&R and the district court's order also confirm the importance of the factual record of each case. As the bankruptcy court noted in the R&R:

The statute and case law emphasize the need for a flexible, facts-and-circumstances approach to difficult resource-allocation issues. What is necessary and reasonable in one case may be totally inappropriate in another.<sup>13</sup>

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### Notes

1. Order (Adopting Report and Recommendation With Modification), [In re Retail Grp., Inc.](#), No. 20-33113 (Bankr. E.D. Va. Sept. 19, 2022) [ECF No. 2818] (the "District Court Order").
2. Bankruptcy Judge's Report and Recommendation, In re Retail Grp., Inc., No. 20-33113 (Bankr. E.D. Va. Aug. 30, 2022) [ECF No. 2798] (the "R&R").
3. The Johnson factors were adopted by the Fourth Circuit in [Barber v. Kimbrell's Inc.](#), 577 F.2d 216, 226 n.28 (4th Cir. 1978) (citing [Johnson v. Georgia Highway Express](#), 488 F.2d 714 (5th Cir. 1974)).
4. See Order Requiring Submission of Approval of Petition for Attorneys' Fees to District Court, In re Retail Grp., Inc., No. 20-33113 (Bankr. E.D. Va. Jan. 13, 2022) [ECF No. 2550] (the "Fee Order"). After entry of the Fee Order, the Bankruptcy Court for the EDVA adopted Local Bankruptcy Rule 1075-2, which directs bankruptcy cases filed in the EDVA that involve total assets or liabilities in excess of \$100 million (a "mega case") to be assigned randomly to any Bankruptcy Judge in the EDVA except for the Chief Bankruptcy Judge, not just the filing division. Accordingly, by separate order, the District Court asked the Bankruptcy Court to also consider any impact of the new rule on its analysis of fees. Order (Modifying Order on Attorneys' Fees), Patterson v. Mahwah Bergen Retail Grp., Inc. (In re Retail Grp., Inc.), No. 3:21cv167 (E.D. Va. Feb. 22, 2022) [ECF No. 83].
5. R&R at 14 (quoting [In re Farrington Mfg. Co.](#), 540 F.2d 653, 657 (4th Cir. 1976)).
6. R&R at 15 (quoting [In re Busy Beaver Bldg. Ctrs., Inc.](#), 19 F.3d 833, 848 (3d Cir. 1994)).
7. 11 U.S.C. § 330(a)(3).
8. R&R at 18 (citing [In re Grubb](#), No. 07-30253-KRH, 2010 WL 396181, at \*4-5 (Bankr. E.D. Va. Jan. 25, 2010)).
9. Barber, 577 F.2d at 226 n.28.
10. R&R at 18.
11. R&R at 24-28.
12. District Court Order at 3-4.
13. R&R at 29; see District Court Order at 3-4.

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