

## Publications

### **Client Alert: Sixth Circuit Holds in *Nicole Gas* that *Baker Botts* Does Not Apply to Contempt Sanctions**

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The Sixth Circuit recently held that *Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 135 S. Ct. 2158 (2015) does not apply to contempt sanctions. *Baker Botts* stands for the proposition that the general American Rule (i.e., each party is responsible for paying its own attorneys' fees) applies in the normal course of bankruptcy proceedings, preventing courts from awarding attorneys' fees incurred for defending fee applications filed pursuant to section 330 of the Bankruptcy Code.

In *Lowe v. Bowers (In re Nicole Gas Production, Ltd.)*, No. 18-3301, 2019 U.S. Dist. LEXIS 5182 (6th Cir. Feb. 22, 2019), one of the appellants owned (the "owner") a company, Nicole Gas, which entered bankruptcy proceedings. During the bankruptcy, the owner became dissatisfied with the trustee's handling of claims that Nicole Gas held against its competitors. The owner commenced an action in state court under the Ohio Corrupt Practices Act against the competitors that allegedly put his business into bankruptcy. Because the owner alleged damages incurred only by Nicole Gas, the trustee claimed that the owner and his counsel had appropriated claims that the trustee owned, and that the appellants violated the automatic stay. The Bankruptcy Court agreed and directed the trustee to file a fee statement, which the appellants objected to. The Bankruptcy Court, in holding the appellants in contempt, awarded the trustee roughly \$91,000 in attorneys' fees as sanctions for the appellant's contempt, including the attorneys' fees incurred while defending the appellants' objections to the fee statement. The Bankruptcy Appellate Panel affirmed the Bankruptcy Court's decision.

Before the Sixth Circuit, the appellants argued that *Baker Botts* precluded the trustee from recovering his attorneys' fees with respect to those incurred defending the fee statement. The appellants argued that the sole mechanism by which a bankruptcy court can award attorneys' fees is pursuant to section 330, which requires professionals to file fee applications. According to the appellants, because the sanction award was comprised of attorneys' fees, *Baker Botts* prevented the trustee from recovering the fees incurred from "defending his law firm's fee request." The trustee, on the other hand,

argued that *Baker Botts* was inapplicable. The Bankruptcy Court did not rely on section 330, but section 105(a) of the Bankruptcy Code, which allows a bankruptcy court to issue any order or judgment “necessary or appropriate to carry out the provisions of this title,” including the authority “to award attorney fees as a sanction for misconduct.” The trustee also noted that the appellants’ willful contempt shifted the case from the normal course of bankruptcy proceedings, and that the fee statement related solely to the contempt findings.

The Sixth Circuit agreed with the trustee, affirming the Bankruptcy Court’s contempt finding and accompanying sanctions. According to the Sixth Circuit, *Baker Botts* simply held that section 330 does not explicitly override the American Rule, and, therefore, does not permit bankruptcy courts to award compensation for fee-defense litigation. Because the Bankruptcy Court relied on section 105(a), and not section 330, *Baker Botts* was inapplicable. Without discussing any limits to a bankruptcy court’s contempt powers, the Sixth Circuit held that sanctions were appropriate because the appellant was aware of the automatic stay, and he had intentionally taken actions to violate it.

The Sixth Circuit’s opinion can be [found here](#).

**Disclosure:** Vorys attorneys [Brenda K. Bowers](#) and [Daniel E. Shuey](#) represented Chapter 7 Trustee of the Bankruptcy Estate of Nicole Gas Production, Ltd. in this case