

# Lawyer Insights

## How Ch. 11 Ruling Ends War Between National, Local Rates

By Tyler Brown, Jason Harbour and Justin Paget  
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On Oct. 18, the [U.S. Bankruptcy Court for the Eastern District of Virginia](#) approved the professional fee applications in the Nordic Aviation Capital bankruptcy cases, including the rates of each of the professionals as appropriate market rates.

This settles any remaining uncertainty in how professionals' hourly rates will be considered for approval in bankruptcy courts in the district. In particular, the bankruptcy court noted that

[m]uch ink has since been spilled differentiating so-called "local" rates from "national" rates. The distinction is much ado about nothing. The market for professional services cannot be predetermined by geography alone.<sup>1</sup>

Instead of relying on geography alone, the bankruptcy court stated that

the plain language of the Bankruptcy Code directs the Court to consider the "customary compensation charged by comparably skilled practitioners in cases other than cases under [Title 11]." The Court must, therefore, look at whether the rates charged are consistent with those set in the relevant market.<sup>2</sup>

To determine the relevant market, the court noted that the market rate will be set for the most part by the amount clients are willing to pay for professional services.

The factors clients may consider in the selection process might include the reputation of the professional, the specialization of the professional, the need for the professional's experience and expertise, the stakes of the transaction and the time pressures of the engagement.<sup>3</sup>

The court also stated that a good understanding of the relevant market in any given case could be gleaned from the rates of professionals other than those engaged by:

- The debtor;
- Debtor-in-possession financing budgets;
- Monthly operating reports of the debtor;

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- Information required by the U.S. trustee program guidelines; and
- The checks and balances built into the fabric of the reorganization process to police the market.<sup>4</sup>

The bankruptcy court also reiterated that the applicable factors for approving professional fee applications are those enumerated in Title 11 of the U.S. Code, Section 330(a)(3), and the Johnson factors.<sup>5</sup>

Additionally, the bankruptcy court noted that in applying the Johnson factors, "it must heed the Fourth Circuit's admonition against per se rules beyond those legislatively mandated," noting that the court cannot "abdicate the equitable discretion granted to it by establishing rules of broad application which fail to take into account the facts of a particular case and the overall objectives of the bankruptcy system."<sup>6</sup>

After identifying the applicable legal standard, the bankruptcy court addressed the evidence that was relevant to the approval of the professional fee applications, including the rates of the professionals.<sup>7</sup>

As the fee applications were uncontested, the court stated that it issued the memorandum opinion to provide guidance to practitioners on the facts they need to develop in support of fee applications filed in bankruptcy cases pending before that court.<sup>8</sup>

In taking the unusual step of issuing a lengthy memorandum opinion for uncontested fee applications, the bankruptcy court put to rest what one commentator recently suggested was a war between national and local rates in the Eastern District of Virginia in mega Chapter 11 cases.<sup>9</sup>

The issue arose in connection with the appeal of the plan confirmation order in the Mahwah Bergen Retail Group Inc. cases on unrelated grounds.

After vacating confirmation in that case, the U.S. District Court for the Eastern District of Virginia ordered that the bankruptcy court issue proposed findings of fact and conclusions of law on any further fee applications in the case and questioned whether attorney rates should exceed the prevailing market rates in the Richmond division of the Eastern District of Virginia.<sup>10</sup>

The district court's order created uncertainty as to how the bankruptcy court might subsequently analyze the rates of professionals from outside the Richmond division.

That uncertainty was short-lived.<sup>11</sup> Importantly, the memorandum opinion represented one of the bankruptcy court's first opportunities to address professional fee applications in a large Chapter 11 case since the entry of the district court order<sup>12</sup> adopting the bankruptcy court's report and recommendation<sup>13</sup> in the Mahwah Bergen bankruptcy cases.<sup>14</sup>

In the memorandum opinion and the bankruptcy court's report and recommendation, two bankruptcy judges from the Eastern District of Virginia have extensively detailed the legal precedent in the [U.S. Court of Appeals for the Fourth Circuit](#) and the appropriate factual predicates for approving market rates.

In sum, the memorandum opinion provides comfort to all practitioners, including those from outside the Eastern District of Virginia, that the appropriateness of attorney rates in cases filed in the district will continue to be assessed through application of the factors identified in Section 330(a)(3) and the Johnson factors on a case-by-case basis, without any additional requirements or per se rules.

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### Notes

1. Memorandum Opinion, [In re Nordic Aviation Capital Designated Activity Company, et al.](#), No. 21-33696 (Bankr. E.D. Va. Oct. 18, 2022) [ECF No. 1135] (the "Memorandum Opinion") at 37.
2. *Id.* at 36.
3. *Id.* at 36.
4. See *id.* at 37-38.
5. 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)).
6. Memorandum Opinion, at 36 (quoting *Harold & Williams Dev. Co. v. U.S. Trustee* ([In re Harold & Williams Dev. Co.](#)), 977 F.2d 906, 910 (4th Cir. 1992)).
7. Memorandum Opinion, at 41-149.
8. *Id.* at 1 n.1. The Court also noted that "[i]t is not the intention of the Court to issue a memorandum opinion on uncontested fee applications in the future provided the appropriate factual foundation has been laid."
9. See Bill Rochelle, *The War Between National and Local Rates Continues in Eastern Virginia*, ABI Rochelle's Daily Wire (Oct. 12, 2022).
10. [Patterson v. Mahwah Bergen Retail Group Inc.](#), 21-167 (E.D. Va. Jan. 13, 2022).
11. The Bankruptcy Court also approved market rates of attorneys from outside the Richmond division in May. See *In re Intelsat*, No. 20-32299-KLP (May 19, 2022).
12. 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].
13. Bankruptcy Judge's Report and Recommendation, *In re Retail Grp., Inc.*, No. 20-33113 (Bankr. E.D. Va. Aug. 30, 2022) [ECF No. 2798].
14. See Jason Harbour and Justin Paget, *Retail Ruling Clarifies Attorney Fees For Large Ch. 11 Cases*, Law360 (Sep. 27, 2022).

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