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NOTES

COURT SUPERVISION OF REORGANIZATION EXPENSES

Before the passage of section 77B of the Bankruptcy Act,¹ court control over fees and expenses incidental to corporate reorganizations was neither effective nor extensive.² The courts limited their jurisdiction over fees to the compensa-

¹ 48 Stat. 912 (1934), 11 U.S. C.A. Supp. § 207 (1935). Prior to the adoption of § 77B reorganizations were usually effected by means of equity receiverships. See Dodd and Baker, *Cases on Business Reorganization, Reorganization, Introductory note*, 1 (1935).

² Lowenthal, *Railroad Reorganization Act*, 47 Harv. L. Rev. 18, 52 (1933); Weiner, *Reorganization under Section 77*, 33 Col. L. Rev. 834, 841 (1933).

tion of officers of the court, the receivers and their attorneys.³ All other expenses, involving those most closely connected with the actual process of reorganization, were left entirely to private bargaining among reorganization managers, creditors and stockholders. One who was about to perform services incidental to the reorganization had to look for compensation, not to the debtor corporation—the assets of which constituted a fund within the control of the court—but to his client, with whom he had to make a separate contract for reimbursement.⁴ Provision for the payment of fees of counsel and compensation and expenses of committees was made in the deposit agreements, under which individual bondholders, stockholders and creditors deposited their securities or claims with protective committees.⁵ The deposit agreements usually invested the committees with comprehensive power to determine the amount of their own compensation and that of their attorneys.⁶ A liberal exercise of this power led to the conviction that expenses incurred in connection with reorganizations and receiverships were exorbitant and unfair to stockholders and creditors.⁷ In the face of the powerful and strategic position of the reorganization committees, the minorities usually gained little by objecting; they were compelled to accept the terms dictated by the majority committee or suffer even greater losses.⁸ Furthermore, unless the minorities were strong enough to force a com-

³ Weiner, *op. cit. supra* note 2.

⁴ The agreements might provide for the payment of expenses by the clients or by the corporation. If the latter arrangement was made, the ultimate burden of paying for the expenses would rest upon the security holders, whose interests in the reorganized corporation would be reduced in value.

⁵ Lowenthal, *The Stock Exchange and Protective Committee Securities*, 33 Col. L. Rev. 1293, 1316 (1933); Rodgers, *Rights and Duties of the Committee in Bondholders' Reorganizations*, 42 Harv. L. Rev. 899, 922 (1929). The courts have refused to consider the provisions of the deposit agreement. *Habirshaw Elec. Cable Co. v. Habirshaw Elec. Cable Co., Inc.*, 296 Fed. 875 (C.C.A. 2d 1924) in which the court held that deposit agreements are binding contracts with which it could not interfere; *United States v. Chicago, Milwaukee, St. Paul and Pac. Ry. Co.*, 282 U.S. 311 (1931) in which the separate agreement concerning reorganization expenses was held outside the jurisdiction of the Interstate Commerce Commission. See Weiner, *op. cit. supra* note 2, at 843.

⁶ Note 4 *supra*. See also Cravath, Stetson and Others, *Some Legal Phases of Corporate Financing, Reorganization and Regulation* 153, 167 (1917), in which it is indicated that the bondholders' committees and the reorganization managers determine among themselves the amount of their own compensation and that of their attorneys. Rosenberg, *A New Scheme of Reorganization*, 17 Col. L. Rev. 523, 528 (1917): "Committees have practically unlimited power to determine the plan, fix fees and commissions for themselves, their bankers, counsel, etc." See note, 40 Yale L. J. 974 (1931).

⁷ Lowenthal, *op. cit. supra* note 2; Weiner, *Reorganization under § 77*, 33 Col. L. Rev. 834, 841 (1933); *Bonds without Safety* 123-205 (Anon. 1932); Sabel, *Unauthorized Expenditures by Bondholders' Protective Committees*, 18 Minn. L. Rev. 784 (1934).

⁸ For a discussion of the precarious position of the individual security holders and creditors and methods of forcing them in, see Lowenthal, *The Investor Pays* 331 *et. seq.* (1933); Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 Va. L. Rev. 541, 698 (1933); Spring, *Upset Prices in Corporate Reorganization*, 32 Harv. L. Rev. 489 (1919);

promise, they were obliged to pay their own expenses. The inevitable result of these conditions was to reduce the opposition to reorganization managers and protective committees and to permit them to continue their activities unrestricted.⁹

In order to check these abuses, the courts might have recognized—as a few courts did—that in passing on the fairness of the plan and the validity of the sale, it was within their province to consider the propriety of the reorganization expenses.¹⁰ While this policy would probably have kept down expenses, it would not have settled the related problem of recognizing the rights of minority groups to reimbursement for expenses reasonably incurred. Last year, however, the Illinois appellate court acknowledged the rights of minority groups to reimbursement by allowing solicitor's fees to the attorney for a group of minority bondholders who had successfully urged modification of the plan.¹¹ In taking this step, the court did not base its decision upon the view that supervision of expenses was incidental to its supervision over the foreclosure receivership and reorganization. Instead, it reached its conclusion by a strained application of the rule that one who preserves, protects or increases a fund in court, so that the entire class of which he is a member benefits, is entitled to his attorney's fees from the fund.¹²

Rosenberg, *A New Scheme of Reorganization*, 17 *Col. L. Rev.* 523, 524 (1917); 46 *Harv. L. Rev.* 713 (1933) (note discussing the advantage which the majority bondholders' committee has because the list of security holders is at its disposal); 1 *Univ. Chi. L. Rev.* 805 (1934) (note discussing upset price as a power in the hands of majority committee); *Bonds without Safety* 123-205 (Anon. 1932).

⁹ See Dodd, *Reorganization through Bankruptcy*, 48 *Harv. L. Rev.* 1100, 1104-1105 (1935); Lowenthal, *The Investor Pays*, part III (1933).

¹⁰ *Bethlehem Steel Co. v. International C. E. Corp.*, 66 F. (2d) 409 (C.C.A. 2d 1933) (the court refused to confirm the plan or sale and remanded for a determination of the reasonableness of an allowance made to bank underwriters in the plan of reorganization); *Chase Nat'l Bank v. Clark Henry Corp.*, 283 N.Y.S. 20, 156 Misc. 767 (1935), in which the New York Supreme Court tacitly assumed that it could pass on the reasonableness of fees as an incident of its jurisdiction over equity receivership proceedings.

¹¹ *First Nat'l Bank of Chicago v. La Salle-Wacker Bldg. Corp.*, 280 Ill. App. 188 (1935).

¹² This rule represents the common law doctrine of reimbursement. Its application has generally been limited to trusts and wills cases. See 35 *Col. L. Rev.* 740 (1935) (note discussing difficulties of application to trust cases); 30 *Ill. L. Rev.* 81 (1935) (note dealing with problem in probate administration). While the Illinois court reached a desirable result in granting fee allowances to the minority its reason for so doing hardly seems sound, for generally the reimbursement doctrine is so limited that it is inapplicable to the rights of intervenors in cases of reorganization. The doctrine usually requires that the claimant shall have created a fund. *Medill, Fees and Expenses in a Corporate Reorganization under Section 77B*, 34 *Mich. L. Rev.* 331, 361 (1936). Furthermore, adversity of interests militates against the recognition of the right to reimbursement. *Hobbs v. McLean*, 117 U.S. 567 (1886); 35 *Col. L. Rev.* 740, 743 (1935). Since clashes of conflicting interest are frequent in reorganization proceedings and since the claimants are chiefly concerned, not with creating or increasing a fund, but in allocating the funds already in court, it would seem that a strict application of the doctrine would

Whatever hesitancy courts may have felt about supervising reorganization expenses in equity receiverships, should not be apparent in reorganizations under § 77B of the Bankruptcy Act,¹³ which expressly provides that all expenses and fees of those engaged in reorganizing corporations are to be brought within the control of the court. In subsection (c) of § 77B it is provided that "the judge . . . (g) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders. . . ."¹⁴ And under the provisions of subsection (f) (5) judicial confirmation of a reorganization plan is to be withheld unless all expenses "incident to reorganization have been fully disclosed and are reasonable, or are to be subject to the approval of the judge. . . ."¹⁵ Unfortunately, these provisions, designed to minimize expenses,¹⁶ to prevent unsupervised payments from sources other than the estate¹⁷ and to avoid the obtaining of excessive fees by those in control of the reorganization machinery,¹⁸ have already been the subject of judicial interpretations which have limited their effectiveness. In their earnestness to lower expenses some of the courts, paradoxical as it may seem, have reduced the extent of their control over fees.

In the case of *In re Memphis Street Ry. Co.*,¹⁹ the district court of Tennessee held that it was required to grant the fees of only the trustee, his attorney and the attorney for the debtor. It also declared that it would allow no other fees out of the debtor corporation's fund unless the services for which the fees were

result in denying reimbursement to any organized interests. See *In re Milwaukee Lodge*, 12 F. Supp. 854, 859 (D.C. Wis. 1935). See note 21 *infra*.

¹³ Note 1 *supra*. For general discussion see Friendly, Some Comments on the Corporate Reorganization Act, 48 Harv. L. Rev. 39 (1934); Spaeth and Friedberg, Early Developments under § 77B, 30 Ill. L. Rev. 137 (1935); Weiner, Corporate Reorganization: § 77B of the Bankruptcy Act, 34 Col. L. Rev. 1173 (1934).

¹⁴ 48 Stat. 917 (1934), 11 U.S. C.A. Supp. § 207 (c) (9) (1935).

¹⁵ 48 Stat. 919 (1934), 11 U.S. C.A. Supp. § 207 (f) (5) (1935). See also 48 Stat. 913 (1934), 11 U.S. C.A. Supp. § 207 (b) (3) (1935).

¹⁶ *In re Rochelle Coal and Lumber Co.*, 11 F. Supp. 830 (D.C. N.Y. 1935); *In re Paramount-Public Corp.*, 12 F. Supp. 823 (D.C. N.Y. 1935); *In re Liberty Baking Corp.*, C.C.H. Bankr. Service, par. 3655 (D.C. N.Y. Oct. 26, 1935): "The evident purpose of Congress in enacting § 77B was to minimize expenses attached to the former practice under equity receiverships."

¹⁷ This conclusion seems to follow from the language of § 77B(f) (5). Cf. Weiner, *op. cit. supra* note 13, at 1188; see *In re Paramount-Public Corp.*, 12 F. Supp. 823, 827 (D.C. N.Y. 1935); see also subsection (b) (10), 48 Stat. 914 (1934), 11 U.S.C.A. Supp. § 207 (b) (10) (1935), which empowers the court to scrutinize and disregard all private agreements; *In re Republic Gas Corp.*, C.C.H. Bankr. Service, par. 3721 (D.C. N.Y. Nov. 21, 1935).

¹⁸ See *In re De Witt Clinton Co., Inc.*, 11 F. Supp. 829 (D.C. N.Y. 1934); *In re Republic Gas Corp.*, C.C.H. Bankr. Service, par. 3721 (D.C. N.Y. Nov. 21, 1935).

¹⁹ *In re Memphis Street Ry. Co.*, 11 F. Supp. 682 (D.C. Tenn. 1935).

asked were rendered "by the claimant, acting in an entirely disinterested manner for the benefit of the estate as an entirety."²⁰ In the light of this principle, the court denied compensation to attorneys who had rendered admittedly useful services for the reorganization committee, refused to pass on the reasonableness of their claims and indicated that they must look to the bondholders for their remuneration. The attitude of the court is tantamount to declaring that the act merely re-enacts the common law doctrine of reimbursement, a doctrine whose application to equity receiverships is of questionable propriety and a doctrine which would once again permit private bargaining for services rendered during the reorganization.²¹ Furthermore, it seems doubtful whether the court was correct in holding that it need not pass on the reasonableness of all expenses incurred in the reorganization. The language of subsection (f) (5), requiring that all amounts paid as fees and expenses be fully disclosed and reasonable²² appears mandatory rather than permissive.²³ To hold that the court has a duty, and not a mere election, to pass on the application for fees seems more consistent not only with the language of the act but with its purpose, which seems to be that the courts shall have complete supervision of all expenses. Moreover, the test adopted by the Tennessee court for determining what fees should be allowed is ambiguous in a very important respect. What services are rendered in an "entirely disinterested manner"? Will intervening bondholders, who in good faith make reasonable objections to the plan of the majority, be denied reimbursement for their expenses because they are not entirely disinterested?²⁴ Is anyone "entirely disinterested" in the reorganization proceeding?

²⁰ 11 F. Supp. 682, 685.

²¹ Cf. Medill, *op. cit. supra* note 12. The thesis of this article is that § 77B merely authorizes proceedings under the Bankruptcy Act in accordance with the principles and practices followed by equity courts in administration suits. The unfortunate effects of this position are evidenced in both the Memphis Street Ry. case (*supra* note 19) and the Milwaukee Lodge case (*supra* note 12). In the former case the court conceded that the work done by counsel and committee was undeniably helpful. Its refusal to allow compensation for their services indicates that a strict adherence to the common law doctrine, will lead to unjustifiable refusals of compensation because it would involve acceptance of the view that "allowances will not be made for services rendered or expenses incurred in furthering the personal interest of the party even though beneficial to the other parties in interest" (Medill, *op. cit. supra* note 12, at 340). In the Milwaukee Lodge case, the court refused to allow fees to bondholders' committees and their attorneys because they acted for the purpose of gaining as much as possible for the bondholders and such action was against the interest of the "adversary" whose trust was in court.

²² 48 Stat. 919 (1934), 11 U.S.C.A. Supp. § 207 (f) (5) (1935).

²³ *In re Sig. Schlesinger & Co., Inc.*, C.C.H. Bankr. Service, par. 3682 (D.C. N.Y. Nov. 6, 1935). A dictum in the Schlesinger case indicates that it would be the duty of the court to pass on the reasonableness of the fees even though there were no objections to the petitions. *In re Kentucky Elec. Power Corp.*, 11 F. Supp. 528, 530 (D.C. Ky. 1935).

²⁴ That minorities can be, and have frequently been, helpful in the reorganization has been recognized under § 77B. *In re 2747 Milwaukee Ave. Bldg. Corp.*, 12 F. Supp. 557 (D.C. Ill. 1935); *In re Paramount-Publix Corp.*, 12 F. Supp. 823 (D.C. N.Y. 1935); *In re Island Park Associates, Inc.*, C.C.H. Bankr. Service, par. 3771 (D.C. N.Y. Dec. 18, 1935); *In re Diversey*

Some courts²⁵ have imposed another limitation on their supervision of fees by a strict construction of the words "in connection with the proceeding and the plan."²⁶ These courts have decided that only services rendered at the time of, or subsequent to, the filing of the petition are compensable within the meaning of subdivision (c) (9). They have therefore refused to allow fees for services rendered before the filing of the petition under § 77B and have left the amount of such compensation to be determined in private agreements. This interpretation might be supported had the words "in connection with the proceeding" alone been used, for then it could have been argued that "proceeding" referred exclusively to developments under § 77B. But the words "and the plan" are also used, and some significance must be attached to them.²⁷ Since subsection (c) (1)²⁸ expressly authorizes the use of acceptances obtained before the filing of the petition, it would seem to follow that the work involved in securing those acceptances was work in connection with the plan.²⁹ Consequently, had § 77B simply provided for paying for services rendered in "connection with the plan" all expenses connected with the negotiation, drafting, acceptance and confirmation of the plan would have been allowed, regardless of when the services were rendered. Then why is the word "proceeding" used at all? There are three plausible reasons for its inclusion: First, to leave no doubt that courts are to allow fees for services rendered in the formation of committees, filing of petitions and in other work preliminary to the actual plan; second, to clarify the position of objecting stockholders and bondholders, who might otherwise be denied the

Bldg. Corp., C.C.H. Bankr. Service, par. 3470 (D.C. Ill. May 17, 1935); *In re Sefton National Fibre Corp.*, C.C.H. Bankr. Service, par. 3770 (D.C. Mo. Dec. 30, 1935). Notwithstanding this recognition of the minority's usefulness, only the Milwaukee and Paramount cases allowed fees to the representatives of minority interests.

²⁵ *In re Memphis Street Ry. Co.*, 11 F. Supp. 682 (D.C. Tenn. 1935); *In re 2747 Milwaukee Ave. Bldg. Corp.*, 12 F. Supp. 557 (D.C. Ill. 1935); *In re Associated Garages Inc.*, C.C.H. Bankr. Service, par. 3609 (D.C. Mo. Sept. 21, 1935); *In re Island Park Associates Inc.*, C.C.H. Bankr. Service, par. 3771 (D.C. N.Y. Dec. 18, 1935): "There can be no allowance for services rendered prior to the commencement of this proceeding."

²⁶ Note 14 *supra*.

²⁷ "The words 'proceeding' and 'plan', as used in the subsection ((c) (9)) are not co-terminous, and services and expenses in connection with the plan may well extend over a considerable period prior to the institution of the proceedings," *In re Paramount-Publix Corp.*, 12 F. Supp. 823, 828 (D.C. N.Y. 1935). *Accord*, in holding that expenses incurred before the petition has been filed under § 77B are compensable: *In re National Dept. Stores Inc.*, 11 F. Supp. 633 (D.C. Del. 1935); *In re Mortgage Sec. Corp.*, C.C.H. Bankr. Service, par. 3400 (D.C. N.Y. Apr. 11, 1935); *In re Bowman-Biltmore Hotels Corp.*, C.C.H. Bankr. Service, par. 3724 (D.C. N.Y. Nov. 26, 1935); *In re Kelly-Springfield Tire Co.*, C.C.H. Bankr. Service, par. 3720 (D.C. Md. Nov. 1935).

²⁸ 48 Stat. 918 (1934), 11 U.S.C.A. Supp. § 207 (e) (1) (1935).

²⁹ *In re Bowman-Biltmore Hotels Corp.*, C.C.H. Bankr. Service, par. 3724 (D.C. N.Y. Nov. 26, 1935); *In re Paramount-Publix Corp.*, 12 F. Supp. 823 (D.C. N.Y. 1935). This position is further strengthened by § 77B (f) (5) which speaks of compensating services "incident to the reorganization."

right to compensation;³⁰ and third, to extend the supervision of courts over fees to cases in which liquidation is ultimately ordered.³¹

Most vexing to the courts has been the problem of determining amounts to be allowed as attorneys' fees. Indeed, the cases seem to have found the problem of devising a yardstick for this purpose insoluble. The courts have purported to fix the amount of the fees after acquainting themselves with the nature of the services,³² the time spent,³³ the ability and standing of counsel,³⁴ the results ac-

³⁰ In subsection (c) (11), 48 Stat. 917 (1934), 11 U.S.C.A. Supp. § 207 (c) (11) (1935), minority groups are given the right to be heard in the proceedings, no doubt because their views may lead to the adoption of a sounder and fairer reorganization plan and also to give them an opportunity to protect their interest. The failure to recognize the right of dissenters, however helpful they are, to reimbursement would be to silence them. If subsection (c) (11) is to be satisfied in the spirit as well as the letter, minorities should be permitted compensation for bona fide and reasonable service rendered in connection with the reorganization. See *First Nat'l Bank of Chicago v. La Salle-Wacker Bldg. Corp.*, 280 Ill. App. 188 (1935), for defense of payments to minorities in equity receiverships. See also notes 9 and 24 *supra*. Notwithstanding the unfortunate effects of discouraging minorities, the cases under § 77B have not been at all generous to them. See *In re Island Park Associates Inc. C.C.H. Bankr. Service*, par. 3771 (D.C. N.Y. Dec. 18, 1935); *In re Diversey Bldg. Corp., C.C.H. Bankr. Service*, par. 3470 (D.C. Ill. May 17, 1935); and *In re Sefton National Fibre Corp., C.C.H. Bankr. Service*, par. 3770 (D.C. Mo. Dec. 30, 1935).

³¹ *Cf. Weiner, op. cit. supra* note 13, at 1189, who contends that subsection (f) (5) is not broad enough to include court supervision in cases where liquidation is ordered. In subsection (c) (8), however, if a plan is not accepted within a reasonable period, the court may dismiss the proceeding under this section or, except in the case of public utilities or solvent debtors, direct the estate to be liquidated. See also subsection (k), 48 Stat. 921 (1934), 11 U.S.C.A. Supp. § 207 (k) (1935). Therefore, the word "proceeding" can include even the eventuality of liquidation. This interpretation would bring within the control of the courts the entire question of expenses and fees, whether connected with the reorganization proper or with steps preliminary to the filing of the plan or with a final liquidation if that is ordered.

³² *In re Nat'l Dept. Stores*, 11 F. Supp. 633 (D.C. Del. 1935); *In re New Rochelle Coal & Lumber Co.*, 11 F. Supp. 830 (D.C. N.Y. 1935); *In re Wayne Pump Co.*, 9 F. Supp. 940 (D.C. Ind. 1935); *In re Allied Owners Corp.*, 79 F. (2d) 187, 192 (C.C.A. 2d 1935); *In re Liberty Baking Corp., C.C.H. Bankr. Service*, par. 3655 (D.C. N.Y. Oct. 26, 1935); *In re Kelly-Springfield Tire Co., C.C.H. Bankr. Service*, par. 3720 (D.C. Md. Nov. 1935).

³³ *In re Allied Owners Corp.*, 79 F. (2d) 187, 191 (C.C.A. 2d 1935); *In re Republic Gas Corp., C.C.H. Bankr. Service*, par. 3721 (D.C. N.Y. Nov. 21, 1935); *In re Mortgage Security Corp., C.C.H. Bankr. Service*, par. 3400 (D.C. N.Y. Apr. 11, 1935); *In re Kentucky Elec. Power Corp.*, 11 F. Supp. 528 (D.C. Ky. 1935); *In re Diversey Bldg. Corp., C.C.H. Bankr. Service*, par. 3470 (D.C. Ill. May 17, 1935); *In re 211 E. Delaware Pl. Bldg. Corp., C.C.H. Bankr. Service*, par. 3828 (D.C. Ill. Feb. 4, 1936); *cf. statement of James H. Wilkerson, J.*, that in the reorganization of the Middle West Utilities Company the petitioners could not expect to be fully compensated for the time expended. *Chicago Daily News*, Feb. 10, 1936, p. 20. See also opinion of Evans, C. J., *In re 211 Delaware Pl. Bldg. Corp., C.C.H. Bankr. Service*, par. 3828 (D.C. Ill. Feb. 4, 1936).

³⁴ *In re Allied Owners Corp.*, 79 F. (2d) 187, 191 (C.C.A. 2d 1935); *In re Kelly-Springfield Tire Co., C.C.H. Bankr. Service*, par. 3720 (D.C. Ind. Nov. 1935).

completed,³⁵ the ability of the debtor to pay,³⁶ the amount involved³⁷ and the prevailing rates in private practice.³⁸ In fact, however, the consistency with which they have reduced the amounts petitioned for appears inconsistent with a serious consideration of those factors.³⁹ The courts have followed the practice under § 77B of reducing the fees so uniformly that the practice has taken on the appearance of the old see-saw horse sale: the petitioners, aware of the proclivity of the judges, increase their demands to absorb the anticipated reduction; the judges, conscious that the petitions express inflated estimates of the services rendered, reduce the allowances. The results have been unfortunate not only because they have led to a public impression that attorneys in reorganization pro-

³⁵ *In re National Dept. Stores*, 11 F. Supp. 633, 640 (D.C. Del. 1935); *In re Wayne Pump Co.*, 9 F. Supp. 940, 942 (D.C. Ind. 1935); *In re Allied Owners Corp.*, 79 F. (2d) 187, 191 (C.C.A. 2d 1935); *In re Garment Center Capitol, Inc.*, C.C.H. Bankr. Service, par. 3685 (D.C. N.Y. Oct. 22, 1935); *In re 211 East Delaware Pl. Bldg. Corp.*, C.C.H. Bankr. Service, par. 3828 (D.C. Ill. Feb. 4, 1936) in which the court contends that the success of the efforts of the attorneys is the best test.

³⁶ *In re Wayne Pump Co.*, 9 F. Supp. 940, 942 (D.C. Ind. 1935); *In re Sig. Schlesinger & Co., Inc.*, C.C.H. Bankr. Service, par. 3682 (D.C. N.Y. Nov. 6, 1935); *In re Consolidation Coal Co.*, C.C.H. Bankr. Service, par. 3538 (D.C. Md. July 10, 1935); *In re Flanagan-Nay Brewing Co.*, C.C.H. Bankr. Service, par. 3610 (D.C. N.Y. Aug. 21, 1935); *In re 211 East Delaware Pl. Bldg. Corp.*, C.C.H. Bankr. Service, par. 3828 (D.C. Ill. Feb. 4, 1936).

³⁷ *In re Sig. Schlesinger & Co., Inc.*, C.C.H. Bankr. Service, par. 3682 (D.C. N.Y. Nov. 6, 1935); *In re 211 East Delaware Pl. Bldg. Corp.*, C.C.H. Bankr. Service, par. 3828 (D.C. Ill. Feb. 4, 1936).

³⁸ *In re Wayne Pump Co.*, 9 F. Supp. 940, 942 (D.C. Ind. 1935); *cf. In re Nat'l Dept. Stores*, 11 F. Supp. 633, 638 (D.C. Del. 1935); *In re Garment Center Capitol, Inc.*, C.C.H. Bankr. Service, par. 3685 (D.C. N.Y. Oct. 22, 1935) (holding that allowances should be less than prevailing private rates).

³⁹ The following cases, not at all atypical, illustrate strikingly the extent to which reductions are made: *In re Nat'l Dept. Stores*, 11 F. Supp. 633 (D.C. Del. 1935), asked \$1,086,750, allowed \$141,700; *In re De Witt Clinton Co., Inc.*, 11 F. Supp. 829 (D.C. N.Y. 1934), reduced fees petitioned for \$19,641.97; *In re Wayne Pump Co.*, 9 F. Supp. 940 (D.C. Ind. 1935), asked \$91,250, allowed \$44,432; *In re Allied Owners Corp.*, 79 F. (2d) 187 (C.C.A. 2d 1935), in which the circuit court reduced allowances made by the district court from \$203,722.15 to \$69,643.50, aff'd March 2, 1936, 56 Sup. Ct. 519, 80 L. Ed. 546; *In re Mortgage Security Corp.*, C.C.H. Bankr. Service, par. 3400 (D.C. N.Y. Apr. 11, 1935), asked \$99,379.21, allowed \$43,362.46; *In re Bowman-Biltmore Hotels Corp.*, C.C.H. Bankr. Service, par. 3724 (D.C. N.Y. Nov. 26, 1935), asked \$117,757.00, allowed \$49,529.80; *In re Garment Center Capitol Inc.*, C.C.H. Bankr. Service, par. 3685 (D.C. N.Y. Oct. 22, 1935), asked \$60,000.00, allowed \$38,000.00; *In re Sig. Schlesinger*, C.C.H. Bankr. Service, par. 3682 (D.C. N.Y. Nov. 6, 1935), asked \$4,250, allowed \$3,200; *In re Kentucky Electric Power Corp.*, 11 F. Supp. 528 (D.C. Ky. 1935), asked \$41,918.00, allowed \$14,018.00; *In re Liberty Baking Corp.*, C.C.H. Bankr. Service, par. 3655 (D.C. N.Y. Oct. 26, 1935), asked \$19,408.16, allowed \$8,908.00; *In re Diversey Bldg. Corp.*, C.C.H. Bankr. Service, par. 3470 (D.C. Ill. May 17, 1935), asked \$54,992.64, allowed \$19,811.08; *In re Flanagan-Nay Brewing Co.*, C.C.H. Bankr. Service, par. 3610 (D.C. N.Y. Aug. 21, 1935), asked \$27,157.48, allowed \$12,502.88; *In re 211 E. Delaware Pl. Bldg. Corp.*, C.C.H. Bankr. Service, par. 3828 (D.C. Ill. Feb. 4, 1936),

ceedings invariably demand exorbitant fees,⁴⁰ but also because they have put a penalty on bona fide demands: the petitioner who demands only what his services are worth will generally find his fees reduced to the same extent as are those of less conscientious petitioners. The factors which the courts now purport to consider in allowing fees are satisfactory; it is their application which is doubtful. If the administrative task is too onerous for the judges themselves, it should be given to some other officer of the court, whose intimacy with the reorganization proceedings will make it possible for him, with some accuracy, to determine the sums to be allowed.⁴¹

RIGHT OF THE RECEIVER OF AN INSOLVENT CORPORATION TO RECOVER PROMOTERS' PROFITS

Corporate promoters have often been able to minimize the risk of liability for secret profits by carefully arranging the promotion transactions in the light of distinctions drawn by the courts.¹ If shares are first issued to outsiders and thereafter the directors transfer property to the corporation at a profit, the corporation can recover the profit in the absence of assent by an independent board of directors after full disclosure or by all shareholders.² And even if at the time of the transfer the promoters own all of the shares then issued, when the corporation later issues further shares to outsiders, these later purchasers are, by the majority view, treated as existing shareholders whose consent is necessary to bar the corporation.³ The United States Supreme Court, however, took the op-

asked \$54,000.00, allowed \$20,000.00; *In re Paramount-Publix Corp.*, 12 F. Supp. 823 (D.C. N.Y. 1935), asked \$3,239,828.15, allowed \$1,045,211.48; *In re Stevens Bros. Corp.* (D.C. Ill.) *Chicago Daily News*, Feb. 11, 1936, \$273,890.00 asked, \$141,159.00 granted; *In re Celotex Company of Chicago* (D.C. Del.), \$721,000.00 asked, less than \$221,000.00 granted, *Chicago Daily News*, Feb. 20, 1936, p. 27.

⁴⁰ See for example the charges of Senator Ashurst, 80 Cong. Rec. Feb. 24, 1936 at 2698; also, the proposal of Senator William G. McAdoo to try federal judges accused of wrongdoing in granting excessive fees. *Chicago Daily Tribune*, Feb. 25, 1936, p. 25. In the course of hearings on requests for fees aggregating \$1,600,000 in connection with the reorganization of the Middle West Utilities, Judge Wilkerson is reported to have said, "Legal fees have grown to be 'grossly exorbitant' as a result of business conditions over the last 25 to 50 years." *Chicago Daily Tribune*, March 14, 1936, p. 35.

⁴¹ Undoubtedly, the present practice of determining fees does involve reliance on the work of officers of the court, such as Masters in Chancery. Their work, however, has not promoted a satisfactory system of determining fees because they, following the example set by the judges, have not given serious consideration to the aforementioned criteria.

¹ See 47 *Harv. L. Rev.* 1031 (1934).

² *Erlanger v. New Sombrero Phosphate Co.*, L. R. 5 Ch. D. 73 (1877), *aff'd* in L. R. 3 App. Cas. 1218 (1878); *Arnold v. Searing*, 73 N.J. Eq. 262, 67 Atl. 831 (1907); *Hughes v. Cadena de Cobre Mining Co.*, 13 Ariz. 52, 108 Pac. 231 (1910); *Davis v. Las Ovas Co.*, 227 U.S. 80 (1913).

³ *Bailey v. Pittsburgh, etc., Gas, Coal & Coke Co.*, 69 Pa. St. 334 (1871); *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 188 Mass. 315, 74 N.E. 653 (1905); *California-Calaveras Mining Co. v. Walls*, 170 Cal. 285, 149 Pac. 595 (1915).