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## Practice & Procedure

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### Beware of Fed. R. Bankr. P. 7008

#### Seeking Attorneys' Fees in Adversary Proceedings

Practitioners should be aware of an important provision of the Federal Rules of Bankruptcy Procedure (FRBP) relating to the recoupment of attorneys' fees in adversary proceedings. Fed. R. Bankr. P. 7008(b) unequivocally requires that before a party is entitled to an award of attorneys' fees, that party must properly and adequately plead the request: "A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." This rule may be fairly innocuous at first glance. However, failure to comply with the strict language of the rule could result in potential embarrassment (if not something worse) for counsel who represented to their client that the recoupment of fees would be a component of any adversary proceeding victory.

#### Case Law Relating to Rule 7008(b)

The case law relating to Fed. R. Bankr. P. 7008 appears to be somewhat split, with some courts taking a strict interpretation of the rule and others placing a more equitable spin on the letter of the law.

#### Strict Interpretation

Various courts in the Ninth Circuit and elsewhere have adopted a strict interpretation of Fed. R. Bankr. P. 7008, holding that substantial compliance is insufficient to satisfy this prerequisite to entitlement for attorneys' fees.<sup>1</sup> Similarly, the Northern

District of California reversed the bankruptcy court's award of fees to a party that had failed to comply with the requirements of Fed. R. Bankr. P. 7008(b), reasoning that:

Federal Rule of Bankruptcy Procedure 7008(b) requires that a request for an award of attorney's fees be pleaded as a claim in "a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate."

There is no question that Appellee was entitled to attorney's fees under the California Corporations Code—the Court found that Fotouhi had not acted in good faith by refusing to produce or delaying production of certain documents. However, Appellee did not claim an entitlement to attorneys' fees until it submitted Proposed Findings of Fact and Conclusions of Law.

Therefore, because attorneys' fees were not properly requested under Fed. R. Bankr. P. 7008(b), they are barred because Appellant did not have adequate notice that attorneys' fees would be sought at trial. That award is therefore *reversed*.<sup>2</sup>

Courts in other circuits have also adopted a strict interpretation of Fed. R. Bankr. P. 7008(b). In the case of *In re DeMaio*,<sup>3</sup> a party failed to plead a request for attorneys' fees as required by Rule 7008. After trial, the party sought "an award of attorneys' fees contending that the contractual terms of the mortgage note contained an attorney's fee provision" despite the fact that the party "did not raise the claim of attorney's fees in its pre-trial memorandum, during trial, or in

1 See *In re Odom*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990) ("Although plead with specificity, Plaintiffs' request for fees is in the form of a prayer only. Such a request is deemed insufficient under Rule 7008(b)."). See also *In re Frazer*, 466 B.R. 107, 118 (Bankr. S.D. Tex. 2012) (rejecting a party's claim for attorneys' fees, reasoning that "[i]t is insufficient for a party to solely demand attorney's fees in the prayer for relief" and because "the Plaintiffs failed to assert a claim for attorney's fees in their complaint...the Plaintiffs are not entitled to recover the attorney's fees that they have incurred for the prosecution of this adversary proceeding"); *In re Wentland*, 410 B.R. 585, 602 (Bankr. N.D. Ohio 2009) ("Plaintiff's amended complaint does not set forth a separate claim for attorney's fees; rather, his request is included only in the prayer for relief. Plaintiff is therefore not entitled to an award of the attorney fees incurred by him in bringing this adversary proceeding.").

2 *Fotouhi v. Mansdorf*, 427 B.R. at 798, 805 (N.D. Cal. 2010) (emphasis supplied).

3 158 B.R. 890 (Bankr. D. Conn. 1993); see also *In re S.S.*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002) ("The plaintiff failed to ask for counsel fees in the adversary complaint as required by Fed. R. Bankr. P. 7008(b). The plaintiff requested counsel fees for the first time in his Proposed Findings of Fact and Conclusions of Law, which he filed three days prior to trial. As the plaintiff has failed to plead his request for attorney's fees as a claim in his adversary complaint as required by Fed. R. Bankr. P. 7008(b), his application for attorney's fees is denied.").



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its post-trial memorandum.”<sup>4</sup> In rejecting the claim for fees based on the party’s failure to comply with Fed. R. Bankr. P. 7008, the court concluded that, based on the party’s failure to plead as a claim its request for attorneys’ fees, as well as the fact that the party failed to refer to any such claim in its trial memoranda, the request for attorneys’ fees must be denied.<sup>5</sup>

### Relaxed Interpretation

An argument can be made that a contractual-based right to recover attorneys’ fees may result in a different pleading requirement, and therefore a different finding. For example, both the Eighth and Ninth Circuit Bankruptcy Appellate Panels (BAPs) have ruled that despite the plain language of Fed. R. Bankr. P. 7008(b), the court can deem the pleadings amended to conform to the evidence pursuant to Rule 15 of the Federal Rules of Civil Procedure and Fed. R. Bankr. P. 7015.<sup>6</sup> In the case of *In re DiSalvo*, the Ninth Circuit BAP concluded that the bankruptcy court had “treated the pleadings as amended to properly plead the attorney fees” because the bankruptcy court had considered a Fed. R. Bankr. P. 7008(b) objection and subsequently awarded attorneys’ fees despite the objection.<sup>7</sup> Similarly, the Eighth Circuit BAP in *In re Richele* also allowed an award of attorneys’ fees despite a party’s failure to comply with the requirements of Fed. R. Bankr. P. 7008(b), reasoning that “[a]lthough not specifically addressed in either the bankruptcy court’s April 14 order or its July 15 order, the awarding of attorney fees constituted a grant of leave to amend to conform to the evidence.”<sup>8</sup> These decisions reflect a more relaxed approach to the requirements of Fed. R. Bankr. P. 7008(b).

### Lesson from Rule 7008(b)

The plain language of the rule itself and the majority of case law surrounding when and how to plead attorneys’ fees under Fed. R. Bankr. P. 7008 support a strict interpretation of the rule. As a practice pointer, even stating a request for attorneys’ fees as a prayer for relief may be deemed insufficient. Consequently, it is best to make sure that any complaint states an actual claim (cause of action) for attorneys’ fees, and any responsive pleading sets forth a claim for attorneys’ fees. It may also be useful to cite back to these pleadings when filing applications or requests for fees as the prevailing party in an adversary proceeding. With these steps, you can avoid any argument that Fed. R. Bankr. P. 7008(b) was not complied with, along with a very uncomfortable conversation with your client about why you did not conform your pleadings to the strict letter of the law. **abi**

<sup>4</sup> 158 B.R. at 891.

<sup>5</sup> *Id.* at 893; see also *In re Tricord Sys. Inc.*, 2005 WL 910531, \*5-6 (D. Minn. April 15, 2005) (denying party’s request for attorneys’ fees, based on Rule 7008, where the party “failed to plead a claim for an award of attorney’s fees...produced no evidence of attorneys’ fees at trial” and failed to “indicate its intention to seek attorneys’ fees”).

<sup>6</sup> See *In re DiSalvo*, 221 B.R. 769, 775, n.11 (B.A.P. 9th Cir. 1998), vacated on other grounds by 219 F.3d 1035, 1040 (9th Cir. 2000); *In re Richele*, 302 B.R. 113, at \*2-3 (B.A.P. 8th Cir. 2003).

<sup>7</sup> 221 B.R. at 775, n.11 (“The bankruptcy court considered plaintiff’s objection that the fees were not properly pled, and nonetheless awarded fees. Because there was no prejudice to plaintiff from any pleading defect, the bankruptcy court did not err in considering the fees issue on the merits.”).

<sup>8</sup> 302 B.R. 113, at \*3 (concluding that “the bankruptcy court, after full and fair consideration of the merits, did not abuse its discretion in considering the issue of attorney fees as part of the Bank’s complaint and in awarding the Bank its fees”). But see *In re Ramsey*, 424 B.R. 217, 226 (Bankr. N.D. Miss. 2009) (rejecting the argument that attorney’s fees should be allowed as an amendment to the pleadings under Rule 7015, and denying fees based on the failure to comply with Rule 7008(b)).

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