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A Claims Agent Can Only Profit from the Fees the Clerk of Court Can Charge

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Introduction

In the Southern District of New York, the retention of claims agents is governed by the judicial procedure set forth in section 156(c) of title 28 of the United States Code, for cases under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) that involve 250 or more creditors and equity holders.¹ When a claims agent is retained under section 156(c), the claims agent is acting in the same capacity as the clerk and the services are “limited in scope to those duties that would be performed by a Clerk of Court with respect to providing notice and processing claims (such as maintaining a claims register).”² In a chapter 11 case, a clerk may only charge fees pursuant 28 U.S.C. § 1930 or obtain fees from the debtor’s estate.³

In *In re Madison Square Boys and Girls Club, Inc.*, the Southern District of New York held that a claims agent retained under section 156(c) cannot have for-profit agreements, with third parties, for fees that a clerk of the court could not charge.⁴ The court determined that when a claims agent is retained under section 156(c), the agent is subject to the same constraints as the

¹ Bankr. S.D.N.Y. R. 5075-1(b)(1).

² Vito Genna, *Protocol for the Employment of Claims and Notice Agents Under 28 U.S.C. § 156(c)*, <https://www.nysb.uscourts.gov/sites/default/files/pdf/newClaimsAgentsProtocol.pdf> (explaining the protocol for the employment of claims and noticing agents under 28 U.S.C. §156(c)).

³ See generally 28 U.S.C. § 1930; 28 U.S.C. § 156(c).

⁴ See *In re Madison Square Boys & Girls Club, Inc.*, 642 B.R. 487, 493–94 (Bankr. S.D.N.Y., 2022).

clerk.⁵ Ultimately, a claims agent cannot charge fees that a clerk cannot charge and perform activities the clerk cannot perform.⁶

This article examines the constraints on claims agents that are retained under section 156(c) and the fees a claims agent can charge. Part I focuses on the differentiation between claims agents that are retained under section 156(c) and those retained pursuant to 327(a) of the Bankruptcy Code. Part II examines the fees that a claims agent retained under section 156(c) is allowed charge.

Discussion

I. Claims Agents Retained Under 28 U.S.C. § 156(c) are Restrained as to the Fees that they are Allowed to Charge.

Court appointed claims agents can be retained under 28 U.S.C. § 156(c) or section 327(a) of the Bankruptcy Code. Claims agents that are retained under the two statutes perform their functions in different capacities. Moreover, there is clear statutory language that bars third parties from having direct access to claims data through the Electronic Case Filing System.

a. *Claims Agents Retained by the Court Under 28 U.S.C. § 156(c) Compared to those Retained Under 11 U.S.C. § 327(a) Have Different Permissible Fees.*

A claims agent that is retained under section 156(c) is distinguished from one retained under section 327(a) because he/she acts in a different capacity.⁷ Section 156(c) states that “a court may utilize . . . services . . . which pertain to the provision of notice, dockets, calendars, and other administrative information to parties in cases filed under the title 11, United States Code, where the . . . services are paid for out of the assets of the estate”⁸ Moreover, when a claims agent is retained under section 156(c), the activities performed by the agent are performed

⁵ See *id.* at 497.

⁶ See *id.*; *In re Latam Airlines Group S.A.*, No. 20-11254, 2022 WL 4229500, at *10 (Bankr. S.D.N.Y., 2022).

⁷ See *In re Madison Square Boys & Girls Club, Inc.*, 642 B.R. at 492.

⁸ 28 U.S.C. § 156(c).

“as an agent of the Clerk.”⁹ Whereas, under section 327(a), “the trustee, with the court’s approval, may employ . . . professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.”¹⁰ Ultimately, the activities performed by a claims agent retained under section 327(a) are performed “on behalf of the debtor.”¹¹ This distinction is a cornerstone that makes for-profit agreements with third parties impermissible for claims agents retained under section 156(c).

Thus, a claims agent is acting in the same capacity as a clerk when retained under section 156(c), thereby making the claims agent subject to the “Code of Conduct for Judicial Employees” (the “Code of Conduct”).¹² More specifically, Canon 2 of the Code of Conduct states that a “judicial employee should not use public office for private gain.”¹³ Therefore, it is impermissible for a claims agent retained under section 156(c) to use his/her position for private gain.¹⁴ Further, a claims agent cannot use the data obtained from the position to create a for-profit contract with third parties because the claims agent would be using his/her public position for private–pecuniary–gain.¹⁵

Courts have not specifically addressed whether a claims agent can create a for-profit contract with a third party when the agent is retained under section 327(a)¹⁶ because such claims agent would not be in possession of the data necessary to create a for-profit contract.¹⁷ Claims

⁹ See *In re Madison Square Boys & Girls Club, Inc.*, 642 B.R. at 492.

¹⁰ 11 U.S.C. § 327(a).

¹¹ See *id.*

¹² See *Guide to Judiciary Policy*, Vol. 2, Pt. A, Ch. 3. Canon 2 (Canon 2 “applies to all employees of the judicial branch . . .”).

¹³ See *id.*

¹⁴ See *Guide to Judiciary Policy*, Vol. 2, Pt. A, Ch. 3. Canon 2; *In re Madison Boys and Girls Club, Inc.*, 642 B.R. at 492.

¹⁵ See *id.*

¹⁶ See *In re Madison Square Boys and Girls Club, Inc.*, 642 B.R. at 495.

¹⁷ See *id.*; 28 U.S.C. § 156(e).

agents are not permitted to access or manage the claims registrar under section 327(a), which would make the third party contract for such data impracticable.¹⁸ Moreover, although a claims agent retained under section 156(c) has access and can manage the claims registrar, such claims agent does not have any proprietary interest in the data because the data is considered property of the United States courts.¹⁹

b. *Claims Agents Cannot Bypass the Statutory Limitations Imposed for Access to the Court's Claims Data.*

Section 107 of the Bankruptcy Code states that the “dockets of a [Chapter 11] bankruptcy court [filing] are public records and open to examination by an entity at reasonable times without charge.”²⁰ Because the bankruptcy record is public, websites have been created to help make the process of buying and selling credit more efficient.²¹ The data, however, must be manually obtained from the public judicial docket and then inputted into the websites because the entities that assist creditors do not have direct access to the Electronic Case Filing system.²² This arduous and inefficient process makes it more difficult for creditors to sell their claims.²³ Despite a valid public policy argument in favor of assisting creditors in selling their claims, there is clear statutory language barring such agreements.²⁴ When there is clear statutory language, public policy arguments will fall short.²⁵ This means that unless Congress chooses to change the standard procedures within section 156, third parties will not have access to the Electronic Case Filing system.²⁶

¹⁸ See *In re Madison Square Boys and Girls Club, Inc.*, 642 B.R. at 493; 11 U.S.C. § 327(a).

¹⁹ 28 U.S.C. § 156(e).

²⁰ 11 USC § 107; *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (holding that a court may seal certain confidential documents from the general public).

²¹ See e.g., KROLL, <https://www.kroll.com/en/services/restructuring-administration> (last visited Feb. 25, 2023)

²² See Electronic Case Filing Procedures, CTA7 ECF; Order Regarding Case Management/Electronic Case Files System (CM/ECF) (B.A.P. 1st Cir.).

²³ *In re Madison Square Boys & Girls Club, Inc.*, 642 B.R. at 496.

²⁴ 28 U.S.C. § 156(e).

²⁵ See *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021).

²⁶ See *id.*

II. 28 U.S.C. § 1930 Delineates the Fees a Clerk of the Court may Charge.

When claims agents are retained by the court under section 156, they are allowed to charge specific fees that are set forth in 28 U.S.C. § 1930. Section 1930 mandates “quarterly fee[s]. . . be paid to the United States trustee ... in each case under chapter 11 of title 11 ... for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first.”²⁷ The section also delineates the fees that are meant to be paid based on the total amount of disbursements at issue.²⁸

A claims agent is also allowed to set his/her own competitive rates for the section 156(c) activities the agent performs.²⁹ The mandate in section 156(c) is that the fees are paid only by the “assets of a [debtor’s] estate.”³⁰ Therefore, as seen from *In re Madison Square Boys and Girls Club, Inc.*, it is crucial for a claims agent to not receive fees from any other source when performing his/her services.³¹ Moreover, obtaining fees from outside sources may make the claims agent fall outside the definition of a “disinterested person.”³² For a claims agent to be retained under either section 327(a) or 156(c), they must be a “disinterested person.”³³ Therefore,

²⁷ 28 U.S.C. § 1930(a)(6)(A); *In re Clinton Nurseries, Inc.*, 53 F.4th 15 (2d Cir. 2022)

²⁸ 28 U.S.C. § 1930(a)(6) (“The fee shall be \$325 for each quarter in which disbursements total less than \$15,000; \$650 for each quarter in which disbursements total \$15,000 or more but less than \$75,000; \$975 for each quarter in which disbursements total \$75,000 or more but less than \$150,000; \$1,625 for each quarter in which disbursements total \$150,000 or more but less than \$225,000; \$1,950 for each quarter in which disbursements total \$225,000 or more but less than \$300,000; \$4,875 for each quarter in which disbursements total \$300,000 or more but less than \$1,000,000; \$6,500 for each quarter in which disbursements total \$1,000,000 or more but less than \$2,000,000; \$9,750 for each quarter in which disbursements total \$2,000,000 or more but less than \$3,000,000; \$10,400 for each quarter in which disbursements total \$3,000,000 or more but less than \$5,000,000; \$13,000 for each quarter in which disbursements total \$5,000,000 or more but less than \$15,000,000; \$20,000 for each quarter in which disbursements total \$15,000,000 or more but less than \$30,000,000; \$30,000 for each quarter in which disbursements total more than \$30,000,000.”)

²⁹ See 28 U.S.C. § 156(c).

³⁰ See *id.*

³¹ See generally *In re Madison Square Boys & Girls Club, Inc.*, 642 B.R. 487 (Bankr. S.D.N.Y., 2022).

³² 11 U.S.C. § 101(14); *In re Madison Square Boys and Girls Club, Inc.*, 642 B.R. at 496–97.

³³ 11 U.S.C. § 101(14); 28 U.S.C. § 156; 11 U.S.C. § 327(a); *In re Madison Square Boys and Girls Club, Inc.*, 642 B.R. at 496–97.

a claims agent may not serve as a court appointed agent under either section if he/she is being paid by third parties.³⁴

Conclusion

A court will not allow a claims agent to be retained under section 156 if the agent contracts with a third party and receives fees that a clerk could not receive.³⁵ A claims agent seeking to be retained by the court must ensure that he/she is impartial because the agent must be a “disinterested person,” otherwise a court cannot accept the retainer.³⁶ Moreover, when a claims agent is retained by the court under section 156(c), the agent must make sure that the fees he/she is collecting are within either section 1930’s disbursement breakdown, or are paid solely by the debtor’s estate.³⁷ Finally, it is important to note that a claims agent that has been preapproved by the court may be removed from the list of approved agents for failure to comply with the requirements set forth in section 156.³⁸

³⁴ See 11 U.S.C. § 101(14); 28 U.S.C. § 156.

³⁵ See *In re Madison Square Boys & Girls Club, Inc.*, 642 B.R. at 493–94.

³⁶ *Id.*

³⁷ 28 U.S.C. § 156(c); 28 U.S.C. § 1930

³⁸ Vito Genna, *Protocol for the Employment of Claims and Notice Agents Under 28 U.S.C. § 156(c)*, <https://www.nysb.uscourts.gov/sites/default/files/pdf/newClaimsAgentsProtocol.pdf> (“failure to comply with the duties set out in [the] Protocol . . . and with the provisions set out in a Section 156(c) Application and order may lead to removal of the claims and noticing agent’s name from the list of approved agents.”).