# In the United States Bankruptcy Court for the District of Maryland

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| In re:<br>**JESSIE WILLARD BELLAMY,**<br>*Debtor.* | Case No. 07–1–1332 DK<br>Chapter 13<br>***AMICUS CURIÆ* BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS** |

**Now Comes** the National Association of Consumer Bankruptcy Attorneys, *Amicus Curiæ*, by counsel Brett Weiss, P.C., and Brett Weiss, and submits this Brief, and states:

By Order dated October 26, 2007, this Court granted the Application of the National Association of Consumer Bankruptcy Attorneys ("NACBA") to file this Amicus Brief in support of Debtor. The facts presented are not in dispute, and the issues before the Court are primarily ones of law, rather than fact.

***Background***

This Court has promulgated local rules governing attorney's fees in Chapter 13 cases, which appear in Appendix F, titled, "Chapter 13 Debtor's Counsel Responsibilities and Fees."[1] A copy is attached and incorporated herein as Exhibit #1. Pursuant to Appendix F, debtors' counsel are permitted to charge a "no look" fee without having to file a fee application pursuant to 11 U.S.C. § 330 or comply with the requirements set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), as adopted by the Fourth Circuit in *Barber v. Kimbrells, Inc.,* 577 F.2d 216 (4th Cir. 1978) and *Harman v. Levin,* 772 F.2d 1150 (4th Cir. 1985).

The vast majority of debtors' counsel in Chapter 13 cases charge flat, rather than hourly, fees for representation. This is preferred both by debtors and debtors' counsel, because most Chapter 13 debtors do not regularly deal with lawyers, and they prefer the cer-

[1] A detailed discussion of the fee structure and Appendix F is beyond the scope of this Brief. Nevertheless, it is helpful to review the background under which the broader issues before the Court came to be presented, and the reason why these issues have been raised.

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tainty of a flat fee over the uncertainty of an hourly fee, and most debtor's counsel prefer not to have to keep detailed time records and spend the time necessary to prepare and file fee applications.

The benefit to counsel in not having to file a fee application or keep time records is somewhat offset by the restrictions in payment imposed by Appendix F. The principal restriction relevant to this proceeding is found in paragraph 4(D), which states:

> In any fee arrangement described in subparagraphs A, B and C above, the plan may allow up to a total of $2,000.00 (minus any deposit or retainer received) to be disbursed by the Trustee to counsel, before any disbursement by the Trustee to other creditors, except claimants whose claims are described in 11 U.S.C. § 507(a)(1). Unless otherwise provided by the confirmed Plan, any remaining unpaid balance of the fee shall be paid in a monthly amount not greater than the lesser of: (a) $125.00 or (b) 90% of the monthly Plan payment in the confirmed Plan.

Before the adoption of Appendix F on May 1, 2007, Chapter 13 counsel fees were paid in a lump sum upon confirmation, from the funds held by the Chapter 13 Trustee. If there was not enough held to pay the fee in full, the balance was paid ahead of other creditors (except trustee commissions) as funds came in. No objection was made to this procedure by debtors, debtors' counsel, creditors' counsel, the Chapter 13 Trustees or the Court.

Since the adoption of Appendix F, the Court has seen an explosion in the number of fee applications by counsel seeking to avoid the payment strictures of the Appendix. The reason, of course, is that, as discussed in more detail *infra,* few debtors' counsel wish to receive payment of a substantial portion or even the majority of their fees at $125.00 per month for many months. Apart from the loss of the time value of money paid in the future, many Chapter 13 cases fail after confirmation (due to no fault of counsel), which results in the total loss of the remainder of unpaid fees.

In this case, debtor's counsel filed a fee application (Docket No. 51) for approval of a $4,500.00 flat fee, and attached contemporaneous time records showing fees for total time expended of $4,845.00. Despite the fact that these time records show that the full amount of this fee has already been earned, leaving no "cushion" for future work, the disclosure under

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FRBP 2016(b) (Docket No. 4), shows that the requested fee covers all work *throughout the course of the case,* with the exception of adversary proceedings. In other words, debtor's counsel will be working for free for the remainder of the case, rather than receiving payment for services performed as the case progresses.

The Chapter 13 Trustee filed an objection (Docket No. 55), arguing that the application failed to comply with the requirements of *Johnson v. Georgia Highway Express, Inc., supra,* and cases of this Court adopting its standards. The Chapter 13 Trustee also objected to the fact that the fee included work for unspecified future services (even though no fees would actually be paid for such work), argued that counsel had failed to establish the reasonableness of its fee, and stated that Appendix F should be followed in how fees were paid notwithstanding the fee application.

In response to the objection, debtor's counsel filed an amended fee application (Docket No. 59) that appeared designed to address these concerns. The Court held a hearing on September 11, 2007 (Docket No. 62), granted the amended application, and entered an Order Authorizing Payment of Counsel Fees As An Administrative Expense (Docket No. 61).

The question the Court has directed be briefed is whether counsel fees allowed in a Chapter 13 case as an administrative expense (i.e. after approval of a fee application) must be paid in full before distribution to other creditors.

## *Argument*

### *A. The Fee Payment In This Case Has Been Determined By The Confirmed Plan.*

As a preliminary matter, *amicus* notes that for the Court to resolve this case, it need not reach the question of whether the Code requires the payment of counsel fees ahead of other creditors. The Chapter 13 Plan herein was confirmed on October 1, 2007 (Docket No. 64). The provisions of a confirmed Chapter 13 plan bind the debtor and each creditor, 11 U.S.C. § 1327(a), and the plan will ordinarily be modified only due to a material change in circumstances. *See In re Arnold,* 869 F.2d 240 (4th Cir. 1989). Section 1327(a) has been con-

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sistently interpreted as barring the relitigation of issues which were or could have been decided at confirmation. *See Multnomah County v. Ivory (In re Ivory),* 70 F.3d 73, 75 (9th Cir. 1995); *In re Szostek,* 886 F.2d 1405, 1408 (3d Cir. 1989). Collier's agrees: "[T]he order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan," 8 Collier On Bankruptcy ¶1327.02, at 1327–3 (15th ed. 1998). Further, it is "quite clear that the binding effect...extends to…any issue necessarily determined by the confirmation order." *Id. at* 1327–5.

Thus, it is first necessary to examine what the confirmed plan in this case (Docket No. 45) says about the payment of claims. It states:

> 2. From the payments received, the Trustee will make the disbursements described below:
>
> a. Allowed unsecured claims for domestic support obligations and Trustee's commissions.
>
> b. *Administrative claims under 11 U.S.C. § 507(a)(2), including attorney's fee balance of $2,000* (unless allowed for a different amount upon prior or subsequent objection).
>
> c. Claims payable under 11 U.S.C. § 1326(b)(3) [Chapter 7 commissions in converted cases]…
>
> d. Other priority claims defined by 11 U.S.C. § 507(a)(3) – (10)…
>
> e. *Concurrent with payments on non-administrative priority claims,* the Trustee will pay secured creditors as follows…
>
> f. *After* payment of priority and secured claims, the balance of funds will be paid pro rata on allowed general, unsecured claims…

(Emphasis added.)

The intent of the plan is clear. Under sections (a) through (d), DSO payments, trustee commissions and administrative priority claims are paid first. Next, non-administrative priority claims are paid concurrently with payments to secured creditors under section (e), and finally, after the payment of all priority and secured claims, general unsecured creditors

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are paid *pro rata.*[2] Regardless of whether the Code *allows* a different payment order, there is simply no basis for arguing that counsel fees in this case should be paid in some fashion other than that specifically provided by the confirmed plan.

Further, this District has already made the decision that the payment of claims in Chapter 13 cases should generally follow the § 507 hierarchy, by adopting Form M: the form Chapter 13 Plan. (The instant debtor's Chapter 13 Plan followed the then-current version of the Form Plan.) Although the language of the Form Plan has been changed several times, most recently on October 15, 2007, one area that has remained unchanged is the required[3] order of payment. In fact, the most recent amendments to the Form Plan, effective November 1, 2007, make even more clear that the Section 507 priorities are to be followed.

The Form Plan provides:

> 2. From the payments received, the Trustee will make the disbursements *in the order described below:*
>
> a. Allowed unsecured claims for domestic support obligations and trustee commissions.
>
> *b. Administrative claims under 11 U.S.C. §507(a)(2), including attorney's fee balance of $_____ (unless allowed for a different amount by an order of court).*
>
> c. Claims payable under 11 U.S.C. § 1326(b)(3). Specify the monthly payment: $ _____.
>
> d. Other priority claims defined by 11 U.S.C. §507(a)(3)-(10)…
>
> e. Concurrent with payments on non-administrative priority claims, the Trustee will pay secured creditors…
>
> f. After payment of priority and secured claims, the balance of funds will be paid pro rata on allowed general, unsecured claims.

(Emphasis added.)

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[2] Although the confirmed plan does not explicitly state that payments under subsection (a) are paid before those in subsection (b), and so on, an examination of the schedules in this case discloses that the only payment due under (a) through (d) will be for debtor's counsel fees and trustee commissions. Administrative priority claims, given the express language of subsections (e) and (f), must be paid first, or they would not be paid at all.

[3] Local Rule 3015–1(a) provides that, "A Chapter 13 plan must conform to Local Bankruptcy Form M, unless compelling circumstances require a deviation."

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In this case, for the Chapter 13 Trustee's argument to succeed: (1) the express provisions of a confirmed Plan (2) containing a payment order in compliance with (3) Form Plan language adopted by this Court (4) that may be departed from only under "compelling circumstances," must all be dispensed with, brushed away and ignored. In the broader picture, the Chapter 13 Trustee is seeking to unilaterally replace the payment order expressly provided for by the Form Plan with an amorphous and uncertain regimen. Such reflects neither the settled position of this Court, as reflected in the language of the Form Plan, nor, as discussed *infra,* does it serve a compelling benefit to debtors, creditors, trustees, or this Court.

***B. A Comparison of How Chapters 7, 11, 12 and 13 Address Fee Priorities.***

Counsel fees under all chapters of the Code may be awarded pursuant to application and approval by the Court under 11 U.S.C. § 330(a). In Chapter 13 cases, however, the Code provides a twist to this procedure. Section 330(a)(1) makes reference to "a professional person employed under section 327 or 1103…" as someone to whom compensation may be awarded. Unlike Trustee counsel in Chapter 7 cases, or counsel for the Debtor In Possession, committee, or trustee in Chapter 11 cases, this requirement for prior Court approval of employment does not apply to a Chapter 13 debtor's counsel. *Compare* 11 U.S.C. § 327 *with* § 330(a)(4); 3 Collier on Bankruptcy ¶327.07 (15th ed. rev. 2003). Rather, a Chapter 13 debtor may retain counsel of his or her choice without the necessity of prior or subsequent judicial approval.

The authority to pay fees to Chapter 13 debtors' counsel flows from § 330(a)(4)(B), which states:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

Fees awarded under § 330(a) are an administrative expense under 11 U.S.C. § 503(b)(2) ("[T]here shall be allowed administrative expenses…including…compensation

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and reimbursement awarded under section 330(a) of this title.") The Court's Order in this case approved counsel's fees as an administrative expense.

Several sections of the Code govern how allowed administrative expenses, such as the fees in this case, are to be paid. The first is 11 U.S.C. § 507. It states in pertinent part:

> (a) The following expenses and claims have priority *in the following order:*
>
> (1) First: Allowed unsecured claims for domestic support obligations…[4]
>
> (2) Second, *administrative expenses allowed under section 503(b) of this title,* and any fees and charges assessed against the estate under chapter 123 of title 28 [Court costs and fees].
>
> (3) Third, unsecured claims allowed [in involuntary cases].
>
> (4) Fourth, allowed unsecured claims [for unpaid wages].
>
> (5) Fifth, allowed unsecured claims for contributions to an employee benefit plan…
>
> (6) Sixth, allowed unsecured claims [against a grain storage facility or fish produce storage or processing facility].
>
> (7) Seventh, allowed unsecured claims [for pre-petition deposits for consumer goods or services].
>
> (8) Eights, allowed unsecured claims of governmental units [for certain taxes].
>
> (9) Ninth, allowed unsecured claims [for certain commitments to insured depositories].
>
> (10) Tenth, allowed claims for death or personal injuries resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, drugs, or another substance.

(Emphasis added.)

Section 507 places approved counsel fees—administrative expenses connected with the conduct of the case—in a high position, ahead of unpaid wages, contributions to employee retirement programs, and even taxes. This is so due to the desire to ensure that coun-

[4] But see discussion *infra.*

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sel is paid, so that debtors are properly and competently represented, with the concomitant benefit to the Court, Trustees and creditors.

In Chapter 7 cases, 11 U.S.C. § 726(a)(1) governs payments. This section—the most straightforward fee payment provision of any chapter—states in pertinent part:

> Except as provided in section 510 of this title [subordination], property of the estate shall be distributed—first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed…

So in Chapter 7 cases, approved counsel fees, which are a second priority administrative expense under § 507, are paid only after Domestic Support Obligations ("DSOs"). Other claims are paid only after counsel fees have been paid in full.

In Chapter 11 cases, 11 U.S.C. § 1129(a)(9) requires confirmable Chapter 11 plans to provide for the full payment of § 507(a)(2) claims on the effective date of the plan, unless counsel has agreed to a different treatment of its claim.

In Chapter 12 cases, the Code is identical to that in § 1326(b)(1). Section 1226(b)(1) provides:

> Before or at the time of each payment to creditors under the plan, there shall be paid—any allowed claim of the kind specified in section 507(a)(2) of this title…

### *C. Chapter 13 Requires Payment of Approved Counsel Fees Before Most Other Creditors.*

The relevant Chapter 13 provisions dealing with the payment of counsel fees are §§ 1322(a)(2) and 1326(b)(1). Section 1322(a)(2) provides:

> The plan shall—provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim.

Section 1326(b)(1) provides:

> Before or at the time of each payment to creditors under the plan, there shall be paid—any unpaid claim of the kind specified in section 507(a)(2) of this title…

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This language states that "any unpaid claim" for administrative expenses (i.e., the unpaid amount due counsel) must be paid "before or at the time of each payment to creditors." It is easy to apply: every time the trustee makes a payment to creditors, he or she must first determine whether there are any unpaid administrative expenses. If there are, the Trustee must pay them before or at the time of making payment to other creditors.

Notwithstanding this plain language reading, the Chapter 13 Trustee argues that these provisions, particularly § 1326(b)(1), at best provide that the Chapter 13 plan *may* provide for payment of such claims ahead of others as a priority, but that they do not *require* that it do so.[5]

It would seem to be a somewhat useless gesture to enact § 507(a)(2), make references to it in § 1326(b)(1), and then make its application completely discretionary. This makes § 1326(b)(1) duplicative of § 1322(a)(2), in that both sections would then merely provide that these claims must be paid in full, rendering these sections largely meaningless in the context of a Chapter 13 case. A traditional linguistic rule of statutory interpretation is that the proper interpretation is one in which every word and section in the statute is meaningful. Thus, we have the canon against surplusage: an interpretation of a statute that makes some words or sections meaningless, insignificant, or redundant should be rejected in favor of an interpretation that makes all words meaningful. No word of a statute is considered excess, unnecessary or without meaning. As the Supreme Court noted well over one hundred years ago:

> We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

*Market Co. v. Hoffman,* 101 U.S. 112, 115–116 (1879). *See also TRW Inc., v. Andrews,* 534 U.S. 19, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001); *United States v. Nordic Village, Inc,* 503

[5] As noted *supra,* the plan here at issue *does* require the payment of such claims ahead of others, as does the Form Plan.

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U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985); *Palm Beach County Canvassing Board v. Harris,* 772 So.2d 1220, 1253 (Fla. 2000).

Colliers on Bankruptcy, while acknowledging that § 1322 allows for flexibility in the payment of certain priority claims (such as allowing concurrent payment with non-priority claims), finds this flexibility is *not* available when dealing with fees and administrative expenses:

> There is no requirement [in a Chapter 13 case] that any priority claims, *except for fees and administrative expenses,* be paid temporally in the prescribed order of priority [set forth in § 507] or in advance of other unsecured claims.

Colliers on Bankruptcy ¶1322.03[2] (15th ed. Rev. 2005) (emphasis added).

This interpretation is confirmed by the legislative history of § 1326, which provides: "Section 1326 supplements the priorities provisions of section 507. Subsection (a) *requires* accrued costs of administrative and filing fees, as well as fees due to the Chapter 13 Trustee, to be disbursed *before payments to the creditors under the plan.*" S. Rep. No. 95–989 95th Cong. 2d. Sess. 142 (1978) (emphasis added). *See In re Shorb,* 101 B.R. 185, 186 (9th Cir BAP 1989).

Several Courts appear to disagree with this, and have found that the statutory schema of Chapter 13 does not require the payment of claims in any particular order akin to § 726(a). In support, the Chapter 13 Trustee has cited a number of cases: *In re Murray,* 348 B.R. 47 (Bankr. M.D.Ga. 2006); *In re Vinnie,* 345 B.R. 386 (Bankr. D.Ala. 2006); *In re Sanders,* 341 B.R. 47, 51 (Bankr. D.Ala. 2006), *aff'd,* 347 B.R. 776 (N.D.Ala. 2006); *In re Balderas,* 328 B.R. 707 (Bankr. W.D.Tex. 2005); *In re Pappas & Rose, P.C.,* 229 B.R. 815 (W.D.Okla. 1998). An analysis of these cases, however, discloses differences between the instant matter and the circumstances addressed in their holdings.

*In re Balderas,* relied upon heavily by the Chapter 13 Trustee, spends much time addressing the reasonableness of counsel's fees under § 330(a)(4)(B), rather than an evaluation of the Code sections relevant in this case. Further, *Balderas* is clearly distinguishable from the

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within case: (1) it was pre-BAPCPA; (2) it dealt with a post-confirmation modification of the Plan; (3) the case history disclosed several payment moratoriums, a substantial period of time when no payments were made to secured creditors, and a significant reduction in the payouts to general unsecured creditors resulting from the proposed modification; and (4) creditors objected to the proposed modification. None of these circumstances is present in the within case. Without statutory support, the judge unilaterally creates, as he calls it, a "rough justice" payout of $100 per month[6] for post-confirmation attorney's fees. The decision is explicitly made applicable only to "the award of post-confirmation attorneys' fees in this district in this court," *id. at* 728, and the opinion notes that, despite the judge's attempt to gain consensus among other judges in his division before the decision was released, they entered general orders at variance with its holding in response. The biggest problem with the *Balderas* decision, however, is its conclusion that § 1326(b)(1) should be interpreted in a manner inconsistent with the plain language and legislative history of that section.

Section 1326(b)(1) states, "Before or at the time of each payment to creditors under the plan, there shall be paid—(1) any unpaid claim of the kind specified in section 507(a)(2) of this title…"[7] The essential question is whether "or at the time of" means a continuing stream of concurrent payments. *Amicus* believes, with the support of Colliers and other judicial decisions, that it means every time the trustee makes a payment to creditors, he or she must first determine whether there are any unpaid administrative expenses. If there are, the Trustee must pay them before or at the time of making payment to other creditors. The language "any unpaid claim" does not say, and cannot mean, a "portion of an unpaid claim."

An excellent analysis of this issue may be found in Judge Tucker's ruling in *In re Harris,* 304 B.R. 751 (Bankr. E.D.Mich. 2004). In *Harris,* the Court held:

> Section 1326(b)(1) plainly means that at any given time after confirmation of a Chapter 13 plan, if there is any unpaid, allowed administrative expense, in-

[6] There is no discussion of what would occur if the remaining plan term would be too short to allow full payment of allowed fees at $100 per month.

[7] At the time *Balderas* was decided, the Code reference was to § 507(a)(1). Both the pre- and post-BAPCPA sections refer to the payment of administrative expenses allowed under § 503(b), which include approved counsel fees.

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> cluding any unpaid, allowed claim for attorney fees owing to a Debtor's attorney, no payment may be made to any other creditor under the plan unless the unpaid administrative expense is paid in full, either first or at the same time. Thus, for example, when the Chapter 13 Trustee makes her first monthly disbursement after confirmation, she may not disburse any payment to secured or unsecured creditors unless at the same time, the Trustee pays, in full, the unpaid, allowed attorney fees of Debtors' counsel.
>
> An administrative claimant like Debtors' counsel, of course, may waive the benefit of § 1326(b)(1) by agreeing to delay payment of the administrative claim. Cf. 11 U.S.C. § 1322(a)(2)(Chapter 13 plan "shall" provide for full payment in deferred cash payments of all claims entitled to priority under § 507 "unless the holder of a particular claim agrees to a different treatment of such claim.") But there has been no such waiver in this case.

*Id. at* 757.

If debtors' counsel opts for the Appendix F no look fee (which includes the $125 per month plan payout of unpaid fees over $2,000), such counsel has agreed "to a different treatment of such claim," allowing fees to be paid in this fashion notwithstanding the language of the Code. But such an agreement is lacking in this case, where the debtor's counsel opted out of Appendix F and filed a fee application.

The two post-BAPCPA *In re Sanders* decisions cited by the Chapter 13 Trustee, one by the Bankruptcy Court and one by the District Court, are also distinguishable. The question presented was whether attorney's fees could be paid concurrently with DSOs, or whether DSOs had to be paid first. Of prime import to both Courts' decisions was the newly adopted § 507(a)(1)(C).

Congress changed § 507(a) in BAPCPA, adding a new subsection (a)(1) to provide for the payment of DSOs. Included in these changes is new § 507(a)(1)(C), which states:

> If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee[8] allowed under paragraphs

[8] While "administrative expenses of the trustee" might not at first glance appear to include debtor's counsel fees to be paid through the plan, the Code makes clear that such are, in fact, included. In Chapter 13 cases, post-petition earnings of the debtor, as well as all pre- and post-petition assets, are considered "property of the estate" under 11 U.S.C. § 1306(a). The debtor remains in possession and largely, control, of all property of the estate until discharge, pursuant to § 1306(b) and paragraph 7 of the Form Plan. The use of property of the estate during the case is governed by two statutes, §§ 363(b) and 1303. Section 363(b) discusses the use of property of the estate by the Trustee, including its expenditure other than in the ordinary course of business. Payments for counsel fees through the Chapter 13 Plan are not in the ordinary course and are made from property of the estate. Expenditures under § 363(b) may be made or authorized by the debtor, rather

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> (1)(A), (2), and (6) of subsection 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

In Chapter 13 cases, this is effectuated by § 1326(b), which requires payment of administrative expenses "before or at the time of each payment to creditors under the plan…". In other words, if there is a DSO, § 507(a)(1)(C) and § 1326(b) require that allowed administrative expenses under § 503(b)(2)—which, as footnote 8 discusses, includes compensation and reimbursement awarded under § 330(a)—be paid before any DSO disbursements.

Relying on § 507(a)(1)(C), the Bankruptcy Court in *Sanders* held that, "Section 1326(b)(1) gave *the debtor* the choice of paying § 507(a)(1) administrative expenses before or concurrently with other claims, so long as the administrative payments began no later than the first payment to other creditors." *Id.* 341 B.R. *at* 51 (emphasis added). A key point here is that it is the *debtor* who can structure the plan to accomplish this, not the Chapter 13 Trustee. The debtor has the ability, but not the requirement. And as, "The debtor shall file a plan," 11 U.S.C. § 1321, and no one other than the debtor may file a plan pre-confirmation, under *Sanders,* it is the debtor who determines through plan language how attorney fees are to be paid. But even if the debtor has the ability, *Sanders* makes it clear that the debtor does not have the requirement to make these payments concurrently:

> Accordingly, the Court finds that the debtors' Chapter 13 plan does not violate § 507(a), as amended, by providing first for the payment of administrative expenses, including attorney fees, as required by § 1326(b)(1).

*Id. at* 51–52.

Given the language of § 507(a)(1)(C), it would be curious indeed that in cases involving DSOs, counsel fees would be required to be paid before even DSOs, while in non-DSO cases, the Chapter 13 Trustee would apparently have them paid concurrently with general unsecured creditors.

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than the trustee, pursuant to the grant of authority of § 1303, which provides that the debtor "shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e) 363(f), and 363(l) of this title." Thus, the post-petition payment of property of the estate for Chapter 13 counsel fees is, definitionally, an "administrative expense of the trustee." In any event, § 1326(b) does not include the "of the trustee" limitation on the payment of administrative expenses.

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A further problem in requiring Chapter 13 counsel fees to be paid concurrently with other creditors is the impact this would have on the equal monthly installment ("EMI") requirements of 11 U.S.C. § 1325(a)(5)(B)(iii)(I). This section states:

> Except as provided in subsection (b), the court shall confirm a plan if—with respect to each allowed secured claim provided for by the plan—the plan provides that—if—property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts…

It is believed that the Chapter 13 Trustee in this case interprets the EMI requirements not to apply to cases in which pre-petition arrearages are being cured, or to payments for priority obligations, but only to crammed-down creditors. *Amicus* shares that belief. But the other three Chapter 13 Trustees in this District apparently do not, and there has been as yet no ruling from this Court as to the scope of EMI.

If the EMI requirements are to be applied to all payments to secured (and possibly to priority) creditors, providing for concurrent payment of counsel fees with secured and/or unsecured creditors for only some months of the plan would create a computational nightmare, making it difficult, if not impossible, to properly determine the funding of Chapter 13 plans without running afoul of EMI. The current practice of providing that payments to lower-priority and secured creditors begin only after full payment of counsel fees avoids this difficulty; changing it as proposed by this Chapter 13 Trustee would create significant difficulties, in addition to increasing the time necessary to prepare and review Chapter 13 Plans by debtors' counsel, creditors' counsel, Chapter 13 Trustees and the Court.

### *D. Even If The Code Allows Discretion In The Payment Of Administrative Expenses, The Chapter 13 Plan Governs How That Discretion Is Imposed.*

Even if the Court concludes that the language of §§ 1322(a)(2) and 1326(b)(2) allow discretion in determining how priority administrative expenses are to be paid, such a conclusion merely adopts the primacy of Chapter 13 Plan language over the statutory distribution hierarchy of § 507. While this option may be available to debtors in specific cases, the Form

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Chapter 13 Plan in this district generally requires the payment of counsel fees in accordance with the § 507 priority list, and certainly ahead of secured and general unsecured creditors.

*In re Aldridge,* 335 B.R. 889 (Bankr. S.D.Ala. 2005), a case examining whether concurrent payment of counsel fees and DSOs would be allowed, stated:

> Thus, *a debtor* could provide a plan that mandated the specific order in which claims were to be paid, and if such plan was confirmed, the trustee would have a duty to disburse the plan payments to the creditors as provided for in the confirmed plan….As stated above, the order confirming Aldridge's plan (and virtually every other chapter 13 plan confirmed in this district) stated that the trustee was to make disbursements on "any claim entitled to priority pursuant to and *in the order set forth in 11 U.S.C. § 507,"* unless the priority was expressly waived.

*Id. at* 893 (emphasis in original.)

The Bankruptcy Court in *In re Sanders,* 341 B.R. 47, 51 (Bankr. N.D.Ala. 2006) made it clear that the authority to select whether § 507 claims would be paid concurrently with other claims lay on the debtor's shoulders:

> Section 1326(b)(1) *gave the debtor the choice* of paying § 507(a)(1) administrative expenses before or concurrently with other claims, so long as the administrative payments began no later than the first payment to other creditors.

(Emphasis added; footnote omitted.)

As discussed *supra,* it is the *debtor* who is given the statutory authority to structure the plan consistent with the Code and Rules, not the Chapter 13 Trustee or creditors. *See* 11 U.S.C. §§ 1321, 1322(b)(11). Even if not required to be paid first, the decision of whether to pay counsel fees concurrently with other creditors is within the debtor's discretion. Since, "The debtor shall file a plan," 11 U.S.C. § 1321, and no one other than the debtor may file a plan pre-confirmation, it is ultimately the debtor who determines through plan language how attorneys fees are to be paid.

### *E. Adoption Of The Chapter 13 Trustee's Position Would Have Serious Impacts.*

Any decision finding that § 507(a)(2) administrative expenses need not be paid before other creditors in Chapter 13 cases would have impacts beyond those affecting counsel fees.

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Under the Pandora's box opened by such a ruling, debtors could propose paying tax obligations before DSO arrearages, or general unsecured claims of a joint non-filer before Chapter 7 administrative costs in a converted case,[9] or mortgage arrearages before unpaid employee wages, and such would be perfectly allowable. Section 507 provides a ranking among many deserving classes of creditors that, with the exception of the change in DSO priorities (reflecting in part the societal change towards DSO arrearages between 1978 and today) has remained largely unchanged since the adoption of the modern Bankruptcy Code. To view it as merely advisory does a great injustice to this framework, while throwing the door wide to potential debtor abuses.

A further difficulty would be caused by forcing Chapter 13 counsel to accept the deferred payment of their fees, regardless of whether they chose the no look Appendix F fees. It is clear that this Chapter 13 Trustee wishes to require all counsel fees in all cases in excess of $2,000 be paid through the Plan at $125 per month. This will cause severe hardship for debtors' counsel.

More than half of all Chapter 13 cases do not result in a discharge, with about 20% failing before debtors' counsel are paid in full. Simply as a matter of basic economics, the cases that succeed have to help pay for the ones that do not. The bottom line is that debtors' counsel do not collect more than about 80% *at most* of the fees charged in Chapter 13 cases. Thus, a $3,500 base fee is not really a $3,500 fee at all. It's only worth an average of $2,800.

And even this lower fee does not adequately reflect the economic realities of a Chapter 13 practice. This is because it takes approximately 20 hours for experienced counsel to shepherd a basic case from initial client contact through to discharge under BAPCPA (not including the defense of lift stays, motions to dismiss, objections to claims, refinance and sale motions, etc.). The Amended Fee Application herein sought compensation for 19.9 hours of time, and within counsel's fee applications in Chapter 13 cases typically reflect at least 20 hours of time through confirmation. In contrast, the fees actually collected, on average (and

[9] If such payments are discretionary, the provisions of 11 U.S.C. § 1326(b)(3) might be unenforceable.

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taking into account cases that are dismissed before counsel receives payment in full), typically represent only 25% to one third of counsel's hourly billing rate.

For example, at $295.00 per hour, a normal rate for experienced bankruptcy counsel,[10] a typical case would generate an hourly fee of $5,900 ($295 x 20 hours). Yet, even at a base fee of $3,500, counsel is only being paid at an effective rate of $175 per hour ($3,500 ÷ 20 hours) (not accounting for additional reductions due to the time value of money and the fact that $2,000 to $2,500 of the fee is now received in the month after confirmation, typically four to eight months after filing). Since about 20% of Chapter 13 cases end up dismissed before counsel receives the balance of fees, *the actual effective rate debtor's counsel receives is $140 per hour. If counsel represents a debtor at the base fee through confirmation ($2,000), this effective rate is lowered to $80.00 per hour.*

Bankruptcy counsel should be paid on a par with counsel in other areas of the law, and in adopting § 330, Congress specifically rejected such a "bargain basement" approach to bankruptcy fees. As the Court stated in *Stroock & Stroock & Lavan v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.),* 127 F.3d 1398, 1403 (11th Cir. 1997):

> Congress has recently indicated a desire to promote the same billing practices in bankruptcy cases as in other branches of legal practice. While "user billing" is certainly not the only billing practice employed today, its use is widespread. A good many reputable firms bill as expenses many of the items rejected in advance by the bankruptcy judge here. Moreover, as all or most of the prohibited items can be readily calculated in reference to work done in a specific case, it is far from obvious that they are, by their nature, non-billable overhead.
>
> Before 1978, courts applied "the spirit of economy" as a factor to be weighed in awarding attorneys' fees in bankruptcy cases. *See In the Matter of First Colonial Corp. of Am.,* 544 F.2d 1291, 1299 (5th Cir.), *cert. denied,* 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977); 3 Collier on Bankruptcy, ¶330.04[3][a] (Lawrence P. King, *et al.,* eds., 15th ed. 1997). Congress rejected this factor when it enacted the Bankruptcy Reform Act of 1978. Congress concluded that taking economy into account interfered too much with

[10] According to the 2006 Baltimore Business Journal fee survey (covering 2005 fees), associates at DLA Piper charged between $240 and $335 per hour, while partners charged between $385 and $900 per hour. Comparisons between fees at Maryland's largest law firm and solo and small practitioners are, of course, not directly applicable. They do demonstrate, however, that fees of $295 per hour for experienced debtor counsel are not at all high in this market.

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the policy of encouraging skilled professionals to participate in bankruptcy cases:

> Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11…. Notions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code.

124 Cong. Rec. 33,994 (daily ed. October 5, 1978) (statement of Sen. DeConcini), reprinted in 1978 U.S.C.C.A.N. 6505, 6511; *see also In re Busy Beaver Bldg. Ctrs., Inc.,* 19 F.3d 833, 850 (3d Cir. 1994) ("Congress determined, it appears, that on average the gain to the estate of employing able, experienced, expert counsel would outweigh the expense to the estate of doing so, and that unless the estate paid competitive sums it could not retain such counsel on a regular basis."); 3 Collier on Bankruptcy, ¶330.04[3][b] (Lawrence P. King, *et al.,* eds., 15th ed. 1997) ("The economy factor was abandoned under the Bankruptcy Code in favor of the new policy that attorneys engaged in bankruptcy cases should receive compensation in parity with that received by attorneys performing services in comparable situations.").

The policy of comparable compensation is specifically written into § 330(a)(1), which expressly includes "the cost of comparable services other than in a case under this title" as a factor to be considered in establishing the compensation of attorneys working on a bankruptcy case. 11 U.S.C. § 330(a)(1).

*See also In re Merry-Go-Round Enters.,* 244 B.R. 327, 343 (Bankr. D.Md. 2000) (Derby, J.) ("In section 330 and its legislative history Congress expressed its intent that compensation in bankruptcy matters be commensurate with fees awarded for comparable services in non-bankruptcy cases. 11 U.S.C. § 330; H.R.Rep. No.595, 95th Cong., 2d Sess. 329-30 (1978), reprinted in U.S.C.C.A.N. 5963, 6286.") (*quoting In re UNR Indus., Inc.,* 986 F.2d 207, 209 (7th Cir. 1993)).

How likely is it that the Bench will see experienced debtor's counsel appearing before it when they are paid an effective rate of $80.00 per hour, particularly when other areas of

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the law offer much higher effective rates: higher fees for less work with minimal judicial fee oversight?

The Chapter 13 Trustee's plans worsen this already bleak picture. A fee balance paid out at $125.00 per month is worth even less, and not only because of the time value of money. Every month that passes increases the percentage of cases that fail, *through no fault of the debtors' counsel,* but simply because life has once again reached over the edge of the cliff and grabbed the legs out from under another struggling debtor. Debtors' counsel should not act as the insurer of their clients' cases, when the vast majority of failed cases have nothing to do with the quality of counsel's representation. (And if it does, disgorgement of fees is appropriate.)

If a case fails pre-confirmation, normally less than one half, and often less than one third of the total fee charged has been received. As a result, there is a great fiscal incentive to get a case confirmed: counsel gets paid. Most Chapter 13 counsel rely on the monthly Trustee checks to allow them to pay rent, staff, expenses and themselves. If these monthly checks are cut by 93.75% (a $2,000 lump sum being reduced to $125 per month for 16 months), many debtors' counsel simply will not be able to pay their bills, and will be forced to leave Chapter 13 consumer bankruptcy practice. And even were they able to survive this blow, if the case fails during the months following confirmation, counsel will not get paid for the work and expenses that have already been provided and incurred.[11]

Most debtors' attorneys require payment in advance of only a small portion of the fees they ultimately expect will be allowed, with the balance to be paid through the plan. The reason is simple: The more an attorney charges "up front," the fewer the number of clients who can afford it. The fewer the number of clients who can afford it, the fewer the number of cases filed through counsel and, in turn, the fewer the number of deserving clients who get

[11] Given the typical time necessary just to confirm a case, the $3,500 and $4,500 fees provided by Appendix F really do not pay counsel *anything* for post-confirmation work. Rather, they merely provide that, in exchange for working for free post-confirmation, counsel will receive payment for their actual pre-confirmation time at a higher percentage of their hourly rate.

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the help that only filing bankruptcy can provide (not to mention the resulting increase in the number of *pro se* debtors).

Requiring any fee not collected up front to be doled out at $125 per month will make it more difficult for debtors to retain counsel. The typical debtor currently pays counsel $1,500.00 before the case is filed, of which $324.00 goes towards the filing fee and credit counseling, and $1,176.00 is allocated towards counsel fees. Where the fee is $3,500, this results in a balance of $2,324.00 to be paid through the Plan. Under the payment regimen of Appendix F, which the Chapter 13 Trustee seeks to make mandatory in all cases, counsel would receive $824 the month following confirmation, with the balance of $1,500 paid at $125 per month for 12 months. To compensate for the risk that the plan will fail during this time, as well as the loss of the time value of money, counsel will require a larger portion, or all of the fee, be paid at the beginning of the case, or will increase their hourly rate or flat fees. Since most debtors are simply unable to pay $3,500, plus costs, before their case is filed, they will either fail to file, will turn to petition preparers, or will file *pro se.* All of these options will impact the Court. Dealing with *pro se* filers using petition preparer generated schedules will eat up a substantial amount of Court and Trustee time, and, due to the dismissal of their cases for failure to follow various requirements, will deprive them of the protections bankruptcy offers. This is even more serious post-BAPCPA due to the amendments to the Code restricting repeat filings.

That these conclusions are feared by the debtors' bar is clearly shown by the large number of fee applications for flat fees in the same amount as provided for by Appendix F, but seeking to avoid the $125 per month payout.

When this Court sets a figure for fees, it must realize that such a number is often not really that number at all, but something less. And it must also realize that counsel cannot pay bills with money they do not collect.

***Conclusion***

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Debtor's confirmed plan and the Form Chapter 13 Plan adopted by this District require the payment of counsel fees as a priority administrative expense ahead of all claims other than DSOs and Trustee's commissions. Thus, regardless of whether the Code requires that the § 507 priorities be strictly followed in making Chapter 13 Plan payments, the plans themselves require it.

But the Code requires it as well. Sections 1322(a)(2) and 1326(b)(1) require that such payments be made before payments to other, lower, priority creditors, secured creditors and general unsecured creditors.

It makes good sense to have such a policy. Encouraging and keeping good debtors' counsel benefits all in the bankruptcy system, and allowing the Chapter 13 Trustee to pay counsel fees concurrently with other creditors will significantly reduce actual fees received, and increase the risk of counsel not being paid if cases fail.

*Amicus* asks that this Court retain the fee structure that has been relied upon by counsel in this District, and require that approved fees be paid as a priority administrative expense in a lump sum (or as a priority) before the payment of other claims.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

**I hereby certify** that a copy of the foregoing document was delivered electronically via ECF this 30th day of October, 2007, to: Chapter 13 Trustee; Debtor's Counsel.

/s/ Brett Weiss

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