No. 14-103

IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO L.L.C.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF THE PETITIONERS, BAKER BOTTS L.L.P. ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys [NACBA] is a non-profit organization with a membership of more than 3,000 consumer bankruptcy attorneys nationwide. NACBA's mission includes educating the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues its individual member attorneys cannot adequately address. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts on behalf of consumer bankruptcy debtors. See, *e.g.*, *Lamie* v. *U.S. Tr.,* 540 U.S. 526 (2004) (discussing § 330); *Hamilton* v. *Lanning*, 560 U.S. 505 (2010); *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260 (2010); *Mort Ranta* v. *Gorman,* 721 F.3d 241 (4th Cir. 2013); *Weber* v. *SEFCU,* 719 F.3d 72 (2d Cir. 2013).

SUMMARY OF ARGUMENT

A significant risk to the functioning of the bankruptcy system is the lack of fair compensation

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners Baker Botts L.L.P., et al. filed blanket consent to the filing of *amicus curiae* briefs, which was docketed on October 8, 2014. Respondent ASARCO L.L.C. has consented to the filing of this brief, and a letter reflecting its consent was filed contemporaneously with this brief.

for attorneys who are compensated by the bankruptcy estate.[2] For several decades, Congress, the courts, and commentators have criticized the lack of comparability and parity to those who work in other legal areas. See generally, G. Ray Warner, *American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases* 3 (LRP Publications 1991) [hereinafter ABI Fee Study]. The problem is serious and systemic. Empirical data has shown that, as a result of the lack of parity, lawyers have declined to work in this area, have turned down important legal tasks because of the fee risks, and experts have expressed concerns that the field was not attracting lawyers of sufficient competency. *Id.* at 136 (noting that in some cases "competent practitioners are moving away from debtor work" and "estate work may not be 'command[ing] the same competency of counsel as other cases'" (quoting 124 Cong. Rec. H11,091-2 (daily ed. Sept. 28, 1978))).

The proper functioning of the bankruptcy system is important for individual debtors, creditors, and the national economy. In some years, creditors have received distributions of over $5 billion in Chapter 13 cases. Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 Am.

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[2] *See, e.g.*, 11 U.S.C. § 101 et. seq. [hereinafter the Code]. Section 330(a)(4)(B) (discussed in Section I, below) permits a court to award compensation by the estate to attorneys hired by a Chapter 13 debtor. This section provides for a more liberal standard, stating that, in addition to the criteria set forth in § 330(a), the court may award reasonable compensation based on benefit and necessity of the services to the debtor. The test of what is reasonable includes the same "comparability" standard as in other cases.

Bankr. L.J. 431, 431 (2007).[3] Studies have shown that the uneven application of the Code (as well as variations among the courts) have large economic and social impacts. *Id*. at 431-32. In many cases, home ownership is at stake: "[T]he large majority of debtors used Chapter 13 primarily to address mortgage defaults . . . ." *Id*. at 469.

NACBA is filing this *amicus* brief because the decision by the Fifth Circuit will make this problem more acute and because the impact is more severe among those who practice in the consumer area, including Chapter 13.[4] Of the slightly more than one million bankruptcy filings in 2014, 999,254 were either Chapter 7 or Chapter 13 cases on behalf of individual debtors.[5] Over 300,000 cases were Chapter 13 cases involving individual debtors, the vast majority of whom were consumers. Fees received by counsel in Chapter 13 cases are extremely

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[3] While distributions to creditors vary considerably between the circuits, in the District of Maryland and the Southern District of Georgia, a substantial number of plans proposed payment of 100%. In other jurisdictions, the norm is around 40%, although lower distributions occur in some jurisdictions. Norberg & Compo, *supra*, at 455.

[4] Chapter 13 is designed to provide for the adjustment of debts of an individual with regular income. See 11 U.S.C. § 1301 et. seq. Chapter 7 is for the collection and liquidation of assets. Chapter 11 relates to larger financial reorganizations.

[5] The number of consumer cases eclipsed the number of Chapter 11 cases by a factor of more than 38. There were 321,278 Chapter 13 cases during this period, but only 8,347 Chapter 11 cases. United States Courts, *Table F-2: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2014* (2014), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f2.pdf.

low, resulting in a "disconnect between the skill, time, and commitment it takes for attorneys to provide debtors with first-rate representation, and compensation that does not always reflect such excellence." Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 123 (2012) [hereinafter Lupica]. [6]

This brief addresses two issues of particular significance to this *amicus* and its members who represent debtors under Chapter 13 of the Bankruptcy Code, but also other professionals in consumer cases.[7] First, the Fifth Circuit's ruling will cause serious harm to consumer bankruptcy lawyers and exacerbate the continued inability to receive comparable pay, despite the mandate of § 330.

The second issue addressed by this *amicus* is the Fifth Circuit's reliance on what it termed "perverse incentives," and a "conspiracy of silence" to justify denial of the payment of defense costs. The Fifth Circuit's view of the bankruptcy bar is unsupported by the factual record and contradicted by empirical data.[8] Moreover, the likelihood that collusion would ever occur in the average Chapter 13 case is minimal

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[6] *See generally,* Lupica, *supra*, at 110. Professor Lupica described an important "disunion between (i) complexity of the consumer bankruptcy system, (ii) the experience and resources needed to represent debtors through an often byzantine maze, and (iii) the dearth of resources available to pay for this representation." *Id*. at 121.

[7] NACBA members include attorneys who practice in both the Chapter 7 and Chapter 13 arena and who primarily represent consumer debtors, counsel to the Chapter 7 Trustee, special counsel appointed in a Chapter 7 case, and other parties in cases involving small amounts of money.

[8] *See generally,* the ABI Fee Study, *supra* (describing among other things the active and vigilant supervision of attorney fees).

because there is virtually no other party with whom debtor's counsel can engage in the so-called "conspiracy of silence." The only principal party is the Chapter 13 Trustee, who is almost always an adversary in fee litigation. The Fifth Circuit's decision, therefore, penalizes consumer lawyers in an effort to avert a threat that simply does not exist.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE CENTRAL MANDATE OF BANKRUPTCY CODE § 330, WHICH REQUIRES COMPARABLE LEGAL FEES FOR BANKRUPTCY AND NON-BANKRUPTCY WORK.

A. Section 330 Of The Code Requires That Bankruptcy Lawyers Be Compensated At Rates Comparable To Non-Bankruptcy Lawyers.

Section 330(a) of the Bankruptcy Code provides that lawyers who render "necessary services" that either benefit the debtor's estate or the administration of the estate, must be compensated at rates "comparable" to attorneys serving in non-bankruptcy areas. 11 U.S.C. § 330(a). A principal purpose of § 330(a) in the Bankruptcy Code, as enacted in 1978, was to abolish the "economy of the estate" doctrine:

> The effect of the last provision [section 330's requirement that compensation be commensurate with that awarded in non-bankruptcy cases] is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977), which set an arbitrary limit on fees payable, . . . and other, similar cases that require fees

> to be determined based on notions of conservation of the estate and economy of administration.

H.R. Rep. No. 95-595, 330 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6286. See also *In re Nucorp Energy, Inc.,* 764 F.2d 655, 658 (9th Cir. 1985) ("In particular, Congress sought to repudiate a series of judicial decisions which had held that the compensation of attorneys in bankruptcy proceedings was subject to the overriding concern, unique to bankruptcy cases, of preserving the estate.").

Congress recognized the immutable link between comparable pay and efficient operation of the bankruptcy system. The 1978 Code "ensure[d] adequate compensation for bankruptcy attorneys so that highly qualified specialists would not be forced to abandon the practice of bankruptcy law in favor of more remunerative kinds of legal work." *Id.* at 658. The absence of comparable pay was seen as detrimental to the smooth operation of the bankruptcy system: "Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field." H.R. Rep. No. 95-595, at 330.

Following the 1978 reforms, fees in consumer bankruptcy cases continued to lag. In 1991, the American Bankruptcy Institute [ABI] conducted a detailed study of legal fees. The ABI observed a "high level of vigilance on the issue of professional compensation" and found that fee objections were common. See ABI Fee Study, *supra*, at 3 ("The relatively high rate of fee objections reported by survey respondents indicates that overall a good deal of policing is occurring."). Yet, in some categories, at least half of the objections were meritless. See *id.* at 67 ("Among the lawyers, 59 percent of the

respondents reported that objections by the United States Trustee to professional fee applications are denied 50 percent or more of the time and 33 percent reported a denial rate of 75 percent or more."). In general, the ABI concluded that "fee rulings by the bankruptcy courts are having a net effect of undermining the Code's comparable services standard."[9] The ABI labeled the frequent fee disputes "an expensive sideshow distracting the professionals from the more important task of administering bankruptcy estates in an efficient manner." *Id.* at 3. Many surveyed attorneys reported that they had declined to do work for the bankruptcy estate because of the fee rulings. See *id.* at 136.

In 1994, Congress made it mandatory under § 330(a)(3) for courts to consider "customary compensation charged by comparably skilled practitioners." 11 U.S.C. § 330(a)(3).[10] Congress also required courts to determine whether fees were

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[9] ABI Fee Study, *supra*, at 3; *see also id.* at 21 ("Although the data are mixed and further research is indicated, there is some evidence that bankruptcy lawyers may be receiving less compensation than their peers in non-bankruptcy fields." The demographics of the respondents for the ABI Fee Study included attorneys, judges, and trustees who were actively involved in Chapter 7, Chapter 11, Chapter 12 and Chapter 13 work. "Chapter 13 work accounted for at least 10 percent of the practice of 31 percent of the respondents and at least 50 percent of the practice of 4 percent of the respondents.").

[10] "[C]onsideration of the factors set forth in § 330(a)(3) is mandatory." Timothy S. Springer, *Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330*, 87 Am. Bankr. L.J. 525, 534 (2013).

necessary to the "administration of the case," as opposed to merely beneficial to the estate.[11]

Section 330(a)(4)(B), which permits attorney's fees in individual Chapter 13 cases "based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section," was also added in 1994. 11 U.S.C. § 330(a)(4)(B). This provision is more expansive than that applicable to Chapters 7 and 11 and permits fee awards in Chapter 13 cases even without a showing of benefit to the estate or the administration of the case.[12] As this Court noted, "[s]ince the amendment's deletion of 'or the debtors *[sic]* attorney' from the original proposed draft affected Chapter 12 and 13 debtors' attorneys as much as Chapter 7 debtors' attorneys, § 330(a)(4)(B) shows a special intent to authorize the formers' fee awards in the face of the new, broad exclusion." *Lamie*, 540 U.S. at 540-41.

Both before and after the enactment of the above amendments, a majority of courts have held that it would be inequitable and inconsistent with § 330 to

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[11] The 1994 Amendments also limited the application of § 330(a) to attorneys who are retained to represent the "estate" under 11 U.S.C. § 327. *See Lamie*, 540 U.S. at 534 ("A debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation.").

[12] *See Collier on Bankruptcy* ¶ 330.02[3][b] (Alan N. Resnick & Henry J. Sommer eds., 16th Ed.); § 23:684. Generally, 2D Bankr. Service L. Ed. § 23:684 ("Chapter 13 debtor's counsel is entitled to administrative expense for compensation for work which is beneficial and necessary to debtor, without proof of benefit or necessity to Chapter 13 estate or creditors." (citing *In re Argento*, 282 B.R. 108 (Bankr. D. Mass. 2002))); *see also In re Top Grade Sausage, Inc.,* 227 F.3d 123, 130 (3d Cir. 2000), *abrogated by Lamie*, 540 U.S. 526 ("Section 330(a)(4)(B) sets forth a more liberal standard for attorneys representing individual debtors in a Chapter 12 or 13 bankruptcy proceeding.").

impose complex requirements on lawyers to obtain a fee, "while simultaneously denying compensation for the efforts necessary to comply with those requirements." *In re Nucorp Energy, Inc.,* 764 F.2d at 659 (permitting compensation for preparing and "presenting" the fee application).[13] The court in *Nucorp* further held, "[i]t would be unduly penurious to require such an accounting without granting reasonable compensation." *Id.* (quoting *Rose Pass Mines, Inc.* v. *Howard*, 615 F.2d 1088, 1093 (5th Cir. 1980) (per curiam)) (internal quotation marks omitted).

The Fifth Circuit's decision effectively reimposed the "economy of the estate" doctrine. The court looked mostly to the "cost" being added to the estate, while paying insufficient attention to the issue of comparability. The court disregarded the congressional mandate by rejecting the fee application which the bankruptcy court had found complied with the standard of comparability.[14]

B. The Fifth Circuit Decision Should Be Reversed Because Reasonable Legal Fees For Defending A Fee Application May Be Permitted In Order For Attorney's Fees To Be "Comparable" To Fees Charged In Non-Bankruptcy Cases.

Section 330(a)(3) states that in determining the amount of reasonable compensation, a court "shall

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[13] *See* Br. Pet'r 13 (describing the "vast majority" of courts which support this view).

[14] The court only found that comparability was in the "eye of the beholder" and gave no basis to suggest that it disagreed with the determination of comparability in the district court's decision. *In re ASARCO, L.L.C.*, 751 F.3d 291, 301 (5th Cir.), *cert. granted*, 135 S. Ct. 44 (2014).

consider" various factors, including, the "customary compensation charged by comparably skilled practitioners in cases other than under this title." 11 U.S.C. § 330(a)(3)(F). Bankruptcy courts have broad discretion in determining the award of fees. See *Grant* v. *George Schuman Tire & Battery Co.,* 908 F.2d 874, 878 (11th Cir. 1990) ("Bankruptcy judges and district courts have broad discretion in determining attorney's fees for bankruptcy proceedings; the exercise of that discretion will not be disturbed absent abuse of discretion."). A refusal to compensate for time spent defending a fee application has been found to be an abuse of discretion requiring reversal for failure to comply with the congressional mandate of comparability.[15]

The Fifth Circuit effectively stripped the bankruptcy courts of the discretion and paid insufficient heed to the requirement to consider comparability. It held, "[t]he claim for comparability is easily made but difficult to analyze."[16] *In re*

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[15] *See In re Nucorp Energy, Inc.,* 764 F.3d at 662 ("[A] refusal to award compensation for the time spent preparing or litigating fee applications results in a reduction of the rate paid for all the attorneys' services. Were we to affirm the district court's decision, we would in effect, be reducing the fees that bankruptcy counsel may earn to a level that fails to provide full compensation for their services."); s*ee also, In re Wind N' Wave,* 509 F.3d 938, 943 (9th Cir. 2007) ("[L]itigation over a fee award should [] be compensable, otherwise fee awards would be diluted . . . . Dilution is 'precisely the result that statutory fee award provisions are designed to prevent.'" (quoting *In re Nucorp Energy, Inc.,* 764 F.2d at 661)).

[16] The Fifth Circuit also stated, "The Bankruptcy Code plainly intended to erase the 'economy of the estate' rule under pre-existing law and thus *raise* the professional fees." *In re ASARCO, L.L.C.*, 751 F.3d at 301 (emphasis added) (citing *In re Pilgrim's Pride Corp.,* 690 F.3d 650, 654-55 (5th Cir. 2012)).

ASARCO, L.L.C., 751 F.3d at 301. That difficulty in analysis apparently led the court to omit from its decision any basis to disturb the ruling of comparability implicit in the bankruptcy court decision.

The Fifth Circuit examined only whether the fees for *base services* passed the comparability test and failed to determine the impact of the 4.4 percent discount on the *overall fee award*. In holding that an imposition of a 4.4 percent reduction to an otherwise comparable fee was permitted, the Fifth Circuit sanctioned a discounted fee.

In its opinion, the court acknowledged that rejection of the fee application might cause the net award to deviate from the comparability standard, but offered little concern as to the net effect:

> Whether a deduction of [4.4 percent] renders the core fee non-comparable to charges by equally skilled practitioners in other types of legal practice is in the eye of the beholder.

Id. at 301.

The loss to the consumer lawyer is not in the eyes of the beholder, but is instead a concrete and objective economic loss of serious magnitude. The Fifth Circuit's seeming indifference to the impact of a fee discount will have a stark effect in consumer bankruptcy cases, and will expand an already large disparity with fees charged in other practice areas.

Professor Lois R. Lupica's study of the consumer bankruptcy system demonstrates that lawyers who work in the Chapter 13 field are already subject to enormous fee pressures. Lupica, *supra*, at 110. These pressures have an appreciable effect on the quality of legal services delivered and on the bankruptcy

system as a whole. The mean fee in a completed Chapter 13 case (*e.g.*, a case in which the debtor received a discharge after plan completion) was $2,564 for the period following the adoption of the Bankruptcy Abuse Prevention Consumer Protection Act [BAPCPA].[17] *Id.* at 57. However, the majority of Chapter 13 cases are either converted to Chapter 7 or dismissed. See *id.* at 55-56. The mean fee in a dismissed case is $1,491. *Id.*

In Chapter 13 practice, the starting point for calculating attorney's fees is usually the jurisdiction's presumptively reasonable rate, or what is known as the "no look fee."[18] No look fees, which typically do not require a fee application,[19] can range from $2,000 to $5,000; although the average fee in many districts is under $3,000. *Id.* at 115. Since the purpose of the no look fee arrangement is to increase case efficiency, it does not include the costs associated with filing a motion, representing a debtor in a contested matter,

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[17] BAPCPA was adopted in 2005, and the cited statistics refer to cases filed between October 17, 2005 and December 31, 2009. *See* Lupica, *supra*, at 51.

[18] In some jurisdictions, competent counsel consider the no look fee inadequate, and instead seek fees based on an hourly rate. Similarly, counsel may file a fee application based on hourly rates in more complex Chapter 13 cases requiring extraordinary amounts of work. These rates are also subject to downward pressures. *See id.* at 110 ("The median hourly rate reported by those responding attorneys who charge an hourly rate is $271. Note however, that this is the rate charged, not necessarily the rate ultimately received. In many instances, there is a significant divergence between the two.").

[19] *See id.* at 40 ("[The no look fee] is a dollar figure that, if charged by a lawyer in connection with his or her representation of a consumer debtor, will typically allow the lawyer to avoid the necessity of filing a fee application with the court.").

or bringing an "adversary proceeding."[20] In order to be compensated for these services, a consumer attorney would have to file a fee application. In many jurisdictions, attorneys decline to file fee applications as a matter of course, due to the lack of certainty in the outcome and high costs. See *id.* at 113 ("[T]he most frequent participants in the system are 'scared' to file the fee applications because they don't know what to expect and many comment that filing the application takes far longer than the fees incurred in many cases (and they can't seek payment for much of the time preparing the application) so they don't bother.").

The entire fee application process, including determining the no look fee, is under the close supervision of the Chapter 13 Trustee. Indeed, in a Chapter 13 case, the most dominant player is typically the Chapter 13 Trustee, who is appointed by the United States Trustee and invested with significant statutory powers over the administration of the case. See 11 U.S.C. § 1302.

Typically, in a Chapter 13 case, it is the Chapter 13 Trustee who is the principal objector to fees.[21] The

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[20] *See id.* at 112 ("[M]ost often, the debtor is charged the [no look fee] in a standard case, but if a complication arises, such as the filing of an adversary proceeding, the attorney may be entitled to either a fixed amount of additional compensation, or payment of an hourly rate for time spent."). The term, "adversary proceeding," can refer to a variety of proceedings within the larger bankruptcy case. A list of typical adversary proceedings is found in Bankruptcy Rule 7001; such proceedings generally follow the Federal Rules of Civil Procedure and are "trial like" and costly.

[21] If debtor's counsel cannot be compensated for fee litigation, then the Chapter 13 Trustee will be invested with more power

cost of defending a fee application can easily equal or exceed the time spent on the rest of the consumer bankruptcy case. If the Trustee is aware that the filing of a fee objection puts the debtor's counsel at risk of losing most or all of their fees, debtors' counsel may be likely to compromise their fee (even if not justified) and the entire goal of comparability will be lost. Thus, in the consumer case it is not 4.4 percent that is at stake, but something closer to 100 percent.

Professor Lupica reports that because of the high probability a case will be dismissed or converted, at least some Chapter 13 lawyers view themselves as taking cases on what is essentially a contingency basis, which "in turn, has a profound effect upon the quality of legal services delivered." Lupica, *supra*, at 119. Ultimately, these problems suggest that the parties who suffer are the debtors, because legal services may be withheld based purely on a combination of cost considerations and concern over the fee application process. See *id*. at 113. See also ABI Fee Study, *supra*, at 136 (finding that 43% of the attorneys surveyed "reported that fee rulings had altered their willingness to do estate work").

The real harm, however, is a systemic aversion by consumer bankruptcy attorneys to legal matters where fees are substantially threatened. Such an outcome would mean that consumer debtors, already at risk of being unable to find competent and affordable counsel, may be further denied experienced legal representation. The Fifth Circuit decision will only add to the uncertainty experienced by lawyers who seek reasonable fee awards, and thus

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and is likely to become the final arbiter over fees, thus stripping the court of its power.

is likely to provide negative incentives for competent counsel to practice consumer bankruptcy law.

The Fifth Circuit's decision, if not reversed, will threaten the chance that consumer debtors will receive adequate representation and that consumer debtor's attorneys will receive reasonable fees, comparable to those received by lawyers practicing in other areas of law.

II. THE FIFTH CIRCUIT DECISION SHOULD BE REVERSED BECAUSE IT IMPROPERLY BASED ITS DECISION ON AN UNJUSTIFIED AND UNPROVEN "CONSPIRACY OF SILENCE" AND "PERVERSE INCENTIVES."

The Fifth Circuit departed from a strict insistence on comparability based, in large measure, on a highly subjective view of attorneys and their supposed willingness to act improperly. The Fifth Circuit thought that "perverse incentives . . . could arise from paying the bankruptcy professionals to engage in satellite fee litigation [and] are easy to conceive." *In re ASARCO, L.L.C.*, 751 F.3d at 301. Reflecting a surprisingly dim view of lawyers who practice in this field, the Fifth Circuit expressed a concern that "[the parties will] enter into a conspiracy of silence with regard to contesting each other's fee application." *Id.* at 302 (quoting *In re Consol. Bancshares, Inc.,* 785 F.2d 1249, 1255 (5th Cir. 1986)) (internal quotation marks omitted).[22]

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[22] *In re Consol. Bancshares, Inc.*, 785 F.2d at 1255 ("Too frequently, court-appointed counsel for debtor and the official creditor committees' interests in a case, creditor committees' interests in a case, sharing the mutual goal of securing approval for their fees, enter into a conspiracy of silence with regard to contesting each other's fee applications.").

This argument is flawed. First and foremost, the alleged conspiracy of silence does not arise in the vast majority of consumer cases for the simple reason that there is typically no one with whom to conspire. There is no creditors' committee, which was the focus of the Fifth Circuit's concern in *Consolidated Bancshares*. Nor did the Fifth Circuit offer any suggestion that standing Chapter 13 Trustees, who hold substantial statutory powers over the case, conspire with debtors.[23] In fact, the Chapter 13 Trustee usually mounts a persistent and aggressive challenge to the fee application. See ABI Fee Study, *supra*, at 68 ("[T]he U.S. Trustee is a very active participant in the fee allowance process."). Moreover, bankruptcy courts vigorously scrutinize the legal fees in all bankruptcy cases, leaving little opportunity for any such conspiracy. See *id.* at 3 ("The survey data also suggest a high level of vigilance on the issue of professional compensation . . . [and] a good deal of policing is occurring.").

Second, the record before the Fifth Circuit did not justify such a conclusion. Neither party requested it. The Fifth Circuit, of its own accord, appears to have launched an extraordinarily aggressive, if not viscous, attack on Baker Botts's fee application. Since they are purely conjecture, the Fifth Circuit's concerns regarding a conspiracy should be rejected.

Third, the scholarly and empirical evidence contradicts the Fifth Circuit's speculations. The ABI Fee Study established that most judges do not report

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[23] Lawyers for creditors typically do not represent debtors and, therefore, have no need for concern about aggressive challenges to fees. Similarly, most debtor lawyers limit their practice to the consumer side and have an incentive to avoid disputes with fellow lawyers. *See generally,* Lupica, *supra*, at 93.

this as a serious problem. See *id.* at 55 (acknowledging the Fifth Circuit's reference to a "conspiracy of silence" in *In re Consolidated Bancshares*, but finding that only 10% of the judges surveyed indicated this was one of their "'biggest problems'"). Moreover, the study showed that objections to legal fees—the opposite of a conspiracy of silence—occur frequently and are often meritless:

> Thus, it appears that attorneys show relatively little hesitation to attack the fee requests of their fellow professionals when it is in their client's interest to do so. If, in fact, there ever was a generally accepted taboo against fee objections, it may have disappeared with the bankruptcy rings.

ABI Fee Study, *supra*, at 59-60. [24] Thus, the Fifth Circuit decision will likely bring about more meritless objections to fee applications, as any objection, regardless of merit, will extract a high price from the consumer lawyer. Such an outcome would deal a massive blow to the congressional goal of comparability.

The Fifth Circuit's reliance on a conspiracy of silence was misguided, and casts a shadow on the bankruptcy bar, as a whole, and on lawyers who handle small, consumer cases, in particular. It should not be a basis for the deviation from the standard of comparability, which is of great importance to the consumer bankruptcy bar and to those who require the legal protection of Chapter 13.

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[24] The term, "bankruptcy ring," means "groups of attorneys in a few cities who had a virtual monopoly on the bankruptcy practice under the old Bankruptcy Act." ABI Fee Study, *supra*, at 60 n.40.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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