2022 Alexander L. Paskay Memorial Bankruptcy Seminar

All Things Attorney Fees

Hon. Caryl E. Delano, Moderator
U.S. Bankruptcy Court (M.D. Fla.) | Tampa

Bifurcation of Fees in Chapter 7
Erik Johanson
Erik Johanson PLLC | Tampa

Roundup of "No Look" Fees in Chapter 13 for Debtors and Secured Creditors
Jeffrey S. Fraser
Albertelli Law | Lake Worth

Douglas W. Neway
Chapter 13 Standing Trustee | Jacksonville

What the U.S. Trustee Looks For in Chapter 11
Heidi A. Feinman
Office of the U.S. Trustee | Miami

Nicole W. Peair
Office of the U.S. Trustee | Tampa

Use of Contingency Fee Arrangements
Douglas A. Bates
Clark Partington Hart Larry Bond & Stackhouse, P.A. | Pensacola

Damien H. Prosser
Morgan & Morgan | Orlando

Strategies for Fee Objections
John A. Anthony
Anthony & Partners LLC | Tampa

A New Judge's Perspective on Fees
Hon. Scott M. Grossman
U.S. Bankruptcy Court (S.D. Fla.) | Fort Lauderdale

The Great Debate: Out-of-Town Rates for In-Town Cases, Miami vs. Tampa: What Is Reasonable?
Corali Lopez-Castro
Kozyak Tropin & Throckmorton | Miami

Megan W. Murray
Underwood Murray PA | Tampa

The "ABCs" of Bifurcation

2022 Alexander L. Paskay Memorial Bankruptcy Seminar, March 29, 2022

By: Erik Johanson, Erik Johanson PLLC

Why Bifurcation?

- Counsel for a Chapter 7 debtor cannot be paid from the bankruptcy estate. Any amounts due to counsel for a Chapter 7 debtor on the petition date are subject to the bankruptcy discharge. *See Lamie v. United States Trustee*, 540 U.S. 526 (2004).
- For this reason, most lawyers who represent Chapter 7 debtors demand to be paid in full before the bankruptcy case is filed.
- However, some Chapter 7 debtors cannot afford to pay their counsel in full before filing for bankruptcy. This problem is particularly acute for persons facing wage garnishments or imminent foreclosure.
- The concept of "bifurcation," also referred to as a "two-contract procedure," has emerged as a work-around to enable counsel to represent Chapter 7 debtors who cannot afford to pay their counsel prior to filing for bankruptcy.

What is Bifurcation?

- In the typical bifurcated fee agreement, the Chapter 7 debtor enters into two contracts.
  - First, the debtor enters into a pre-petition contract under which counsel agrees to perform the basic services necessary to file the petition in exchange for little or no fee.
  - After the petition is filed, the debtor is given the option to enter into a second post-petition contract under which counsel agrees to perform the additional services necessary to complete the case in exchange for a flat fee.
- The debtor is not required to enter into the second post-petition contract. If the debtor does not wish to be represented post-petition in exchange for payment of their counsel's fee, the debtor can obtain alternative counsel or proceed pro se.

Is Bifurcation Permitted in the Eleventh Circuit?

- The Bankruptcy Courts for the Middle and Southern District of Florida have approved bifurcated fee agreements so long as they comply with certain requirements. *See In re Brown*, 631 B.R. 77 (Bankr. S.D. Fla. 2021) (Isicoff J.) and *Walton v. Clark & Washington, P.C.*, 469 B.R. 383 (Bankr. M.D. Fa. 2012) (Williamson, J.).
- In a recent decision, *In re Shatusky*, Case No. 8:22-bk-00131-RCT, Doc. No. 36 (Bankr. M.D. Fla. Mar. 18, 2022), Judge Colton harmonized both *In re Brown* and *Walton* to define the "minimum requirements for an acceptable bifurcated contract." Specifically, Judge Colton identified six (6) minimum requirements for bifurcated fee agreements.

The Minimum Requirements for Bifurcation

- 1. Adequate Disclosure to the Client
  - The pre and post-petition contracts must clearly set forth the services being provided under each contract and the cost for such services. Any services not included in the post-petition contract, e.g. "unbundled services," must be clearly delineated and the costs for such additional services must be specified.
  - The client must be presented with both contracts prior to signing the pre-petition agreement, along with a disclosure indicating that, post-petition, the client may: (1) retain the attorney for a fee under the post-petition agreement, (2) retain a new attorney post-petition, or (3) proceed pro se. If the client decides to proceed pro se, the lawyer must represent the client until the court authorizes the lawyer to withdraw.
  - The client must sign the pre-petition contract before the lawyer files the bankruptcy case. The post-petition contract cannot be signed until after the case is filed.

The Minimum Requirements for Bifurcation Cont.

- 2. Provision of the Required Pre-Petition Services
  - The attorney must consult with the client regarding whether to file bankruptcy and adequately inform the debtor of the consequences of filing for bankruptcy.
  - The attorney must prepare and file all documents necessary to commence the bankruptcy case, including the petition, creditor's matrix, any motion to waive the filing fee or to pay the filing fee in installments, the statement of attorney compensation, and the credit counseling certificate.
  - Unless or until the lawyer is permitted to withdraw, the lawyer must assist the client comply with their obligations under Section 521 and attend the Section 341 meeting.
- 3. Cooling Off Period
  - The client must be given 14 days after signing the post-petition contract to cancel the agreement, or a 14 day cooling off period between the filing of the petition and signing the post-petition contract, or both.

The Minimum Requirements for Bifurcation Cont.

- 4. Adequate Disclosure to the Court
  - The lawyer must file a Rule 2016(b) statement disclosing the limited services to be provided under the pre-petition contract and the compensation paid for such services.
  - The lawyer must supplement the Rule 2016(b) statement after the post-petition contract is signed and the compensation to be paid for such services.
- 5. Reasonable Fees
  - The fees charged both pre and post-petition must be reasonable. The reasonableness of pre and post-petition fees is not determined by comparing the work done pre-petition to the work that was done post-petition. All services that may have been required post-petition are considered even if they were not necessary. However, services that would never arise in the case, e.g. student loan issues for a debtor who does not have student loans, are not considered.

The Minimum Requirements for Bifurcation Cont.

- 6. Filing Fee
  - The lawyer cannot "advance" the filing fee. The client must pay the filing fee in full or obtain permission for the fee to be paid in installments.
  - Note Florida Rule of Professional Conduct 4-1.8(e) ("A lawyer is prohibited from providing financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.").

The Future of Bifurcation

- Factoring
  - In a factoring arrangement, counsel assign the right to collect their fees to a third-party in exchange for a discounted payment of the total fee. The factoring company then collects the fee directly from the client.
  - There are several reported decisions addressing the factoring of post-petition fees under a bifurcated fee agreement:
    - *In re Hazlett*, 2019 Bankr. LEXIS 1166, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019) (defining criteria under which factoring may be acceptable but discouraging the use of factoring arrangements that do not strictly comply with ethical guidance)
    - *In re Baldwin*, 2021 Bankr. LEXIS 2753, 2021 WL 4592265 (Bankr. W.D. Ky. Oct. 5, 2021) (disapproving factoring of fees under a bifurcated fee agreement)
    - *In re Brown*, 631 B.R. 77, 99 (Bankr. S.D. Fla. 2021) (stating, in dicta, that "the Court has determined that it will not allow any attorney to factor its legal fees. This creates an inherent conflict of interest between the attorney and the debtor . . .").
    - *In re Milner*, 612 B.R. 415 (Bankr. W.D. Ok. 2019) (disapproving a bifurcated and factored post-petition fee agreement)
    - *In re Prophet*, 628 B.R. 788 (Bankr. D.S.C. 2021) (disapproving a bifurcated and factored post-petition fee agreement based on application of the Court's local rules, which the court construed to prohibit limited representations), *but see Benjamin R. Matthews & Assoc. v. Fitzgerald*, 2022 U.S. Dist. LEXIS 44520 (D.S.C. Mar. 14, 2022) (reversing the bankruptcy court's ruling as it pertained to the interpretation of the local rule and remanding for further proceedings)

The Future of Bifurcation Cont.

- Traditional Financing
  - As an alternative to financing, lenders may consider offering targeted loans to Chapter 7 debtors for the express purpose of paying post-petition fees under a bifurcated fee agreement. The lender will pay the firm the full amount of its fee and, in exchange, the client will sign a post-petition financing agreement to repay the lender in 12 monthly installments, plus interest.
  - The only known reported decision to consider this method of financing in a Chapter 7 case is Judge Colton's recent decision in *In re Shatusky*. Judge Colton required the parties to make further disclosures for purposes of fully evaluating the proposed financing arrangement, but the court did rule as a general matter that an attorney may present "third party" financing options to a chapter 7 debtor under a bifurcated fee contract so long as the option is given as an option and not as affirmative advice to incur the debt.

Chapter 11 Fee Applications
The United States Trustee Perspective

Heidi Feinman, Trial Attorney, Miami
Nicole Peair, Trial Attorney, Tampa

Governing Statute: 11 U.S.C. § 330
Key Terms

- Trustee, Ombudsman, Examiner, Professional Person Employed under § 327 or § 1103 Notice and Hearing
- Notice and Hearing
- Reasonable Compensation
- Actual and Necessary Services and Expenses
- No Unnecessary Duplication of Services
- Must Provide Benefit to the Debtor's Estate

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Interim Compensation 11 U.S.C. §331

- Can request every 120 days after order for relief
- Notice and Hearing
- Holdbacks

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Holdbacks?

- Inability to predict administrative insolvency until conclusion of case
- Guard against disgorgement if there is administrative insolvency
- Balancing against estate's need for working capital
- Incentivize professional to diligently pursue case to conclusion

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Bankruptcy Rule 2016(a)

Detailed Statement

- Services Rendered
- Time Expended
- Expenses Incurred
- Amounts Requested

Statement of Amounts Paid or Promised

Source of Compensation

Any Sharing Agreements

5

Who Must File a Fee Application?

- Trustee or Examiner appointed pursuant to 11 U.S.C. § 1104
- Ombudsman appointed pursuant to 11 U.S.C. §§ 332 and 333
- Professionals employed pursuant to § 327 and Bankruptcy Rule 2014
  - Attorneys, Accountants, other professionals
  - Employed by Debtor, Committee, Trustee, or Examiner

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Professionals: § 327 and Rule 2014

- First disclosure of who is employed, terms of employment, fees and retainers
- Rule 2014 disclosures
  - Facts establishing necessity of employment
  - Name of firm and persons to be employed
  - Reasons for selection
  - Services to be rendered
  - Connections
  - Fee arrangement
  - Verified Statement
- Local Rules may require additional information
- Order must be entered before fees considered

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Local Rules

Middle District of Florida (www.flmsb.uscourts.gov/localrules)

Local Rule 2016-1(c)(2)

Procedure Manual: Chapter 11 Local Rule Fee App Summary

Southern District of Florida: (www.flsb.uscourts.gov/local-rules)

Local Rule 2016-1(B)(3)

Guidelines for Fee Applications for Professionals

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Must Consider:

- Johnson v. Georgia Highway Express
- Lodestar Analysis

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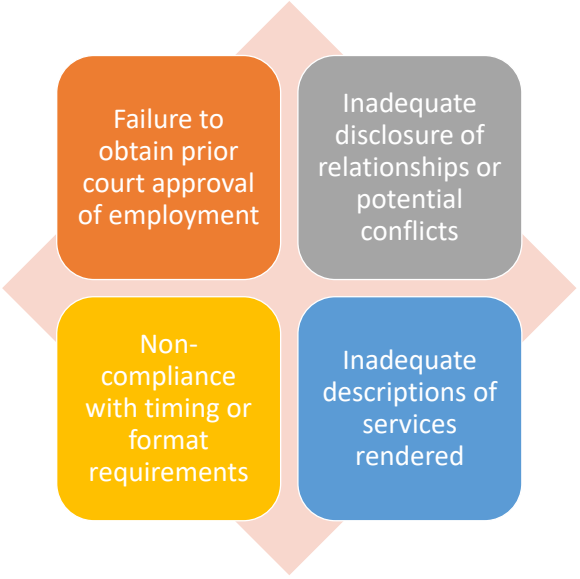
Potential Deficiencies:



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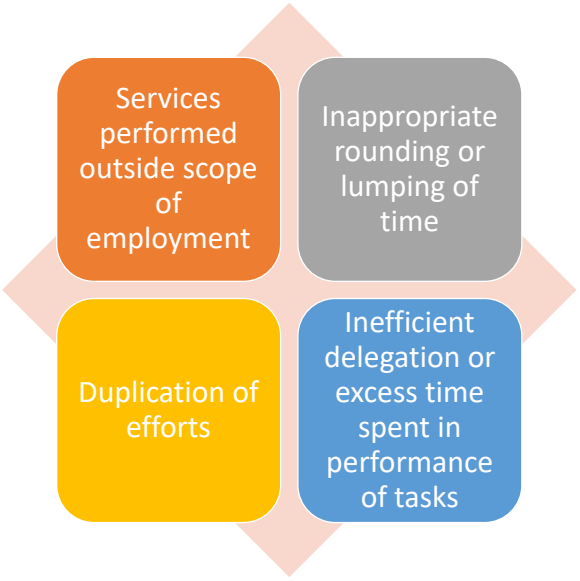

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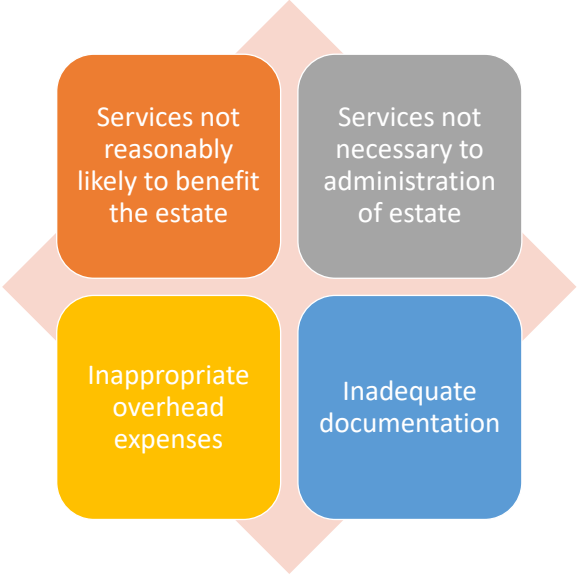

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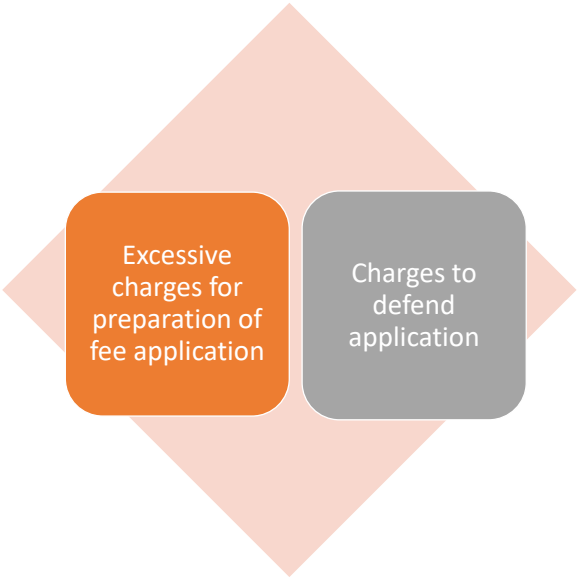

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Retainers

EVERGREEN RETAINERS

POST-PETITION RETAINERS

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Fee Guidelines Larger Chapter 11 Cases

Chapter 11 cases with $50 million or more in both assets and liabilities

Aggregated for jointly administered cases

Contact your local United States Trustee Office for more information

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Final Notes

- The Court is the arbiter
- United States Trustee uses these general guidelines to determine if fees meet the requirements of § 330 and whether or not an objection is appropriate and necessary

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United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 3. Case Administration (Refs & Annos)
Subchapter II. Officers

11 U.S.C.A. § 327

§ 327. Employment of professional persons

Currentness

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other 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.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2563; Pub.L. 98-353, Title III, § 430(c), July 10, 1984, 98 Stat. 370; Pub.L. 99-554, Title II, §§ 210, 257(e), Oct. 27, 1986, 100 Stat. 3099, 3114.)

Notes of Decisions (831)

11 U.S.C.A. § 327, 11 USCA § 327
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 3. Case Administration (Refs & Annos)
Subchapter II. Officers

11 U.S.C.A. § 328

§ 328. Limitation on compensation of professional persons

Currentness

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2563; Pub.L. 98-353, Title III, § 431, July 10, 1984, 98 Stat. 370; Pub.L. 109-8, Title XII, § 1206, Apr. 20, 2005, 119 Stat. 194.)

Notes of Decisions (298)

11 U.S.C.A. § 328, 11 USCA § 328
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 3. Case Administration (Refs & Annos)
Subchapter II. Officers

11 U.S.C.A. § 330

§ 330. Compensation of officers

Effective: September 30, 2021

Currentness

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for--

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) 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.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

(b)(1) There shall be paid from the filing fee in a case under chapter 7 of this title $45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States--

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title;

to pay $15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

(e)(1) There is established a fund in the Treasury of the United States, to be known as the "Chapter 7 Trustee Fund", which shall be administered by the Director of the Administrative Office of the United States Courts.

(2) Deposits into the Chapter 7 Trustee Fund under section 589a(f)(1)(C) of title 28 shall be available until expended for the purposes described in paragraph (3).

(3) For fiscal years 2021 through 2026, the Chapter 7 Trustee Fund shall be available to pay the trustee serving in a case that

is filed under chapter 7 or a case that is converted to a chapter 7 case in the most recent fiscal year (referred to in this subsection as a "chapter 7 case") the amount described in paragraph (4) for the chapter 7 case in which the trustee has rendered services.

(4) The amount described in this paragraph shall be the lesser of--

(A) $60; or

(B) a pro rata share, for each chapter 7 case, of the fees collected under section 1930(a)(6) of title 28 and deposited to the United States Trustee System Fund under section 589a(f)(1) of title 28, less the amounts specified in section 589a(f)(1)(A) and (B) of title 28.

(5) The payment received by a trustee under paragraph (3) shall be paid in addition to the amount paid under subsection (b).

(6) Not later than September 30, 2021, the Director of the Administrative Office of the United States Courts shall promulgate regulations for the administration of this subsection.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2564; Pub.L. 98-353, Title III, §§ 433, 434, July 10, 1984, 98 Stat. 370; Pub.L. 99-554, Title II, §§ 211, 257(f), Oct. 27, 1986, 100 Stat. 3099, 3114; Pub.L. 103-394, Title I, § 117, Title II, § 224(b), Oct. 22, 1994, 108 Stat. 4119, 4130; Pub.L. 109-8, Title II, § 232(b), Title IV, §§ 407, 415, Title XI, § 1104(b), Apr. 20, 2005, 119 Stat. 74, 106, 107, 192; Pub.L. 116-325, § 3(c), Jan. 12, 2021, 134 Stat. 5087; Pub.L. 117-43, Div. A, § 131, Sept. 30, 2021, 135 Stat. 351.)

Notes of Decisions (1891)

11 U.S.C.A. § 330, 11 USCA § 330
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Federal Rules of Bankruptcy Procedure (Refs & Annos)
Part II. Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants

Federal Rules of Bankruptcy Procedure, Rule 2014

Rule 2014. Employment of Professional Persons

Currentness

(a) Application for an order of employment

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(b) Services rendered by member or associate of firm of attorneys or accountants

If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

CREDIT(S)

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991.)

ADVISORY COMMITTEE NOTES

Subdivision (a) is adapted from the second sentence of former Bankruptcy Rule 215(a). The remainder of that rule is covered by § 327 of the Code.

Subdivision (b) is derived from former Bankruptcy Rule 215(f). The compensation provisions are set forth in § 504 of the Code.

1991 Amendments

This rule is amended to include retention of professionals by committees of retired employees pursuant to § 1114 of the Code.

The United States trustee monitors applications filed under § 327 of the Code and may file with the court comments with respect to the approval of such applications. See 28 U.S.C. § 586(a)(3)(H). The United States trustee also monitors creditors' committees in accordance with 28 U.S.C. § 586(a)(3)(E). The addition of the second sentence of subdivision (a) is designed to enable the United States trustee to perform these duties.

Subdivision (a) is also amended to require disclosure of the professional's connections with the United States trustee or persons employed in the United States trustee's office. This requirement is not intended to prohibit the employment of such persons in all cases or to enlarge the definition of "disinterested person" in § 101(13) of the Code. However, the court may consider a connection with the United States trustee's office as a factor when exercising its discretion. Also, this information should be revealed in the interest of full disclosure and confidence in the bankruptcy system, especially since the United States trustee monitors and may be heard on applications for compensation and reimbursement of professionals employed under this rule.

The United States trustee appoints committees pursuant to § 1102 of the Code which is applicable in chapter 9 cases under § 901. In the interest of full disclosure and confidence in the bankruptcy system, a connection between the United States trustee and a professional employed by the committee should be revealed in every case, including a chapter 9 case. However, since the United States trustee does not have any role in the employment of professionals in chapter 9 cases, it is not necessary in such cases to transmit to the United States trustee a copy of the application under subdivision (a) of this rule. See 28 U.S.C. § 586(a)(3)(H).

Notes of Decisions (242)

Fed.Rules Bankr.Proc. Rule 2014, 11 U.S.C.A., FRBP Rule 2014
Including Amendments Received Through 3-1-22

End of Document

626 B.R. 51
United States Bankruptcy Court, M.D. Florida.

IN RE: FUNDAMENTAL LONG TERM CARE, INC., Debtor.

Case No. 8:11-bk-22258-MGW
|
DATED: March 30, 2021.

Synopsis
Background: Law firms retained as special counsel for Chapter 7 trustee filed applications for attorney fees and expenses.

[Holding:] The Bankruptcy Court, Michael G. Williamson, J., held that trustee's contingent fee agreement with law firms was not improvident.

Ordered accordingly.

West Headnotes (8)

[1] **Bankruptcy** Amount; hourly rate

Bankruptcy court may not later alter the terms of professional's approved contingency fee agreement unless the terms prove to have been improvident in light of developments that could not have been anticipated at the time of the employment. 11 U.S.C.A. § 328(a).

1 Cases that cite this headnote

[2] **Bankruptcy** Amount; hourly rate

Bankruptcy statute governing limitation on compensation of professional persons applies to a professional's fees in cases where the bankruptcy court approves a particular rate or means of payment for the professional at the time of his employment. 11 U.S.C.A. § 328.

[3] **Bankruptcy** Amount; hourly rate

The standard for considering a professional's fees under bankruptcy statute governing limitation on compensation of professional, which applies when the court pre-approved a particular rate or terms of compensation, is distinct from the standard for considering fees under bankruptcy statute governing compensation when the court did not pre-approve a particular rate or terms of compensation for the professional. 11 U.S.C.A. §§ 328, 330.

[4] **Bankruptcy** Effect of contract; prior compensation

Generally, once terms of attorney's employment are approved by bankruptcy court, they cannot be challenged as "unreasonable." 11 U.S.C.A. §§ 328, 330.

[5] **Bankruptcy** Amount; hourly rate

If employment terms and conditions are approved by bankruptcy court, then professional's compensation is governed by those terms and conditions, rather than general "reasonable compensation for services rendered" language of Bankruptcy Code. 11 U.S.C.A. §§ 328, 330.

1 Cases that cite this headnote

[6] **Bankruptcy**Amount; hourly rate

Finding of improvidence, pursuant to the section of the Bankruptcy Code governing limitation on compensation of professional persons for whom court has pre-approved a particular rate or terms of compensation, is a difficult determination to make. 11 U.S.C.A. § 328.

[7] **Bankruptcy**Effect of contract; prior compensation

Contingency fee agreement is not improvident, pursuant to the section of the Bankruptcy Code governing limitation on compensation of professional persons, even if the fees appear excessive in hindsight at the end of the case, or even if an unexpected event such as a settlement or sale affects the rate claimed by the professional, as long as the event was capable of anticipation at the time the fee agreement was pre-approved. 11 U.S.C.A. § 328.

[8] **Bankruptcy**Effect of contract; prior compensation

Chapter 7 trustee's contingent fee agreement with law firms retained as special counsel was not improvident, pursuant to the section of the Bankruptcy Code governing limitation on compensation of professional persons; firms successfully completed the work that they were retained to perform, including reaching $6.5 million settlement of claims, which produced a significant benefit to the bankruptcy estate that the estate would not otherwise have received, services of firms led directly to estate's receipt of settlement funds, and the settlement clearly was capable of anticipation at the time that trustee employed firms. 11 U.S.C.A. § 328.

Attorneys and Law Firms

***52** Robert F. Elgidely, Esq. Fox Rothschild LLP Special Counsel to Chapter 7 Trustee

John H. Genovese, Esq. Genovese Joblove & Battista, P.A. Former Special Counsel to Chapter 7 Trustee

James L. Wilkes, II, Esq. Wilkes & Associates, P.A. Counsel for the Probate Estates

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING ORDERS AWARDING ATTORNEYS' FEES AND EXPENSES TO SPECIAL COUNSEL FOR CHAPTER 7 TRUSTEE

Michael G. Williamson, United States Bankruptcy Judge

On March 3, 2021, the Court entered two orders (the Fee Orders) awarding fees and expenses to two law firms for legal services that they provided to the Chapter 7 Trustee in litigation against Troutman Sanders, LLP (the Troutman Litigation). The Fee Orders are (1) an order approving the final fee application of Robert F. Elgidely, ***53** Esquire (Elgidely) and the Law Firm of Fox Rothschild LLP (the Fox Firm) as special counsel to the Chapter 7 Trustee;[1] and (2) an order approving the fee application of the Law Firm of Genovese Joblove & Battista, P.A. (the Genovese Firm) as former special counsel to the Chapter 7 Trustee.[2] At the request of the Estates of Juanita Jackson, Elvira Nunziata, Joseph Webb, Arlene Anne Townsend, Opal Lee Sasser, and James Henry Jones (the Probate Estates),[3] the Court enters these findings of fact and conclusions of law in support of the Fee Orders.

[1]The Court had approved the Trustee's applications to employ the Fox Firm and the Genovese Firm on a contingency fee basis under 11 U.S.C. § 328(a). Under § 328(a), the Court may not later alter the terms of an approved contingency fee agreement unless the terms "prove to have been improvident" in light of developments that could not have been anticipated at the

time of the employment. Here, the Court finds that Elgidely, the Fox Firm, and the Genovese Firm diligently performed the services that they were employed to perform, and the Troutman Litigation was settled by Troutman's payment of $6.5 million to the Chapter 7 Trustee for the benefit of the estate. The Trustee's employment of Elgidely, the Fox Firm, and the Genovese Firm on a contingency fee basis was not improvident, and the Court approves their fee applications on the terms set out in the agreement.

I. Background

A. The bankruptcy case and commencement of the Troutman Litigation

On December 5, 2011, the Estate of Juanita Jackson filed an involuntary Chapter 7 petition against the Debtor, and an order for relief was entered on January 12, 2012. Beth Ann Scharrer was appointed as the Trustee of the Chapter 7 estate.

On June 2, 2014, the Trustee initiated the Troutman Litigation by filing a complaint and jury trial demand against Troutman Sanders, LLP and two individuals.[4] The original complaint contained five counts alleging negligence and fraud. On December 8, 2015, the Court entered a *Memorandum Opinion and Order on Motions to Dismiss* in which it dismissed Count I of the complaint with prejudice, and dismissed Counts II through V without prejudice.[5]

B. Employment of Elgidely and the Genovese Firm

On January 11, 2016, the Trustee filed an application to employ Elgidely and the Genovese Firm as special counsel to represent her in the Troutman Litigation.[6] In the application, the Trustee represented (1) that Elgidely would be primarily responsible for handling the prosecution of the Troutman Litigation, (2) that the Genovese Firm would first enter a Phase I negotiation phase and later, if necessary, a Phase 2 continued litigation phase, and (3) that the Genovese Firm would charge "on a contingency fee basis equivalent to 20% ***54** of the gross recovery in Phase I and equivalent to 40% (plus an additional five percent (5%) in the event of an appeal) of the gross recovery in Phase 2 whether through collection of a judgment, settlement or otherwise."

Troutman filed a limited objection to the application,[7] and the Probate Estates filed an objection stating that they "have no objection to the Trustee's employment of the Genovese firm to pursue the claim of the bankruptcy estates, and the payment of reasonable compensation to the firm by Scharrer – solely from any recovery from the Bankruptcy Estate's claims against Troutman – in order to pursue actions against Troutman, as long as the terms of this Court's Settlement Order [among the Probate Estates, the Trustee, and Estate Professionals] remain in effect."[8]

On January 14, 2016, the Court conducted a hearing on the application. At the hearing, the Probate Estates supported the employment of Elgidely and the Genovese Firm and the payment of reasonable compensation for their services, and were concerned primarily about the impact of the employment on their independent claims against Troutman after the bankruptcy case was closed.[9]

On February 9, 2016, the Court entered an order approving the Trustee's application to employ Elgidely and the Genovese Firm (the Genovese Employment Order).[10] After noting that the "Probate Estates, who would benefit from any recovery in the Troutman Adversary, supported the employment application," the Genovese Employment Order provides:

> Before this case is closed, Elgidely and GJB shall be compensated for their representation of the Trustee in the Troutman Adversary on a contingency fee basis equivalent to: (a) 20% of the gross recovery obtained during the Negotiation Phase; and (b) *40% of the gross recovery obtained, whether by settlement, judgment collection, or otherwise, during the Litigation Phase (plus an additional 5% in the event of an appeal). Payment of compensation before the case is closed shall be subject to Bankruptcy Code § 328(a)*. Once the Liquidating Trust is established, Elgidely's and GJB's compensation shall be subject to the agreement of the Trustee and the Probate Estates.[11]

No party filed a motion to reconsider the Genovese Employment Order. In addition, the bankruptcy case has not been closed, and no Liquidating Trust was established in this case.[12]

C. The Troutman Litigation

On May 6, 2016, the Genovese Firm filed an amended complaint and demand for jury trial in the Troutman

Litigation.[13] The amended complaint contained four counts asserting claims for civil conspiracy, aiding and abetting fraud, aiding and abetting conversion, and aiding and abetting breach of fiduciary duties. During the course of the litigation, Troutman filed a motion to dismiss the amended complaint, an answer with 29 affirmative defenses, and a motion for partial summary judgment.[14] On November ***55** 7, 2016, the Court entered an *Agreed Order Establishing Pretrial Procedures* and set dates for the parties to complete discovery and file summary judgment motions.[15]

On December 13, 2016, the Trustee and Troutman entered into a *Settlement Agreement to Resolve, Release, and Bar Claims*, under which Troutman agreed to pay the sum of $6.5 million to the Trustee.[16] On December 16, 2016, the Trustee filed a motion to approve the settlement under Fed. R. Bankr. P. 9019.[17] The Probate Estates objected to the settlement,[18] and the parties engaged in extensive discovery on the Trustee's motion to approve the settlement and the Probate Estates' objection.[19] On May 1, 2017, the Court conducted a trial on the motion and objection,[20] and on May 17, 2017, the Court entered an *Order Granting Trustee's Verified Motion to Approve Compromise of Controversy with Troutman Sanders LLP* (the Troutman Settlement Order).[21]

On May 31, 2017, the Probate Estates filed a notice of appeal of the Troutman Settlement Order.[22] On May 30, 2019, the District Court remanded the matter to the Bankruptcy Court to determine the limited issue of "whether the Trustee's settling with Troutman Sanders without approval from the Probate Estates violated the Settlement Term Sheet" between the Trustee and the Probate Estates.[23] On August 19, 2019, the Court entered a Memorandum Opinion and Order on the remanded matter, and determined that the Trustee's settlement with Troutman did not violate the Settlement Term Sheet entered by the Trustee and the Probate Estates.[24]

On August 16, 2019, the Probate Estates filed a second notice of appeal related to the Troutman Settlement Order.[25] On September 30, 2020, the District Court entered an order affirming the Troutman Settlement Order,[26] and later entered an order denying the Probate Estates' motion for rehearing of the District Court order.

On February 19, 2021, Troutman paid the settlement amount of $6.5 million to the Trustee.[27]

D. Employment of Elgidely and the Fox Firm

In October 2019, during the pendency of the Probate Estates' second appeal in the Troutman Litigation, Elgidely left the Genovese Firm and began employment with the Fox Firm. On November 27, 2019, the Trustee filed an application to employ Elgidely and the Fox Firm to represent her in her defense of the Probate Estates' second appeal of the Troutman Settlement Order.[28]

The Probate Estates filed an objection to the application alleging a number of disqualifying conflicts of interest between ***56** the Fox Firm and the bankruptcy estate.[29] The Trustee filed a response to the objection,[30] and the Court conducted a hearing on January 27, 2020.[31]

On April 3, 2020, the Court entered a Memorandum Opinion and Order finding no conflicts of interest between the Fox Firm and the bankruptcy estates, overruling the Probate Estates' objection, and approving the Trustee's application to employ Elgidely and the Fox Firm as special counsel in the Troutman Litigation (the Fox Employment Order).[32] In addition, the Fox Employment Order provides:

> The contingency fee previously approved by the Court will be allocated between Fox Rothschild and the Genovese Firm in a manner agreed upon by those firms, or, as may be determined by this Court at the appropriate time if an agreement cannot be reached. The aggregate contingency fee payable to Fox Rothschild and the Genovese Firm will not exceed the contingency fee previously approved by this Court.[33]

The Probate Estates filed a notice of appeal of the Fox Employment Order.[34] On September 21, 2020, the District Court entered an order dismissing the appeal.[35]

E. The Genovese Firm's fee application and order

On February 22, 2021, the Genovese Firm filed an application for an award of the agreed allocation of the contingency fee earned as former special counsel to the Trustee in the Troutman Litigation.[36] The Genovese Firm asserts that the application covers the period from January 11, 2016, to November 13, 2019, that the Trustee has funds on hand in the amount of $6,530,211.42, that the total amount of the approved contingency fee earned for prosecuting the Troutman Litigation was $2,925,000.00, and that the Genovese Firm's agreed allocation of the total contingency fee is $2,193,750.00. In addition, the Genovese Firm seeks reimbursement of expenses in the amount of $42,676.04 and attached a summary of the requested expenses. Consequently, the Genovese Firm

seeks a total award of $2,236,426.04 through the application.

On March 3, 2021, the Court entered an order approving the application and awarded the Genovese Firm "$2,193,750.00 in compensation as its portion of the Total Contingency Fee on a final basis and reimbursement of its expenses totaling $42,676.04, for a total award of $2,236,426.04."[37]

F. The Fox Firm's fee application and order

On February 22, 2021, the Fox Firm filed a final application for an award of compensation as special counsel to the Trustee.[38] The Fox Firm asserts that the application covers the period from October 2019 to January 2021, that the Trustee has funds on hand in the amount of $6,530,211.42, that the total contingency fee for prosecuting the Troutman Litigation is $2,925,00.00, and that the Fox Firm's agreed allocation of the total contingency ***57** fee is $731,250.00. In addition, the Fox Firm seeks reimbursement of expenses in the amount of $2,764.01 and attached a summary of expenses and disbursements. Consequently, the Fox Firm seeks a total award of $734,014.01 through the application.

On March 3, 2021, the Court entered an order approving the application and awarding the Fox Firm "$731,250.00 as its portion of the Contingency Fee on a final basis and reimbursement of its expenses totaling $2,764.01, for a total award of $734,014.01."[39]

The order approving the Fox Firm's fees and expenses provides that "specific findings and a statement of the facts and considerations supporting each of these conclusions have been omitted in the interest of brevity but will be prepared and filed at the request of any party if received by this Court within ten (10) days after the entry of this Order."[40] The Probate Estates made a timely request.[41]

II. Analysis

A. 11 U.S.C. § 328(a)

Section 328(a) of the Bankruptcy Code expressly authorizes a trustee's employment of a professional on a contingent fee basis. Specifically, the section provides that a trustee, with the court's approval, may employ a professional person under § 327 "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, *or on a contingent fee basis*." The section also provides that, after the professional's employment is concluded, the court may allow a different compensation than the terms of compensation approved in the employment agreement if such terms and conditions "prove to have been improvident in light of developments not capable of being anticipated at the time" that they were fixed.[42]

[2] [3]Section 328 applies to a professional's fees in cases where the bankruptcy court approves a particular rate or means of payment for the professional at the time of his employment. The standard for considering a professional's fees under § 328 is distinct from the standard for considering fees under 11 U.S.C. § 330, which authorizes the award of "reasonable" compensation. Section 330 applies when the court did not pre-approve a particular rate or terms of compensation for the professional.[43]

[4] [5]Generally, once the terms of an attorney's employment are approved under § 328, they cannot be challenged as "unreasonable" under § 330 of the Bankruptcy Code.[44]

> If employment terms and conditions are approved by a bankruptcy court under § 328(a), then the professional's compensation is governed by those terms and conditions, rather than the general "reasonable compensation for services rendered" language of § 330(a)(1)(A).... Case law makes clear that the "subject to" qualification in § 330(a)(1) means that the previously approved § 328(a) terms and conditions control the professional's compensation. ***58** [45]

[6] [7]In other words, after a court pre-approves the terms of employment under § 328(a), "its power to amend those terms is severely constrained."[46] The terms can only be altered if they prove to have been improvident in light of unanticipated developments, and a "finding of improvidence pursuant to § 328 is a difficult determination to make."[47] For example, a contingency fee agreement is not improvident even if the fees appear excessive in hindsight at the end of the case, or even if an unexpected event such as a settlement or sale affects the rate claimed by the professional, as long as the event was *capable* of anticipation at the time the fee agreement was pre-approved.[48]

B. The Trustee's contingent fee agreement with the Genovese Firm and the Fox Firm was not improvident.

[8]The Trustee's contingent fee agreement with Elgidely, the Genovese Firm, and the Fox Firm was pre-approved by the Court under § 328(a) in the orders approving their employment. Her application to employ the Genovese Firm set out the terms of the contingent fee arrangement in detail, her application to employ the Fox Firm incorporated the fee arrangement, and the orders approving the Trustee's employment of the Genovese Firm and the Fox Firm clearly approved the terms of the contingent fee agreement.[49]

The Court will not alter the terms of the Trustee's contingent fee agreement with Elgidely, the Genovese Firm, and the Fox Firm because the terms of the arrangement have not proved to be improvident by subsequent developments in the case.

First, Elgidely, the Genovese Firm, and the Fox Firm successfully completed the work that they were retained to perform. They were employed to prosecute the Troutman Litigation after the Court had dismissed the original complaint. The record of the Troutman Litigation shows that, among other services, Elgidely and the Genovese Firm or the Fox Firm (1) filed an amended complaint, (2) entered a settlement agreement with Troutman, (3) successfully defended the settlement in contested evidentiary proceedings in the Bankruptcy Court, and (4) further successfully defended the settlement in two appeals to the District Court.

Second, the settlement in the Troutman Litigation produced a significant benefit to the bankruptcy estate that the estate would not otherwise have received. The settlement provided for Troutman to pay $6.5 million to the Trustee, and the settlement amount has in fact been paid. After disbursement of the Trustee's fees and costs, the settlement yielded more than $2.7 million to the estate for distribution to creditors under the Bankruptcy Code.[50]

Finally, no unexpected events occurred in this case that rendered the contingent ***59** fee agreement improvident. Settlement of the Troutman Litigation clearly was capable of anticipation at the time that the Trustee employed Elgidely and the law firms, and the services of Elgidely and the law firms led directly to the estate's receipt of the settlement funds.[51]

In conclusion, the Court finds that the Trustee's contingent fee agreement with Elgidely, the Genovese Firm, and the Fox Firm was approved in advance under § 328(a). The Court will approve the compensation and expenses requested by Elgidely, the Genovese Firm, and the Fox Firm under that section because the Trustee and the attorneys that she employed diligently fulfilled the duties that they were retained to perform, there have been no developments not capable of anticipation that make the agreement improvident, and the results of the services provided by Elgidely, the Genovese Firm, and the Fox Firm were extraordinary and beneficial to the estate.[52]

Accordingly, it is

ORDERED that contingency fees and expenses are awarded to Robert F. Elgidely, Esquire, Fox Rothschild LLP, and Genovese Joblove & Battista, P.A. in accordance with (1) the *Order Approving Final Application for Allowance and Payment of Compensation and Reimbursement of Expenses to Robert F. Elidely, Esq. and the Law Firm of Fox Rothschild LLP, as Special Counsel to Chapter 7 Trustee Beth Ann Scharrer* (Doc. No. 2303), and (2) the *Order Approving Application for Award of Compensation and Approval and Payment of Agreed Allocation of Earned Contingency Fee and Reimbursement of Expenses to the Law Firm of Genovese Joblove & Battista, P.A., as Former Special Litigation Counsel to Chapter 7 Trustee for Beth Ann Scharrer* (Doc. No. 2304).

Attorney Robert F. Elgidely is directed to serve a copy of these Findings of Fact and Conclusions of Law on interested parties who do not receive service by CM/ECF and file a proof of service within 3 days of entry.

All Citations

626 B.R. 51, 70 Bankr.Ct.Dec. 24

Footnotes

1 Doc. No. 2303.

2 Doc. No. 2304.

3 Doc. Nos. 2312, 2313.

4 Adv. Pro. No. 8:14-ap-00486-MGW, Doc. No. 1.

5 Adv. Pro. No. 8:14-ap-00486-MGW, Doc. No. 62.

6 Doc. No. 1914.

7 Doc. No. 1916.

8 Doc. No. 1917.

9 Doc. No. 1921, Transcript of January 14, 2016 hearing, pp. 13-17.

10 Doc. No. 1927 (emphasis added).

11 Doc. No. 1927.

12 See Doc. Nos. 1964, 2228.

13 Adv. Pro. No. 8:14-ap-00486-MGW, Doc. No. 85.

14 *Id*. at 91, 102, 103.

15 *Id*. at 112.

16 Doc. No. 1999, p. 24.

17 Doc. No. 1999.

18 Doc. Nos. 2006, 2107.

19 *See*, for example, Doc. Nos. 2009, 2016, 2028, 2031-2022, 2040, 2062, 2078, 2080, 2083.

20 Doc. No. 2112.

21 Doc. No. 2127.

22 Doc. No. 212.

23 Doc. No. 2217.

24 Doc. No. 2228.

25 Doc. No. 2231.

26 Doc. Nos. 2295, 2296.

27 See Doc. No. 2298, ¶ 51.

28 Doc. No. 2258.

29 Doc. Nos. 2259, 2260.

30 Doc. No. 2266.

31 Doc. No. 2267.

32 Doc. No. 2275.

33 Doc. No. 2275, p. 17.

34 Doc. No. 2283.

35 Doc. No. 2294.

36 Doc. No. 2300.

37 Doc. No. 2304.

38 Doc. No. 2298.

39 Doc. No. 2303.

40 Doc. No. 2303, p. 5.

41 Doc. Nos. 2312, 2313.

42 11 U.S.C. § 328(a) (emphasis added).

43 *In re Clark*, 2014 WL 10250672, at *2 (Bankr. N.D. Fla. July 28, 2014).

44 *In re John Q. Hammons*, 600 B.R. 436, 449 (Bankr. D. Kan. 2019).

45 *In re Hungry Horse, LLC*, 574 B.R. 740, 746 (Bankr. D. N. Mex. 2017).

46 *In re Smart World Technologies, LLC*, 552 F.3d 228, 232 (2d Cir. 2009).

47 *In re XO Communications, Inc.*, 323 B.R. 330, 339 (Bankr. S.D.N.Y. 2005).

48 *In re John Q. Hammons*, 600 B.R. at 450-51(citing *In re ASARCO*, 702 F.3d 250, 259 (5th Cir. 2012)) and *In re Smart World Technologies*, 383 B.R. 869, 877 (S.D.N.Y. 2008, aff'd, 552 F.3d 228 (2d Cir. 2009)).

49 *In re Clark*, 2014 WL 10250672, at *3.

50 See Doc. No. 2011, pp. 9-10; Doc. No. 2108, Sworn Direct Testimony of Chapter 7 Trustee, p. 1, ¶ 4.

51 See *In re John Q. Hammons*, 600 B.R. at 450-51 (Developments such as a new title insurance issue, an alleged breach of professional duties, and an alleged lack of a "causal connection" between the professional's work and the disposition of the debtor's assets were not events that rendered the professional's fees improvident.)

52 *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327, 345 (Bankr. D. Md. 2000).

End of Document

MORGAN & MORGAN
BUSINESS TRIAL GROUP
Contingency-Fee Litigation

March 22, 2022

CLIENT
ADDRESS
EMAIL

Re: PLAINTIFF v. DEFENDANT

LEGAL REPRESENTATION AGREEMENT

Dear CLIENT:

This letter acknowledges that Morgan & Morgan, P.A. (the "Firm") has been retained to represent you in connection with the matter described in Section A. The purpose of this letter is to confirm our agreement (the "Agreement") for this representation.

A. Scope of Representation.

i. This Agreement applies to our representation of you in the prosecution of claims against _____ regarding _____.

ii. We will require that a separate representation agreement be entered into before we represent you in any other matter.

B. Attorneys' Fees and Costs.

i. **This is a contingent fee contract.** This is not a claim for personal injury or property damage as defined in Rule 4-1.5(f)(4) of the Rules Regulating the Florida Bar and, therefore, is not governed by the limitations and requirements thereof.

ii. Our fee for the representation will be _____ **Percent (__%)** of the Gross Value of any Recovery. Our fee for the representation will be calculated based on the "Gross Value" of any "Recovery." Recovery means any settlement, award, or judgment obtained from the resolution of this case or as the result of this case. Gross Value means the total monetary value – whether in cash, property, reduction of liability, future business relationships, or other things of value – of any Recovery in this case or as a result of this case.

You may be entitled to recover attorneys' fees from another party. In the event you are awarded attorneys' fees, this amount will be included in the Gross Value used in calculating the Firm's fees. The Firm will be entitled to receive a fee of the greater of: (1) the percentage of Gross Value set forth below, or (2) the amount of the awarded attorneys' fees.[1] Either way, the Firm will deduct any advanced costs from your share of the Recovery after the Firm's fee has been calculated, as addressed below.

You agree that any money paid from a Recovery or any attorneys' fees recovered from another party will be directed to the Firm's trust account before being disbursed to you.

You agree that the Firm's fees will be paid within 30 days of you receiving the Recovery. If the Firm's fees are not paid within 30 days of you receiving the Recovery, you agree to pay the Firm interest at the Florida statutory judgment interest rate plus two percent on any of the Firm's outstanding fees.

iii. The Firm is not obligated to undertake your representation in any appeal. If the Firm agrees to undertake your representation in any appeal, a separate agreement will be necessary.

iv. The Firm is not obligated to undertake your representation in any additional action required to collect a settlement, award, or judgment. If the Firm agrees to undertake your representation in any collections action, a separate agreement will be necessary.

v. The Firm may, but is not required to, advance costs incurred in your representation. **In the event the Firm advances costs on your behalf, you acknowledge that the Firm will deduct costs from your share of the Recovery after the Firm's fee has been calculated.** You understand and agree that you are only obligated to pay costs if there is a Recovery in this claim. These costs shall include, but are not limited to, cash and non-cash expenditures for: court filing fees, experts, mediation fees, subpoenas and deposition costs, witness fees, long distance telephone calls, facsimiles, photocopies, postage, in-house printing, travel, parking, a $25.00 record retention fee, investigative services and all other costs necessary for proper performance of legal services. Any unpaid amounts shall accrue interest at the rate of 1.5% per month. In the event that the

[1] If a settlement is reached after a verdict or judgment of damages has been entered, but before an award of fees has been entered, and the settlement includes amounts in excess of the amount of the verdict or judgment of damages, then the excess amounts will be treated as Court awarded attorneys' fees for the purpose of this calculation.

Firm withdraws from the case, the Firm reserves the right to be reimbursed for these costs if a recovery is made by another firm. If at any time you would like an update of the amount of costs that have been advanced on your case, the Firm will provide it to you at your written request.

The Firm will advance these costs on your behalf. These costs will be deducted from your portion of the recovery in the case (the amount remaining after subtracting the attorneys' fees owed under this Agreement) before final disbursement of proceeds to you.

C. **Lien for Fees and Costs.** To secure the payment of the Firm's fees and costs incurred under the terms of this Agreement, you hereby confer and grant a charging lien on your claim and any recovery in this case, and a retaining lien on the files and records, as permitted by law, which will be deemed in force and perfected from the date of this Agreement.

D. **Fees and Costs Shifting.** In some circumstances, you may be required to pay another party for their attorneys' fees and costs. If applicable, this risk is yours alone and does not affect or diminish the fees and costs owed the Firm under this Agreement.

E. **Previous or Current Attorneys.** The Firm is not responsible for paying attorneys' fees or costs to any attorneys that you have previously or currently retained in this or other litigation. Any attorneys' fees or costs that you may owe a previously or currently retained attorney will be solely your responsibility. Any amount that you may owe your previous or current attorneys does not affect or diminish the fees and costs owed the Firm under this Agreement or the amount of the Recovery.

F. **Associating Attorneys.** The Firm shall be responsible to pay attorneys' fees to any associated attorney solely from the final disbursement of proceeds to the Firm.

G. **Attorneys' Opinions.** Either at the commencement or during the course of our representation, we may express opinions or beliefs concerning the litigation or various courses of action and the results that might be anticipated. Any such statement made by any attorneys of the Firm is intended to be an expression of opinion only, based on information available to us at the time, and should not be construed by you as a promise or guarantee.

H. **Record Retention.** You should immediately implement a "litigation hold" and preserve all the information and evidence that is or may be relevant to this action. Please ensure that your agents, accountants, auditors, computer system personnel, employees and any other applicable persons or departments are informed that a litigation hold is in place regarding all matters related or foreseeably related to the above referenced matter.

I. **Tax Advice**. You understand that the Firm does not employ tax attorneys or give tax advice. You are solely responsible for determining the tax implications of any decision, settlement, resolution, or judgment in your case. You are free to consult with other professionals regarding the tax implications of your lawsuit.

J. **Discharge, Withdrawal, or Settlement.**

i. If this Agreement is terminated, and a Recovery is later made, the Firm is entitled to payment of reasonable attorneys' fees and costs incurred at the time the Recovery is made, as permitted by law.

ii. You have the right to settle, dismiss, or otherwise discontinue the pursuit or defense of this matter at any time, as permitted by law.

K. **Disputes Resolution.**

i. [INSERT]

L. **Modification.** No modification of this Agreement shall be binding unless in writing and signed by each party.

M. **Severability.** If any of the provisions or terms of this Agreement, or the application thereof to any person or circumstances, shall for any reason be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such provision to the unaffected persons or circumstances, shall not be affected thereby but, rather, shall be enforced to the greatest extent as permitted by law.

N. **Media and Advertisement.** You provide your consent for the Firm and its attorneys to publish the results of your case – including trial verdicts, arbitration awards, settlement amounts (without disclosing the names of the parties where confidential), or fee awards – in advertisements and other media.

O. **Acceptance.** Please indicate your acceptance of this Agreement by signing in the appropriate place below, and returning it to our office. You agree that we will not begin representing you unless and until you deliver this signed Agreement to us.

P. **Review of Representation Agreement.** Please review this contract carefully to be certain that it accurately sets forth our agreement. We also encourage you to have it reviewed by independent legal counsel. In the event that you do not understand anything in this agreement, please let us know so further written explanations can be provided. The Firm will not begin representing you unless and until you deliver this signed Agreement to the Firm.

We look forward to working with you. If you have any questions, please do not hesitate to contact me.

Sincerely,

MORGAN & MORGAN, P.A.
Business Trial Group

_____
ATTORNEY

ACCEPTED BY:

_____

Date: _____

Fee Excerpts From Middle District Administrative Orders

Fee Schedule From Second Amended Order Establishing Presumptively Reasonable Debtor's Attorney's Fees In Chapter 13 Cases For Tampa And Fort Myers Divisions (Miscellaneous Proceeding No. 07-mp-00002-MGW)

2. Attorneys representing chapter 13 debtors may charge up to these amounts as a presumptively reasonable attorney's fee:

a. $ 4,500 – For all bankruptcy-related matters required for the successful confirmation and completion of a debtor's case.

b. $ 1,800 – For representation of a debtor in mortgage modification mediation ordered by the Bankruptcy Court. For more complex mortgage modification mediations, fees not to exceed $2,500 may be requested. In either event, a request for a fee award shall be either by separate application or in a motion for approval of a mortgage modification. The fees for mortgage modification mediation shall cover payment for all related motions.

c. Monitoring Fee – Attorneys may include an additional monthly monitoring fee up to $50 per month, effective in the month following confirmation of the plan, to cover all post-petition legal services.

Attorney Fees Excerpt From Administrative Order FLMB-2022-1 Prescribing Procedures For Student Loan Management Program In All Bankruptcy Cases Effective February 2, 2022

13. **Debtor's Attorney's Fees**. Debtor's counsel is entitled to reasonable compensation for services rendered in representing Debtor in the SLM process and may request attorney's fees in Chapter 13 cases by filing a fee application or by providing for the payment of fees in Debtor's Chapter 13 plan. If Debtor is a debtor in a Chapter 13 case, the fees shall be paid as an administrative expense in addition to the fees and costs incurred by Debtor's attorney in representing Debtor in the bankruptcy case.

a. **SLM Program Fees**. The "presumptively reasonable" fee for representing Debtor in the SLM Program is $1,500.00 and includes, at minimum, the following services:

i. Filing the Notice of SLM;
ii. Preparation of the Initial SLM Package;
iii. Preparation of any additional forms required throughout the SLM Program;
iv. Submission of all documentation through the Portal;
v. Filing other required motions or papers; and
vi. Preparation of proposed orders and settlement papers, if applicable.

b. **Annual Recertification Fee**. In addition, Debtor's counsel may charge $250.00 per year to assist Debtor with recertification of Debtor's IDR Plan and/or the filing of any related notices or amended schedules with the Court, if applicable. In Chapter 13 cases, the Trustee is authorized to disburse $250.00 to Debtor's counsel upon the filing of a Notice of Recertification with the Court.

c. **Additional Compensation**. Debtor's counsel may seek additional compensation by separate application attaching contemporaneous time records for extraordinary services provided during SLM.

Attorney Fee Excerpt From Administrative Order FLMB-2020-7 Prescribing Procedures for Chapter 13 Cases Filed On Or After August 1, 2020

17. Duties of Debtor's Attorney and Payment of Attorney's Fees. Debtor's attorney must assist Debtor in all matters related to this case unless the Court has granted the attorney's motion to withdraw from the case. Debtor's counsel shall not withhold legal advice or service from Debtor because of lack of payment and may not demand payment from Debtor or any person on behalf of Debtor as a condition of providing legal advice or service. If the case is converted or dismissed, the Court shall retain jurisdiction to review the total amount of attorney's fees requested by or paid to Debtor's attorney.

As required by Rule 2016(b), Debtor's attorney must disclose:

a. Any prepetition retainer paid to the attorney by Debtor or any other person for Debtor's benefit;

b. Filing fees collected from Debtor and remitted to the Court; and

c. Post petition payments made to the attorney by Debtor or other person for Debtor's benefit. Such payments shall be held in the attorney's trust account pending Court approval.

If Debtor's attorney fails to timely and completely file these disclosures or to comply with all requirements in this Order, the Court may order a reduction in the amount of attorney's fees requested or the disgorgement of fees.

Guidelines and Recommendations for Representing Debtors in a Chapter 13 Case to Maximize Your Hourly Rate Under a Presumptively Reasonable Fee

1. Spend ample time with your client prior to filing a petition.

    a. Preparation of Chapter 13 Petitions, Schedules, SOFAs, Means Tests and Chapter 13 Plans should involve the active participation of the attorney.

    b. Prepetition consultations, review and editing of documents should not be delegated to paralegals or legal assistants.

    c. A few hours spent with your client obtaining necessary financial documentation prior to filing and reviewing paystubs, tax returns, Schedules and SOFA will eliminate the need for most post petition amendments.

2. Educate your Client about the Chapter 13 Process.

    a. Provide your client with all the information about when payments under the Chapter 13 case will commence and advise of the methods of payment available and where payments must be sent. Encourage the use of automatic payments like TFS Billpay or wage deductions.

    b. Advise your clients to notify you of any significant or long term changes in financial circumstances immediately, whether good or bad. Specifically mention windfalls, like lottery or inheritances and potential claims for injuries, or property damage that arose prior to or during the bankruptcy case.

    c. Advise and remind your clients to prepare and submit their tax returns to you on an annual basis and turnover the tax refund to the Trustee each year of the plan.

    d. Advise clients to take the Debtor Education Course sooner than later to avoid unnecessary delays completing the case.

3. Calendar Applicable Deadlines To Confirm the Case And Avoid Continuances.

    a. Claims Bar Review should be done as close to the deadline to file a POC so that any objections can be filed and negative notice can run.

    b. File any amended plans with enough time to circulate to all interested parties prior to confirmation hearing.

    c. Familiarize yourself with all Administrative Orders addressing Chapter 13 cases as they include important information, requirements and deadlines that will impact whether a Chapter 13 Plan can be confirmed.

Managing your Chapter 13 cases efficiently and thoroughly at the outset of your retention will dramatically reduce the time spent on your case between the petition date and confirmation of the plan, thus increasing your overall hourly rate under a set presumptively reasonable fee.

ORDERED in the Southern District of Florida on September 29, 2021.

Mindy A. Mora, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re:	Case No.: 20-23868-MAM
Matthew Allan Cousins and Karina Clara Cousins,	Chapter 13
Debtors. _____/	

ORDER SUSTAINING-IN-PART OBJECTION TO NOTICE OF POST-PETITION MORTGAGE FEES, EXPENSES, AND CHARGES (ECF NO. 44)

THIS MATTER came before the Court for hearing on June 3, 2021 (the "Hearing") upon the *Objection to Notice of Post-Petition Mortgage Fees, Expenses and Charges Filed by Lakeview Loan Servicing, LLC* (ECF No. 44) (the "Fee Objection") filed by the above-captioned Debtors and Lakeview Loan Servicing, LLC's ("Creditor") response (ECF No. 47) (the "Response").

Debtors asserted in their Fee Objection that Creditor's fees were unreasonable

and excessive for routine services. Debtors also argued that Creditor's delay in filing fee notices until after the confirmation hearing prejudiced them because their disposable income has been fully devoted to their plan payments, and they will have to pay Creditor directly or pay to modify their plan to accommodate Creditor's fees. Creditor responded that its fees were reasonable and permitted under the underlying loan documents, and that Debtors forced Creditor to act by filing for bankruptcy in the first place.

For the reasons that follow, the Court will sustain the Fee Objection, in part.

BACKGROUND

I. The Bankruptcy Filing and Chapter 13 Plan

Debtors filed this Bankruptcy Case on December 22, 2020. They filed their first chapter 13 plan,[1] statement of current monthly income,[2] calculation of disposable income,[3] and payment advices[4] along with their bankruptcy petition. Creditor's counsel filed a notice of appearance[5] on January 22, 2021, and Debtors filed their first amended chapter 13 plan[6] on February 5, 2021.

Even a swift review of the docket shows that Debtors were proactive in their

[1] ECF No. 2.

[2] ECF No. 4.

[3] ECF No. 5.

[4] ECF No. 8.

[5] ECF No. 14.

[6] ECF No. 15.

case. They objected to a claim,[7] appeared for their 341 meeting,[8] and moved to set an interest rate on their vehicle.[9] Their efforts culminated in the filing of their second amended plan (ECF No. 28) (the "Second Amended Plan" or "Plan") on March 2, 2021. The Court held a confirmation hearing on the Plan on April 1, 2021 (the "Confirmation Hearing") and entered the confirmation order (ECF No. 42) (the "Confirmation Order") on April 22, 2021. Debtors' confirmed Plan provided for Debtors to cure the arrearage and maintain the payments owed to Creditor. Debtors sought to cure arrears of $6,062.27 through their Plan.

II. The Proof of Claim, Fee Notice, and Fee Objection

Creditor filed its Proof of Claim[10] on January 29, 2021, in the total amount of $126,263.12. The Proof of Claim listed $6,062.27 in arrears and asserted as security a mortgage on Debtor's principal residence. Debtors did not object to the Proof of Claim.

On April 19, 2021, over two weeks after the Confirmation Hearing, Creditor filed its Notice of Post-Petition Mortgage Fees, Expenses, and Charges (the "Fee Notice") under Bankruptcy Rule 3002.1 ("Rule 3002.1") as a supplement to the Proof of Claim.[11] The Fee Notice included (i) "Bankruptcy/Proof of claim fees of $500

[7] ECF No. 22.

[8] *See* ECF No. 10.

[9] ECF Nos. 17 and 19.

[10] Claim No. 6-1.

[11] Creditor also filed a Notice of Mortgage Payment Change (ECF No. 27) (the "Payment Change Notice") on March 1, 2021. Debtors do not object to the Payment Change Notice.

incurred on February 1, 2021, approximately two months before the Confirmation Hearing, and (ii) attorneys' fees of $450 incurred for "Plan Review" on December 29, 2020, nearly four months before the Court entered the Confirmation Order. Debtors filed the Fee Objection on May 7, 2021, asserting that the fees were excessive for "ministerial" tasks that national mortgage servicers routinely perform. Debtors argued that Creditor should not need to hire counsel to perform routine services, and total attorneys' fees of $950 were unreasonable and inconsistently charged from case to case. Debtors also observed that Creditor did not include time sheets to justify its fees.

Debtors' secondary assertion was that the timing of the Fee Notice was prejudicial to Debtors and inequitable because Debtors must either pay the fees claimed by Creditor out-of-pocket or pay their counsel an additional $500 to modify the Plan to include Creditor's post-confirmation fees.[12] Debtors stressed that if Creditor had filed the Fee Notice prior to confirmation, which it easily could have done, then Debtors could have negotiated the fees and included them in the Plan prior to confirmation. Debtors acknowledged, however, that Creditor is in technical compliance with Rule 3002.1.

III. The June 1 Hearing[13]

[12] Debtors' counsel indicated at the June 3 Hearing that a typical fee for a motion to modify is $500.00, based upon the Court's Guidelines for Compensation for Professional Services or Reimbursement of Expenses by Attorneys for Chapter 13 Debtor's Pursuant to Local Rule 2016-1(B)(2)(a) (Effective 09/01/2019).

[13] On the same day, the Court also heard argument from counsel for debtors and creditors in two additional cases with similar facts and legal issues. Those cases are: *In re Matheus Dias De Almeida* (21-11793) *and In re Gaspare G. Chiarenza and Jean M. Chiarenza* (21-10492). The Court will enter separate orders in each of those cases.

At the June 1 Hearing, Debtors' counsel explained that Debtors intended to maintain their payments and cure the default owed to Creditor through their Plan. Debtors' counsel argued that, while Creditor is entitled to post-petition legal fees under the underlying loan documents, the amount and notice of the fees was unreasonable. Debtors' counsel argued that the fees were excessive for tasks that should be routine for a residential mortgage lender. In addition, Debtors' counsel emphasized that he could have incorporated payment of the fees into the Plan or worked with Creditor to settle the amount of the outstanding fees if Creditor had notified him of the amount of the fees at the time they were incurred.

Creditor's counsel responded that he does not file fee notices until Creditor sends a referral to do so, and that, at any rate, there is no rule requiring fee notices to be filed prior to confirmation.

After hearing argument from counsel for Debtor and Creditor, the Court took the Fee Objection and Response under advisement.

DISCUSSION

I. Rule 3002.1

Before the implementation of Rule 3002.1, many mortgage lenders, in fear of violating the automatic stay, applied post-petition fees and costs to a debtor's balance but would not notify the debtor until plan payments were complete. As a result, debtors could make every payment under a confirmed chapter 13 plan only to discover that they were in default at the end of the plan payment period.[14] Rule 3002.1 helps

[14] *See In re Martins*, 11-14128-BKC-LMI, 2013 WL 9868648, at *1 (Bankr. S.D. Fla. Nov. 20, 2013).

avoid that result by facilitating communication between debtors and mortgage lenders about payment changes and post-petition fees and costs.[15]

Subsection (c) of Rule 3002.1 sets forth the notice requirements for post-petition fees, expenses, and charges. It provides that the holder of a claim secured by a security interest in a debtor's principal residence:

> . . . shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The *notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred*.

Rule 3002.1(c) (emphasis added). Notices under Rule 3002.1(c) must be filed as a supplement to a proof of claim.[16]

Rule 3002.1 applies to claims (1) secured by a security interest in a debtor's principal residence and (2) for which the plan provides that either the debtor or the trustee will make contractual installment payments.[17] The rule does not apply once the court enters an "order terminating or annulling the automatic stay . . . with respect to the residence that secures the claim."[18]

II. Reasonableness of Attorneys' Fees

Debtors only disputed the reasonableness of Creditor's fees. They do not dispute Creditor's entitlement to fees or whether Creditor filed the notices within

[15] *See* Rule 3002.1 advisory committee's notes to 2011 adoption and 2016 amendments.

[16] Rule 3002.1(d).

[17] Rule 3002.1(a).

[18] *Id*.

the timeframe provided by Rule 3002.1. There are two fees at issue: $500 for "Bankruptcy/Proof of claim fees" and $450 incurred for "Plan Review". Combined, the fees total $950 (the "Total Fees"). According to Debtors, the filing of a proof of claim and review of a standard chapter 13 plan are routine tasks that should not have required incurring excessive fees. The Court agrees.

After careful consideration of the Objection, Response, presentation of counsel, and applicable caselaw, the Court determines that, under these circumstances, total fees of $950 are excessive and unreasonable. Preparation of a proof of claim and review of a chapter 13 plan to ensure that it addresses a secured creditor's claim and complies with 11 U.S.C. § 1322 is the type of legal work that experienced chapter 13 creditor counsel can and should perform efficiently without incurring excessive fees. This is particularly true in the context of a routine chapter 13 plan that proposes to cure arrears and maintain payments in respect of secured mortgage debt. The Court appreciates Creditor's desire to employ an attorney to review a plan and prepare and file a proof of claim, but while "some reimbursement for plan review and claim preparation is appropriate," it is only appropriate "in an amount that is reasonable under the present circumstances." *In re Moore*, 619 B.R. 35, 37-38 (Bankr. W.D.N.Y. 2020).

Under these circumstances, Creditor should not have expended more than 30 minutes on plan review. Debtors utilized the Court's Local Form 31 for the initial plan (ECF No. 2) (the "Initial Plan"), first amended plan (ECF No. 15) (the "First Amended Plan"), and Second Amended Plan. They implemented standard language

in comparison to typical chapter 13 plans that come before the Court for confirmation. The Initial Plan, First Amended Plan, and Second Amended Plan did not contain any non-standard plan provisions, and each plan contained approximately two pages of content.

Creditor should have spent no more than one hour and a half on the preparation and filing of the Proof of Claim. Creditor prepared the Proof of Claim using the Court's Official Form, and the attachments to the Proof of Claim contain copies of documents that were presumably provided to Creditor's counsel by Creditor. Counsel to Creditor should not have needed to expend more than one hour reviewing the documents and half an hour filling in the standard proof of claim form.

III. Creditor's Delay

The Total Fees are excessive for the work performed and are therefore unreasonable on that basis alone. The Court is troubled, however, with Creditor's delay in asserting the fees to Debtors. Creditor waited 111 days after incurring the fee for "Plan Review" and 77 days after incurring the fee for "Bankruptcy/Proof of claim" fees to file the Fee Notice. In this instance, Creditor's inaction leading up to and including the Confirmation Hearing effectively represented to Debtors that Creditor either did not incur or was not seeking fees for legal services rendered between the Bankruptcy Filing and Confirmation Hearing. Yet, Creditor was aware well before the Confirmation Hearing that it was owed fees from December 29, 2020 and February 1, 2021 because it filed the Fee Notice with fees incurred on those

dates.

The record is devoid of any indication that Creditor informed Debtors about those fees either before or during the Confirmation Hearing. Because Debtors had no reason to know the amount of any post-petition charges leading up to confirmation, it was foreseeable that Debtors would not include such charges in their disposable income calculations prior to the Confirmation Hearing. Had Creditor filed the Fee Notice before the Confirmation Hearing, Debtors could have negotiated the amount of the fees with Creditor, amended the Plan to accommodate those fees, or worked out a payment arrangement with Creditor.

The Court observes that Creditor's inaction and delay in filing its Fee Notice until after the date of the Confirmation Hearing prevented Debtors from being able to formulate a plan that accurately computed the disposable income available to cover their Plan payments and ensure they had sufficient available funds to pay Creditor's post-petition, pre-confirmation fees.

Now, Debtors are left with a Hobson's choice: (1) incur an additional fee of $500 for their attorney to modify their Plan, in order to allocate some of their disposable income to payment of the post-petition fees claimed by Creditor, or (2) try to pay the fees outright, despite the fact that all of their disposable income is currently devoted to making payments under their confirmed Plan.

While the Court does not base its holding on Creditor's delay, it appears inequitable for Debtors to bear the additional cost of having their counsel modify their confirmed Plan when Creditor easily could have filed its Fee Notice upon incurring

the fees or before the date of the Confirmation Hearing. This is especially true in the instance of a creditor paying its counsel a flat fee for certain bankruptcy-related legal services, as appears to be the arrangement in this instance.

CONCLUSION

The Court determines that a reasonable fee due to Creditor for review of Debtors' plan and preparation of a proof of claim is no more than $500 (hourly rate of $250 multiplied by 2 hours), particularly in this instance when Debtors' case is relatively simple.

ORDER

Accordingly, the Court, having considered the Fee Objection, the Response, and argument of counsel at the June 1 Hearing and being otherwise fully advised in the premises, **ORDERS AND ADJUDGES** that:

1. The Fee Objection is **SUSTAINED** in part and **OVERRULED-IN-PART**, as set forth herein.

2. The fees sought in the Fee Notice are allowed in the reduced aggregate amount of $500.

3. All other aspects of the Objection are **OVERRULED**.

4. The Court reserves jurisdiction over all matters arising from or related to the interpretation or implementation of this Order.

###

Copies Furnished To:

Ryan E. Loyacano, Esq.

Frederic Dispigna, Esq.

Attorney Loyacano is directed to serve this Opinion and Order upon all interested parties and file a conforming certificate of service.

ORDERED in the Southern District of Florida on January 13, 2022.

Laurel M. Isicoff
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:
MARIA BARRIOS
Debtor
_____/

Case No. 20-10283-BKC-LMI
Chapter 13

ORDER GRANTING DEBTOR'S MOTION FOR CLARIFICATION OF THE ORDER AT ECF 75 SUSTAINING IN PART OBJECTION TO NOTICE OF POST-PETITION MORTGAGE FEES, EXPENSES, AND CHARGES (ECF 76)

THIS CAUSE having come before the Court at 9:00 am on the 4th day of January 2022 upon the Debtor's Motion for Clarification of the Order at ECF 75 Sustaining in Part Objection to Notice of Post-Petition Mortgage Fees, Expenses, and Charges (ECF 76), and this court having considered the basis for the motion, and for the reasons stated on the record, it is ORDERED and ADJUDGED

1. The Debtor's Motion for Clarification of the Order at ECF 75 Sustaining in Part Objection to Notice of Post-Petition Mortgage Fees, Expenses, and Charges is GRANTED.

2. The Court clarifies the Order at ECF 75 as follows:

    a. The Court finds a half of an hour of time for "Plan Review" to be reasonable. The Court approves a fee of $107.50, at $215/hour.

b. The Court finds one hour of time for "Bankruptcy/Proof of claim fees" to be reasonable. The Court approves a fee of $215.00, at $215/hour.

c. The Court finds that the $250.00 incurred for "POC 410A Review" is unreasonable and cannot be charged to the Debtor.

d. The Court finds one hour of time for "Plan Objection" to be reasonable. The Court approves a fee of $215.00, at $215/hour.

# # #

Submitted By:
Jose P. Funcia, Esq.
Miller & Funcia, P.A.
9555 N. Kendall Drive, Suite 211
Miami, Florida 33176
millerandfunciapa@gmail.com
Phone: 305-274-2922

Jose P. Funcia, Esq. is directed to serve copies of this order on the parties noted above and to file a certificate of service

Miami vs. Tampa: What Is Reasonable

Q1	Q2	Q3	Q4
What do the Courts say?	Has the pandemic made this a non-issue with Zoom providing greater access to those who otherwise need to travel?	How different are the rates?	What will continue to justify the difference in rates?

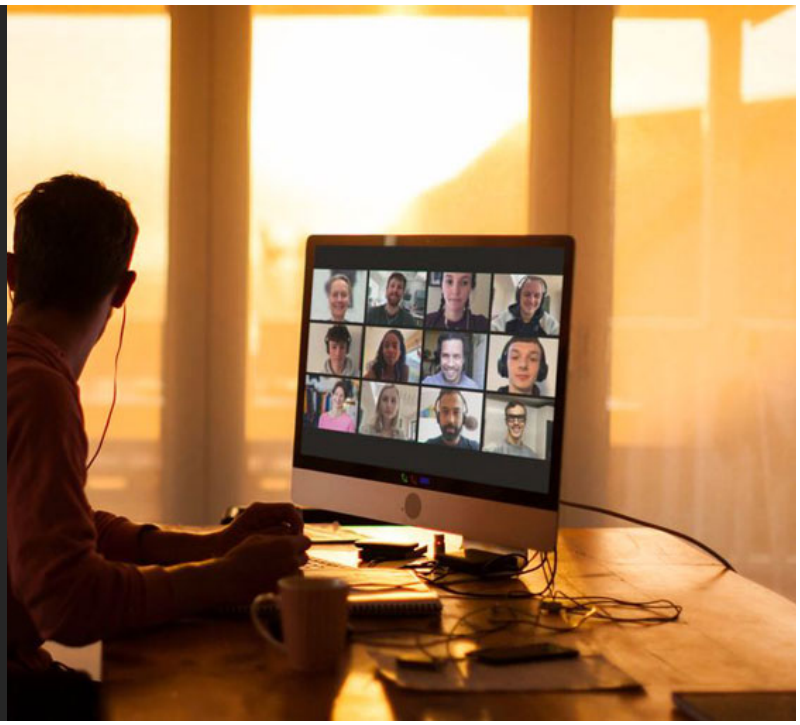
Miami vs. Tampa: What Is Reasonable

Q5	Q6
Should we have standard "out of towner" rates?	Is there a difference?

What do the Courts say?

- "Market-driven" approach.
  - In re Insilco Techs., Inc., 291 B.R. 628, 634 (Bankr. D. Del. 2003).
- Factors to be considered, include, but are not necessarily limited to (1) whether terms of an engagement agreement reflect normal business terms in the marketplace; (2) the relationship between the Debtor and the professionals, i.e., whether the parties involved are sophisticated business entities with equal bargaining power who engaged in an arms-length negotiation; (3) whether the retention, as proposed, is in the best interests of the estate; (4) whether there is creditor opposition to the retention and retainer provisions; and (5) whether, given the size, circumstances and posture of the case, the amount of the retainer is itself reasonable, including whether the retainer provides the appropriate level of ***711** "risk minimization," especially in light of the existence of any other "risk-minimizing" devices, such as an administrative order and/or a carve-out.
  - In re Pan Am. Hosp. Corp., 312 B.R. 706, 710–11 (Bankr. S.D. Fla. 2004).

Has the pandemic made this a non-issue with Zoom providing greater access to those who otherwise need to travel?



How different are the rates?

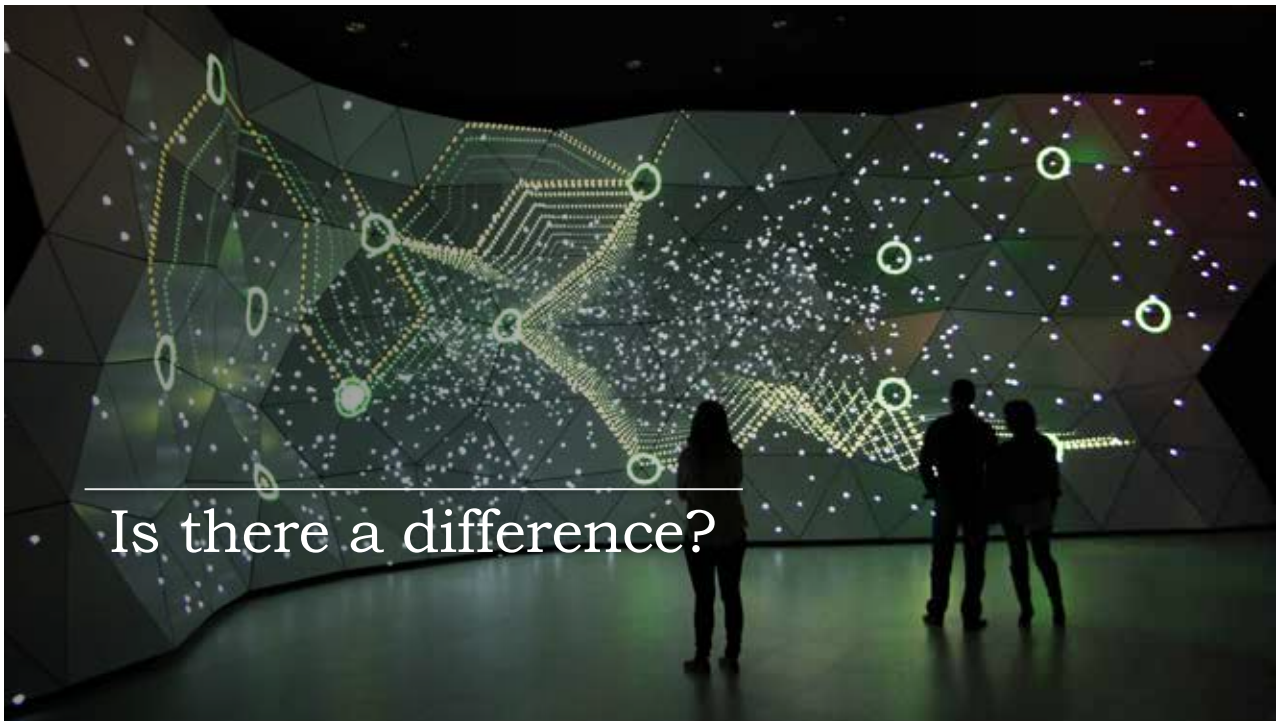
Sampling of SubV Cases in Middle and Southern Districts.

Average SD Florida $421.00
- More Consistent

Average MD Florida $399.00
- wider range


What will continue to justify the difference in rates?
Hint: The Clients


YES
NO
Should we have standard "out of towner" rates?
SPOILER ALERT: NO!


Is there a difference?

Faculty

John A. Anthony is the managing member of Anthony & Partners in Tampa, Fla., where his practice focuses on chapter 11 reorganizations, complex chapter 7 liquidations, assignments for the benefit of creditors, loan restructures, state court loan enforcement litigation and lender-liability defense in state and federal courts. Previously, he chaired a statewide 22-lawyer creditors' rights department of a large law firm. Mr. Anthony served for four years on the Tampa Bay Bankruptcy Bar Association's Board of Directors, and served for two years as an editor of its newsletter, *The Cramdown*. He frequently speaks and writes regarding matters of importance to financial institutions and other creditors, and he has been AV-rated by Martindale-Hubbell for 25 years, with regular appearances on *Florida Trend*'s "Legal Elite." He is a member of the Florida Bar Association's Corporate Banking and Business Law Section, as well as the Federal, American, Tampa Bay Bankruptcy, Polk County and Lakeland Bar Associations and the Bankruptcy Bar Association for the Southern District of Florida. He has been rated AV-Preeminent by Martindale-Hubbell since 1983, and is admitted to practice before the U.S. District Courts for the Middle, Southerm and Northern Districts of Florida and the Eleventh Circuit Court of Appeals. Mr. Anthony received his B.A. from Georgetown University College of Arts and Sciences in theology and political philosophy in 1984 and his J.D. from Georgetown University Law Center in 1987.

Douglas A. Bates is a shareholder with Clark Partington Hart Larry Bond & Stackhouse, P.A. in Pensacola, Fla., and chairs its Commercial Litigation section. He has handled insolvency matters, distressed business situations and special-asset cases across the State of Florida and the U.S., and across a wide range of industries including airline, hospitality, manufacturing, retail and financial services. He serves as a trusted advisor to local, regional and national clients and maintains his focus on commercial and real estate litigation, as well as bankruptcy and creditors' rights matters. Mr. Bates is listed in *Chambers USA* and is an active member of the Business Law Section of The Florida Bar, serving on the Section's Executive Council. He also is a member of The Florida Bar Standing Committee on Student Education and Bar Admissions, as well as numerous other local, statewide and national organizations. Mr. Bates received his B.S.B.A. *summa cum laude* from Birmingham Southern College and his J.D. *cum laude* from the University of Florida College of Law.

Hon. Caryl E. Delano is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the Middle District of Florida in Tampa, initially appointed on June 25, 2008, and named Chief Judge on October 1, 2019. She also was appointed Presiding Judge of the Fort Myers Division in July 2012. Previously, Judge Delano practiced before the bankruptcy courts of the Central District of California for 14 years. In 1994, she returned to Tampa and most recently practiced law with the firm of Addison & Delano, P.A., where she concentrated her practice on bankruptcy and commercial litigation. Judge Delano has represented debtors and creditors in numerous chapter 11 cases and related adversary proceedings. She is a member of The Florida Bar, The State Bar of California, the National Conference of Bankruptcy Judges, ABI, the Business Law Section of The Florida Bar (Executive Council, CLE Committee), the Hillsborough County Bar Association and the Tampa Bay Bankruptcy Bar Association. In addition, she served as the liaison judge to the Middle District of Florida's Local Rules Lawyers' Advisory Committee from 2011-20 and is a member of the National Conference of Bankruptcy Judges Federal Rules Advisory Committee. In 2017, Judge Delano received the Southwest

Florida Bankruptcy Professionals Association's Alexander L. Paskay Professionalism Award. In addition, she is a former executive director and past-president of the J. Clifford Cheatwood American Inn of Court. Judge Delano received her B.A. in English *cum laude* in 1976 from the University of South Florida and her J.D. in 1979 from Indiana University School of Law, having completed her final year of law school at Emory University School of Law.

Heidi A. Feinman is a trial attorney with the U.S. Trustee Program in Miami. She started in Atlanta in 1992 and moved to the Miami office in 1998. Although she has overseen cases in all three divisions in the Southern District of Florida and appeared before most of the judges, she has regularly appeared before Judges Hyman and Friedman and now appears before Judges Kimball and Mora. For the last approximately 23 years, Ms. Feinman has been the Bankruptcy Fraud Criminal Referral Coordinator with the Miami office and is the liaison with the U.S. Attorney's Office and other federal agencies regarding bankruptcy criminal matters. She is a member of the SDFL Transnational Elder Fraud Strike Force and the Securities and Investment Task Force. In 2002 and 2003, Ms. Feinman was appointed a Special Assistant U.S. Attorney in Miami and assisted in the prosecution and conviction of Thomas Warmus for bankruptcy fraud. She is a member of several government fraud working groups and has lectured on bankruptcy fraud to the U.S. Attorney Program, the court, the bankruptcy bar and other agencies. Ms. Feinman currently serves on several U.S. Trustee Program working groups. She also works on trustee oversight and is a point person on regional SBRA matters. She is a member of the Lawyers Advisory Committee and previously served on the Local Rules Committee for the U.S. Bankruptcy Court for the Southern District of Florida on behalf of the U.S. Trustee's Office. Ms. Feinman a DOJ Ambassador to several Florida law schools and a DOJ mentor. She received her B.S. in accounting in 1986 from the University of Florida and her J.D. from the University of Florida Levin College of Law in 1990.

Jeffrey S. Fraser is a partner at Albertelli Law in Lake Worth, Fla., and focuses his representation on secured creditors and ensuring that their interests are protected in chapters 7, 11 and 13. He handles contested litigation, including valuation hearings, adversary proceedings, sanction hearings, and any and all other disputed matters in bankruptcy court. As partner over his firm's national bankruptcy department, Mr. Fraser works closely with each state's managing attorneys as it relates to training, legal strategy, and all facets of the firm's bankruptcy practice. He is an active participant in the Southern District of Florida's bankruptcy bar and was the 2019 chair of the Local Rule Committee and an inaugural member the district's Lawyer Advisory Committee (LAC), serving as the committee's chair in 2020 and 2021. Through these roles, he has worked closely with South Florida bankruptcy judges and lawyers in reviewing local practices and rules; participating as a panelist for various district programs; assisting with the drafting of the district's Model Chapter 13 Plan and Mortgage Modification Mediation procedures and guidelines; and addressing other matters or concerns for the South Florida bankruptcy community. Mr. Fraser is a past president of the Jamaican-American Bar Association and has helped the organization create mentorship relationships with local law students. He also served as a panelist at a commercial law seminar in Kingston, Jamaica, discussing the 2014 Jamaican Insolvency Act, and he has organized foreclosure and bankruptcy workshops, spoken on numerous CLE panels, and guest-appeared on South Florida radio. Mr. Fraser was selected by *Super Lawyers* as one of its "Florida Rising Stars" for 2019, 2020 and 2021. In addition, he was named a 2017 Blackshear Fellow by the National Conference of Bankruptcy Judges (NCBJ) and a 2020 ABI "40 Under 40" honoree, and he has published articles on consumer bankruptcy issues in the *American Legal & Finance Network* and *Default Servicing News*. Mr. Fraser has the highest rating

by Martindale-Hubbell. He received his B.A. in 2007 from the University of Miami and his J.D. in 2010 from the University of Miami School of Law.

Hon. Scott M. Grossman is a U.S. Bankruptcy Judge for the Southern District of Florida in Fort Lauderdale, sworn in on Oct. 2, 2019. He previously was a shareholder with a large international law firm in its global restructuring and bankruptcy practice, and he represented distressed companies, debtors, secured and unsecured creditors, official committees, trustees, landlords and purchasers of distressed assets, and worked on bankruptcy cases across various industries, including real estate, hospitality, health care, entertainment, banking, technology, energy and financial fraud. While primarily involved in chapter 11 reorganizations, he also represented clients in out-of-court workouts and restructurings, chapter 7 liquidations, receiverships, assignments for the benefit of creditors and insolvency-related litigation. Judge Grossman was active in local bar activities, including having served as president of the Bankruptcy Bar Association of the Southern District of Florida. When in private practice, he was listed in *Chambers USA*, *The Best Lawyers in America* and *Super Lawyers* magazine, and was a member of the winning teams for the Global M&A Network's Turnaround Atlas Awards for both "Cross Border Special Situation M&A Deal (Small-Mid Markets)" in 2019, as well as "Turnaround of the Year — Small Markets" in 2015. Judge Grossman began his legal career in the Attorney General's Honors Program at the U.S. Department of Justice, where he was a trial attorney in the Tax Division, Civil Trial Southern Section, from 1999-2004. He received his B.S. in 1996 from the University of Florida and his J.D. in 1999 from George Washington University Law School.

Erik Johanson is the founder of Erik Johanson PLLC in Tampa, Fla., where his practice includes commercial bankruptcy, business litigation, commercial litigation, appeals, local counsel services and general civil litigation. He began his career in private practice in Tampa, representing debtors, creditors and bankruptcy trustees in commercial chapter 7 and 11 bankruptcy cases in the U.S. Bankruptcy Court for the Middle District of Florida. Mr. Johanson left private practice in 2015 to serve a two-year term as a judicial law clerk to U.S. District Judge Elizabeth A. Kovachevich. During his clerkship, he oversaw Judge Kovachevich's docket of civil cases and bankruptcy appeals. He founded Erik Johanson PLLC in July 2020. Mr. Johanson has been honored as one of the 2022 "Top Lawyers" by *Tampa Magazine* for bankruptcy/creditor/debtor rights/insolvency & reorganization law, and has been listed in *Super Lawyers* as a "Rising Star" in civil litigation and business bankruptcy since 2019. He also was a finalist and won for Outstanding Brief at the 21st Annual Duberstein Bankruptcy Moot Court Competition, in 2013, which is sponsored by ABI and St. John's University School of Law. In addition, he received the William F. Blews *Pro Bono* Service Award in 2013. Mr. Johanson received his B.S. in finance and philosophy *magna cum laude* from Florida State University in 2009 and his J.D. *cum laude* from Stetson University College of Law in May 2013.

Corali Lopez-Castro has been a partner at Kozyak Tropin & Throckmorton, LLP in Miami since 1998. She is currently serving her third term as managing partner of the firm. Ms. Lopez-Castro concentrates her practice on bankruptcy and commercial litigation matters, focusing on bankruptcy reorganizations and liquidations, receiverships, debt restructuring and creditors' rights. She has been involved with the liquidation of four bank holding companies in bankruptcy courts around the country and in state court. Ms. Lopez-Castro served on the panel of trustees for the Southern District of Florida between 1998 and 2002, during which she time was responsible for the liquidation of

assets in bankruptcy cases filed in the U.S. Bankruptcy Court for the Southern District of Florida. She has also been appointed a receiver in several cases, including as equity receiver in a $100 million Ponzi scheme case. In 2014, Ms. Lopez-Castro was inducted as a Fellow into the 25th Class of the American College of Bankruptcy. In 2006, she was elected the second woman president of the Cuban American Bar Association, the largest voluntary bar association in Florida, and in 2018, she was inducted into the International Academy of Trial Lawyers (IATL). She has devoted most of her career promoting diversity in the legal profession. Ms. Lopez-Castro received her B.A. from Brown University and her J.D. *cum laude* from the University of Miami School of Law.

Megan W. Murray is a founding shareholder of Underwood Murray PA in Tampa, Fla., and has nearly 20 years of reorganization and workout experience advising business owners, debtors, trustees, creditors' committees, secured and unsecured creditors, and asset-purchasers and sellers. She also has worked on both the legal side and business side in a global financial institution. Ms. Murray counsels businesses and owners in a wide variety of industries, including, but not limited to, real estate, hospitality, pharmaceutical, medical services, construction, insurance, transportation and financial services, in making critical business decisions while prosecuting and defending complex business disputes. She has been involved in director and officer liability litigation, bondholder disputes, shareholder and partnership disputes, court-appointed receiverships, assignment proceedings, and the recovery of large and small business assets. Ms. Murray is an ABI "40 Under 40" honoree and has been named in *Chambers & Partners USA*, *Florida Super Lawyers* and *Florida Trend*'s Legal Elite multiple years running. She is rated AV-Preeminent by Martindale-Hubbell and is a contributing author to *Creditors' and Debtors' Practice in Florida*, a frequent speaker on bankruptcy and insolvency topics, and co-chair of ABI's Real Estate Committee. She also is active in local and national bankruptcy bar associations. Ms. Murray received her B.B.A. from the University of Iowa Tippie College of Business in 2002 and her J.D. with honors from the University of Iowa College of Law in 2011, where she was a contributing editor to the *Iowa Law Review* and an ABI Medal of Excellence recipient.

Douglas W. Neway has served as the Chapter 13 Standing Trustee for the Jacksonville Division and Chapter 12 Trustee for Jacksonville and Orlando Divisions in Florida since October 2007. Previously, he was the managing partner of Bond, Botes & Neway, P.C. in Orlando from 1997-2007, where he represented debtors in consumer bankruptcy cases. Mr. Neway has served as chairman of the Orange County Bankruptcy Bar Association, the Central Florida Bankruptcy Law Association, the Jacksonville Bankruptcy Bar Association and the Orlando Division's Bankruptcy Judicial Liaison Committee, and he was an original member of the Middle District of Florida's Districtwide Bankruptcy Steering Committee. He was also the Florida State Chairman of the National Association of Consumer Bankruptcy Attorneys, is a member of the Florida Bar's Bankruptcy/UCC Committee and the Statewide Bankruptcy Judicial Liaison Committee, and serves on the board of directors for the Jacksonville Bankruptcy Bar Association. Mr. Neway is a frequent lecturer on consumer bankruptcy topics at seminars, colleges and law schools. He successfully argued *In re Tanner* before the Eleventh Circuit, which allowed strip-off of mortgages in chapter 13 cases, and drafted an amendment to F.S 222.25, increasing Florida's personal property exemption law that was enacted in July 2007. Mr. Neway received his B.F.A. in acting from Marymount Manhattan College and his J.D. from Nova University School of Law.

Nicole W. Peair is a trial attorney in the Tampa, Fla., field Office of the U.S. Trustee for Region 21, which is comprised of the Tampa and Fort Myers Divisions of the Middle District of Florida. She joined the U.S. Trustee's Office in 2010 through the Attorney General's Honors Program. Ms. Peair is responsible for monitoring chapter 11 and 7 cases for compliance with the Bankruptcy Code and Rules and has oversight responsibility for members of the panel of bankruptcy trustees. She received her B.S. from Louisiana State University and her J.D. *cum laude* from Southern University Law Center, during which time she served as an editor and manager of the *Southern University Law Review*.

Damien H. Prosser is co-managing partner of Morgan & Morgan's Business Trial Group in Orlando, Fla., where he litigates complex commercial cases exclusively on a contingency-fee basis. He has extensive civil jury trial experience and typically tries at least one business case to verdict a year. In June, after a six-day jury trial in New York, one of his clients was awarded a multi-million-dollar verdict against Major League Baseball's media arm, MLB Advanced Media, for breach of contract and fraud. Mr. Prosser began his legal career with a prestigious national law firm and quickly realized the economic challenge of litigating cases under the billable hour model applied to most commercial litigation. He also realized that an additional problem is the absence of actual trial experience by most lawyers at many of the national firms. Mr. Prosser was named a "Rising Star" in 2010, 2012, 2013, 2014, 2015, 2016 and 2017 by *Florida Super Lawyers* magazine, and he has been recognized as a "Legal Elite Up and Comer" by *Florida Trend* magazine. Prior to joining Morgan & Morgan, he practiced for several years with BakerHostetler and Shutts & Bowen. He received his B.A. *cum laude* and Phi Beta Kappa from Florida State University and his J.D. from Mercer University School of Law.