Cutting-Edge Issues in Retention and Fee Applications

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Panelists:

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Topic:

This panel addresses disclosure issues relating to disinterestedness, compensation and reimbursement requirements, compensation incurred in defending fee applications against objection, and other emerging issues.

Outline:

1. Introduction
    a. Introduce panelists
    b. US Trustee disclaimer
    c. Introduce topics
2. *Baker Botts LLP v. ASARCO, LLC* — Supreme Court holds that fees incurred in defending against an objection to a professional's fee application are not compensable under Bankruptcy Code §330
    a. Description of case background, context, and reasoning
    b. Discussion of holding
    c. Discussion of legal and practical implications of holding
    d. Possible legislative responses

3. Standards of review for fee applications

    a. In assessing the reasonableness of fees under Bankruptcy Code §330, should courts perform a retrospective analysis to determine whether the services performed and the fees associated with those services provided a material, identifiable benefit to the estate as viewed with the benefit of hindsight

        i. *In re Woerner,* 783 F.3d 266 (5th Cir. 2015), which reversed

        ii. *In re Pro–Snax Distributors, Inc.,* 157 F.3d 414 (5th Cir. 1998)

        iii. *In re Saldana,* 2015 WL 4429419 (N.D. Tex. July 20, 2015)

    b. Chapter 11 trustee fees and Bankruptcy Code §326(a)

        i. How should the §326(a) cap apply to a trustee who does not distribute cash to creditors but otherwise prosecutes a successful Chapter 11 case?

            1. "Of Bunnies and Moneys: Fixing Trustee Payment under §326(a)," *ABI Journal* (June 2014)

            2. *Tamm v. United States Trustee (In re Hokulani Square, Inc.),* 776 F.3d 1083 (9th Cir. 2015)

        ii. Does §326(a) cap apply to trustee fees that would be a surcharge against collateral under Bankruptcy Code §506(c)?

4. Policy and procedure, including new Large Chapter 11 Case Fee Guidelines

    a. Description of new guidelines and practical implications

    b. Current perspectives:

        i. Bankruptcy Court

        ii. US Trustee program

        iii. Practitioners

5. Questions & Answers

135 S.Ct. 2158
Supreme Court of the United States

BAKER BOTTS L.L.P. et al., Petitioners
v.
ASARCO LLC.

No. 14–103. | Argued Feb. 25, 2015. | Decided June 15, 2015.

Synopsis
Background: Order was entered by the United States Bankruptcy Court for the Southern District of Texas, Richard S. Schmidt, J., 2011 WL 2974957, awarding fees to Chapter 11 debtors' attorneys, including compensation for time spent litigating in defense of their fee applications, and allowing enhancement of the lodestar amount. Appeal was taken. The District Court, Andrew S. Hanen, J., 477 B.R. 661, affirmed in part and remanded. Following remand, the District Court, 2013 WL 1292704, affirmed the final fee award, and debtor appealed. The United States Court of Appeals for the Fifth Circuit, Edith H. Jones, Circuit Judge, 751 F.3d 291, affirmed in part and reversed in part. Certiorari was granted.

[Holding:] The United States Supreme Court, Justice Thomas, held that the Bankruptcy Code does not permit bankruptcy courts to award attorney fees to counsel or other professionals employed by the bankruptcy estate for work performed in defending a fee application in court.

Affirmed.

Justice Sotomayor filed an opinion concurring in part and concurring in the judgment.

Justice Breyer filed a dissenting opinion, in which Justices Ginsburg and Kagan joined.

West Headnotes (21)

[1] **Bankruptcy**
Employment of Professional Persons or Debtor's Officers
Bankruptcy
Attorneys

51Bankruptcy
51IXAdministration
51IX(A)In General
51k3029Employment of Professional Persons or Debtor's Officers
51k3029.1In general
51Bankruptcy
51IXAdministration
51IX(A)In General
51k3029Employment of Professional Persons or Debtor's Officers
51k3030Attorneys

Bankruptcy Code permits trustees to employ attorneys and other professionals to assist them in their duties. 11 U.S.C.A. § 327(a).

Cases that cite this headnote

[2] **Bankruptcy**
Employment of Professional Persons or Debtor's Officers
Bankruptcy
Debtor in possession, in general

51Bankruptcy
51IXAdministration
51IX(A)In General
51k3029Employment of Professional Persons or Debtor's Officers
51k3029.1In general
51Bankruptcy
51XIVReorganization
51XIV(D)Administration
51k3622Debtor in possession, in general

Chapter 11 debtors-in-possession are given the same statutory authority as trustees to retain professionals. 11 U.S.C.A. §§ 327(a), 1107(a).

1 Cases that cite this headnote

[3] **Federal Civil Procedure**
Result; prevailing parties; "American rule"

170AFederal Civil Procedure
170AXIXFees and Costs

170Ak2737Attorney Fees
170Ak2737.1Result; prevailing parties; "American rule"

Basic point of reference when considering the award of attorney fees is the bedrock principle known as the "American Rule," whereby each litigant pays his own attorney fees, win or lose, unless a statute or contract provides otherwise.

1 Cases that cite this headnote

[4] **Statutes**
Common or civil law

361Statutes
361IIIConstruction
361III(M)Presumptions and Inferences as to Construction
361k1381Other Law, Construction with Reference to
361k1384Common or civil law

Statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar legal principles.

Cases that cite this headnote

[5] **Federal Civil Procedure**
Result; prevailing parties; "American rule"

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.1Result; prevailing parties; "American rule"

Supreme Court will not deviate from the American Rule, whereby each litigant pays his own attorney fees, win or lose, absent explicit statutory authority.

1 Cases that cite this headnote

[6] **Federal Civil Procedure**
Result; prevailing parties; "American rule"

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.1Result; prevailing parties; "American rule"

Supreme Court has recognized departures from the American Rule only in specific and explicit provisions for the allowance of attorney fees under selected statutes; although these statutory changes to the American Rule take various forms, they tend to authorize the award of "a reasonable attorney's fee," "fees," or "litigation costs," and usually refer to a "prevailing party" in the context of an adversarial "action."

Cases that cite this headnote

[7] **United States**
Statutory provisions

393United States
393IILiabilities of and Claims Against United States
393II(J)Costs and Fees
393II(J)1In General
393k1083Statutory provisions
(Formerly 393k147(4))

Attorney fees provision of the Equal Access to Justice Act, which mentions "fees," a "prevailing party," and a "civil action," is a fee-shifting statute that trumps the American Rule. 28 U.S.C.A. § 2412(d)(1)(A).

1 Cases that cite this headnote

[8] **Bankruptcy**
Items and services compensable
Bankruptcy
Items and Services Compensable

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)2Professional Persons in General
51k3159Items and services compensable
51Bankruptcy

51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3181In general

Bankruptcy Code does not permit bankruptcy courts to award attorney fees to counsel or other professionals employed by the bankruptcy estate for work performed in defending a fee application in court; statutory text authorizing "reasonable compensation for actual, necessary services rendered by" such professionals neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other, and so cannot displace the American Rule with respect to fee-defense litigation. 11 U.S.C.A. §§ 327(a), 330(a)(1).

2 Cases that cite this headnote

[9] **Bankruptcy**
Employment of Professional Persons or Debtor's Officers

51Bankruptcy
51IXAdministration
51IX(A)In General
51k3029Employment of Professional Persons or Debtor's Officers
51k3029.1In general

Professionals hired pursuant to the section of the Bankruptcy Code governing employment of professional persons are hired to serve the administrator of the bankruptcy estate for the benefit of the estate. 11 U.S.C.A. § 327(a).

Cases that cite this headnote

[10] **Bankruptcy**
Benefit to estate

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3183Benefit to estate

Phrase "reasonable compensation for actual, necessary services rendered," as used in the section of the Bankruptcy Code governing compensation of professionals, permits courts to award fees to attorneys for work done to assist the administrator of the bankruptcy estate. 11 U.S.C.A. § 330(a)(1).

Cases that cite this headnote

[11] **Bankruptcy**
Items and services compensable
Bankruptcy
Items and Services Compensable

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)2Professional Persons in General
51k3159Items and services compensable
51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3181In general

Section of the Bankruptcy Code governing compensation of professionals provides compensation for all professionals employed by the bankruptcy estate, whether accountant, attorney, or auctioneer, for all manner of work done in service of the estate administrator. 11 U.S.C.A. §§ 327(a), 330(a)(1).

Cases that cite this headnote

[12] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

361Statutes
361IIIConstruction
361III(B)Plain Language; Plain, Ordinary, or Common Meaning
361k1091In general

In interpreting a statutory phrase, the court looks

to the ordinary meaning of the words in question at the time Congress added the phrase to the statute.

1 Cases that cite this headnote

[13] **Bankruptcy**
Items and services compensable

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)2Professional Persons in General
51k3159Items and services compensable

Term "services," as used in the section of the Bankruptcy Code allowing reasonable compensation for "actual, necessary services rendered" by professionals employed by the estate, refers to labor performed for and in the interest of the administrator of the bankruptcy estate. 11 U.S.C.A. § 330(a)(1).

Cases that cite this headnote

[14] **Federal Civil Procedure**
Result; prevailing parties; "American rule"

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.1Result; prevailing parties; "American rule"

Most fee-shifting provisions permit a court to award attorney fees only to a "prevailing party," a "substantially prevailing' party," or a "successful" litigant.

Cases that cite this headnote

[15] **Bankruptcy**
Items and services compensable
Bankruptcy
Items and Services Compensable

Bankruptcy
Preparation of fee request

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)2Professional Persons in General
51k3159Items and services compensable
51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3181In general
51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3186Preparation of fee request

Professional's preparation of a fee application is part of the "services rendered" to the administrator of the bankruptcy estate, whereas a professional's defense of that application is not. 11 U.S.C.A. §§ 327(a), 330(a)(1, 6).

Cases that cite this headnote

[16] **Bankruptcy**
Items and Services Compensable
Federal Civil Procedure
Result; prevailing parties; "American rule"

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3181In general
170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.1Result; prevailing parties; "American rule"

In this country's legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization.

Cases that cite this headnote

bankruptcy than it is elsewhere.

Cases that cite this headnote

[17] **Bankruptcy**
Frivolity or bad faith; sanctions

51Bankruptcy
51IICourts; Proceedings in General
51II(C)Costs and Fees
51k2182Grounds and Circumstances
51k2187Frivolity or bad faith; sanctions

Rule 9011 of the Federal Rules of Bankruptcy Procedure, bankruptcy's analogue to Rule 11 of the Federal Rules of Civil Procedure, authorizes the court to impose sanctions for bad-faith litigation conduct, which may include an order directing payment of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

Cases that cite this headnote

[18] **Constitutional Law**
Making, Interpretation, and Application of Statutes
Constitutional Law
Particular Issues and Applications

92Constitutional Law
92XXSeparation of Powers
92XX(C)Judicial Powers and Functions
92XX(C)2Encroachment on Legislature
92k2472Making, Interpretation, and Application of Statutes
92k2473In general
(Formerly 51k2021.1)
92Constitutional Law
92XXSeparation of Powers
92XX(C)Judicial Powers and Functions
92XX(C)2Encroachment on Legislature
92k2499Particular Issues and Applications
92k2500In general
(Formerly 361k1404)

Supreme Court's unwillingness to soften the import of Congress' chosen words even if the Court believes the words lead to a harsh outcome is longstanding, and is no less true in

[19] **Federal Civil Procedure**
Result; prevailing parties; "American rule"

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.1Result; prevailing parties; "American rule"

Congress has not granted the courts roving authority to allow counsel fees whenever the courts might deem them warranted.

Cases that cite this headnote

[20] **Statutes**
Language and intent, will, purpose, or policy

361Statutes
361IIIConstruction
361III(A)In General
361k1078Language
361k1080Language and intent, will, purpose, or policy

Courts' job is to follow statutory text even if doing so will supposedly undercut a basic objective of the statute.

Cases that cite this headnote

[21] **Federal Civil Procedure**
Result; prevailing parties; "American rule"

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.1Result; prevailing parties; "American rule"

General practice of the United States is in opposition to forcing one side to pay the other's

attorney fees, and even if that practice is not strictly correct in principle, it is entitled to the respect of the court until it is changed, or modified, by statute.

Cases that cite this headnote

2160 *Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent ASARCO LLC hired petitioner law firms pursuant to § 327(a) of the Bankruptcy Code to assist it in carrying out its duties as a Chapter 11 debtor in possession. See 11 U.S.C. § 327(a). When ASARCO emerged from bankruptcy, the law firms filed fee applications requesting fees under § 330(a)(1), which permits bankruptcy courts to "award ... reasonable compensation for actual, necessary services rendered by" § 327(a) professionals. ASARCO challenged the applications, but the Bankruptcy Court rejected ASARCO's objections and awarded ***2161** the law firms fees for time spent defending the applications. ASARCO appealed to the District Court, which held that the law firms could be awarded fees for defending their fee applications. The Fifth Circuit reversed, holding that § 330(a)(1) did not authorize fee awards for defending fee applications.

Held : Section § 330(a)(1) does not permit bankruptcy courts to award fees to § 327(a) professionals for defending fee applications. Pp. 2163 – 2169.

(a) The American Rule provides the " 'basic point of reference' " for awards of attorney's fees: " 'Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.' " *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 252–253, 130 S.Ct. 2149, 176 L.Ed.2d 998. Because the rule is deeply rooted in the common law, see, *e.g., Arcambel v. Wiseman,* 3 Dall. 306, 1 L.Ed. 613, this Court will not deviate from it " 'absent explicit statutory authority,' " *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855. Departures from the American Rule have been recognized only in "specific and explicit provisions," *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141, usually containing language that authorizes the award of "a reasonable attorney's fee," "fees," or "litigation costs," and referring to a "prevailing party" in the context of an adversarial "action," see generally *Hardt, supra,* at 253, and nn. 3–7, 130 S.Ct. 2149. Pp. 2163 – 2164.

(b) Congress did not depart from the American Rule in § 330(a)(1) for fee-defense litigation. Section 327(a) professionals are hired to serve an estate's administrator for the benefit of the estate, and § 330(a)(1) authorizes "reasonable compensation for actual, necessary services rendered." The word "services" ordinarily refers to "labor performed for another," Webster's New International Dictionary 2288. Thus, the phrase " 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client, *Woods v. City Nat. Bank & Trust Co. of Chicago,* 312 U.S. 262, 268, 61 S.Ct. 493, 85 L.Ed. 820. Time spent litigating a fee application against the bankruptcy estate's administrator cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator. Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1), it could have done so, as it has done in other Bankruptcy Code provisions, *e.g.,* § 110(i)(1)(C). Pp. 2164 – 2166.

(c) Neither the law firms nor the United States, as *amicus curiae,* offers a persuasive theory for why § 330(a)(1) should override the American Rule in this context. Pp. 2165 – 2169.

(1) The law firms' view—that fee-defense litigation is part of the "services rendered" to the estate administrator—not only suffers from an unnatural interpretation of the term "services rendered," but would require a particularly unusual deviation from the American Rule, as it would permit attorneys to be awarded fees for unsuccessfully defending fee applications when most fee-shifting provisions permit awards only to "a 'prevailing party,' " *Hardt, supra,* at 253, 130 S.Ct. 2149. Pp. 2165 – 2166.

(2) The Government's argument is also unpersuasive. Its theory—that fees for fee-defense litigation must be understood as a component of the "reasonable compensation for [the underlying] services rendered" so that compensation for the "actual ... services rendered" will not be diluted by unpaid time spent litigating ***2162** fees—cannot be reconciled with the relevant text. Section 330(a)(1) does not authorize courts to award "reasonable compensation," but "reasonable compensation for *actual, necessary services rendered,*" and the Government

properly concedes that litigation in defense of a fee application is not a "service." And § 330(a)(6), which presupposes compensation "for the preparation of a fee application," does not suggest that time spent defending a fee application must also be compensable. *Commissioner v. Jean,* 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134, distinguished.

The Government's theory ultimately rests on the flawed policy argument that a "judicial exception" is needed to compensate fee-defense litigation and safeguard Congress' aim of ensuring that talented attorneys take on bankruptcy work. But since no attorneys are entitled to such fees absent express statutory authorization, requiring bankruptcy attorneys to bear the costs of their fee-defense litigation under § 330(a)(1) creates no disincentive to bankruptcy practice. And even if this Court believed that uncompensated fee-defense litigation would fall particularly hard on the bankruptcy bar, it has no "roving authority ... to allow counsel fees ... whenever [it] might deem them warranted," *Alyeska Pipeline, supra,* at 260, 95 S.Ct. 1612. Pp. 2166 – 2169.

751 F.3d 291, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and ALITO, JJ., joined, and in which SOTOMAYOR, J., joined as to all but Part III–B–2. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment. BREYER, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined.

Attorneys and Law Firms

Aaron Streett, Houston, TX, for Petitioners.

Jeffrey L. Oldham, Houston, TX, for Respondent.

Brian H. Fletcher for the United States as amicus curiae, by special leave of the Court, supporting the petitioners.

Evan A. Young, Baker Botts L.L.P., Austin, TX, Omar J. Alaniz, Baker Botts L.L.P., Dallas, TX, G. Irvin Terrell, Aaron M. Streett, Counsel of Record, Michelle S. Stratton, Shane Pennington, Baker Botts L.L.P., Houston, TX, Wm. Bradford Reynolds, Baker Botts L.L.P., Washington, DC, Shelby A. Jordan, Nathaniel P. Holzer, Jordan, Hyden, Womble, Culbreth & Holzer, P.C., Corpus Christi, TX, for Petitioners.

Paul D. Clement, Jeffrey M. Harris, Bancroft PLLC, Washington, DC, Jeffrey L. Oldham, Counsel of Record, Bryan S. Dumesnil, Bradley J. Benoit, Heath A. Novosad, Bracewell & Giuliani LLP, Houston, TX, for Respondent.

Opinion

Justice THOMAS delivered the opinion of the Court.

Section 327(a) of the Bankruptcy Code allows bankruptcy trustees to hire attorneys, accountants, and other professionals to assist them in carrying out their statutory duties. 11 U.S.C. § 327(a). Another provision, § 330(a)(1), states that a bankruptcy court "may award ... reasonable compensation for actual, necessary services rendered by" those professionals. The question before us is whether § 330(a)(1) permits a bankruptcy court to award attorney's fees for work performed in defending a fee application in court. We hold that it does not and therefore ***2163** affirm the judgment of the Court of Appeals.

I

In 2005, respondent ASARCO LLC, a copper mining, smelting, and refining company, found itself in financial trouble. Faced with falling copper prices, debt, cash flow deficiencies, environmental liabilities, and a striking work force, ASARCO filed for Chapter 11 bankruptcy. As in many Chapter 11 bankruptcies, no trustee was appointed and ASARCO—the " 'debtor in possession' "—administered the bankruptcy estate as a fiduciary for the estate's creditors. §§ 1101(1), 1107(a).

[1] [2] Relying on § 327(a) of the Bankruptcy Code, which permits trustees to employ attorneys and other professionals to assist them in their duties, ASARCO obtained the Bankruptcy Court's permission to hire two law firms, petitioners Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., to provide legal representation during the bankruptcy.[1] Among other services, the firms prosecuted fraudulent-transfer claims against ASARCO's parent company and ultimately obtained a judgment against it worth between $7 and $10 billion. This judgment contributed to a successful reorganization in which all of ASARCO's creditors were paid in full. After over four years in bankruptcy, ASARCO emerged in 2009 with $1.4 billion in cash, little debt, and resolution of its environmental liabilities.

[1] Although § 327(a) directly applies only to trustees, § 1107(a) gives Chapter 11 debtors in possession the same authority as trustees to retain § 327(a) professionals. For the sake of simplicity, we refer to §

327(a) alone throughout this opinion.

The law firms sought compensation under § 330(a)(1), which provides that a bankruptcy court "may award ... reasonable compensation for actual, necessary services rendered by" professionals hired under § 327(a). As required by the bankruptcy rules, the two firms filed fee applications. Fed. Rule Bkrtcy. Proc. 2016(a). ASARCO, controlled once again by its parent company, challenged the compensation requested in the applications. After extensive discovery and a 6–day trial on fees, the Bankruptcy Court rejected ASARCO's objections and awarded the firms approximately $120 million for their work in the bankruptcy proceeding plus a $4.1 million enhancement for exceptional performance. The court also awarded the firms over $5 million for time spent litigating in defense of their fee applications.

ASARCO appealed various aspects of the award to the District Court. As relevant here, the court held that the firms could recover fees for defending their fee application.

The Court of Appeals for the Fifth Circuit reversed. It reasoned that the American Rule—the rule that each side must pay its own attorney's fees—"applies absent explicit statutory ... authority" to the contrary and that "the Code contains no statutory provision for the recovery of attorney fees for *defending* a fee application." *In re ASARCO, L.L.C.,* 751 F.3d 291, 301 (2014) (internal quotation marks omitted). It observed that § 330(a)(1) provides "that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration." *Id.,* at 299. Because "[t]he primary beneficiary of a professional fee application, of course, is the professional," compensation for litigation defending that application does not fall within § 330(a)(1). *Ibid*.

We granted certiorari, 573 U.S. ——, 135 S.Ct. 44, 189 L.Ed.2d 897 (2014), and now affirm.

***2164 II**

A

[3] [4] [5] "Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 252–253, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010) (internal quotation marks omitted). The American Rule has roots in our common law reaching back to at least the 18th century, see *Arcambel v. Wiseman,* 3 Dall. 306, 1 L.Ed. 613 (1796), and "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar [legal] principles," *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (internal quotation marks and ellipsis omitted). We consequently will not deviate from the American Rule " 'absent explicit statutory authority.' " *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (quoting *Key Tronic Corp. v. United States,* 511 U.S. 809, 814, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994)).

[6] We have recognized departures from the American Rule only in "specific and explicit provisions for the allowance of attorneys' fees under selected statutes." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Although these "[s]tatutory changes to [the American Rule] take various forms," *Hardt, supra,* at 253, 130 S.Ct. 2149 they tend to authorize the award of "a reasonable attorney's fee," "fees," or "litigation costs," and usually refer to a "prevailing party" in the context of an adversarial "action," see, *e.g.,* 28 U.S.C. § 2412(d)(1)(A); 42 U.S.C. §§ 1988(b), 2000e–5(k); see generally *Hardt, supra,* at 253, and nn. 3–7, 130 S.Ct. 2149 (collecting examples).

[7] The attorney's fees provision of the Equal Access to Justice Act offers a good example of the clarity we have required to deviate from the American Rule. See 28 U.S.C. § 2412(d)(1)(A). That section provides that "a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort) ... brought by or against the United States" under certain conditions. *Ibid.* As our decision in *Commissioner v. Jean,* 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990), reveals, there could be little dispute that this provision—which mentions "fees," a "prevailing party," and a "civil action"—is a "fee-shifting statut[e]" that trumps the American Rule, *id.,* at 161, 110 S.Ct. 2316.

B

[8] [9] Congress did not expressly depart from the American Rule to permit compensation for fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings. Section 327(a) authorizes the employment of such professionals, providing that a "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 [him] in carrying out [his] duties." In other words, § 327(a) professionals are hired to serve the administrator of the estate for the benefit of the estate.

[10] Section 330(a)(1) in turn authorizes compensation for these professionals as follows:

> ***2165** "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." (Emphasis added.)

This text cannot displace the American Rule with respect to fee-defense litigation. To be sure, the phrase "reasonable compensation for actual, necessary services rendered" permits courts to award fees to attorneys for work done to assist the administrator of the estate, as the Bankruptcy Court did here when it ordered ASARCO to pay roughly $120 million for the firms' work in the bankruptcy proceeding. No one disputes that § 330(a)(1) authorizes an award of attorney's fees for that kind of work. See *Alyeska Pipeline, supra,* at 260, and n. 33, 95 S.Ct. 1612 (listing § 330(a)(1)'s predecessor as an example of a provision authorizing attorney's fees). But the phrase "reasonable compensation for actual, necessary services rendered" neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other—in this case, from the attorneys seeking fees to the administrator of the estate—as most statutes that displace the American Rule do.

[11] [12] [13] Instead, § 330(a)(1) provides compensation for all § 327(a) professionals—whether accountant, attorney, or auctioneer—for all manner of work done *in service of* the estate administrator. More specifically, § 330(a)(1) allows "reasonable compensation" only for "*actual, necessary services rendered*." (Emphasis added.) That qualification is significant. The word "services" ordinarily refers to "labor performed for another." Webster's New International Dictionary 2288 (def. 4) (2d ed. 1934); see also Black's Law Dictionary 1607 (3d ed. 1933) ("duty or labor to be rendered by one person to another"); Oxford English Dictionary 517 (def. 19) (1933) ("action of serving, helping or benefiting; conduct tending to the welfare or advantage of another").[2] Thus, in a case addressing § 330(a)'s predecessor, this Court concluded that the phrase " 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client. *Woods v. City Nat. Bank & Trust Co. of Chicago,* 312 U.S. 262, 268, 61 S.Ct. 493, 85 L.Ed. 820 (1941); accord, *American United Mut. Life Ins. Co. v. Avon Park,* 311 U.S. 138, 147, 61 S.Ct. 157, 85 L.Ed. 91 (1940). Time spent litigating a fee application against the administrator of a bankruptcy estate cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator.

[2] Congress added the phrase "reasonable compensation for the services rendered" to federal bankruptcy law in 1934. Act of June 7, 1934, § 77B(c)(9), 48 Stat. 917. We look to the ordinary meaning of those words at that time.

This legislative decision to limit "compensation" to "services rendered" is particularly telling given that other provisions of the Bankruptcy Code expressly transfer the costs of litigation from one adversarial party to the other. Section 110(i), for instance, provides that "[i]f a bankruptcy petition preparer ... commits any act that the court finds to be fraudulent, unfair, or ***2166** deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any)," the bankruptcy court must "order the bankruptcy petition preparer to pay the debtor ... reasonable attorneys' fees and costs in moving for damages under this subsection." § 110(i)(1)(C). Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1) in a similar manner, it easily could have done so. We accordingly refuse "to invade the legislature's province by redistributing litigation costs" here. *Alyeska Pipeline,* 421 U.S., at 271, 95 S.Ct. 1612.

III

The law firms, the United States as *amicus curiae,* and the dissent resist this straightforward interpretation of the statute. The law firms and the Government each offer a theory for why § 330(a)(1) expressly overrides the American Rule in the context of litigation in defense of a fee application, and the dissent embraces the latter. Neither theory is persuasive.

A

We begin with the law firms' approach. According to the firms, fee-defense litigation is part of the "services rendered" to the estate administrator under § 330(a)(1). See Brief for Petitioners 23–30. As explained above, that reading is untenable. The term "services" in this provision cannot be read to encompass adversarial fee-defense litigation. See Part II–B, *supra*. Even the dissent agrees on this point. See *post,* at 2169 (opinion of BREYER, J.).

[14] Indeed, reading "services" in this manner could end up compensating attorneys for the *unsuccessful* defense of a fee application. The firms insist that "estates *do* benefit from fee defenses"—and thus receive a "service" under § 330(a)(1)—because "the estate has an interest in obtaining a just determination of the amount it should pay its professionals." Brief for Petitioners 25–26 (internal quotation marks omitted). But that alleged interest—and hence the supposed provision of a "service"—exists whether or not a § 327(a) professional prevails in his fee dispute. We decline to adopt a reading of § 330(a)(1) that would allow courts to pay professionals for arguing for fees they were found never to have been entitled to in the first place. Such a result would not only require an unnatural interpretation of the term "services rendered," but a particularly unusual deviation from the American Rule as well, as "[m]ost fee-shifting provisions permit a court to award attorney's fees only to a 'prevailing party,' " a " 'substantially prevailing' party," or "a 'successful' litigant," *Hardt,* 560 U.S., at 253, 130 S.Ct. 2149 (footnote omitted). There is no indication that Congress departed from the American Rule in § 330(a)(1) with respect to fee-defense litigation, let alone that it did so in such an unusual manner.

B

The Government's theory, embraced by the dissent, fares no better. Although the United States agrees that "the defense of a fee application does not *itself* qualify as an independently compensable service," it nonetheless contends that "compensation for such work is properly viewed as part of the compensation *for the underlying services* in the bankruptcy proceeding." Brief for United States as *Amicus Curiae* 25. According to the Government, if an attorney is not repaid for his time spent successfully litigating fees, his compensation for his actual "services rendered" to the estate administrator in the underlying proceeding will be diluted. *Id.,* at 18. The United States thus urges us to treat fees for fee-defense work "as a component ***2167** of 'reasonable compensation.' " *Id.,* at 33; accord, *post,* at 2169 (BREYER, J., dissenting). We refuse to do so for several reasons.

1

First and foremost, the Government's theory cannot be reconciled with the relevant text. Section 330(a)(1) does not authorize courts to award "reasonable compensation" *simpliciter,* but "reasonable compensation *for actual, necessary services rendered by* " the § 327(a) professional. § 330(a)(1)(A) (emphasis added). Here, the contested award was tied to the firms' work on the fee-defense litigation and is correctly understood only as compensation for that work. The Government and the dissent properly concede that litigation in defense of a fee application is not a "service" within the meaning of § 330(a)(1); it follows that the contested award was not "compensation" for a "service." Thus, the only way to reach their reading of the statute would be to excise the phrase "for actual, necessary services rendered" from the statute.[3]

[3] The dissent's focus on reasonable compensation is therefore a red herring. See *post,* at 2171 – 2172. The question is not whether an award for fee-defense work would be "reasonable," but whether such work is compensable in the first place.

[15] Contrary to the Government's assertion, § 330(a)(6) does not presuppose that courts are free to award compensation based on work that does not qualify as a service to the estate administrator. That provision specifies that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." The Government argues that because time spent *preparing* a fee application is compensable, time spent

defending it must be too. But the provision cuts the other way. A § 327(a) professional's preparation of a fee application is best understood as a "servic[e] rendered" to the estate administrator under § 330(a)(1), whereas a professional's defense of that application is not. By way of analogy, it would be natural to describe a car mechanic's preparation of an itemized bill as part of his "services" to the customer because it allows a customer to understand—and, if necessary, dispute—his expenses. But it would be less natural to describe a subsequent court battle over the bill as part of the "services rendered" to the customer.

The Government used to understand that time spent preparing a fee application was different from time spent defending one for the purposes of § 330(a)(1). Just a few years ago, the U.S. Trustee explained that "[r]easonable charges for preparing ... fee applications ... are compensable ... because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid." 78 Fed.Reg. 36250 (2013) (emphasis deleted). By contrast, "time spent ... defending ... fee applications" is ordinarily "not compensable," the Trustee observed, as such time can be "properly characterized as work that is for the benefit of the professional and not the estate." *Ibid.*

To support its broader interpretation of § 330(a)(6), the Government, echoed by the dissent, relies on our remark in *Jean* that "[w]e find no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." 496 U.S., at 162, 110 S.Ct. 2316; see *post,* at 2172 – 2173. But that use of *Jean* begs the question. *Jean* addressed a statutory provision that everyone agreed authorized court-awarded fees for fee-defense litigation. 496 U.S., at 162, 110 S.Ct. 2316. The "only dispute" in that context ***2168** was over what "finding [was] necessary to support such an award." *Ibid.* In resolving that issue, the Court declined to treat fee-application and fee-litigation work differently given that the relevant statutory text—"a court shall award to a prevailing party ... fees and other expenses ... incurred by that party in any civil action"—could not support such a distinction. *Id.,* at 158, 110 S.Ct. 2316. Here, by contrast, the operative language—"reasonable compensation for actual, necessary services rendered"—reaches only the fee-application work. The fact that the provision at issue in *Jean* "did not mention fee-defense work," *post,* at 2172, is thus irrelevant.

In any event, the Government's textual foothold for its argument is too insubstantial to support a deviation from the American Rule. The open-ended phrase "reasonable compensation," standing alone, is not the sort of "specific and explicit provisio[n]" that Congress must provide in order to alter this default rule. *Alyeska Pipeline,* 421 U.S., at 260, 95 S.Ct. 1612.

2

Ultimately, the Government's theory rests on a flawed and irrelevant policy argument. The United States contends that awarding fees for fee-defense litigation is a "judicial exception" necessary to the proper functioning of the Bankruptcy Code. Brief for United States as *Amicus Curiae* 15, n. 7 (internal quotation marks omitted). Absent this exception, it warns, fee-defense litigation will dilute attorney's fees and result in bankruptcy lawyers receiving less compensation than nonbankruptcy lawyers, thereby undermining the congressional aim of ensuring that talented attorneys will take on bankruptcy work. Accord, *post,* at 2170 – 2171.

[16] [17] As an initial matter, we find this policy argument unconvincing. In our legal system, *no* attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization. Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers.[4]

[4] To the extent the United States harbors any concern about the possibility of frivolous objections to fee applications, we note that "Federal Rule of Bankruptcy Procedure 9011—bankruptcy's analogue to Civil Rule 11—authorizes the court to impose sanctions for bad-faith litigation conduct, which may include 'an order directing payment ... of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.' " *Law v. Siegel,* 571 U.S. ——, ——, 134 S.Ct. 1188, 1198, 188 L.Ed.2d 146 (2014).

The United States nonetheless contends that uncompensated fee litigation in bankruptcy will be particularly costly because multiple parties in interest may object to fee applications, whereas nonbankruptcy fee litigation typically involves just a lawyer and his client. But this argument rests on unsupported predictions of how the statutory scheme will operate in practice, and the Government's conduct in this case reveals the perils associated with relying on such prognostications to interpret statutes: The United States took the opposite

view below, asserting that "requiring a professional to bear the normal litigation costs of litigating a contested request for payment ... dilutes a bankruptcy fee award no more than any litigation over professional fees." Reply Brief for Appellant United States Trustee in No. 11–290 (SD Tex.), p. 15. The speed with which the Government has changed its tune offers a good argument against substituting policy-oriented predictions for statutory text.

***2169** [18] [19] [20] More importantly, we would lack the authority to rewrite the statute even if we believed that uncompensated fee litigation would fall particularly hard on the bankruptcy bar. "Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding," and that is no less true in bankruptcy than it is elsewhere. *Lamie v. United States Trustee,* 540 U.S. 526, 538, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us "roving authority ... to allow counsel fees ... whenever [we] might deem them warranted." *Alyeska Pipeline, supra,* at 260, 95 S.Ct. 1612. Our job is to follow the text even if doing so will supposedly "undercut a basic objective of the statute," *post,* at 2170. Section 330(a)(1) itself does not authorize the award of fees for defending a fee application, and that is the end of the matter.

* * *

[21] As we long ago observed, "The general practice of the United States is in opposition" to forcing one side to pay the other's attorney's fees, and "even if that practice [is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Arcambel,* 3 Dall., at 306 (emphasis deleted). We follow that approach today. Because § 330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

Justice SOTOMAYOR, concurring in part and concurring in the judgment.

As the Court's opinion explains, there is no textual, contextual, or other support for reading 11 U.S.C. § 330(a)(1) in the way advocated by petitioners and the United States. Given the clarity of the statutory language, it would be improper to allow policy considerations to undermine the American Rule in this case. On that understanding, I join all but Part III–B–2 of the Court's opinion.

Justice BREYER, with whom Justice GINSBURG and Justice KAGAN join, dissenting.

The Bankruptcy Code authorizes a court to award "*reasonable compensation* for actual, necessary services rendered by" various "professional person[s]," including "attorneys," whom a bankruptcy "trustee [has] employ[ed] ... to represent or assist the trustee in carrying out the trustee's duties." 11 U.S.C. §§ 327(a), 330(a) (emphasis added). I agree with the Court that a professional's defense of a fee application is not a "service" within the meaning of the Code. See *ante,* at 2165. But I agree with the Government that compensation for fee-defense work "is properly viewed as part of the compensation *for the underlying services* in [a] bankruptcy proceeding." Brief for United States as *Amicus Curiae* 25. In my view, when a bankruptcy court determines "reasonable compensation," it may take into account the expenses that a professional has incurred in defending his or her application for fees.

I

The Bankruptcy Code affords courts broad discretion to decide what constitutes "reasonable compensation." The Code provides that a "court shall consider the nature, the extent, and the value of ... services [rendered], taking into account *all relevant factors*." § 330(a)(3) (emphasis added). Cf. ***2170** *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("reemphasiz[ing a trial court's] discretion in determining the amount of a fee award," which "is appropriate in view of the [trial] court's superior understanding of the litigation"). I would hold that it is within a bankruptcy court's discretion to consider as "relevant factors" the cost and effort that a professional has reasonably expended in order to recover his or her fees.

Where a statute provides for reasonable fees, a court may take into account factors other than hours and hourly rates. *Perdue v. Kenny A.,* 559 U.S. 542, 551–557, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010). For instance, "an enhancement" to attorney's fees "may be appropriate if the attorney's performance includes an extraordinary

outlay of expenses and the litigation is exceptionally protracted." *Id.,* at 555, 130 S.Ct. 1662. And "there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees" that justify additional compensation. *Id.,* at 556, 130 S.Ct. 1662. These examples demonstrate that increased compensation is sometimes warranted to reflect exceptional effort or resources expended in order to attain one's fees.

In that vein, work performed in defending a fee application may, in some cases, be a relevant factor in calculating "reasonable compensation." Consider a bankruptcy attorney who earns $50,000—a fee that reflects her hours, rates, and expertise—but is forced to spend $20,000 defending her fee application against meritless objections. It is within a bankruptcy court's discretion to decide that, taking into account the extensive fee litigation, $50,000 is an insufficient award. The attorney has effectively been paid $30,000, and the bankruptcy court might understandably conclude that such a fee is not "reasonable."

Indeed, this Court has previously acknowledged that work performed in defending a fee application is relevant to a determination of attorney's fees. In *Commissioner v. Jean,* 496 U.S. 154, 160–166, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990), the Court held that fee-defense work is compensable under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). The Court quoted with approval the Second Circuit's statement that "[d]enying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." 496 U.S., at 162, 110 S.Ct. 2316 (quoting *Gagne v. Maher,* 594 F.2d 336, 344 (1979); internal quotation marks omitted).

A contrary interpretation of "reasonable compensation" would undercut a basic objective of the statute. Congress intended to ensure that high-quality attorneys and other professionals would be available to assist trustees in representing and administering bankruptcy estates. To that end, Congress directed bankruptcy courts to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under" the Bankruptcy Code. § 330(a)(3)(F). Congress recognized that comparable compensation was necessary to ensure that professionals would "remain in the bankruptcy field." H.R.Rep. No. 95–595, p. 330 (1977), 1978 U.S.C.C.A.N. 5963, 6286. Cf. *Perdue, supra,* at 552, 130 S.Ct. 1662 ("[A] 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case").

In some cases, the extensive process through which a bankruptcy professional ***2171** defends his or her fees may be so burdensome that additional fees are necessary in order to maintain comparability of compensation. In order to be paid, a professional assisting a trustee must file with the court a detailed application seeking compensation. Fed. Rule Bkrtcy. Proc. 2016(a). The application will not be granted until after the court has conducted a hearing on the matter. § 330(a)(1). And "[t]he 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." § 330(a)(2).

By contrast, an attorney representing a private party, or a professional working outside of the bankruptcy context, generally faces fee objections made only by his or her client—and those objections typically are made outside of court, at least initially. This process is comparatively simple, involves fewer parties in interest, and does not necessarily impose litigation costs. Consequently, in order to maintain comparable compensation, a court may find it necessary to account for the relatively burdensome fee-defense process required by the Bankruptcy Code. Accounting for this process ensures that a professional is paid "reasonable compensation."

II

The majority rests its conclusion upon an interpretation of the statutory language that I find neither legally necessary nor convincing. The majority says that Congress, in writing the reasonable-compensation statute, did not "displace the American Rule with respect to fee-defense litigation." *Ante,* at 2165. The American Rule normally requires "[e]ach litigant" to "pa[y] his own attorney's fees, win or lose." *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 253, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010).

But the American Rule is a default rule that applies only where "a statute or contract" does not "provid[e] otherwise." *Ibid.* And here, the statute "provides otherwise." *Ibid.* Section 330(a)(1)(A) permits a "court [to] award ... 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."

This Court has recognized that through § 330(a), Congress "ma[d]e specific and explicit [its] provisio[n] for the allowance of attorneys' fees," and thus displaced the American Rule. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 260, and n. 33, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (listing § 330(a)' s predecessor among examples of provisions authorizing attorney's fees).

The majority suggests that the American Rule is not displaced with respect to fee-defense work in bankruptcy because § 330(a) does not specifically authorize fees for that particular type of work. See *ante,* at 2164 ("Congress did not expressly depart from the American Rule to permit compensation for fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings"). To the extent that the majority intends to impose a requirement that a statute must explicitly mention fee defense in order to provide compensation for that work, this requirement is difficult to reconcile with the Court's decision in *Jean*. There, the Court held that the Equal Access to Justice Act authorizes compensation for fee-defense work. See 496 U.S., at 160–166, 110 S.Ct. 2316. The fee provision of the Equal Access to Justice Act, as enacted at the time, permitted an "award to a prevailing party ***2172** ... of fees and other expenses ... incurred by that party in any civil action ... brought by or against the United States." *Id.,* at 158, 110 S.Ct. 2316 (quoting 28 U.S.C. § 2412(d)(1)(A) (1988 ed.)). The provision did not mention fee-defense work—but the Court nonetheless held that such work was compensable. See *Jean, supra,* at 160–166, 110 S.Ct. 2316. I would do the same here.

The majority focuses on particular words that appear in the Equal Access to Justice Act: "fees," "prevailing party," and "civil action." See *ante,* at 2163. But neither the term "fees" nor the phrase "prevailing party" relates specifically to fee-defense work. And even assuming that the phrase "civil action" is more easily read to cover fee litigation than the phrase "actual, necessary services," that difference here is beside the point. I find the necessary authority in the words "reasonable compensation," not the words "actual, necessary services." In order to ensure that each professional is paid *reasonably* for compensable services, a court must have the discretion to authorize pay reflecting fee-defense work.

The majority asserts that by interpreting the phrase "reasonable compensation," I have effectively "excise[d] the phrase 'for actual, necessary services rendered' from the statute." *Ante,* at 2167. But the majority misunderstands my views. The statute permits compensation for fee-defense work as a part of compensation *for the underlying services*. Thus, where fee-defense work is not necessary to ensure reasonable compensation for some underlying service, then under my reading of the statute, a court should not consider that work when calculating compensation.

Indeed, to the extent that the majority bases its decision on the specific words of § 330(a), its argument seems weak. The majority disregards direct statutory evidence that Congress intended to give courts the authority to account for reasonable fee-litigation costs. Section 330(a)(6) states that "any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." This provision does not authorize compensation, but rather *assumes* (through the words "any compensation awarded") pre-existing authorization under § 330(a). And the majority cannot convincingly explain why, under its reading of the statute, fee-application is a compensable "actual, necessary servic[e] rendered" to the estate.

The majority asserts that a fee application, unlike fee defense, can be construed as a "service" to the bankruptcy estate. See *ante,* at 2167 – 2168. The majority draws an analogy between a fee application and an itemized bill prepared by a car mechanic. See *ibid*. It argues that, like an itemized bill, a fee application is a "service" to the customer. But customers do not generally pay their mechanics for time spent preparing the bill. A mechanic's bill is not a separate "service," but rather is a medium through which the mechanic conveys what he or she wants to be paid. Similarly, a legal bill is not a "service" rendered to a client. In fact, ASARCO concedes that attorneys do not charge their clients for time spent preparing legal bills. See Tr. of Oral Arg. 33. A bill prepared by an attorney, or another bankruptcy professional, is not a "service" to the bankruptcy estate.

The majority suggests that a fee application *must* be a service " 'because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid.' " *Ante,* at 2167 (quoting 78 Fed.Reg. 36250 (2013)). But if the existence of a legal requirement specific to bankruptcy were sufficient to make an activity a compensable ***2173** service, then the time that a professional spends at a hearing defending his or her fees would also be compensable. After all, the statute permits a court to award compensation only after "a hearing" with respect to the issue. § 330(a)(1). And there is no such requirement for most attorneys, who simply bill their clients and are paid their fees. But the majority does not believe that preparing for or appearing at such a hearing—an integral part of fee-defense work—is compensable. The majority

simply cannot reconcile its narrow interpretation of "reasonable compensation" with § 330(a)(6)'s provision for fee-application preparation fees.

In my view, the majority is wrong to distinguish between the costs of fee preparation and the costs of fee litigation. Cf. *Jean,* 496 U.S., at 162, 110 S.Ct. 2316 ("We find no textual or logical argument for treating ... differently a party's preparation of a fee application and its ensuing efforts to support that same application"). And the majority should not distinguish between the compensability of fee litigation under the Equal Access to Justice Act and fee litigation under the Bankruptcy Code. Its decision to do so creates anomalies and undermines the basic purpose of the Bankruptcy Code's fee award provision.

For these reasons, I respectfully dissent.

All Citations

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783 F.3d 266
United States Court of Appeals,
Fifth Circuit.

In the Matter of Clifford J. **WOERNER**; Gail S. **Woerner**, Debtors.
Barron & Newburger, P.C., Appellant
v.
Texas Skyline, Limited; Pecos & 15th, Limited; United States Trustee; Skyline Interests, L.L.C., Appellees.

No. 13–50075. | April 9, 2015.

Synopsis
Background: Following conversion of case from Chapter 11 to Chapter 7, law firm that had represented debtor in his Chapter 11 bankruptcy filed fee application, seeking fees in excess of $130,000. United States Trustee (UST) and creditor objected. The United States Bankruptcy Court for the Western District of Texas, Sam Sparks, J., allowed approximately $20,000 in fees but disallowed the remainder as unreasonable. Firm appealed. The District Court affirmed, and firm appealed. The Court of Appeals, 758 F.3d 693, affirmed. The Court granted rehearing en banc.

Holdings: The Court of Appeals, Edward C. Prado, Circuit Judge, held that:

[1] a court may compensate an attorney in a Chapter 11 bankruptcy case not only for activities that were "necessary," but also for services that were objectively reasonable at the time they were made, overruling *In re Pro–Snax Distributors, Inc.*, 157 F.3d 414, and

[2] remand was warranted for bankruptcy court to evaluate whether law firm was entitled to attorney fees under prospective, "reasonable at the time" standard.

Vacated and remanded.

E. Grady Jolly, Circuit Judge, filed specially concurring opinion.

West Headnotes (7)

[1] **Bankruptcy**
Scope of review in general

51Bankruptcy
51XIXReview
51XIX(B)Review of Bankruptcy Court
51k3779Scope of review in general

The Court of Appeals reviews a district court's decision by applying the same standard of review to the bankruptcy court's conclusions of law and findings of fact that the district court applied.

Cases that cite this headnote

[2] **Bankruptcy**
Discretion

51Bankruptcy
51XIXReview
51XIX(B)Review of Bankruptcy Court
51k3784Discretion

The Court of Appeals reviews a bankruptcy court's award of attorney's fees for abuse of discretion. 11 U.S.C.A. § 330.

1 Cases that cite this headnote

[3] **Bankruptcy**
Conclusions of law; de novo review
Bankruptcy
Discretion

51Bankruptcy
51XIXReview
51XIX(B)Review of Bankruptcy Court
51k3782Conclusions of law; de novo review
51Bankruptcy
51XIXReview
51XIX(B)Review of Bankruptcy Court
51k3784Discretion

An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal

standard, reviewed de novo, or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous.

Cases that cite this headnote

[4] **Bankruptcy**
Items and Services Compensable
Bankruptcy
Necessity of service

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3181In general
51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3180Items and Services Compensable
51k3182Necessity of service

A court may compensate an attorney in a Chapter 11 bankruptcy case not only for activities that were "necessary," but also for services that were objectively reasonable at the time they were made; what matters is that, prospectively, the choice to pursue a course of action was reasonable; overruling, *In re Pro–Snax Distributors, Inc.*, 157 F.3d 414. 11 U.S.C.A. § 330.

1 Cases that cite this headnote

[5] **Bankruptcy**
Discretion

51Bankruptcy
51IXAdministration
51IX(E)Compensation of Officers and Others
51IX(E)3Attorneys
51k3171Discretion

A court in a Chapter 11 bankruptcy case has broad discretion to award or curtail attorney's fees, taking into account all relevant factors. 11 U.S.C.A. § 330(a)(3).

1 Cases that cite this headnote

[6] **Bankruptcy**
Discretion
Bankruptcy
Remand

51Bankruptcy
51XIXReview
51XIX(B)Review of Bankruptcy Court
51k3784Discretion
51Bankruptcy
51XIXReview
51XIX(B)Review of Bankruptcy Court
51k3789Determination and Disposition; Additional Findings
51k3790Remand

The Court of Appeals reviews a bankruptcy court's fee determination for abuse of discretion, and remand is warranted when the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous. 11 U.S.C.A. § 330.

Cases that cite this headnote

[7] **Bankruptcy**
Remand

51Bankruptcy
51XIXReview
51XIX(B)Review of Bankruptcy Court
51k3789Determination and Disposition; Additional Findings
51k3790Remand

Remand was warranted for bankruptcy court to evaluate whether law firm was entitled to Chapter 11 attorney fee award under prospective, "reasonable at the time" standard, since new legal rule was announced on appeal and facts of case on appeal were complex; although bankruptcy court stated its impression that outcome would be the same under either

standard, it did not conduct its analysis with eye toward prospective inquiry of whether services were "reasonable at the time" they were rendered and there were no findings of fact premised on prospective rule. 11 U.S.C.A. § 330.

Cases that cite this headnote

Attorneys and Law Firms

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Appeals from the United States District Court for the Western District of Texas.

Before STEWART, Chief Judge, REAVLEY, JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

Opinion

***268** EDWARD C. PRADO, Circuit Judge:

This case concerns a bankruptcy court's order reducing the fees a debtor's counsel received under 11 U.S.C. § 330. On May 13, 2010, on the eve of a major state-court judgment against him, Debtor Clifford Woerner[1] filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Appellant Barron & Newburger ("B & N"), a law firm, represented Woerner in his Chapter 11 bankruptcy. On April 20, 2011, the bankruptcy court converted the case to Chapter 7.

[1] Woerner filed a joint petition with his wife Gail Woerner. Because Gail Woerner was subsequently dismissed from the case, we refer to Woerner as the only debtor.

Its services terminated, B & N filed an application for fees in excess of $130,000. The bankruptcy court allowed approximately $20,000 and disallowed the remainder, finding that the additional fees were unreasonable. The district court affirmed. B & N appealed, contending that the bankruptcy court misapplied Fifth Circuit precedent and 11 U.S.C. § 330 in reducing the fees awarded to it. In an opinion issued on July 15, 2014, a panel of this Court affirmed the district court's judgment. *In re Woerner,* 758 F.3d 693, 702 (5th Cir.2014). However, all three members of the panel specially concurred to call for en banc reconsideration of *In re Pro–Snax Distributors, Inc.,* 157 F.3d 414 (5th Cir.1998), the opinion interpreting § 330 that controlled the appeal. *In re Woerner,* 758 F.3d at 702–06 (Prado, J., specially concurring).

We granted rehearing en banc to reexamine our decision in *Pro–Snax*. *In re Woerner,* 771 F.3d 820 (5th Cir.2014) (per curiam). We now recognize that the retrospective, "material benefit" standard enunciated in *Pro–Snax* conflicts with the language and legislative history of § 330, diverges from the decisions of other circuits, and has sown confusion in our circuit. Correspondingly, we overturn *Pro–Snax* 's attorney's-fee rule[2] and adopt the prospective, "reasonably likely to benefit the estate" standard endorsed by our sister circuits.

[2] We leave undisturbed the remainder of that opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Events Before Woerner Filed for Bankruptcy

In 2006, Woerner and Texas Skyline, Ltd. formed a limited partnership for the purpose of undertaking a real estate venture. Within the partnership, DPRS—a company Woerner owned—was the sole general partner, Woerner was a limited partner with a 49.99% interest in the partnership, and Texas Skyline was the sole investor and a limited partner in the project. Over the course of the next three years, Woerner misappropriated funds from the partnership for personal use. When Texas Skyline discovered Woerner's activities, it sued him in state court for breach of the partnership agreement and breach of fiduciary duties. The case proceeded to a bench trial on April 27, 2010. After the parties rested, the state court announced an oral ruling in favor of Texas Skyline and set a remedies hearing for May 14, 2010.

Woerner and his state-court trial counsel met with B & N

on May 4, 2010 to discuss filing for bankruptcy. B & N agreed to the representation and filed Woerner's voluntary petition for Chapter 11 bankruptcy relief on May 13—the night before the state-court remedies hearing. That filing triggered the Bankruptcy Code's automatic stay provision, which ***269** brought the state-court proceeding to a halt. *See* 11 U.S.C. § 362(a).

B. B & N Litigates Woerner's Chapter 11 Case

In the ensuing eleven months, B & N provided services that it claimed were worth $134,800 in legal fees. On May 18, 2010, with B & N's assistance, Woerner filed mandatory disclosure documents with the bankruptcy court—namely, schedules and a statement of financial affairs.

B & N also defended Woerner in adversary proceedings that were brought to prevent Woerner from discharging liabilities. On August 4, 2010, Texas Skyline initiated an adversary proceeding with the bankruptcy court under 11 U.S.C. § 523(a)(4) for breach of fiduciary duty. Texas Skyline then fought to lift the stay of the state-court judgment. Woerner contested and lost, and the stay of state-court proceedings was lifted. Woerner also contested adversary proceedings brought by John Baker II, one of the other active creditors in this case. On November 2, 2010, Woerner filed Amended Schedules (b) and (c) and also amended his Statement of Financial Affairs.

B & N helped Woerner negotiate with his creditors. Woerner and the adversarial creditors agreed to mediation with a bankruptcy judge. Talks with Texas Skyline broke down, but on December 17, 2010, B & N filed a Joint Motion to Compromise with the bankruptcy court, which B & N maintained would have resolved this case. Yet Baker insisted that the settlement was merely a proposal, objected to it, and refused to execute it. For these negotiation services, B & N sought over $6,000.

B & N also investigated the concealment of some of Woerner's assets and subsequently amended Woerner's financial disclosures to include approximately $9,000 of additional personal assets, including investments, jewelry, firearms, and fur coats that were not originally disclosed. This concealment prompted Baker to move to convert Woerner's case from a Chapter 11 reorganization to a Chapter 7 trustee-administered liquidation. *See* 11 U.S.C. § 1112(b)(1) (requiring the bankruptcy court to convert or dismiss a Chapter 11 case upon finding "cause"). Texas Skyline moved to intervene in the motion to convert. B & N litigated Woerner's attempts to press for a motion to approve the settlement and oppose the motion to convert. The billing records show that the firm (1) prepared a motion to sell some of Woerner's personal property for the purpose of funding an appeal from the state-court judgment; (2) started investigating potential causes of action against Texas Skyline and Baker; (3) drafted a disclosure statement and reorganization plan; and (4) deposed a representative from Texas Skyline about potential mismanagement of partnership assets.

C. Woerner's Case Is Converted to Chapter 7, Ending B & N's Representation

The bankruptcy court conducted a hearing on the pending motions, denying the motion to approve the settlement and granting the motion to convert on April 20, 2011. As the bankruptcy court summarized in its oral ruling on the fee application, "the Court found that it was appropriate to convert this case to Chapter 7 because the Court was of the opinion ... that [Woerner] w[as] not forthright as [a] Debtor[ ] under the Bankruptcy Code in terms of listing [his] assets and giving proper evaluations." On September 3, 2011, B & N filed an application for approximately $134,000 in fees under § 330. Following the U.S. Trustee's objection, B & N amended its fee application. B & N ***270** ultimately sought $130,656.50 in fees, and $5,793.37 in expenses. The Trustee renewed its objection to the fees. Texas Skyline also objected, arguing that all of the fees were unreasonable because (1) Woerner never had the means to fund a Chapter 11 reorganization and (2) B & N's actions were dilatory and required creditors to incur unnecessary attorney's fees.

D. The Bankruptcy Court Disallows Most of B & N's Requested Fees

The bankruptcy court then conducted a hearing on the fee request. B & N offered testimony from Woerner's nonbankruptcy counsel and two attorneys from B & N to prove that (1) Woerner brought the case for a legitimate purpose and (2) the litigation costs were driven up by Texas Skyline's alleged intransigence.

The bankruptcy court took the fee application under advisement and entered an oral ruling on April 11, 2012. Citing *Pro–Snax,* the bankruptcy court explained that, for a service to be compensable under § 330, fee applicants must prove that the service resulted in an "identifiable, tangible, and material benefit to the bankruptcy estate," *Pro–Snax,* 157 F.3d at 426. Applying that standard, the bankruptcy court awarded the expenses in full but only $19,409.00 in fees—an 85% reduction. The bankruptcy court arrived at $19,409.00 by considering separately each category of fees (such as case administration, resisting a motion to lift the stay, preparing bankruptcy

schedules, and similar categories), granting some in whole and some in part, and denying others. Most of the disallowed fees were denied due to B & N's lack of success. Specifically, the bankruptcy court found much of B & N's billed time was not of identifiable benefit to the estate. The district court entered its final order affirming the bankruptcy court on January 17, 2013. It ruled that the record supported finding that B & N's fees were unreasonable under § 330 and *Pro–Snax*. The district court observed that the bankruptcy court "specifically invoked *Pro–Snax* at the hearing on fees, and appears to have relied upon it in determining to reduce [B & N]'s fees based on the limited success and lack of benefit to the estate." It declined to entertain B & N's argument that *Pro–Snax* was wrongly decided and rejected B & N's contention that the opinion's operative language was dicta, concluding that *Pro–Snax* supplied the governing standard for attorney compensation under Chapter 11 in the Fifth Circuit. Correspondingly, the district court found no error in the bankruptcy court's application of *Pro–Snax* to B & N's fee application.

II. JURISDICTION AND STANDARD OF REVIEW

B & N timely filed a notice of appeal from the bankruptcy court's order to the United States District Court for the Western District of Texas under 28 U.S.C. § 158(a)(1) and Federal Rule of Bankruptcy Procedure 8002(a). The district court had jurisdiction over Woerner's Chapter 11 bankruptcy case under 28 U.S.C. §§ 157, 158, and 1334. We have jurisdiction over this timely appeal from the district court's order under 28 U.S.C. §§ 158(d)(1) and 2107(b).

[1] [2] [3] This Court reviews the district court's decision "by applying the same standard of review to the bankruptcy court's conclusions of law and findings of fact that the district court applied." *In re Cahill,* 428 F.3d 536, 539 (5th Cir.2005) (per curiam). Moreover, this Court reviews the bankruptcy court's award of attorney's fees for abuse of discretion. *Id.* (citing *In re Coho Energy, Inc.,* 395 F.3d 198, 204 (5th Cir.2004); *In re Barron,* 325 F.3d 690, 692 (5th Cir.2003)). "An abuse ***271** of discretion occurs where the bankruptcy court (1) applies an improper legal standard [, reviewed de novo,] or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous." *Id.* (citing *In re Evangeline Ref. Co.,* 890 F.2d 1312, 1325 (5th Cir.1989)).

III. DISCUSSION

B & N argues that this Court's interpretation of § 330 in *Pro–Snax* is erroneous, and that remand to the bankruptcy court is warranted in order for that court to assess B & N's request for attorney's fees under the correct legal standard. The U.S. Trustee agrees with B & N that *Pro–Snax* was wrongly decided but maintains that remand is unnecessary because B & N is not eligible for any fees beyond those awarded by the bankruptcy court even under the more lenient prospective standard that B & N and the U.S. Trustee advocate. Texas Skyline contends that this Court should affirm the district court's ruling regardless of our disposition of *Pro–Snax* because B & N is not entitled to the fees it seeks under any standard. We address these issues—the viability of *Pro–Snax* and the need for remand—in turn.

A. The Proper Standard for Awarding Attorney's Fees Under § 330

B & N and the U.S. Trustee contend that the "hindsight" or "material benefit" standard we enunciated in *Pro–Snax* conflicts with the text and legislative history of § 330 and unnecessarily places us at odds with our sister circuits. We agree.

1. Statutory Framework

a. Reorganization Under Chapter 11 of the Bankruptcy Code

When a debtor commences a bankruptcy case, a legal entity known as the "estate" is created. 11 U.S.C. § 541(a). The estate contains all of the debtor's property, subject to exceptions not applicable here. *Id.* When a debtor files a case to reorganize under Chapter 11, the debtor becomes the debtor-in-possession of the estate and takes on the rights, powers, and fiduciary duties of a trustee. *Id.* §§ 1101, 1106–1108; *see also CFTC v. Weintraub,* 471 U.S. 343, 355, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). The debtor-in-possession retains control over the property of the estate and must repay creditors according to the terms of a reorganization plan. 11 U.S.C. §§ 1115(b), 1123, 1142. The proponent of a reorganization plan—usually, but not necessarily, the debtor-in-possession—must provide a court-approved disclosure statement that contains "adequate information" about the assets, liabilities, and financial affairs of the debtor sufficient to enable creditors to make an "informed judgment" about the plan. *Id.* §§ 1121, 1125. Creditors

may accept or reject the reorganization plan in a special voting process governed by the Bankruptcy Code. *Id.* § 1126.

If the creditors accept the reorganization plan, it must then be confirmed by the bankruptcy court. *Id.* § 1129. The confirmation of the reorganization plan typically brings the bankruptcy case to an end. *Id.* § 1141.

b. Compensation to Professionals Under Chapter 11

The debtor-in-possession may ask the bankruptcy court for permission to employ professionals, including attorneys, to assist the debtor-in-possession with the reorganization of the bankruptcy estate. *Id.* § 327.

Congress has enacted a uniform scheme for retaining and compensating such attorneys under 11 U.S.C. §§ 327–330. First, under § 327(a), the debtor must obtain the bankruptcy court's approval to employ the ***272** attorney. Then, under § 330(a)(1)(A), an attorney who has been employed under § 327(a) may request "reasonable compensation for actual, necessary services rendered." The bankruptcy court may exercise its discretion, upon motion or sua sponte, to "award compensation that is less than the amount ... requested." *Id.* § 330(a)(2). Section 330(a)(3) further directs courts to "consider the nature, the extent, and the value of" the legal services provided when determining the amount of reasonable compensation to award, "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.

Id. § 330(a)(3) (emphasis added).

Section 330(a)(4) further lists those services for which a court may *not* approve compensation:

> (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.

Id. § 330(a)(4) (emphasis added).

2. The* Pro–Snax *Retrospective, "Material Benefit" Standard

The underlying bankruptcy case at issue in *Pro–Snax* was initiated when creditors filed an involuntary Chapter 7 bankruptcy petition against the debtor. *Pro–Snax,* 157 F.3d at 416. The bankruptcy court later converted the case to Chapter 11 upon the debtor's consent and appointed a Chapter 11 trustee soon thereafter. *Id.* The debtor proposed a plan of reorganization, but the bankruptcy court denied confirmation of the plan based largely on the creditors' objections. *Id.* at 416–17. The court then converted the case back to a Chapter 7 proceeding. *Id.* at 417.

The law firm Andrews & Kurth ("A & K") provided legal services to the debtor both before and after the case had been converted to Chapter 11. *Id.* at 416–17. Upon A & K's fee application, the bankruptcy court awarded A & K $30,000 in fees and $7,500 in expenses. *Id.* at 417 n. 4. The district court reversed the award on the ground that § 330 precluded A & K from being compensated from the assets of the estate for work performed after the Chapter 11 trustee had been appointed. *Id.* at 419. The district court remanded the case to the bankruptcy court, however, for a recalculation of fees in light of the creditors' concession that A & K was entitled to compensation for the work it performed before the Chapter 11 trustee was appointed. *Id.* at 419. In so doing, the district court instructed the bankruptcy court to consider the "backdrop of the ***273** American Rule, any statutory exceptions to that rule applicable in this case, and the usual standards for the award of fees to be paid by other parties to the litigation."

Andrews & Kurth, L.L.P. (In re Pro–Snax Distribs., Inc.), 212 B.R. 834, 839 (N.D.Tex.1997).

On appeal, our Court divided its discussion of the merits into two parts. We first took up the issue of "whether a Chapter 11 debtor's attorney may be compensated for work done after the appointment of a trustee under § 330(a) of the Bankruptcy Code." *Pro–Snax,* 157 F.3d at 416. After considering the statutory language of § 330, congressional intent, and public policy, this Court ultimately concluded that § 330, on its face, precludes any award of fees to a debtor's attorney for that attorney's work performed *after* a Chapter 11 trustee has been appointed. *Id.* at 425–26. The Supreme Court later vindicated this holding in *Lamie v. U.S. Trustee,* 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004), and our opinion today has no effect on this holding.

In the second, briefer part of the opinion, of relevance here, we discussed the applicable standard to evaluate A & K's fee application for the services it rendered to the debtor *before* the trustee was appointed. This Court considered two possible tests advocated by the parties. A & K urged the use of a "reasonableness" test—"whether the services were objectively beneficial toward the completion of the case *at the time they were performed.*" *Id.* at 426 (emphasis added). The creditors, on the other hand, advanced a hindsight approach—whether the services "*resulted* in an identifiable, tangible, and material benefit to the bankruptcy estate." *Id.* (emphasis added). Citing only *In re Melp, Ltd.,* 179 B.R. 636 (E.D.Mo.1995), we adopted the stricter "hindsight" or "material benefit" measure, expressing our reluctance "to hold that any service performed at any time need only be reasonable to be compensable." *Id.* It is this standard that we reconsider today.

3. The Text, History, and Application of § 330

a. The Text of § 330

Section 330 gives a bankruptcy court discretion to determine the amount of reasonable compensation. But the statute also constrains that discretion by requiring the court to "tak[e] into account" a set of listed factors, including "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." 11 U.S.C. § 330(a)(3)(C) (emphasis added).

The statute reinforces this point in an accompanying section: a court must disallow any compensation when the services "were not reasonably likely to benefit the debtor's estate or necessary to the administration of the case." *Id.* § 330(a)(4)(A)(ii) (punctuation omitted); *see In re ASARCO, L.L.C.,* 751 F.3d 291, 299 (5th Cir.), *cert. granted,* —— U.S. ——, 135 S.Ct. 44, 189 L.Ed.2d 897 (2014) ("Section 330 states twice, in both positive and negative terms[,] that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration." (citation omitted)); *In re Ames Dep't Stores, Inc.,* 76 F.3d 66, 71 (2d Cir.1996) (referring to "reasonably likely to benefit the debtor's estate" as an "inverse construction" of § 330(a)(3)(C)), *abrogated on other grounds by Lamie,* 540 U.S. 526, 124 S.Ct. 1023. Read together, a court may compensate an attorney for services that are "reasonably likely to benefit" the estate and adjudge that reasonableness "at the time at which the service was rendered."

***274** [4] Section 330, then, explicitly contemplates compensation for attorneys whose services were reasonable when rendered but which ultimately may fail to produce an actual, material benefit. "Litigation is a gamble, and a failed gamble can often produce a large net loss even if it was a good gamble when it was made." *In re Taxman Clothing Co.,* 49 F.3d 310, 313 (7th Cir.1995). The statute permits a court to compensate an attorney not only for activities that were "necessary," but also for good gambles—that is, services that were objectively reasonable at the time they were made—even when those gambles do not produce an "identifiable, tangible, and material benefit." What matters is that, prospectively, the choice to pursue a course of action was reasonable.[3]

[3] *In re Taxman Clothing Co.* provides a concrete example:

> Suppose that [debtor's attorney] had been seeking to recover ... $330,000 and that he had had a 90 percent chance of winning a judgment for that amount and successfully defending the judgment in this court. An expenditure of $85,000 in attorney's fees would not be unreasonable when the expected benefit was $297,000 ($330,000 x.9), so if the attorney performed competently but simply was unlucky and lost he would have a good claim for his fees....

49 F.3d at 313.

b. The Legislative History of § 330

The legislative history of § 330 provides additional

support for this reading. When Congress enacted § 330 in 1978, it relaxed the previously stringent standard that bankruptcy courts applied in reviewing professional fee awards. 3 *Collier on Bankruptcy* ¶ 330.LH[4] (16th ed.2015). Under the old regime, our Court enforced a "strong policy ... that estates be administered as efficiently as possible." *In re First Colonial Corp. of Am.,* 544 F.2d 1291, 1299 (5th Cir.1977) (citations omitted), *superseded by statute,* 11 U.S.C. § 330. This policy originated in the idea that "[s]ince attorneys assisting the trustee in the administration of a bankruptcy estate are acting not as private persons but as officers of the court, they should not expect to be compensated as generously for their services as they might be were they privately employed." *Id.* (citation omitted); *see also Mass. Mut. Life Ins. Co. v. Brock,* 405 F.2d 429, 432–33 (5th Cir.1968) (holding that the interest of the public—especially the debtor and creditors—could limit compensation to a debtor's counsel), *superseded by statute,* 11 U.S.C. § 330.

But "[i]n enacting section 330, Congress intended to move away from doctrines that strictly limited fee awards" and instead provide compensation "commensurate with the fees awarded for comparable services in non-bankruptcy cases." *In re UNR Indus., Inc.,* 986 F.2d 207, 208–09 (7th Cir.1993) (citing, *inter alia,* H.R.Rep. No. 95–595, at 329–30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286). To that end, § 330 instructs courts to award "reasonable compensation" for "actual, necessary services" based on "the nature, the extent, and the value of such services." 11 U.S.C. § 330(a). Congress took a further step in 1994 when it "codif[ied] many of the factors previously considered by courts in awarding compensation and reimbursing expenses." 3 *Collier on Bankruptcy* ¶ 330.LH[5]; *see* Bankruptcy Reform Act of 1994, Pub.L. No. 103–394, § 224, 108 Stat. 4106, 4130–31 (1994).[4] In particular, ***275** Congress added the language at issue here: §§ 330(a)(3)(C) and 330(a)(4)(A).

[4] For example, our circuit was among the first to conclude that the factors developed for determining reasonable attorney's fees in the non-bankruptcy context were "equally useful" in assessing bankruptcy attorney's fees. *First Colonial,* 544 F.2d at 1299 (applying factors from *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717–19 (5th Cir.1974), to a bankruptcy fee determination). Those same factors formed the foundation for the 1994 revision. *See* 3 *Collier on Bankruptcy* ¶ 330.LH [5] n. 12.

The drafting history of those provisions suggests that Congress considered and specifically rejected an actual-benefit test. The Senate version of the Bankruptcy Reform Act of 1994 contained the seed of the eventual guidelines for reasonable compensation contained in § 330. *See* S. 540, 103d Cong. § 309 (as reported by S. Comm. on the Judiciary, Oct. 28, 1993). The Bill reported out of the Senate Judiciary Committee differed in at least one important respect from the eventual Act, however. That Senate draft instructed courts only to consider "whether the services were necessary in the administration of or beneficial toward the completion of a case under [the Bankruptcy Code]." *Id.* After adopting a floor amendment, however, the Senate added the words "at the time at which the service was rendered" after the word "beneficial." *See* 140 Cong. Rec. 8383 (1994) (setting out amendment 1645 to S. 540); S. 540, 103d Cong. § 310 (as passed by Senate, Apr. 26, 1994); *see also Lamie,* 540 U.S. at 539–40, 124 S.Ct. 1023 (discussing amendment 1645). The House version of the legislation did not include any guidelines for determining the reasonableness of attorney compensation. *See generally* H.R. 5116, 103d Cong. (as reported by H. Comm. on the Judiciary, October 4, 1994). The legislative process therefore strongly suggests that Congress could not have intended the language in § 330 to impose an actual-benefit requirement determinable by a court only at the completion of the case.

c. The Application of § 330 in Other Circuits

In light of the plain language of § 330(a)(4)(A) after the 1994 amendments, the Second, Third, and Ninth Circuits have rejected the actual-benefit test in favor of a prospective standard. In *In re Ames Department Stores, Inc.,* the Second Circuit expressly rejected an approach that would make fee awards "contingent upon a showing of actual benefit to the estate," opting instead to give effect to the statute's "reasonably likely to benefit the debtor's estate" standard. 76 F.3d at 71–72. The Third Circuit similarly rejected the actual-material-benefit standard, concluding that it departed from the statute by imposing a "heightened standard" and requiring evaluation "by hindsight." *In re Top Grade Sausage, Inc.,* 227 F.3d 123, 131–32 (3d Cir.2000), *abrogated on other grounds by Lamie,* 540 U.S. 526, 124 S.Ct. 1023. Finally, the Ninth Circuit held that § 330(a)(4)(A) superseded that court's past precedent, which had "requir[ed] that the services actually provide an 'identifiable, tangible and material benefit to the [debtor's] estate.' " *In re Smith,* 317 F.3d 918, 926–27 (9th Cir.2002) (quoting *In re Xebec,* 147 B.R. 518, 523 (B.A.P. 9th Cir.1992)), *abrogated on other grounds by Lamie,* 540 U.S. 526, 124 S.Ct. 1023.[5]

[5] The Seventh Circuit has applied a similar rule without specifically relying on the post–1994 guidelines. *See In re Taxman Clothing Co.,* 49 F.3d at 314–16 (holding that the bankruptcy court abused its discretion in granting a fee award to an attorney whose preference action did not have a reasonable likelihood of benefiting the estate).

Pro–Snax 's only citation in support of the actual-benefit test was *In re Melp,* a case that interpreted the pre–1994 version of § 330. *See* 179 B.R. at 639 (quoting pre–1994 language). Indeed, the only other circuit precedents to apply an actual-benefit requirement either were decided before 1994 or relied entirely on pre–1994 precedent for determining "reasonable ***276** compensation."[6] As discussed above, though, whereas the pre–1994 statutory language did not provide guidance on whether to consider the reasonable likelihood a service would benefit the estate, the post–1994 language foreclosed an actual-benefit test by requiring that the court evaluate the likelihood of benefit to the estate at the time the service was rendered. All other circuits that have construed the post–1994 version of § 330 have recognized this distinction. *Pro–Snax* 's reliance on *Melp* is misplaced and puts us out of step with our sister circuits.[7]

[6] *See In re Kohl,* 95 F.3d 713, 714 (8th Cir.1996) ("[A]n attorney fee application in bankruptcy will be denied to the extent the services rendered were for the benefit of the debtor and did not benefit the estate.") (quoting *In re Reed,* 890 F.2d 104, 106 (8th Cir.1989)); *In re Lederman Enters., Inc.,* 997 F.2d 1321, 1323 (10th Cir.1993) ("An element of whether the services were 'necessary' is whether they benefited the bankruptcy estate."); *Grant v. George Schumann Tire & Battery Co.,* 908 F.2d 874, 882–83 (11th Cir.1990) (interpreting pre–1994 § 330 as requiring that attorney's appeal bring a benefit to the estate).

[7] We note that courts within our own Circuit have applied *Pro–Snax* unevenly. *See, e.g., In re Broughton Ltd. P'ship,* 474 B.R. 206, 209 n. 5 (Bankr.N.D.Tex.2012) (collecting cases and observing that "[l]ower courts have adopted differing views of what type of retrospective analysis should be employed and have disagreed whether a prospective analysis may be considered in determining whether *Pro–Snax* is satisfied").

4. The Prospective, "Reasonable at the Time" Standard

We conclude that § 330 embraces the "reasonable at the time" standard for attorney compensation endorsed by our colleagues in the Second, Third, and Ninth Circuits. As explained above, the text and legislative history of § 330 contemplate a prospective standard for the award of attorney's fees relating to bankruptcy proceedings—one that looks to the necessity or reasonableness of legal services at the time they were rendered. Under this framework, if a fee applicant establishes that its services were "necessary to the administration" of a bankruptcy case or "reasonably likely to benefit" the bankruptcy estate "at the time at which [they were] rendered," *see* 11 U.S.C. § 330(a)(3)(C), (4)(A), then the services are compensable.

In assessing the likelihood that legal services would benefit the estate, courts adhering to a prospective standard ordinarily consider, among other factors, the probability of success at the time the services were rendered, the reasonable costs of pursuing the action, what services a reasonable lawyer or legal firm would have performed in the same circumstances, whether the attorney's services could have been rendered by the Trustee and his or her staff, and any potential benefits to the estate (rather than to the individual debtor). *See, e.g., In re Strand,* 375 F.3d 854, 860–61 (9th Cir.2004); *In re Top Grade Sausage, Inc.,* 227 F.3d at 132; *In re Ames Dep't Stores, Inc.,* 76 F.3d at 72; *In re Taxman Clothing Co.,* 49 F.3d at 313–15. Whether the services were ultimately successful is relevant to, but not dispositive of, attorney compensation. *See* 11 U.S.C. § 330(a)(3) ("[T]he court shall consider the nature, the extent and *the value* of such services, taking into account all relevant factors...." (emphasis added)); *In re Smith,* 317 F.3d at 926; *In re Top Grade Sausage, Inc.,* 227 F.3d at 132; *In re Ames Dep't Stores, Inc.,* 76 F.3d at 71; *cf. Johnson,* 488 F.2d at 718 (instructing courts to consider "the results obtained" by an attorney seeking compensation); *see also* ***277** *In re Pilgrim's Pride Corp.,* 690 F.3d 650, 656 (5th Cir.2012) (affirming the continued relevance of the *Johnson* factors).

[5] Insofar as *Pro–Snax* precludes resort to this prospective analysis, we overrule those portions of the opinion. We recognize, however, that *Pro–Snax* 's principal holding remains valid, and we observe that our ruling today is not intended to limit courts' broad discretion to award or curtail attorney's fees under § 330, "taking into account all relevant factors," 11 U.S.C. § 330(a)(3). Having articulated a new standard, we now must decide whether remand is warranted in order for the bankruptcy court to assess B & N's attorney's-fee application under the appropriate standard.

B. The Need for Remand to Analyze B & N's Attorney's–Fee Request

[6] We review a bankruptcy court's fee determination for abuse of discretion, and remand is warranted when the bankruptcy court "(1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous." *Cahill,* 428 F.3d at 539.

[7] B & N asserts that remand is compulsory because the bankruptcy court premised its findings of fact and conclusions of law on *Pro–Snax* 's now-erroneous "material benefit" standard. Both Texas Skyline and the U.S. Trustee counter that remand is unnecessary because this Court can affirm the district court's ruling on any ground supported by the record, *e.g., Zuspann v. Brown,* 60 F.3d 1156, 1160 (5th Cir.1995), and because there is "no reasonable possibility that the outcome would be different" on remand, *Sims v. ANR Freight Sys., Inc.,* 77 F.3d 846, 849 (5th Cir.1996) (citing *Joshi v. Fla. State Univ. Health Ctr.,* 763 F.2d 1227, 1236 (11th Cir.1985)). The U.S. Trustee points out that when the bankruptcy court denied B & N's motion to certify the matter for direct appeal, it indicated that the case was "not a good candidate" because the disposition would be the same "whether you don't or you do apply the results oriented component of *Pro–Snax*." But although the bankruptcy court stated its impression that the outcome would be the same under either standard, it did not conduct its analysis with an eye toward the prospective inquiry whether the services were "reasonable at the time" they were rendered. *Cf. In re Missionary Baptist Found. of Am., Inc.,* 712 F.2d 206, 211, 213 (5th Cir.1983) (remanding where the bankruptcy court failed to set forth findings of fact and conclusions of law under each element of the relevant test). In the absence of findings of fact premised on a prospective rule, we cannot say with certainty that there is "no reasonable possibility that the outcome would be different" on remand, *Sims,* 77 F.3d at 849.

Because our opinion today announces a new legal rule, and out of an abundance of caution given the complex facts of the case before us, we remand this matter for the bankruptcy court to evaluate whether B & N is entitled to fees under the prospective, "reasonable at the time" standard.

IV. CONCLUSION

For the foregoing reasons, we overrule *Pro–Snax* 's attorney's-fee standard and join our colleagues in the Second, Third, and Ninth Circuits in prescribing a prospective, "reasonable at the time" standard for the award of attorney's fees in a Chapter 11 bankruptcy proceeding. We therefore VACATE the award of attorney's fees and REMAND this matter to the district court. We further direct the district court to remand to the bankruptcy court to apply the newly announced standard to the ***278** facts of this case.[8]

[8] In light of the extensive record and in the interest of judicial economy, we leave it in the sound discretion of the bankruptcy court whether it can decide this question on the existing record or whether further factual development is warranted.

E. GRADY JOLLY, Circuit Judge, specially concurring:

I concur in Judge Prado's thorough and comprehensive writing and write separately only to synthesize the legal standard that we now adopt:

> A bankruptcy court's analysis of attorney fee awards ordinarily should begin and end by applying the statutory language in 11 U.S.C. § 330. This analysis usually can be reduced as follows: (1) a court is permitted, but not required, to award fees under § 330 for services that could reasonably be expected to provide an identifiable, material benefit to the estate at the time those services were performed (or contributed to the administration of the estate); and (2) courts may consider all other relevant equitable factors, as stated in § 330(a)(3), including as one of those factors, when appropriate, whether a professional service contributes to a successful outcome.

Our opinion today does not *require* a bankruptcy court to award fees for any service that can be characterized as reasonable as of the time it was performed, as the bankruptcy courts remain restricted by the terms of § 330, which require compensable services to be both "actual" and "necessary." 11 U.S.C. § 330(a)(1)(A). Thus, a

bankruptcy court evaluating the prospective reasonableness of an attorney's litigation strategy should consider whether the services were targeted to obtain an identifiable, material benefit. An identifiable benefit distinguishes an actual benefit from a speculative one, and a material benefit distinguishes a necessary benefit from an irrelevant one.

Because I read Judge Prado's writing to endorse these views, I am pleased to concur in his fine opinion.

All Citations

783 F.3d 266, 60 Bankr.Ct.Dec. 240, Bankr. L. Rep. P 82,808

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Warning
As of: Aug 10, 2015

IN THE MATTER OF: PRO-SNAX DISTRIBUTORS, INC., Debtor. ANDREWS & KURTH L.L.P., Appellant, versus FAMILY SNACKS, INC. doing business as GUY'S FOODS, MISSION FOODS/FIESTA JIMINEZ, a division of GRUMA, INC., and GUILTLESS GOURMET, Appellees.

No. 97-11128

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

157 F.3d 414*; *1998 U.S. App. LEXIS 26873*; *40 Collier Bankr. Cas. 2d (MB) 1218*; *33 Bankr. Ct. Dec. 463*; *12 Tex. Bankr. Ct. Rep. 517

October 20, 1998, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Texas. 3:96-CV-3444-G. Joe Fish, US District Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, a law firm for debtor in bankruptcy, challenged the decision of the United States District Court for the Northern District of Texas, which ruled in favor of appellee creditors and held that appellant was not entitled to compensation under *11 U.S.C.S. § 330* for services performed for debtor in bankruptcy after appointment of a trustee.

OVERVIEW: Appellee creditors argued that an amendment to *11 U.S.C.S. § 330(a)(1)* that removed the words "or to debtor's attorney," from a list of persons who could have been compensated for services, limited appellants to recovery for services before appointment of the trustee, as professional persons employed under *11 U.S.C.S. § 327*. The court held that it was bound by the canon of statutory construction that required a court to have interpreted a statute according to plain meaning without reference to legislative history or public policy, where the meaning of the statute was unambiguous. The court held that although a grammatical error left in the statute after the words were extracted may have indicated the removal was inadvertent, the statute as amended unambiguously indicated that the debtor's attorney could not have been compensated after appointment of a trustee. The court held that appellant was therefore entitled only to compensation for services before the appointment that resulted in identifiable, tangible, and material benefit to the estate.

OUTCOME: The court affirmed the judgment in favor of appellee creditors and held that the law firm was not entitled to compensation performed for services after appointment of a trustee.

LexisNexis(R) Headnotes

Bankruptcy Law > Case Administration > Professional Services > Compensation > General Overview
[HN1] See *11 U.S.C.S. § 330(a)(1)*.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > General Overview
Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > General Overview
[HN2] See *11 U.S.C.S. § 327*.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > General Overview
Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > General Overview
Bankruptcy Law > Reorganizations > Debtors in Possession > Powers & Rights
[HN3] *11 U.S.C.S. § 1107(a)* provides that a debtor-in-possession has all the rights of a trustee serving in a case under this chapter.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN4] An appellate court reviews a decision of the district court by applying the same standard to the bankruptcy court's findings of fact and conclusions of law as the district court applied. A bankruptcy court's findings of fact are subject to clearly erroneous review, while its conclusions of law are reviewed de novo.

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
[HN5] Circuit court jurisdiction over appeals from bankruptcy courts extends to all final decisions, judgments, orders, and decrees entered by the district court. *28 U.S.C.S. § 158(d)*. Unlike a district court, which has discretion to take jurisdiction over interlocutory appeals from the bankruptcy court, *28 U.S.C.S. § 158(a)*, a circuit court has no such discretion and is limited to reviewing only final orders.

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN6] A circuit court refers to a two-pronged inquiry to determine whether a remand by a district court to the bankruptcy court is both final and subject to appeal. First, the circuit court must determine whether the order of the bankruptcy court itself is final in character; if it is, the circuit court must then decide if the district court's remand requires extensive further proceedings.

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN7] A remand from a district court reversing a final order of the bankruptcy court may be deemed final if it leaves only a ministerial task for the bankruptcy court. While in some cases the calculation of attorneys' fees may be a ministerial duty collateral to the merits of the action,, a remand requiring such a calculation is not final if it necessitates further factual development or other significant judicial activity involving the exercise of considerable discretion, or is likely to generate a new appeal or affect the issue that the disappointed party wants to raise on appeal from the order of remand.

Governments > Legislation > Interpretation
[HN8] In the absence of any ambiguity, a court's examination is confined to the words of the statute, which are assumed to carry their ordinary meaning.

Governments > Legislation > Interpretation
[HN9] Even where one party's argument finds express support in the legislative history to a statute, where that legislative history is clearly contrary to the statutory language, it is unpersuasive. As long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of

the statute.

Bankruptcy Law > Case Administration > Professional Services > Compensation > General Overview

[HN10] Any work performed by legal counsel on behalf of a debtor must be of material benefit to the estate for compensation under *11 U.S.C.S. § 330*.

COUNSEL: For ANDREWS & KURTH LLP, Appellant: James Van Oliver, Dallas, TX. James P Muenker, Andrews & Kurth, DAllas, TX.

For FAMILY SNACKS INC dba Guy's Foods, MISSION FOODS/FIESTA JIMENEZ, a division of Gruma Inc, GUILTLESS GOURMET, Appellants: J Maxwell Tucker, Winstead, Sechrist & Minick, Dallas, TX.

JUDGES: Before DUHE, BENAVIDES, and STEWART, Circuit Judges.

OPINION BY: CARL E. STEWART

OPINION

[*416] CARL E. STEWART, Circuit Judge:

This case, one of first impression in this circuit, calls for us to determine whether a Chapter 11 debtor's attorney may be compensated for work done after the appointment of a trustee under *§ 330(a) of the Bankruptcy Code*. It arises from a lengthy and acrimonious dispute between a debtor, Pro-Snax Distributors, Inc. ("Pro-Snax" or "Debtor"), and several of its creditors in the wake of the filing of an involuntary Chapter 7 petition. Mission Foods/Fiesta Jiminez, a division of Gruma, Inc., Family Snacks, Inc. d/b/a Guy's Foods, and Guiltless Gourmet (together, the "Petitioning Creditors" or [**2] "Appellees") seek to restrict the payment of fees to the law firm of Andrews & Kurth L.L.P. ("A&K" or "Appellant"), contending that the legal services rendered by A&K after the appointment of a Chapter 11 trustee were barred by statute. Deciding the case on the equities, the bankruptcy court found in favor of A&K and awarded fees for some of the services rendered. The district court reversed, ruling that, notwithstanding legislative history suggesting a contrary intent, the plain language of the statute at issue precluded an award of fees to A&K. A&K timely appealed this ruling. While sympathizing with A&K's plight and acknowledging reports that Congress plans to amend the statute at issue to cover an award of fees in exactly this situation, we are bound by the language of the statute precluding such an award at present and thus affirm the judgment of the district court.

BACKGROUND

I. Procedural History

On August 10, 1995, the Petitioning Creditors filed an involuntary petition under Chapter 7 against Pro-Snax, and an interim Chapter 7 trustee was appointed on August 31, 1995. [1] From the earliest stages of the bankruptcy proceeding, it was obvious to the bankruptcy [**3] court that this case would present "a constant litigation background" because mutual suspicions between the Debtor and the Petitioning Creditors would prohibit any meaningful negotiations between them. On September 13, 1995, the Debtor exercised its statutory right by consenting to relief under Chapter 11 and converted the proceeding thereto. Prior to the filing of the involuntary petition and through the conversion to a Chapter 11 action, A&K had provided legal services to the Debtor.

1 At about the same time, the Petitioning Creditors requested and received an injunction against the Debtor to prohibit it from engaging in a proposed settlement with its other creditors to distribute funds from the estate before a disbursement plan had been filed.

On October 16, 1995, the bankruptcy court denied the Petitioning Creditors' motion to reconvert the proceeding to Chapter 7 and appointed a Chapter 11 trustee to oversee the case. Concurrently, the Debtor filed its first plan of reorganization and disclosure statement. [**4] A&K assisted in the preparation of this plan. [2] Hearings on the re-organization plan were held on February 13, 1996, and, based largely on the objections of the [*417] Petitioning Creditors, the plan was denied confirmation. [3] Immediately thereafter, the Petitioning Creditors again moved for reconversion to Chapter 7, and this time, on February 20, 1996, the bankruptcy court granted the motion.

2 Appellant contends that the filing of this plan was approved by the newly-appointed trustee, but Appellee correctly observes that nothing in the record supports this claim. In any event, the Debtor filed an amended plan and disclosure

statement on November 29, 1995.

3 The other creditors of the estate apparently supported the Debtor's plan. See *In re Pro-Snax Distributors, Inc., 204 B.R. 492, 494 (Bankr. N.D. Tex. 1996).*

A&K's employment as counsel for the Debtor was authorized by the bankruptcy court *nunc pro tunc* on July 1, 1996, the date on which A&K filed its Application for Compensation [**5] and Reimbursement ("Fee Application"), for the period September 13, 1995 through May 31, 1996. In the Fee Application, A&K sought payment of $ 44,638 in fees and $ 10,725.37 in expenses. The Petitioning Creditors objected to the payment of fees, but on September 30, 1996, after a hearing on the subject, the bankruptcy court awarded fees and expenses to A&K. [4]

4 The award for fees was reduced to $ 30,000 and expenses to $ 7,500, against which there was a pre-existing $ 10,000 credit from the original retainer, making $ 27,500 the total balance sought by A&K.

On October 2, 1996, the Petitioning Creditors filed a Motion for Reconsideration of the Order. The motion was denied on November 20, 1996, and the trustee paid A&K's fees and expenses out of the estate. At no time did the trustee or any other creditor object to A&K's Fee Application or the bankruptcy court's order.

The Petitioning Creditors filed a Notice of Appeal to the United States District Court for the Northern District of Texas. That court reversed [**6] the bankruptcy court's ruling that fees could be awarded for services provided after the appointment of the Chapter 11 Trustee, and remanded the case for a recalculation of the fee award. See *Family Snacks, Inc. v. Andrews & Kurth, L.L.P., 212 B.R. 834, 835 (N.D. Tex. 1997).* A&K then timely filed this appeal.

II. Bankruptcy Court's Holding

The crux of this dispute centers on whether the Bankruptcy Code provides for an award of attorneys' fees to A&K for its services rendered to the Debtor in this case. The key statutory provision construing this issue is *11 U.S.C. § 330*. After acknowledging that *11 U.S.C. § 503(b)(2)* provides an administrative priority (*i.e.*, over unsecured creditors) for fees awarded under *11 U.S.C. § 330*, the bankruptcy court concluded--on the basis of extensive findings on the record--that A&K could be awarded compensation from the bankruptcy estate under *§ 330(a)(1)* for work done as "the debtor's attorney" after the appointment of the Chapter 11 trustee. See *In re Pro-Snax Distributors, Inc., 204 B.R. 492, 495-97 (Bankr. N.D. Tex. 1996).* [HN1] *Section* [**7] *330(a)(1)* provides, in pertinent part, that

> after notice to the parties in interest and the United States Trustee and a hearing, . . . the court may award to a trustee, an examiner, a professional person employed under *section 327* or *1103*--
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney . . . ; and
>
> (B) reimbursement for actual, necessary expenses. [5]

11 U.S.C. § 330(a)(1).

5 Two aspects of *§ 330(a)(1)* need to be addressed at the outset. First, as the statute presently exists, the word "or" does not appear between the words "examiner" and "a professional employed under *section 327*." The most benign explanation for this error is that it is a grammatical error, but as discussed below, the parties dispute this.

Second, prior to the amendments made to *§ 330* in 1994, the words "or to the debtor's attorney" followed the words "a professional person employed under *section 327*" as follows:

> (a) . . . the court may award to a trustee, to an examiner, to a professional person employed under *section 327* . . ., **or to the debtor's attorney--**
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney . . .

(emphasis added). Thus, prior to 1994, *§ 330(a)(1)* explicitly authorized an award of fees to

the debtor's attorney.

[**8] The bankruptcy court noted that the current version of *§ 330(a)* did not explicitly provide for an award payable to the "debtor's attorney"--and indeed that the words "or to [*418] the debtor's attorney" were removed from the statute by the 1994 amendments--but nevertheless concluded that the statute was vague and did not preclude an award of compensation in A&K's favor. In particular, the court (1) distinguished two cases urged by the Petitioning Creditors as advocating a narrow reading of amended *§ 330(a)(1)* (*i.e.*, which precluded such compensation); [6] (2) voiced its reluctance to interpret vague statutory language to effect a major change in bankruptcy practice that was not the subject of some discussion in legislative history; and (3) noted that many courts and commentators have concluded that amended *§ 330(a)(1)* should not be read to foreclose compensation to a debtor's attorney for work done after the appointment of a Chapter 11 trustee--*i.e.*, because such an interpretation "would represent a fundamental change in the law that is clearly unintended and extremely unlikely." *204 B.R. at 496*.

6 The cases relied on by the Petitioning Creditors were *In re NRG Resources, Inc., 64 B.R. 643 (W.D. La. 1986)*, and *In re Friedland, 182 B.R. 576 (Bankr. D. Colo. 1995)*.

[**9] In holding as it did, the bankruptcy court rejected the Petitioning Creditors' argument that because *§ 330(a)(1)* no longer contained the words "or to the debtor's attorney," a fee award to A&K could only be sustained if A&K qualified as "a professional person employed under *section 327*." *204 B.R. at 494*. [HN2] *Section 327* provides, in pertinent part, that

> (a) except as otherwise provided in this section, the trustee, with the court's approval, may employee 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.

11 U.S.C. § 327(a). Although by its terms *§ 327(a)* applies only to professionals employed by the "trustee," [HN3] *11 U.S.C. § 1107(a)* provides that a "debtor-in-possession" has "all the rights . . . of a trustee serving in a case under this chapter." While not denying that under these provisions Pro-Snax, as a debtor-in-possession, was empowered to retain counsel at the expense of [**10] the bankruptcy estate, the Petitioning Creditors argued that this right existed only so long as Pro-Snax qualified as a debtor-in-possession. In their view, (1) A&K's right to compensation at the expense of the estate (*i.e.*, under *§ 330(a)(1)*'s allowance for fees in favor of "professionals employed under *section 327*") ended with the appointment of the Chapter 11 trustee--which automatically terminated Pro-Snax's status as a debtor-in-possession; and (2) *§ 330* did not provide an alternative basis to award A&K compensation (*e.g.*, for work done as "the debtor's attorney"). For these reasons, the Petitioning Creditors concluded that A&K was entitled only to $ 3,047 in fees, which represented the $ 13,047 earned by A&K prior to the appointment of the Chapter 11 trustee, reduced by A&K's $ 10,000 retainer. As discussed above, the bankruptcy court rejected this narrow interpretation of *§ 330(a)(1)*, as espoused by the Petitioning Creditors.

Finally, after determining that *§ 330(a)(1)* did not preclude an award of fees in favor of A&K, the bankruptcy court identified the standard that "has evolved to determine when an attorney should be allowed compensation from the estate for work [**11] done after the appointment of a trustee." *204 B.R. at 496*. Following the lead of other courts, the bankruptcy court determined that an attorney's work must benefit the estate before any compensation is payable, and that any fee request should be reduced for work that is duplicative of the trustee's efforts; obstructs or impedes the administration of the estate; or is inconsistent with the debtor's duties. [7] The bankruptcy court noted that normally attorneys' fees are not compensable after a trustee is appointed, but that in this case it was reasonable for the debtor to try to confirm a plan through the efforts of its attorney, A&K. See id. Although the court expressed certain misgivings about the benefits [*419] conferred upon the estate by A&K, [8] the court nonetheless concluded that a debtor's attorney cannot guarantee success, and that A&K "partially benefitted the estate in the areas of liquidation of inventory, business operations, case administration, claims objections, attempted settlement, disclosure statement, and plan prosecution." Id. In addition, the court felt it necessary to employ a "continuing cost-benefit analysis," stating that A&K should [**12]

not be compensated for work done if--at the time the work was performed--the reasonable chance of success (*i.e.*, for confirmation of the plan) was outweighed by the cost in pursuing the action. In particular, the court noted that "where a trustee has been appointed, the time and costs of prosecuting a [Chapter 11] liquidating plan should not exceed the comparable results and swiftness that would normally be accomplished by a straight Chapter 7 liquidation." Id. Taking all these factors into account, the court allowed fees to A&K in the reduced amount of $ 30,000 and expenses in the reduced amount of $ 7,500. After the bankruptcy court denied their motion for reconsideration, the Petitioning Creditors appealed.

7 See also *§ 330(a)(4)(A)*, which provides that "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."

8 The court rejected A&K's contention that it had been responsible for reducing the claim of Mission Foods/Fiesta Jiminez by $ 500,000, found that A&K's opinion that Pro-Snax could qualify as a small debtor was flawed, and noted that Pro-Snax's Chapter 11 plan was never confirmed.

[**13] III. District Court's Holding

The district court reversed the judgment of the bankruptcy court. See *Family Snacks, 212 B.R. at 835*. The district court agreed with the Petitioning Creditors' narrow interpretation of *§ 330*, concluding that A&K could not be compensated as counsel for the Debtor--from assets of the estate--for services rendered after the Chapter 11 trustee was appointed. After noting that the American Rule of attorney's fees is applicable to bankruptcy proceedings and that, under the Rule, each party generally bears its own litigation expenses unless a statute authorizes the fees to be shifted, the court concluded that the plain language of the current *§ 330(a)(1)*--which does not include an explicit provision allowing fees to a "debtor's attorney"--cannot sustain an award to A&K for work done as "counsel for the debtor." See *id. at 839*. According to the court, the only indication that Congress intended to set aside the American Rule in this circumstance--that is, the fact that, prior to 1994, *§ 330(a)* explicitly allowed compensation to "the debtor's attorney"--fell woefully short of the "explicit congressional authorization" [**14] that is required to circumvent the American Rule. Further, the court observed that the award to A&K could not be sustained under the bankruptcy court's inherent powers, as this action did not fall into any of the categories of cases warranting an exception to the American Rule--for example, cases involving bad faith on the part of the losing party.

Although it reversed the award of fees under *§ 330*, the district court remanded the case for a recalculation of the fees in light of the Petitioning Creditors' concession that A&K was entitled to compensation for work done prior to the appointment of the Chapter 11 trustee. The court instructed the bankruptcy court to recalculate the fee against the backdrop of the American Rule, any statutory exceptions to the Rule, and the usual standards for the award of fees to professionals in bankruptcy cases. With respect to the final factor, the district court observed that while the bankruptcy court had already addressed some of those standards, it should more closely examine the most critical one--degree of success. [9] See id. (citing *Farrar v. Hobby, 506 U.S. 103, 114, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992)*). A&K timely [**15] appealed the district court's order reversing and remanding the case.

9 The district court noted that the bankruptcy court had already found that "the debtor did not have many successes in this case in terms of accomplishment," *Family Snacks, 212 B.R. at 839*, implying that any award should be measured against this reality. See *Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)*.

DISCUSSION

I. Appropriate Appellate Jurisdiction

[HN4] We review the decision of the district court by applying the same standard to [*420] the bankruptcy court's findings of fact and conclusions of law as the district court applied. See *In re Gamble, 143 F.3d 223, 225 (5th Cir. 1998)*. A bankruptcy court's findings of fact are subject to clearly erroneous review, while its conclusions of law are reviewed de novo. See id. The issues on appeal in this case are purely legal ones.

Before addressing the merits of this dispute, we must first [**16] pause to consider the propriety of our subject

matter jurisdiction over the case. [HN5] Our jurisdiction over appeals from bankruptcy courts extends to "all final decisions, judgments, orders, and decrees entered [by the district court]." *28 U.S.C. § 158(d)*. Unlike a district court, which has discretion to take jurisdiction over interlocutory appeals from the bankruptcy court, see *28 U.S.C. § 158(a)*, we have no such discretion and are limited to reviewing only final orders.

In this case, the district court has remanded its decision to the bankruptcy court for a recalculation of the amount owed to A&K. As such, [HN6] we refer to the two-pronged inquiry enunciated in *In re Greene County Hospital, 835 F.2d 589* (5th Cir.), reh'g denied, en banc, *841 F.2d 396*, and cert. denied sub nom. *Path-Science Labs., Inc. v. Green County Hospital, 488 U.S. 820 (1988)*, to determine whether this remand is both final and subject to appeal. See *Greene County Hospital, 835 F.2d at 595*. First, we must determine whether the order of the bankruptcy court itself is final in character, see id [**17] . (citation omitted); if it is, we must then decide if the district court's remand requires extensive further proceedings. See id. (citation omitted). Only the second prong--the nature of the remand--is at issue in this case.

[HN7] "A remand from the district court reversing a final order of the bankruptcy court may . . . be deemed final if it leaves only a ministerial task for the bankruptcy court." Id. (citation omitted); see also *Travelers Insurance Co. v. KCC-Leawood Corporate Manor I, 908 F.2d 343, 345 (8th Cir. 1990)* ("Remand orders requiring only mechanical, computational, or ministerial tasks may be considered final."). "While in some cases the calculation of attorneys' fees may be a ministerial duty collateral to the merits of the action," *In re Miscott Corp., 848 F.2d 1190, 1193 (11th Cir. 1988)*, a remand requiring such a calculation is not final if it necessitates further factual development or other significant judicial activity involving the exercise of considerable discretion, see *Travelers, 908 F.2d at 345*, or is likely to generate a new appeal or affect the issue that the disappointed party wants to raise on appeal [**18] from the order of remand. See *In re Schneider, 873 F.2d 1155 (8th Cir. 1989)*.

Both parties before us contend that we have jurisdiction over the case, albeit for vastly different reasons, [10] but jurisdiction is of course not something to which the parties to a controversy may simply agree. In this case, however, this court does have subject matter jurisdiction over the controversy. The district court's remand order neither necessitates further fact-finding nor the use of substantial discretion on the part of the [*421] bankruptcy court. [11] Indeed, the district court's order plainly disallows any fees earned after the appointment of the Chapter 11 trustee, and any discretion given to the bankruptcy court in determining the amount of pre-trustee fees is of minimal significance, given that such discretion (*i.e.*, "[consider the debtor's] degree of success") could only be used to reduce the maximum possible award of $ 3,047. For these reasons, the judgment of the district court conclusively determined, in all material respects, the key questions presented for our review, and thus we turn to the merits of the parties' arguments.

10 A&K contends that the district court's remand order--after (1) reversing on *§ 330* grounds the bankruptcy court's award of fees earned after the appointment of the Chapter 11 trustee and (2) concluding that no exceptions to the American Rule were applicable--merely left the bankruptcy court with a "mechanical, computational, or ministerial" task to perform, that is, a reduction of the fee award to include only those fees earned before the trustee was appointed. A&K observes that a remand to the bankruptcy court at this juncture would most assuredly result in a second appeal and therefore be a waste of time and other judicial resources, given that their assertion that (1) the order to reverse the $ 30,000 fee award was based on an incorrect interpretation of *§ 330*, and *(2)* the standard identified by the district court to determine the appropriate amount (*i.e.*, "[consider the debtor's] degree of success") will still be live issues.

Likewise, the Petitioning Creditors also urge us to assume jurisdiction, claiming that the bankruptcy court's remaining duties are purely computational and require only that the court enter an award of $ 3,047 to A&K ($ 13,047 pre-trustee fees minus the $ 10,000 retainer). In addition, the Petitioning Creditors claim that the instant dispute over A&K's fees is the only remaining controversy preventing filing of the final report and payment to the creditors, and that further delay in resolving this dispute is unwarranted.

[**19]

11 Although the seminal case *Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945)*, involved a question of final judgment from a state court, its foundation principle--that a decision is final when all that remains to be done on remand is to perform an accounting to bring the decision in line with the higher court's judgment, see *id. at 131-32*--supports the conclusion here that the district court's judgment is final and that to await the bankruptcy court's determination of fees would be pointless. Cf. *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975)* (listing different types of state court final decisions and enumerating the Radio Station WOW variety as ones in which the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings").

II. The Construction of *11 U.S.C. § 330*

Section 330 of the Bankruptcy Code speaks to the compensation of officers employed by the estate of the debtor. [**20] The issue before this court, then, is whether the bankruptcy court may award fees and expenses to an attorney "employed under *section 327* or *1103*," even though the statute does not include attorneys in its list of officers who may be compensated.

The district court read the statute verbatim and held that compensation for attorneys is expressly precluded by the statute. Before this court, A&K offers essentially two arguments to contend that the district court incorrectly decided that *§ 330* precludes awarding fees to a debtor's attorney after the appointment of a Chapter 11 trustee, and we review each in turn.

A. *Congressional Intent*

First, although A&K acknowledges that in 1994 Congress removed the words "the debtor's attorney" from *§ 330*'s list of compensable officers, the Appellant posits that this omission was clearly inadvertent in light of the lack of legislative history devoted to it. In addition, A&K observes that a prominent commentator has expressed the same opinion. See 3 *Collier on Bankruptcy P 330.LH[5]* at 330-77 ("Because the change is inconsistent with current case law and the legislative history of *§ 330* does not support such drastic change, courts [**21] should construe the deletion as unintended"). Collier has in fact concluded--consistent with the standards expressed in *§§ 330(a)(3)(C)* and *(a)(4)(A)*--that if the services of a debtor's attorney "are reasonably likely to benefit the debtor's estate, they should be compensable." 2 *Collier on Bankruptcy P 330.04* at 330-43. In addition, A&K alerts us to the Second Circuit's decision in *In re Ames Dep't Stores, Inc., 76 F.3d 66 (2d Cir. 1996)*, in which the court not only agreed with Collier's assessment, but stated that such an interpretation was consistent with "the statute's aims that attorneys be reasonably compensated and that future attorneys not be deterred from taking bankruptcy cases due to failure to pay adequate compensation." [12] *Id. at 71-72*; see also *In re Miller, 211 B.R. 399, 402 (Bankr. D. Kan. 1997)* (finding that the statute as currently written is ambiguous and that the absence of any mention in the legislative history regarding the omission of "to the debtor's attorney" obviates in favor of the conclusion that compensation is permissible).

12 As support for its contention that we should confine ourselves to the statute's plain language, the Petitioning Creditors argue that A&K's reliance on dicta from Ames is misplaced, as the Second Circuit--while stating that it was "inclined" to agree that the words "or to the debtor's attorney" were inadvertently omitted from *§ 330*--nevertheless disallowed the fee award at issue based on a lack of benefit to the estate from the attorney's services. This argument is unavailing, however, because the Second Circuit's assessment of the amended statute--albeit contained in dicta--is nevertheless probative of the issue of whether the omission of the words "or to the debtor's attorney" was intended.

[**22] The Petitioning Creditors of course urge us (as they did below) that because [*422] *§ 330(a)(1)* no longer includes the words "debtor's attorney" in its list of compensable persons, A&K can be compensated only for work done as a "professional person employed under *section 327*." The Petitioning Creditors concede that *§§ 330*, *327*, and *1107* in combination authorize an award of fees earned by A&K while Pro-Snax was a debtor-in-possession but insist that once the Chapter 11 trustee was appointed (and Pro-Snax ceased to be a debtor-in-possession), A&K was no longer a "professional person" entitled to compensation.

Notwithstanding this straightforward reading of the statute, A&K attempts to bolster its contention that

Congress inadvertently omitted "the debtor's attorney" from *§ 330(a)(1)* by comparing the two relevant clauses of *§ 330*--

> (a)(1) the court may award to a trustee, an examiner, a professional person employed under *section 327*-
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney"

--and argues that the word "attorney" in the second clause is rendered superfluous if, as the [**23] Petitioning Creditors claim, a debtor's attorney is compensable only so long as it qualifies as a "professional person employed under *section 327*." A&K concludes that the word "attorney" should not be superseded in this manner, and that any ambiguity created by the omission of the words "or to the debtor's attorney" from the first clause should be interpreted in favor of allowing an award of fees to debtor's counsel, especially in light of the fact that such compensation was expressly allowed prior to 1994. [13] The Petitioning Creditors argue that the word "attorney" in *§ 330(a)(1)(A)* is not rendered superfluous after the 1994 amendments as A&K claims. The Petitioning Creditors guide us to *§ 330(a)(4)(B)*, which provides that

> 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.

11 U.S.C. § 330(a)(4)(B) (emphasis added). The Petitioning [**24] Creditors claim that in combination these two provisions allow compensation to an individual debtor's attorney in a Chapter 12 or 13 case for "actual, necessary services;" establish that the word "attorney" in *§ 330(a)(1)(A)* is not meaningless; and conclusively show that the words "or to the debtor's attorney" do not have to be read back into *§ 330(a)(1)* (*i.e.*, to allow post-trustee compensation to a debtor's attorney in Chapter 11 cases, which expressly is not allowed by the current statute).

13 A&K makes the obvious point here that prior to 1994--when *§ 330* contained the words "or to the debtor's attorney" in the first clause--the word "attorney" in the second clause referred to that earlier reference to "the debtor's attorney." In addition, A&K claims that two bills are currently pending before Congress that add the words "or to the debtor's attorney" back to the first clause of the statute.

While this argument somewhat defuses A&K's claim that the word "attorney" in *§ 330(a)(1)(A)* is superfluous, [**25] it does not explain why a grammatical error currently exists in the statute. The current statute omits the word "or" between the words "examiner" and "professional person"(in the first clause quoted above). That error is perhaps the best evidence that the words "or to the debtor's attorney" were inadvertently excised from *§ 330(a)(1)*.

The Petitioning Creditors also argue that the deletion of the words "or to the debtor's attorney" was consistent with the stated legislative objective of the 1994 amendments--that is, to promote "greater uniformity" in the standards used by courts to award professional fees in bankruptcy cases. The Petitioning Creditors claim that such "uniformity" was desirable in light of conflicting authority on whether a debtor's counsel had a right to fees at the expense of the estate after a trustee was appointed and that the intended effect of the deletion of those words--a per se ban on awarding of such fees--promoted the desired uniformity. Indeed, [*423] the Petitioning Creditors view the 1994 amendments as a codification of the decision in *In re NRG Resources, Inc., 64 B.R. 643 (W.D. La. 1986)*.

In NRG, the court stated that [**26]

> the intent of the Bankruptcy Code seems crystal clear that just as a trustee replaces the debtor-in-possession for the purpose of administering the estate and operating its business, so it is that the trustee's attorney displaces the debtor's attorney in order that the trustee will have counsel and assistance in performing his fiduciary duties. There is no need for the debtor to have assistance performing those duties which are fully assumed by the trustee, and hence any "debtor's attorneys" can serve no beneficial purpose for the estate

> unless they are characterized as attorneys for the trustee.

NRG, 64 B.R. at 647. Significantly, long before the 1994 amendments clouded the issue, the court added that

> *[§ 330* seems] simply to recognize [a debtor's attorney's right to seek interim compensation] where the debtor is continuing in possession. [This] provision[] [does] not support the proposition that the debtor's attorney is allowed interim compensation for services rendered after the appointment of a trustee and employment of trustee's attorneys. A trustee having been appointed, it is his duty to administer the estate and anyone [**27] participating in the performance of that duty must meet the requirements of *11 U.S.C. § 327*.

Id. at 648.

While NRG certainly is "strong medicine" to the case at bar, it is apparently the only case of note conflicting with the so-called majority rule allowing compensation after the appointment of a trustee. See *In re Stroudsburg Dyeing & Finishing Co., 209 B.R. 648, 649 (Bankr. M.D.Pa. 1997)* (finding "no case that has subscribed to [NRG Resources'] unwavering proscription against compensating counsel for the out of possession debtor"). Moreover, the Ames court--while acknowledging Congress' desire for greater consistency in *§ 330* law--made no mention of Congress' desire to impose a per se ban on compensation. Rather, the court viewed the 1994 amendments as implementing a uniform set of standards that those rendering professional services must meet before they are compensable from the bankruptcy estate:

> With the 1994 amendments of *section 330*, Congress made another move towards greater equity in estate management. It provided that an award for fees might be made for services that were "beneficial [**28] at the time at which the service was rendered," *§ 330(a)(3)(c)*, and, by inverse construction, "reasonably likely to benefit the debtor's estate." Id. (a)(4)(A)(ii)(I).

Ames, 76 F.3d at 71. At this juncture, a clear determination cannot be made as to whether Congress "intended" to disallow all fees to a debtor's counsel after the appointment of a Chapter 11 trustee.

B. *Public Policy*

A&K also offers public policy rationales in favor of a broad reading of *§ 330* and posits that the American Rule of attorney's fees should not be applied to the instant case. Standing in the way of this conclusion is the decision, obviously, in NRG Resources. Even A&K admits that NRG hurts its case; it paraphrases the holding in this manner: "[After the Trustee is appointed], the Trustee's attorney displaces the debtor's attorney and . . . the debtor's attorney can serve no beneficial purpose for the estate unless the attorney is characterized as an attorney for the trustee." Brief of Appellant at 19 (citing *NRG, 64 B.R. at 647*). Nevertheless, A&K distinguishes NRG as a Chapter 7 case and posits that the majority rule, even in Chapter [**29] 7 cases, is that the appointment of a trustee does not invoke a per se ban on awarding compensation to a debtor's attorney for work done after the appointment but instead triggers a more flexible "benefits analysis" approach.

A&K suggests that this "benefits analysis," and not a per se ban on compensation, is also appropriate in the Chapter 11 context, because debtors in Chapter 11 have an even greater need of representation after the appointment of a trustee than similarly-situated debtors in other Chapters. In particular, A&K notes that Chapter 11 debtors may need (1) representation at the § 341 meeting, [*424] (2) assistance in prosecuting a plan of reorganization under *§ 1121(c)*, and *(3)* assistance in cooperating with a trustee in performance of the trustee's duties. A&K avers that if we uphold the district court's per se ban on awarding fees after the appointment of a trustee, attorneys will be disinclined to represent a debtor's interests after a trustee is appointed. The result, A&K concludes, will be the widespread "under-exercising" of debtors' rights and the underperformance of debtors' Code-mandated duties.

Finally, A&K also claims that while the American Rule of [**30] attorney's fees generally prevents fee shifting from party to party (and thus requires each party to bear its own litigation expenses), it does not require attorneys to work for free. According to A&K, the district court's holding unfortunately ensures just that, since Pro-Snax--a bankrupt business--cannot pay A&K's fees.

To apply the American Rule to deny compensation in such circumstances, A&K concludes, is nonsensical, and simply works a hardship on attorneys.

The Petitioning Creditors address these concerns by arguing that A&K has not sufficiently made the showing required for a court to interpret a lack of legislative history with respect to a change in a bankruptcy statute as an implied invitation to apply prior practice under the statute to resolve a dispute. In particular, the Petitioning Creditors claim that A&K has failed to show: (1) that the current version of *§ 330* is in any way ambiguous on the issue of compensating debtor's attorneys; (2) that pre-1994 practice with respect to compensating a debtor's attorney after the appointment of a trustee was clearly established and uniform; and/or (3) that the legislative history of the 1994 amendments indicates a congressional [**31] desire that pre-1994 practice with respect to *§ 330* be "brought forward." In the end, the Petitioning Creditors maintain that current *§ 330* should be given its "ordinary, contemporary, common meaning;" that current *§ 330* plainly does not allow compensation to the debtor's attorney after a trustee has been appointed; and that the bankruptcy court's contrary finding--although a "well-intentioned attempt at equity"--was necessarily invalid.

The Petitioning Creditors also claim that A&K's worries with respect to the "under-exercising" of debtors' rights and the underperformance of debtors' duties (*i.e.*, if debtors' attorneys are not paid) are overblown. The Petitioning Creditors aver that *11 U.S.C. § 521* provides the sole duties of a dispossessed debtor, only three of which are applicable to a corporate debtor--(1) filing a list of creditors and certain financial schedules; (2) cooperating with the trustee as necessary; and (3) surrendering to the trustee all property, records, and books of the Debtor. The Petitioning Creditors stress that the filing of a Chapter 11 plan is not one such "duty" (as claimed by A&K and the bankruptcy court), but only a [**32] "right." On this basis, the Petitioning Creditors conclude that the $ 10,000 retainer received by A&K sufficiently covered the value of any assistance it provided in helping Pro-Snax execute its limited statutory duties.

Finally, the Petitioning Creditors posit that interpreting *§ 330(a)(1)* (with its notable lack of the words "or to the debtor's attorney") as a fee-shifting statute in favor of debtors' attorneys has the potential to open a "pandora's box"--*i.e.*, if such an interpretation is premised on the policy view that attorneys should be compensated for assisting debtors in exercising their right to file a plan under *11 U.S.C. § 1121(c)*. The Petitioning Creditors aver that if such an interpretation carries the day, there is no principled reason why the attorney's fees of creditors, shareholders, or indentured trustees--who likewise may file plans under *§ 1121(c)*--should not also be shifted. The Petitioning Creditors conclude that such widespread fee-shifting to creditors--with nary a specific authorization in the statute--is simply unwarranted in light of the American Rule of attorney's fees.

III. Analysis

A. *Section 330* [**33] *Disallows Compensation to A&K*

We decide the issue before us bound by our conventions of statutory construction, [*425] even though common sense might lead the lay observer to conclude that a different result is perhaps more appropriate. The law, and the rules to which we adhere in order to interpret it, does not always conform to the dictates of common sense. In this case, we are faced with a statute which is clear on its face. It excludes attorneys from its catalog of professional officers of a bankruptcy estate who may be compensated for their work after the appointment of a Chapter 11 trustee. Although the legislative history and, indeed, a brief syntactical evaluation of the clause at issue suggest that Congress inadvertently neglected to include attorneys, our canons of construction do not require--nay, do not permit--us to consider these exogenous sources when the statute is clear textually on its face. [14] Consequently, we must affirm the judgment of the district court denying compensation to Appellant.

> 14 While it is certainly true that the omission of the conjunction "or" from the 1994 amendments to *§ 330* makes for an awkward sentence, this omission does not change the meaning of the words around it. Indeed, all that the omission would signify to a reader unfamiliar with the pre-1994 statute is the typographical deletion of "or" before the phrase "a professional person." It does not, of itself, suggest that the phrase "to the debtor's attorney" is also missing from the statute as enacted.

[**34] A&K argues that *§ 330*'s statutory language,

its legislative history, and the lack of any legislative history purporting to change the attorney-compensation language in the 1994 amendments to *§ 330* combine to support its belief that it should be compensated from the estate for work performed after the appointment of a Chapter 11 trustee. We disagree because we must commence our analysis by examining the plain language of the relevant statute, see *Stanford v. Commissioner, 152 F.3d 450, 455 (5th Cir. 1998)*; *G.M. Trading Corp. v. Commissioner, 121 F.3d 977, 981 (5th Cir. 1997)*, and here our reading of *§ 330(a)* begins and ends our inquiry. As we have said before, [HN8] "in the absence of any ambiguity, our examination is confined to the words of the statute, which are assumed to carry their ordinary meaning." Stanford, 1998 WL 496488, *5. Recourse to the legislative history is unnecessary in light of the plain meaning of this text. See *Darby v. Cisneros, 509 U.S. 137, 147, 125 L. Ed. 2d 113, 113 S. Ct. 2539 (1993)*.

Since this "cardinal canon of statutory construction," *Texas Food Indus. Ass'n v. USDA, 81 F.3d 578, 582 (5th Cir. 1996)*, [**35] is the rule of our circuit, we must ask whether the statute as written is ambiguous. As we stressed above, while the grammatical elision leads to an awkward construction, it does not in any way render the statute nonsensical. That being the case, we must "presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992)*; *Texas Food Industries, 81 F.3d at 581-82*; *United States v. Meeks, 69 F.3d 742, 744 (5th Cir. 1995)*. Here, by deleting "to the debtor's attorney" from the statute, Congress has clearly indicated that the debtor's attorney may not be compensated from the estate after the appointment of a Chapter 11 trustee.

The absence of legislative history on this point does not, of course, render the statute ambiguous; even if Congress intended to leave the language intact, the statute as it appears in the Code is unambiguous. [15] In another recent decision analyzing the Bankruptcy Code, we held that [HN9] even where one party's argument finds "express support" in the legislative history to a statute, where [**36] that legislative history is "clearly contrary to the statutory language," it is "unpersuasive." [16] [*426] *Gamble, 143 F.3d at 225*. As Justice Scalia has written in interpreting the Bankruptcy Code: "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute," *BFP v. Resolution Trust Corp., 511 U.S. 531, 566, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994)* (quoting *United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)*), and we decline to do so here. Since there is no dispute that the statute as enacted in 1994 does not include the phrase "to the debtor's attorney," there can be no dispute that *§ 330(a)* is dispositive as written as to the compensation due A&K.

> 15 Furthermore, nothing in the legislative history that A&K offers to support its interpretation if so "anchored" to the text of the statute that we would be obliged to heed it. *United States v. Gonzales, 520 U.S. 1, 117 S. Ct. 1032, 1036, 137 L. Ed. 2d 132 (1997)* (quoting *Shannon v. United States, 512 U.S. 573, 583, 129 L. Ed. 2d 459, 114 S. Ct. 2419 (1994)*).

[**37]

> 16 In Gamble, the Debtor argued that a statutory exception to the nondischargeability of debts (*11 U.S.C. § 523(a)(15)*) governed all property settlement debts between husband and wife except "those situations where the debtor has agreed to indemnify his former spouse against a marital debt owed to a third party in exchange for lower alimony payments or a more favorable property settlement." *Gamble, 143 F.3d at 225*. Even though there was legislative history to support the Debtor's proposition that Congress only enacted this statute to protect former spouses from having unfairly reduced amounts of property and/or alimony, we observed that the language of the statute was in direct contravention to this interpretation and thus precluded it. See id.

B. A&K's Pre-Appointment Services Must Have Resulted in Identifiable, Tangible, and Material Benefit to the Estate

The other task to which this appeal commends us is deciding which standard we must apply to A&K's services rendered before the appointment of the trustee. A&K argues that a reasonableness [**38] test is appropriate--whether the services were objectively beneficial toward the completion of the case at the time they were performed. The Petitioning Creditors, by contrast, advocate a more stringent test--whether A&K's services resulted in an identifiable, tangible, and material benefit to the bankruptcy estate. We determine today that the stricter test is the appropriate measure.

In so holding, we find that the bankruptcy court erred in taking a lenient view of the standard. Although we acknowledge that the bankruptcy court may have "had the best sense of the case" and was "at a particularly good vantage point to determine which, if any, of [A&K's] legal services inured to the benefit of the estate," it is not at all clear that those services represented an identifiable, tangible, and material benefit to the estate. The bankruptcy court found that A&K's services were useful in certain respects--liquidation, business operations, case administration, claims objection, attempted settlement, disclosure statement, and plan prosecution--but we are disinclined to hold that any service performed at any time need only be reasonable to be compensable.

Indeed, the bankruptcy court here [**39] found that some portions of the work for which A&K seeks compensation were duplicative of the trustee's, see *§ 330(a)(4)(A)(I)*, and reduced the award accordingly. While our ruling may not change the ultimate award to A&K, we believe it important to stress that [HN10] any work performed by legal counsel on behalf of a debtor must be of material benefit to the estate. See *In re Melp, Ltd., 179 B.R. 636 (E.D. Mo. 1995).*

The district court's instruction to the bankruptcy court, to consider strongly the debtor's lack of success in obtaining confirmation of the Chapter 11 plan, is consistent with the standards identified by Congress in *§ 330*, which require that--at the time the services are performed--the chances of success must outweigh the costs of pursuing the action. Even though the bankruptcy court found support for the Chapter 11 plan among creditors other than the Petitioning Creditors, and, if the plan had been confirmed, the estate could have been brought to a swifter conclusion than if the case were brought under Chapter 7, we find that A&K should have known from the outset that the Debtor's prosecution of a Chapter 11 plan would fail, given that the Petitioning [**40] Creditors--who collectively held more than 50% of the indebtedness in this case--filed an involuntary Chapter 7 case against the Debtor and repeatedly informed the Debtor and the bankruptcy court that they believed the case should be administered under Chapter 7. [17]

17 We believe that these facts necessarily should have led A&K to the conclusion that its services were futile, meaning that we would find against A&K even if we today adopted the reasonableness standard that it suggests.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court, reversing and remanding the bankruptcy court's decision.

2015 WL 4429419
Only the Westlaw citation is currently available.
United States District Court,
N.D. Texas,
Dallas Division.

In re Gonzalo **SALDANA**, Mexia Nursery & Tree Farm, Inc., and Mexia Tire Service, LLC, Debtors.
Orenstein Law Group, P.C., Appellant,
v.
Estela **Saldana**, Appellee.

Bankruptcy Case Nos. 13–34861–SGJ–7, 13–34862–SGJ–7, 13–34863–SGJ–7. | Civil Action Nos. 3:15–CV–0362–G, 3:15–CV–0363–G, 3:15–CV–0364–G. | Signed July 20, 2015.

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MEMORANDUM OPINION AND ORDER

A. JOE FISH, Senior District Judge.

***1** Appellant and cross-appellee, Orenstein Law Group, P.C. ("OLG"), and appellee and cross-appellant, Estela Saldana ("Estela"),[1] appeal from an order of the United States Bankruptcy Court denying in part OLG's application for compensation. The court has jurisdiction to hear these appeals under 28 U.S.C. § 158(a). For the reasons discussed below, the bankruptcy court's order regarding the application for compensation is affirmed in part and remanded in part.

I. *BACKGROUND*

A. *Factual Background*

In December 2010, Gonzalo Saldana ("Gonzalo") filed for divorce from Estela. Appellant's Brief at 5 (docket entry 19). The parties eventually entered into a divorce settlement agreement that awarded Estela $2.6 million. *Id.* Over two-and-a-half years after this settlement, Gonzalo, Mexia Nursery, and Mexia Tire (collectively, "the debtors")-the latter two being businesses Gonzalo owned-filed separate voluntary Chapter 11 bankruptcy petitions. *Id.* at 4. The bankruptcy court jointly administered the debtors' cases for procedural purposes during many of the bankruptcy proceedings, but the cases were not substantively consolidated. Record on Appeal ("R.") 290–92 (docket entry 6).

On January 1, 2014, OLG commenced its representation of the debtors in their Chapter 11 bankruptcy cases. Appellee's Response to Appellant's Principal Brief and Principal Brief in Cross–Appeal ("Appellee's Brief") at 4 (docket entry 20). OLG performed various services for the debtors until August 4, 2014, when the court converted Gonzalo's and Mexia Tire's cases to Chapter 7 and appointed a Chapter 11 trustee in the Mexia Nursery case. R. 850. With its legal work complete, OLG filed an application for compensation with the bankruptcy court. R. 93–183.

On December 22, 2014, the bankruptcy court held a hearing regarding OLG's application. R. 855–928. The bankruptcy court provided both OLG and Estela, who filed an objection to OLG's application, R. 184–92, an opportunity to present their arguments regarding the reasonableness of the fee application. *See* R. 855–928. At the conclusion of this hearing, the bankruptcy court granted OLG a portion of the fees requested. R. 925–27. Pertinent to the present appeal are the bankruptcy court's decisions to (1) deny OLG any compensation for its work regarding the adversary complaint the debtors filed against Estela, (2) grant OLG half of its requested compensation for its work opposing Estela's motions to convert, and (3) grant OLG all of its requested fees concerning its preparation and support of the debtors' Chapter 11 bankruptcy plan and disclosure statement. R. 923–27; *see also* Appellant's Brief at 19–30; Appellee's Brief at 11–23.

B. *Issues Raised on Appeal*

Both OLG and Estela filed timely notices to appeal the bankruptcy court's order. R. 1–4. The court consolidated all three appeals after the necessary transfers. Order to Consolidate (docket entry 17). OLG appeals multiple

issues that concern the award of attorney's fees in one or more of the three underlying bankruptcy cases:

> ***2** 1. Did Estela have standing to object to and appeal the attorney's fees awarded in the Mexia Tire and Mexia Nursery cases?
>
> 2. When ruling on OLG's application for compensation, did the bankruptcy court improperly interpret 11 U.S.C. § 330(a)(3)? Specifically, does the statute authorize consideration of legal fees earned by another law firm that were all incurred prior to OLG's participation in the case and some of which were incurred prior to the bankruptcy petitions?
>
> 3. Did the bankruptcy court improperly evaluate OLG's application for compensation by using a retrospective standard, *see In re Pro–Snax Distributors, Inc.*, 157 F.3d 414, 426 (5th Cir.1998), or did it use the prospective standard recently enunciated by the Fifth Circuit? *See In re Woerner*, 783 F.3d 266, 273–76 (5th Cir.2015) (en banc).
>
> 4. Were the bankruptcy court's two factual conclusions listed below clearly erroneous?
>
> a. The debtors' filing and prosecution of the adversary complaint against Estela was not
>
> (1) reasonably likely to benefit the debtors' estates or
>
> (2) necessary to the administration of the cases.
>
> b. As of late June 2014, defending against Estela's motions to convert[2] was not (1) reasonably likely to benefit the debtors' estates or (2) necessary to the administration of the cases.

Appellant's Brief 1–3.

On cross-appeal, Estela presents four major issues:

> 1. Did OLG have standing to object to and appeal the attorney's fees awarded in the Mexia Tire case?
>
> 2. Should the bankruptcy court have denied all of OLG's fees relating to Estela's motions to convert because the bankruptcy court could not timely confirm the debtors' proposed plan to prevent conversion?
>
> 3. Were these three bankruptcy cases filed to improperly gain review of the divorce settlement between Gonzalo and Estela, thus rendering all three cases essentially a two-party dispute? And, if so, does this imply that the bankruptcy court should have denied all fees to OLG because none of its services were (1) reasonably likely to benefit the debtors' estates or (2) necessary to the administration of the cases?
>
> 4. Should the bankruptcy court have denied all of OLG's fees relating to the debtors' proposed plan and disclosure statement because the bankruptcy court could not timely confirm the debtors' proposed plan and, even if statutory time limits were not at issue, would Estela's lack of approval prevent the debtors from obtaining approval of a plan?

Appellee's Brief at 14–21; Appellant's Brief at 15–16; Appellee's Reply at 1–3 (docket entry 22). Both parties filed two briefs in accordance with the court's briefing schedule. Order (docket entry 18). The appeal is now ripe for consideration.

II. *ANALYSIS*

A. *Legal Principles*

1. *Standards of Review*

The court reviews the bankruptcy court's award of attorney's fees for abuse of discretion. *In re Cahill*, 428 F.3d 536, 539 (5th Cir.2005) (citations omitted). "An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous. *Id.* (citing *In re Evangeline Refining Company*, 890 F.2d 1312, 1325 (5th Cir.1989)). Thus, the court reviews "legal conclusions de novo and ... findings of fact for clear error." *Id.* (citations omitted). When considering a mixed question of law and fact, the court considers the question de novo, but reviews the "underlying facts" for clear error. *In re Green Hills Development Company, LLC*, 741 F.3d 651, 654–55 (5th Cir.2014).

2. *Appellate Standing in Bankruptcy Cases*

***3** District courts possess statutory authority to hear appeals from bankruptcy court "final judgments, orders,

and decrees....” 28 U.S.C. § 158(a). “As Article III is inapplicable to bankruptcy courts, standing to appeal in a bankruptcy proceeding is derived originally from statute....” *Rohm & Hass Texas, Inc. v. Ortiz Brothers Insulation, Inc.,* 32 F.3d 205, 210 n. 18 (5th Cir.1994). Congress established the “person aggrieved” standard to govern bankruptcy appellate standing. 11 U.S.C. § 67(c) (repealed 1978). Despite the statute’s eventual repeal, the “person aggrieved” standard “continues to govern standing” in bankruptcy cases. *In re Coho Energy Inc.,* 395 F.3d 198, 202 (5th Cir.2004).

The “person aggrieved” standard is more rigorous than the standard for traditional Article III standing. *See In re Coho Energy Inc.,* 395 F.3d at 202–03 (“Because bankruptcy cases typically affect numerous parties, the ‘person aggrieved’ test demands a higher causal nexus between act and injury.”). To facilitate the efficient administration of bankruptcy estates, the standard circumscribes litigation to those individuals directly affected by the bankruptcy court’s proceedings. *In re El San Juan Hotel,* 809 F.2d 151, 154 (1st Cir.1987). An appellant must show that the bankruptcy court’s order “directly and adversely affected” his pecuniary interest, *In re Fondiller,* 707 F.2d 441, 443 (9th Cir.1983), by “diminish[ing] his property, increas[ing] his burdens, or impair[ing] his rights.” *In re El San Juan Hotel,* 809 F.2d at 154 (citation omitted).

For example, in *In re Coho Energy,* 395 F.3d at 203, the Fifth Circuit concluded that a law firm previously discharged by a Chapter 11 debtor was not a “person aggrieved” by the bankruptcy court’s order approving an attorney’s fees settlement between the debtor and a successor firm. The discharged firm alleged that its claim for attorney’s fees, which had no ceiling given accruing interest, could possibly exceed the amount in the court’s registry. *Id.* at 203. However, after subtracting the settlement amount and the debtor’s shareholders’ share, $4.5 million remained to pay the discharged firm’s estimated $3.4 million plus interest. *Id.* According to the Fifth Circuit, the discharged firm’s interest in the settlement agreement was “improbable” in light of the nearly one million dollars of excess funds to cover accruing interest. *Id.* This “remote possibility” of possessing a financial interest was insufficient to satisfy the “person aggrieved” test. *Id.*

3. *Compensation of Attorneys in a Chapter 11 Proceeding*

A bankruptcy court can grant a Chapter 11 debtor-in-possession permission to employ attorneys to “assist ... with the reorganization of the bankruptcy estate.” *In re Woerner,* 783 F.3d at 271 (citing 11 U.S.C. § 327). After court-approved attorneys complete their work, they can request “reasonable compensation for actual, necessary services rendered” and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1).

***4** To determine whether an amount is reasonable, “the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors....” *Id.* § 330(a) (3). Among other things, a court can consider “the time spent on such services,” “the rates charged for such services,” and “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....” *Id.*

In a recent opinion, the Fifth Circuit read the last of the above listed considerations together with the statutory prohibition of compensation for services *not* “reasonably likely to benefit the debtor’s estate,” *id.* § 330(a)(4)(A)(ii), to conclude that courts must assess the reasonability of services prospectively. *In re Woerner,* 783 F.3d at 273–77 (discussing Section 330’s statutory text, legislative history, and other circuits’ interpretations to justify jettisoning the former retrospective standard of *In re Pro–Snax*). “Under this framework, if a fee applicant establishes that its services were ‘necessary to the administration’ of a bankruptcy case or ‘reasonably likely to benefit’ the bankruptcy estate ‘at the time at which [they were] rendered,’ *see* 11 U.S.C. § 330(a)(3)(C), (4)(A), then the services are compensable.” *Id.* at 276 (alteration in original). The Fifth Circuit emphasized, however, that this framework does not “limit courts’ broad discretion to award or curtail attorney’s fees under § 330, ‘taking into account all relevant factors,’ 11 U.S .C. § 330(a)(3).” *Id.* at 277.

B. *Application*

1. *Standing Analysis*

a. Estela Possesses Standing in the Mexia Nursery Case

Estela qualifies as a “person aggrieved” by the bankruptcy court’s award of attorney’s fees in the Mexia Nursery case. Any assets remaining in the Mexia Nursery estate

will flow to Gonzalo as the sole owner of Mexia Nursery stock. R. 219. Gonzalo's present assets are insufficient to pay Estela's claim in full; consequently, assets that reach Gonzalo's estate following Mexia Nursery's liquidation will reduce Estela's claim. R. 211, 226. Any money OLG receives as attorney's fees from Mexia Nursery, however, will reduce the amount available to satisfy Estela's claim. As opposed to a "remote possibility" of the bankruptcy court's order affecting Estela's interests, *In re Coho Energy,* 395 F.3d at 203, any attorney's fees the bankruptcy court awards in the Mexia Nursery case diminishes Estela's recovery and thus qualifies her as a "person aggrieved."

b. Estela Lacks Standing but OLG Possesses Standing in the Mexia Tire Case

Due to the paucity of assets in the Mexia Tire estate, *see* Appellant's Brief at 15; Appellee's Reply at 2, both parties rely on the possible disgorgement of approximately $106,000 Estela received from the sale of a parcel of real property in the Mexia Tire estate. *See* R. 394–96; 732–33. OLG claims that if the state court finds Estela guilty of fraud, *see* R. 863–64, she may have to send the money back to the Mexia Tire estate.[3] Appellant's Brief at 16. In this event, Mexia Tire would possess funds to pay OLG's attorney's fees. *Id.* It is improper for this court to conduct a merits-based assessment of Gonzalo's state court claims. The court therefore concludes that OLG possesses greater than a "remote possibility" of recovering attorney's fees from Mexia Tire's estate, *In re Coho Energy,* 395 F.3d at 203, and consequently has standing to appeal the bankruptcy court's decision in the Mexia Tire case.

***5** In contrast, Estela lacks standing to appeal in the Mexia Tire case. Estela undoubtedly has a pecuniary interest in the possibility of disgorgement. However, this does not establish her interest in amount of attorney's fees awarded to OLG in the Mexia Tire case. If the state court orders the disgorgement of funds, it will have concluded Estela engaged in fraudulent activity. *See* R. 403–10. Such conduct would undermine Estela's claim to any assets in Gonzalo's estate that flowed from the Mexia Tire estate.[4] Because Estela's interest in the Mexia Tire attorney's fees award is "improbable," she lacks standing to appeal. *In re Coho Energy,* 395 F.3d at 203.

2. *The Bankruptcy Court Applied a Prospective Analysis Under 11 U.S.C. § 330*

The bankruptcy court noted the "staggering" amount of attorney's fees accumulated across the three cases in light of, among other things, "the overall results while in Chapter 11." R. 924. This statement, according to OLG, indicates that the bankruptcy court "erroneously applied an after-the-fact, results based analysis" when assessing the application for compensation. Appellant's Brief at 27. This lone statement, however, occurred before the bankruptcy court's ultimate determination of the appropriate compensation in these cases. *See* R. 924–27. After considering the statements the bankruptcy court made contemporaneously with its ruling on OLG's application for compensation, the court is confident the bankruptcy court applied the correct prospective standard. *See, e.g.,* R. 925–26 ("[B]y the time the second motion to dismiss or convert was filed in late June of 2014, it was obvious *at that point* that a reorganization was not in prospect ..."; "By that point, the bar date, the deadline for proofs of claim had occurred, all of the proofs of claim were in, and it was clear to all *at that point* that a Chapter 11 plan just no longer was reasonable, made sense"; *"At that point in time,* I cannot find it was ever reasonably likely to benefit the estate or administration of the case.") (emphasis added).

3. *Section 330 Authorizes a Bankruptcy Court to Consider Legal Fees Incurred by Another Law Firm Both Prior to and During the Bankruptcy Case*

As indicated above, Section 330(a)(3) instructs a bankruptcy court to take "into account all relevant factors" when analyzing an application for compensation. The bankruptcy court noted that another law firm incurred approximately $47,000 of fees in preparation for the bankruptcy filings and another $58,000 of fees during the early stages of the bankruptcy proceedings before OLG assumed the role of counsel. R. 924. Combined with OLG's requested legal fees, these fees produce an aggregate total of approximately $230,000. *Id.* In the bankruptcy court's judgment, these fees were "somewhat staggering given the number of creditors [and] the size of creditor claims...." *Id.*

OLG criticizes the bankruptcy court's consideration of fees earned by another law firm by noting that "[n]one of these factors or assumptions upon which the Bankruptcy Court premised its analysis under 11 U.S.C. § 330(a)(3) is even mentioned under the language of the statute." Appellant's Brief at 28. However, the statute's text "indicates that its list of factors is not exclusive:

bankruptcy courts may consider 'all relevant factors,' including factors not specified in the statute." *In re Pilgrim's Pride Corporation,* 690 F.3d 650, 665 (5th Cir.2012) (citations omitted). The total amount of attorney's fees incurred in preparation for and during a bankruptcy case is certainly a relevant factor for bankruptcy courts to consider under Section 330, especially when this total appears excessive given the complexity or size of the bankruptcy proceeding.

4. *The Bankruptcy Court's Factual Conclusion Regarding the Adversary Complaint Was Not Clearly Erroneous*

***6** The bankruptcy court discussed the claims registers in each of the three cases to support its conclusion that the April 2014 adversary complaint, R. 1556–71, was not reasonably likely to benefit the debtors' estates or necessary to the administration of the cases. OLG admits that "by some point in fall of 2013, it would have been generally understood [that Estela] was not asserting a lien in ... the tree inventory" of Mexia Nursery. R. 903. With only $82,045.35 in unsecured claims, R. 1377–78, the proceeds from the sale of the tree inventory would clearly pay all unsecured claims. R. 903–07; Mexia Nursery ("MN") R. 385 (noting that the tree inventory sold for a total of $671,153.92) (docket entry 8, case 3:15–CV–0363–G); *see also* R. 990 (indicating that as of May 31, 2013 the tree inventory was worth over $2,000,000 "in ordinary course of business and not bulk sales"). With respect to the Mexia Tire and Gonzalo cases, creditors filed a total of $4,325.35 in unsecured claims. R. 1371–76, 1380. The $17,595.00 in fees incurred while prosecuting the adversary complaint appear excessive given this small amount of unsecured claims and support the inference that "only Gonzalo Saldana personally was benefitting." R. 926. The near certainty that Mexia Nursery's unsecured creditors would be paid in full combined with the inordinate amount of legal fees relative to the amount of unsecured claims in the Mexia Tire and Gonzalo cases support the bankruptcy court's conclusion.

5. *The Bankruptcy Court's Factual Conclusion Regarding the Motion to Dismiss/Convert Category of Fees Was Not Clearly Erroneous*

The bankruptcy court indicated its concern whether various time limits would prevent it from confirming any proposed plan. *See* R. 830–39. Specifically, the amended scheduling order listed June 2, 2014 as the deadline to file a plan and disclosure statement and July 17, 2014 as the deadline to confirm the plan. R.2081. The debtors filed their joint plan and disclosure statement on time. *See* R. 413–492. However, the plan was not confirmed by July 17, and the debtors did not file a motion to extend both the scheduling order's deadline and the statutory deadline for approving a plan following its initial filing. 11 U.S.C. § 1129(e) ("In a small business case, the court shall confirm a plan ... not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).")

Moreover, as of June 23, 2014–the date Estela filed the relevant motion to convert-the debtors had not set a hearing for consideration of the disclosure statement. With only twenty-four days remaining until the July 17th confirmation deadline, the debtors were incapable of providing the necessary twenty-eight days' notice before creditors' consideration of a disclosure statement or plan. FED. R. BANKR. P.2002(b).

Following these two relevant dates (*i.e.,* June 23 and July 17), a significant portion of the fees sought by OLG was incurred. *See* R. 141–154. The "context of the case in June, July and August 2014," as detailed above, supports the bankruptcy court's conclusion that "it was not reasonable to be incurring this high level of fees," with the resulting reduction of the fees by fifty percent. R. 926.

6. *The Bankruptcy Court Had Authority to Award OLG Fifty–Percent of the Fees in the Motion to Dismiss/Convert Category*[5]

***7** Section 330(a) (3)(C) authorizes compensation for fees that are "necessary to the administration of" a Chapter 11 case. The bankruptcy court made a factual determination that some of the discovery material[6] OLG secured "could have been useful to the overall case administration," R. 925, even though the debtors were likely unable to defeat Estela's motion to convert. *See supra* at 15. While the bankruptcy court used the word "useful" rather than "necessary," the court cannot conclude that awarding fifty-percent of OLG's fees in this category was clearly erroneous. *See In re Green Hills Development Company, LLC,* 741 F.3d at 654–55 (noting that a court reviews the "underlying facts" in a mixed question for clear error).

Following Estela's third motion to convert, the bankruptcy court converted both the Gonzalo and Mexia Tire cases to Chapter 7. R. 529–30; Mexia Tire R. 23435

(docket entry 9, case 3:15–CV–0364–G). Mexia Nursery continued to operate under the oversight of a Chapter 11 Trustee until the business was ultimately liquidated under Chapter 7. MN 25, 247–48. The discovery material, specifically the depositions of Richard Sadler-the debtors' accountant-and Gonzalo, provided the appointed trustees pertinent information such as "funds flow" on their respective cases, R. 925, and also delivered insight on the interrelatedness of the three cases. This court cannot conclude that finding such information "necessary to the administration of" these cases was clearly erroneous.[7] § 330(a) (3)(C).

7. *Estela Waived the Right to Appeal Her Claim that the Bankruptcy Cases Were Primarily a Two–Party Dispute Through Which Gonzalo Sought to Secure Review of the Divorce Decree*

Estela failed to raise this issue in her objection to the final fee application. *See* R. 184–92. Moreover, Estela failed to raise the issue during the bankruptcy court's hearing on the fee application.[8] *See* R. 865–928. As the issue was not presented to the bankruptcy court, this court declines to consider it.

8. *Remand of the Mexia Nursery and Gonzalo Cases to the Bankruptcy Court to Determine Whether Fees Awarded in the Proposed Plan and Disclosure Statement Category Should be Reduced*

As noted above, the bankruptcy court reached the conclusion that any fees defending against Estela's June 23, 2014 motion to convert were not reasonably likely to benefit the debtors' estates.[9] *See supra* at 15–16. This conclusion relied on, *inter alia,* the debtors' inability to satisfy the requirement of twenty-eight days' notice before a disclosure statement or proposed plan could be considered. FED. R. BANKR. P.2002(b). The bankruptcy court provided no insight why any of the fees in the "plan and disclosure statement" category, *see* R. 155–162, following June 19, 2014 (*i.e.,* twenty-eight days preceding the July 17, 2014 deadline to confirm a plan) should be allowed if the debtors were incapable of confirming a plan as of this date. Moreover, even if the bankruptcy court could have reduced the twenty-eight day requirement listed in the rules, it failed to explain why it awarded any fees incurred after July 17, 2014–the deadline both listed in the scheduling order and resulting from 11 U.S.C. § 1129(e) for confirming a plan. *See* R. 162, 2081.

***8** On remand, the bankruptcy court should consider how the above issues affect the fees awarded in the "plan and disclosure statement" category *in the Mexia Nursery and Gonzalo cases.*[10] R. 155–62. This court's decision to remand does not imply that the bankruptcy court should reduce any, or all, of the attorney's fees in this category. Rather, the bankruptcy court should explain why OLG's services are-or are not-compensable by discussing either their necessity to the administration of the cases or their benefit to the cases at the time the fees were incurred. *See* § 330(a)(3)(C). If the bankruptcy court concludes the fees are compensable because they were "beneficial at the time at which" the services were performed, it should address Estela's argument regarding the impossibility of reaching a consensual plan with Estela and the absolute priority rule. *See* R. 892–93; Appellee's Brief at 20–21.

III. *CONCLUSION*

For the reasons discussed above, the bankruptcy court's order regarding OLG's application for attorney's fees is **AFFIRMED** in part and **REMANDED** in part.

SO ORDERED.

[1] To avoid confusion, the court refers to both Estela Saldana and Gonzalo Saldana by their first names.

[2] The category labeled "motion to dismiss/convert" includes fees incurred defending against three separate motions to convert filed by Estela on January 3, June 23, and July 24, 2014. *See* R. 139–54; *see also* docket entries 85, 175, and 187 in case number 13–34861–SGJ–7 before the Northern District of Texas Bankruptcy Court. The vast majority of fees were incurred following the June 23 motion. *See* R. 141–54.

[3] After dismissing all of the claims in the adversary proceeding against Estela, the bankruptcy court lifted the bankruptcy stay, allowing Gonzalo to advance his fraudulent transfer theories against Estela in state court. *See* R. 862–64.

[4] This is the key distinction between Estela's arguments for standing in the Mexia Tire and Mexia Nursery cases. Assets will flow from the Mexia Nursery estate

to Gonzalo's estate regardless of the state court proceeding. However, the Mexia Tire estate will only possess leftover assets that will flow to Gonzalo's estate if Gonzalo succeeds in his state court action. To succeed in state court, Gonzalo must demonstrate that Estela engaged in fraudulent conduct. If proven, this fraudulent conduct would render Estela's likelihood of recovery from Gonzalo's estate uncertain.

[5] Given the standing analysis above, Estela's appeal pertains only to the attorney's fees awarded in the Gonzalo and Mexia Nursery cases. *See supra* at 10–11.

[6] Expenses expended on discovery comprise a large portion of fees in this category. The discovery-related fees following the June 23, 2014 motion to convert totaled $26,600. *See* R. 142–45. Combined with the $3,100 in fees incurred responding to Estela's first motion to convert, R. 139–40, this totals $29,700–an amount quite close to the $30,578 in fees awarded by the bankruptcy court in this category. R. 926.

[7] The Fifth Circuit's *In re Woerner* decision does not require a different result. *See* 783 F.3d at 273–76. Bankruptcy courts can consider "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." § 330(a)(3)(C) (emphasis added). The *In re Woerner* court focused on the portion of this statutory provision following the "or." 783 F.3d at 273. Specifically, the Fifth Circuit concluded that when assessing whether services are "reasonably likely to benefit the debtor's estate," § 330(a)(4)(A)(ii)(I), a bankruptcy court must follow the instruction of Section 330(a)(3) (C) and look to the "time at which the service was rendered...." 783 F.3d at 273–74. However, the statute authorizes a bankruptcy court to award fees that are "necessary to the administration of ... a case," § 330(a)(3)(C), even if the fees were incurred as the result of a poor choice. While OLG's defending against the motions to convert may have been ill-advised, the bankruptcy court concluded some of the fees related to work that was necessary to administration of the bankruptcy cases and thus was compensable.

[8] The closest Estela came to raising the issue during the hearing was when she noted that "she is the only beneficiary in this estate...." R. 922. However, this lone reference fails to properly present the issue to the bankruptcy court. Moreover, even if Estela had properly raised the issue, she failed to inform the bankruptcy court how the issue should influence its legal analysis of OLG's application for compensation.

[9] However, the bankruptcy court concluded that half of these fees were compensable because they were necessary to the administration of the estates.

[10] *See supra* note 5.

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Problems in the Code

By Jordan A. Kroop and Bradley A. Cosman

Of Bunnies and Moneys: Fixing Trustee Payment under § 326(a)

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Thomas Austin, a cattle and sheep rancher who left Victorian England for Australia in the 1850s, is widely regarded as the person responsible for introducing rabbits to Australia. He was a hunting enthusiast with a penchant for shooting small, furry rodents that were not indigenous to the land "down under." He imported two dozen rabbits from England and released them on his ranch, reasoning that "the introduction of a few rabbits could do little harm and might provide a touch of home, in addition to a spot of hunting."[1] Austin's rabbits propagated like … well, like rabbits — so much so that by 1901, the exploding rabbit population in Australia threatened to destroy its farming industry, forcing the government's land department to build what became the longest fence in the world: more than 2,000 miles of fencing to keep the voracious horde of rabbits from advancing any further west into Australia's agricultural heartland.

Austin could not have been familiar with 20th century American sociologist Robert Merton's now-famous "law of unintended consequences," or else he might have reconsidered his "hare"-brained scheme. His solution to the small problem of a rabbit-less homestead had the unintended consequence of jeopardizing Australian agriculture. To this day, Australia has a serious rabbit problem.

A relatively recent chapter 11 case in Phoenix had a rabbit problem of its own, created by the unintended consequences of Congress's drafting of § 326(a) of the Bankruptcy Code while thinking only of chapter 7 trustees. Radical Bunny LLC was an Arizona entity that pooled investments from individuals and personal trusts for the purpose of making loans to another now-infamous Arizona lender called Mortgages Ltd., which, in turn, used the loan proceeds from Radical Bunny to make short-term secured loans to real estate developers. In 2008, as the real estate market collapsed, Mortgages Ltd.'s loan portfolio became deeply distressed, and by June 2008, it was in chapter 11. Four months later, faced with no reasonable possibility of being repaid on its loans to Mortgages Ltd., Radical Bunny itself was in chapter 11.[2] The bankruptcy court appointed a chapter 11 trustee to administer an estate devoid of any cash or liquid assets and containing essentially one illiquid asset: approximately $197 million in alleged secured claims against the Mortgages Ltd. bankruptcy estate.

After substantial bankruptcy court litigation that lasted more than two years, Radical Bunny — through its chapter 11 trustee — and Mortgages Ltd. reached a settlement that was ultimately embodied in a Byzantine chapter 11 plan for Mortgages Ltd. that, among many other things, allowed Radical Bunny's claims and gave the Radical Bunny bankruptcy estate two sources of recovery: (1) an interest in a liquidation trust vested with various Mortgages Ltd. assets and (2) membership interests in a series of loan-specific limited liability companies (LLCs) vested with the lender's interests in particular outstanding loans originally made by Mortgages Ltd. Most of those loans were already distressed, many were themselves the subject of other bankruptcy proceedings and foreclosures, and nearly all required considerable time to realize maximum value for LLC members like Radical Bunny. Although Radical Bunny's recoveries under the Mortgages Ltd. plan were likely worth at least a few million dollars, everyone knew that it would take years to monetize Radical Bunny's interests in those LLCs.

Having negotiated this settlement with the Mortgages Ltd. estate, the Radical Bunny chapter 11 trustee proposed his own simple reorganization plan in March 2010. Radical Bunny's plan provided for a reorganized entity to maintain operations that were strictly limited to managing and ultimately monetizing the illiquid LLC membership interests that Radical Bunny received under the Mortgages Ltd. plan. Since the Radical Bunny estate had no cash or other liquid assets at the time that its chapter 11 trustee's plan was confirmed in May 2010, payment of all administrative expenses, including all the trustee's fees, was delayed more than a year until proceeds from the Mortgages Ltd. loan LLCs began to trickle in.

Once the Mortgages Ltd. estate began distributing cash to reorganized Radical Bunny, Radical Bunny's chapter 11 trustee filed a final fee application. Despite the absence of any material objections to the compensation sought in that application, now-retired Bankruptcy Judge Charles Case identified a peculiar statutory problem: Section

1 "The State Barrier Fence of Western Australia," National Library of Australia, *available at* http://pandora.nla.gov.au/pan/43156/20040709-0000/agspsrv34.agric.wa.gov.au/programs/app/barrier/history.htm.

2 *In re Radical Bunny LLC*, Case No. 2:08-bk-13884-CGC (Bankr. D. Ariz.). Radical Bunny's bankruptcy case was converted to chapter 11 shortly after an involuntary petition had been filed by creditors. The court appointed a chapter 11 trustee in light of several ongoing civil and criminal investigations being conducted by the Securities and Exchange Commission and the state of Arizona against the individuals running Radical Bunny.

326(a) seemed to preclude the court from approving *any* compensation to the chapter 11 trustee because "the Trustee did not distribute money [to the reorganized Radical Bunny] in the traditional sense."[3]

Here is how the problem arises: Sections 330 and 326(a) of the Bankruptcy Code work together to determine the appropriate amount of compensation that should be awarded a trustee. Under § 330, bankruptcy courts are authorized to award "reasonable compensation" to trustees.[4] Once requested fees are deemed reasonable under § 330, § 326(a) imposes a sliding scale of sorts that caps the amount of reasonable compensation at a percentage of "moneys disbursed or turned over in the case by the trustee to parties in interest." In this way, the reasonableness of the trustee's compensation is first determined under § 330 and then "cut down" to the cap calculated under § 326(a).[5]

Since § 326(a) expressly tethers compensation to "moneys disbursed or turned over," what constitutes "moneys" significantly affects a trustee's compensation. If the trustee does not disburse or turn over any moneys, the trustee's fee cap is zero. But does "moneys" simply mean "cash"?

Regarding "moneys" as being synonymous with cash presents little problem, for the most part, in chapter 7 cases because chapter 7 trustees have an express duty to expeditiously liquidate all assets of the estate into cash.[6] Construing "moneys" as being synonymous with cash can, however, create a serious problem for chapter 11 trustees, whose duty is to operate the debtor's business and confirm a reorganization plan.[7] If "moneys" means only cash, chapter 11 trustees who administer estates with prospectively valuable but presently illiquid assets — real estate, causes of action, ownership interests in other entities, etc. — may find themselves entirely uncompensated. Must chapter 11 trustees hastily and recklessly monetize these types of assets, realizing only a small fraction of their potential future value, just so they have something to distribute and, therefore, a means of being compensated for their service under § 326(a)? Wouldn't doing that implicate trustees' fiduciary duties to the estate? By allowing trustee compensation only with reference to "moneys disbursed" in § 326(a), Congress has seemingly created the unintended consequence of offering chapter 11 trustees a Hobson's choice: either (1) recklessly liquidate assets and get paid, or (2) prudently wait to maximize asset value and not get paid. Section 326(a) has created a rabbit problem.

The scope of the term "moneys" as used in § 326(a) has been previously explored in the context of chapter 7 cases and has resulted in a split of authority. An apparent minority of courts has developed a "constructive disbursement" theory, which allows a trustee to receive compensation based on the value of disbursements of property or other consideration, not just distributions of cash. Under this theory, nonliquidated property is deemed to be "moneys" for purposes of § 326(a); this includes property such as securities,[8] realty that is subject to existing liens,[9] a guaranty of contracts[10] and the assumption of an existing mortgage.[11]

Modify § 326(a) to compensate a chapter 11 trustee based on a percentage of the "*value of property* disbursed or turned over," rather than ... "*moneys* disbursed or turned over."

However, a majority of courts, including the Fifth Circuit, still rejects the constructive disbursement theory, some due to a "plain-meaning" analysis.[12] Other courts have rejected the constructive disbursement theory as inconsistent with putative congressional intent regarding § 326(a).[13] Courts rejecting the constructive disbursement theory have done so despite acknowledging the potentially inequitable results for trustees,[14] as well as warnings that excluding distributions of property from § 326(a) would create an incentive for trustees to liquidate assets even though liquidation might not be in the best interests of the estate.[15] These courts simply find themselves constrained by the plain meaning of § 326(a).

There is another apparent problem of statutory construction: The Bankruptcy Code uses "moneys" in only two places, whereas it uses "cash" in several other places. When Congress said "cash," it meant cash, so ostensibly, Congress must have meant something different when it used the word "moneys" instead of "cash." It is a principle of statutory interpretation that different words used in the same statute should be assigned different meanings whenever possible.[16]

Case law on either side of the issue has been largely limited to chapter 7 cases. There has been essentially no reported case law analyzing the application of § 326(a) in chapter 11 — particularly where a plan has been confirmed — where a trustee's role is markedly different and where the unintended consequences of § 326(a) are most pernicious. The stark difference between the roles of chapter 7 trustees and chapter 11 trustees may offer a logical

3 *In re Radical Bunny LLC*, Case No. 2:08-bk-13884-CGC (Bankr. D. Ariz.), Under Advisement Decision Approving Chapter 11 Trustee's Fee Application, dated July 22, 2011 [Docket No. 1211].

4 As a practical matter and under most case precedent, "reasonable compensation" is typically determined by considering, among other things, the amount of time spent, hourly rates charged, whether the services were necessary or beneficial, complexity of the tasks performed, and customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

5 *Gill v. Wittenburg (In re Fin. Corp. of Am.)*, 114 B.R. 221, 223 (B.A.P. 9th Cir. 1990).

6 11 U.S.C. § 704(a)(1). As discussed below, this is not to say that the scope of "moneys" in chapter 7 has not been without controversy.

7 11 U.S.C. § 1106(a) (requiring chapter 11 trustee to perform duties in § 704(a), but not § 704(a)(1)).

8 *See In re Toole*, 294 F. 975 (S.D.N.Y. 1920).

9 *See Southwestern Media Inc. v. Rau*, 708 F.2d 419, 423 (9th Cir. 1983) (*dictum*); *In re Stanley*, 120 B.R. 409 (Bankr. E.D. Tex. 1990).

10 *See In re Greenly Energy Holdings Pa. Inc.*, 102 B.R. 400 (E.D. Pa. 1989).

11 *See York Int'l Bldg. Inc. v. Chaney*, 527 F.2d 1061, 1074 n.12 (9th Cir. 1975).

12 *See Pritchard v. United States Trustee (In re England)*, 153, F.3d 323 153 F.3d 232, (5th Cir. 1998) ("[The] plain language of § 326(a) indicates that the statute caps a trustee's compensation based upon only the moneys disbursed, without any allowance for the property disbursed."); *see also In re Barnett*, 133 B.R. 487, 489 (Bankr. N.D. Iowa 1991) (relying on plain language to exclude property disbursements from § 326(a)); *In re New England Fish Co.*, 34 B.R. 899, 901-02 (Bankr. W.D. Wash. 1983) (same); *In re Am. Canadian Invests. Inc.*, 353 B.R. 852 (Bankr. E.D. Va. 2006) (same).

13 *See Staiano v. Cain (In re Lan Assocs. XI LP)*, 192 F.3d 109, 115-21 (3d. Cir. 1999) (value of credit-bid not within scope of "moneys" under § 326(a); based on legislative history of § 326(a), "moneys" is limited to cash equivalents); *In re Am. Canadian Invests. Inc.*, 353 B.R. 852 (Bankr. E.D. Va. 2006) (based on legislative history of § 326(a), "moneys" is limited to cash equivalents).

14 *Lan Assocs.*, 192 F.3d at 121 (concluding that solution to potential undercompensation of trustees resulting from their holding lies with Congress); *England*, 153 F.3d at 237 (same).

15 *England*, 153 F.3d at 236 (noting that § 330 allows bankruptcy court to award lesser amount of compensation when trustee has manipulated estate to increase maximum compensation under § 326(a)).

16 *See, e.g., Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001) ("The use of different terms within related statutes generally implies that different meanings were intended." (quoting 2A Norman J. Singer, *Sutherland's Statutes and Statutory Construction* § 46.06, at 194 (6th ed. 2000))).

continued on page 88

Problems in the Code: Fixing Trustee Payment under § 326(a)

from page 45

basis for distinguishing chapter 7 case law that rejects the constructive disbursement theory. Judge Case's decision in *Radical Bunny* did precisely that.

Judge Case rejected the argument that "moneys" is not synonymous with "cash" and ruled that the distributions made under the *Radical Bunny* plan were not "moneys" under the plain meaning of the word.[17] The court then turned to the constructive distribution theory,[18] recognizing that "monetary recovery [was] all but impossible" in the *Radical Bunny* case, but also noting that the trustee had nevertheless managed to bring substantial value to the estate through the confirmed *Mortgages Ltd.* plan and the *Radical Bunny* plan. The court acknowledged — but then rejected — a strict application of § 326(a) that would bar the trustee from any compensation. As the court put it, denying the chapter 11 trustee all fees where the trustee had confirmed a plan that brought significant, albeit non-cash, value to the estate would be an "absurd result not intended by the legislative process."[19] This resulted in an unintended consequence: Radical Bunny's rabbit problem.

The bankruptcy court found that Radical Bunny's chapter 11 trustee deserved compensation because the trustee did exactly what § 1106 of the Bankruptcy Code directed him to do: confirm a plan. By awarding the chapter 11 trustee's requested compensation despite the statutory formulation in § 326(a), the *Radical Bunny* decision highlights both the problem and the solution that is associated with use of the term "moneys" in § 326(a).

The problem is that a narrow interpretation of the term "moneys" in § 326(a) unjustly denies compensation to chapter 11 trustees who have successfully administered a valuable — but illiquid — estate. The solution is as easy as it is obvious: Modify § 326(a) to compensate a chapter 11 trustee based on a percentage of the "*value of property* disbursed or turned over," rather than a percentage of "*moneys* disbursed or turned over." This minor statutory amendment would better align a chapter 11 trustee's compensation with a chapter 11 trustee's duties. Just three words would fix the unintended consequences of legislative drafting.

It's the fence that would keep the rabbits out. abi

17 *Id.* at 6 (citing various dictionary and other sources).

18 *Id.* at 7. The bankruptcy court also analyzed other situations beyond constructive disbursement theory in which courts had allowed the payment of fees under § 326(a) even though no money had been disbursed. For example, the bankruptcy court pointed out that trustee fees have been approved in the following instances: (1) where a case has been converted from chapter 11 to chapter 7 before any distributions were made (*see In re Fin. Corp. of Am.*, 114 B.R. 221 (B.A.P. 9th Cir. 1990)), (2) where a case had been converted from chapter 7 to chapter 13 before distributions were made (*see In re Hages*, 252 B.R. 789 (N.D. Cal. 2000)) and (3) on the basis of *quantum meruit*. *Id.* at 8-10. Although analyzed, the bankruptcy court did not ultimately rely on these situations in its holding.

19 *Radical Bunny* at 5-6.

1 of 6 DOCUMENTS

Positive
As of: Aug 10, 2015

IN RE: HOKULANI SQUARE, INC., a Hawaii corporation, Debtor, BRADLEY R TAMM, Chapter 7 Trustee, Appellant, v. UST - UNITED STATES TRUSTEE, HONOLULU, Appellee.

No. 11-60072

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

776 F.3d 1083*; *2015 U.S. App. LEXIS 1179*; *73 Collier Bankr. Cas. 2d (MB) 147*; *Bankr. L. Rep. (CCH) P82,769*; *60 Bankr. Ct. Dec. 140

October 10, 2013, Argued and Submitted, Honolulu, Hawaii
January 26, 2015, Filed

PRIOR HISTORY: [**1] Appeal from the Ninth Circuit, Bankruptcy Appellate Panel. BAP No. 10-1468. Pappas, Dunn, and Jury, Bankruptcy Judges, Presiding. *United States Trustee v. Tamm (In re Hokulani Square, Inc.), 460 B.R. 763, 2011 Bankr. LEXIS 4366 (B.A.P. 9th Cir., 2011)*

DISPOSITION: AFFIRMED.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-*11 U.S.C.S. § 326(a)* was properly interpreted not to permit a trustee to collect fees on a credit bid transaction in which the trustee disbursed only property, not "moneys," to the creditor, based on the clear statutory language and holdings of sister circuit courts; [2]-Accordingly, the bankruptcy court's award of compensation to a trustee, based on a winning credit bid made by secured creditors on real property of the bankruptcy estate using money the estate owed them rather than cash, was properly reversed.

OUTCOME: Judgment affirmed.

LexisNexis(R) Headnotes

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Compensation
Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Liquidations
[HN1] In bankruptcy, it is the trustee's job to manage the estate. Often, this means liquidating all the estate's assets and distributing the proceeds to creditors, shareholders and other interested parties. Some of the proceeds are awarded to the trustee as compensation, which is calculated based on the value of the assets he disburses.

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

Bankruptcy Law > Case Administration > Administrative Powers > Estate Property Lease, Sale & Use

[HN2] When the secured creditors of a bankruptcy exercise their right to credit bid under *11 U.S.C.S. § 363(k)*, this means that they use the money the estate owes them, rather than cash, in making their bid. In such a transaction, the creditors get the property, and the estate's debt is reduced by the amount of the bid.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

[HN3] The appellate court reviews the Bankruptcy Appellate Panel's interpretation of *11 U.S.C.S. § 326(a)* de novo.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Compensation

[HN4] The bankruptcy court has discretion to award a trustee fees up to a cap that is calculated as a percentage of "all moneys disbursed or turned over in the case by the trustee to parties in interest." *11 U.S.C.S. § 326(a)*. Because "moneys disbursed or turned over" is not defined in the Bankruptcy Code, it retains its ordinary meaning. There are numerous ways to define "moneys," but dictionaries mostly agree that the term refers to a generally accepted medium of exchange. It is also clear that "disburse" means to "pay out," and "turn over" means to "deliver" or "surrender." Taken together, this language seems to say that the trustee may collect fees only on those transactions for which he pays interested parties (in this case, secured creditors) in some form of generally accepted medium of exchange.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Compensation

[HN5] *11 U.S.C.S. § 326(a)* uses the plural "moneys" and not "money," the more common collective-noun form. The plural is frequently used, especially in financial and legal contexts, to denote "discrete sums of money" or "funds." There appears to be no significance to use of the plural here.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Compensation
Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

Bankruptcy Law > Case Administration > Administrative Powers > Estate Property Lease, Sale & Use

[HN6] In a credit bid transaction, the trustee turns property over to the creditor, and the creditor reduces the amount the estate owes him by the value of his bid. The only thing "disbursed or turned over" by the trustee is the underlying property. However broadly courts define "moneys," the term cannot be expansive enough to encompass real estate, which is about as far from a "medium of exchange" as one can get. Congress elected to restrict the trustee's maximum compensation using the narrow term "moneys," as opposed to a broader term such as "property" or "assets," and courts must assume that the legislative purpose is expressed by the ordinary meaning of the words used. The legislative history of *11 U.S.C.S. § 326(a)* confirms this view. Two sister circuits have also concluded that *§ 326(a)* permits no pay for property disbursements in satisfaction for creditors' claims.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Compensation
Governments > Legislation > Interpretation

[HN7] While it is true that courts typically will not read the Bankruptcy Code to erode past bankruptcy practice, even the most well-established pre-Code practice cannot overcome language of the Code that leaves no room for clarification. And *11 U.S.C.S. § 326(a)* leaves little to the imagination. Given Congress's clear statement that trustees may be compensated for nothing but "moneys disbursed," historical practice is beside the point.

Governments > Legislation > Interpretation

[HN8] A mere handful of lower court decisions, without more, does not demonstrate a "widely accepted and established" practice, such as for statutory interpretation.

Governments > Legislation > Interpretation
Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Compensation

[HN9] The distinction drawn by *11 U.S.C.S. § 326(a)* may be harsh and misguided, but it is not absurd. The absurdity canon is not a license for courts to disregard statutory text where it conflicts with policy preferences; instead, it is confined to situations where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone. If the text of *§ 326(a)* is not

wise, it is at least rational. Congress made a policy judgment in selecting the words of *§ 326(a)*, and courts are in no position to contradict it.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Compensation
Governments > Legislation > Interpretation
[HN10] In drafting *11 U.S.C.S. § 326(a)*, Congress may not have chosen the most sensible path. But between the statute's clear language and on-the-button legislative history, it appears that Congress's choice was deliberate. *Section 326(a)* does not permit a trustee to collect fees on a credit bid transaction in which the trustee disburses only property, not "moneys," to the creditor. Other courts of appeals have reached the same conclusion and there is no basis for creating a circuit conflict.

SUMMARY:

SUMMARY*

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Bankruptcy

The panel affirmed the Bankruptcy Appellate Panel's reversal of the bankruptcy court's award of compensation to a chapter 7 trustee.

The trustee's compensation is calculated based on the value of the bankruptcy estate assets he disburses. In this case, secured creditors made a winning credit bid on real property of the bankruptcy estate, using money the estate owed them, rather than cash. The panel held that *11 U.S.C. § 326(a)* does not permit a trustee to collect fees on a credit bid transaction in which the trustee disburses only property, not "moneys," to the creditor.

COUNSEL: Bradley R. Tamm (argued); Lissa D. Shults and Melissa A. Miyashiro, Shults & Tamm, ALC, Honolulu, Hawaii, for Appellant.

Noah M. Schottenstein (argued), Trial Attorney, Ramona Elliot, Deputy Director/General Counsel, P. Matthew Sutko, Associate General Counsel, Executive Office for the United States Trustees, Washington, D.C.; Tiffany Carroll, Acting United [**2] States Trustee for Region 15, Curtis B. Ching, Assistant United States Trustee, United States Department of Justice, Office of the United States Trustee, Honolulu, Hawaii, for Appellee.

Daniel M. Benjamin, Ballard Spahr LLP, San Diego, California, for Amicus Curiae Carl A. Eklund.

JUDGES: Before: Alex Kozinski, Raymond C. Fisher, and Paul J. Watford, Circuit Judges. Opinion by Judge Kozinski.

OPINION BY: Alex Kozinski

OPINION

[*1085] KOZINSKI, Circuit Judge:

[HN1] In bankruptcy, it's the trustee's job to manage the estate. Often, this means liquidating all the estate's assets and distributing the proceeds to creditors, shareholders and other interested parties. Some of the proceeds are awarded to the trustee as compensation, which is calculated based on the value of the assets he disburses. We address whether the trustee's compensation may reflect the value of what is known as a "credit bid."

FACTS

Hokulani Square, Inc., filed for bankruptcy in May 2007. Bradley Tamm was appointed as the chapter 7 trustee. One of Hokulani's principal assets was a set of condominiums that exposed the estate to serious liabilities. Recognizing the risks of owning the condominiums, Tamm moved to auction them off. Two groups of secured creditors, both [**3] of which had liens on the condominiums, jointly submitted the winning bid at $1.5 million.

[HN2] To pay, the secured creditors exercised their right to credit bid under *11 U.S.C. § 363(k)*. This means that they used the money the estate owed them, rather than cash, in making their bid. In such a transaction, the creditors get the property, and the estate's debt is reduced by the amount of the bid.

Tamm petitioned the bankruptcy court for compensation in the amount of $109,293. He came up with this number by including the $1.5 million credit bid in his calculations. The United States Trustee objected on the ground that including the value of the credit bid was not authorized by *11 U.S.C. § 326(a)*. Excluding the credit bid would reduce Tamm's fee by approximately $40,000.

The bankruptcy court awarded Tamm the full $109,293, but the Ninth Circuit Bankruptcy Appellate Panel (BAP) reversed. Tamm appeals. We have jurisdiction under *28 U.S.C. § 158(d)* and [HN3] review the BAP's interpretation of *section 326(a)* de novo. *See In re Sasson, 424 F.3d 864, 867 (9th Cir. 2005).*

DISCUSSION

1. [HN4] The bankruptcy court has discretion to award a trustee fees up to a cap that is calculated as a percentage of "*all moneys disbursed or turned over* in the case by the trustee to parties in interest." *11 U.S.C. § 326(a)* (emphasis added). Because "moneys disbursed [**4] or turned over" isn't defined in the Code, it retains its ordinary meaning. *See Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 131 S. Ct. 716, 724, 178 L. Ed. 2d 603 (2011).* There are numerous ways to define "moneys,"[1] but dictionaries mostly agree that the term [*1086] refers to a generally accepted medium of exchange. *See, e.g., Third New Int'l Dictionary* 1458 (2002) ("something generally accepted as a medium of exchange, measure of value, or a means of payment"); *Black's Law Dictionary* 1158 (10th ed. 2014) ("The medium of exchange authorized or adopted by a government as part of its currency; esp. domestic currency"); *Oxford English Dictionary* 992 (2d ed. 1989) ("[c]urrent coin . . . in pieces of portable form as a medium of exchange and measure of value"). It's also clear that "disburse" means to "pay out," *Black's Law Dictionary* 561 (10th ed. 2014), and "turn over" means to "deliver" or "surrender," *Webster's New Collegiate Dictionary* 1262 (8th ed. 1977). Taken together, this language seems to say that the trustee may collect fees only on those transactions for which he pays interested parties (in this case, secured creditors) in some form of generally accepted medium of exchange.

> 1 [HN5] The statute uses the plural "moneys" and not "money," the more common collective-noun form. The plural "is [**5] frequently used, especially in financial and legal contexts, to denote 'discrete sums of money' or 'funds.'" Bryan A. Garner, *Garner's Modern American Usage* 529 (2d ed. 2003). We can discern no significance to use of the plural here, and the parties have suggested none.

[HN6] In a credit bid transaction, the trustee turns property over to the creditor, and the creditor reduces the amount the estate owes him by the value of his bid. The only thing "disbursed or turned over" by the trustee is the underlying property, in this case, a set of condominiums. However broadly we define "moneys," the term can't be expansive enough to encompass real estate, which is about as far from a "medium of exchange" as one can get. *See, e.g.*, Ping Cheng, et al., *Illiquidity and Portfolio Risk of Thinly Traded Assets*, 36 J. Portfolio Mgmt. 126, 126 (2010) (categorizing real estate as a highly illiquid asset). Congress elected to restrict the trustee's maximum compensation using the narrow term "moneys," as opposed to a broader term such as "property" or "assets," and we must "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Phinpathya, 464 U.S. 183, 189, 104 S. Ct. 584, 78 L. Ed. 2d 401 (1984)* (internal quotation marks omitted).

The statute's [**6] legislative history confirms this view. A report of the House Judiciary Committee says that *section 326(a)* covers "the situation where the trustee liquidates property subject to a lien and distributes the proceeds." H.R. Rep. No. 95-595, at 327 (1977). The report is careful to note that *section 326(a)* "does not cover cases in which the trustee simply turns over the property to the secured creditor, nor where the trustee abandons the property and the secured creditor is permitted to foreclose." *Id.* This passage suggests that Congress considered the possibility of paying trustees for turning over property to creditors, and worded *section 326(a)* so as to preclude it.

Looking at the same legislative history, two of our sister circuits have also concluded that *section 326(a)* permits no pay for property disbursements in satisfaction for creditors' claims. The Fifth Circuit decided that *section 326(a)* doesn't allow a trustee to collect on the value of property given to creditors in exchange for a reduction in the amount they're owed. *In re England, 153 F.3d 232, 235 (5th Cir. 1998).* It reasoned that "[t]he plain language of *§ 326(a)* indicates that the statute caps a trustee's compensation based upon only the moneys disbursed, without any allowance for the property disbursed." *Id.* And the Third Circuit held that "Congress [**7] did not intend to include credit bids in the trustee's compensation" because in a credit bid transaction "the secured creditor receives [] *property* in satisfaction of its secured claim." *In re Lan Assocs. XI, L.P., 192 F.3d 109, 117-18 (3d Cir. 1999).*

2. Tamm and amicus ask us to interpret *section 326(a)* to align with bankruptcy practice prior to the 1978

Bankruptcy Act. [HN7] While it's true that we typically "will not read the Bankruptcy Code to [*1087] erode past bankruptcy practice," *Pa. Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 563, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990)*, even the most well-established pre-Code practice can't overcome language of the Code that "leaves no room for clarification," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 11, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)*. And, as noted, *section 326(a)* leaves little to the imagination. Given Congress's clear statement that trustees may be compensated for nothing but "moneys disbursed," historical practice is beside the point.

Even if we did seek guidance from past practices, it would make no difference. Tamm and amicus cite a few pre-Code lower court cases that allowed fees on transactions where the trustee returned property to a lienholder in satisfaction of a secured claim. Interpreting *section 326(a)*'s predecessor, these cases reasoned that the trustee constructively disbursed moneys to creditors, even if he never paid the creditors in cash. *See, e.g., In re Columbia Cotton Oil & Provision Corp., 210 F. 824, 827-28 (4th Cir. 1913)*. But [HN8] a mere handful of lower court decisions, without [**8] more, does not demonstrate a "widely accepted and established" practice. *See Hartford Underwriters, 530 U.S. at 9-10* (internal quotation marks omitted) (concluding that "a number of lower court cases" were insufficient to show a clearly established pre-Code practice); *cf. In re Bonner Mall P'ship, 2 F.3d 899, 912 (9th Cir. 1993)* (deferring to a pre-Code practice that "several Supreme Court cases had mentioned" and where there was direct evidence Congress had knowledge of the practice).

Furthermore, Tamm and amicus overlook pre-Code cases concluding that *section 326(a)*'s predecessor was "plain and unambiguous" in providing that "it is the moneys disbursed or turned over, and not property, that forms the basis for" the trustee's fee. *In re Morris Bros., 8 F.2d 629, 630 (D. Or. 1925)*; *see also, e.g., In re Brigantine Beach Hotel Corp., 197 F.2d 296, 299 (3d Cir. 1952)* ("It is clear that the word 'moneys' in the clause '. . . upon all moneys disbursed or turned over . . .' is not the equivalent of property."). Considering the sparse and conflicting evidence of any historical practice of compensating trustees for credit bids, we doubt that this was "the type of rule that . . . Congress was aware of when enacting the Code." *Hartford Underwriters, 530 U.S. at 10* (internal quotation marks omitted).

Tamm also contends that our decisions--specifically *York Int'l Bldg., Inc. v. Chaney, 527 F.2d 1061 (9th Cir. 1975)*, and *Sw. Media, Inc. v. Rau, 708 F.2d 419 (9th Cir. 1983)*--permit trustee compensation where no money changes hands but the trustee nonetheless "has properly [**9] performed services in relation" to "the particular property." *Id. at 423 n.4* (quoting *In re Schautz, 390 F.2d 797, 800 (2d Cir. 1968)*). But our cases adopt no such theory. In *York*, which was decided before the Code, we said in a footnote without explanation that, "[f]or the purpose of calculating the trustee's fee under this section, we treat the assumption of the existing mortgages as a disbursement." *York, 527 F.2d at 1074 n.12*. Not only does *York* fail to address credit bids, but it also doesn't discuss the meaning of "moneys disbursed." Instead, *York* applies a different statute, one that doesn't tie a trustee's compensation to the amount of "moneys disbursed." *Southwestern Media* is equally inapplicable; it concerns not trustees' fees but whether a trustee violated his fiduciary duties. While that opinion contains some advisory language about trustee compensation, we made clear that we were "not decid[ing] how the trustee's fee base would [be] defined," rendering any [*1088] language about *section 326(a)* rank dicta. *Sw. Media, 708 F.2d at 424*.

Finally, Tamm argues that our reading of *section 326(a)* produces absurd results. *See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989)* (Scalia, J., concurring). According to Tamm, taking the text literally means that the difference for a trustee between being paid for his services and working for free may turn on trivialities. When a third party wins [**10] an auction, the money collected counts in calculating the trustee's fee, but if a secured creditor tops the third party's bid by a mere dollar, the trustee gets nothing, even though he does the same work and achieves the same result for the estate.

[HN9] The distinction drawn by *section 326(a)* may be harsh and misguided, but it is not absurd. The absurdity canon isn't a license for us to disregard statutory text where it conflicts with our policy preferences; instead, it is confined to situations "where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 471, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)* (Kennedy, J., concurring); *see also* Antonin Scalia & Bryan Garner, *Reading Law* 234

(2012). If the text of *section 326(a)* is not wise, it is at least rational. Excluding credit bids may have been meant to motivate trustees to seek out third party buyers and thus get better results for the estate. The legislators may have estimated that this benefit of excluding credit bids from trustees' fees outweighed any of the problems described above. Congress made a policy judgment in selecting the words of *section 326(a)*, and we are in no position to contradict it.

* * *

[HN10] In drafting *section 326(a)*, Congress [**11] may not have chosen the most sensible path. But between the statute's clear language and on-the-button legislative history, it appears that Congress's choice was deliberate. We hold that *section 326(a)* does not permit a trustee to collect fees on a credit bid transaction in which the trustee disburses only property, not "moneys," to the creditor. Other courts of appeals have reached the same conclusion and we find no basis for creating a circuit conflict.

AFFIRMED.