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Everybody Wants to Get Paid: The Complete Guide to Compensation Issues

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EVERYBODY WANTS TO GET PAID: COMPLETE GUIDE TO COMPENSATION ISSUES

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CHAPTER 7 COMPENSATION ISSUES

"IF I HAD THAT MUCH MONEY, I WOULDN'T NEED TO FILE BANKRUPTCY"

- Post-BAPCPA attorneys fees for representing consumer debtors have been on the rise.
- Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17 (2012).
- "For no-asset cases filed under Chapter 7, mean attorney fees have increased 48%—as high as $1,500 at the mean in some jurisdictions."

"IF I HAD THAT MUCH MONEY, I WOULDN'T NEED TO FILE BANKRUPTCY"

- *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125 (7th Cir. 2003): obligations owing under a prepetition fee agreement are subject to automatic stay and bankruptcy discharge.
- Traditional solution: Plenary representation, paid in full pre-petition.
  - Problems?
- Alternative? Unbundling!
  - Limited Service Agreements
  - Bifurcation

LIMITED SERVICE AGREEMENTS, A/K/A A "PERILOUS PATH"

- Rule 1.1: "A lawyer ***shall*** provide ***competent representation*** to a client. Competent representation requires the ***legal knowledge***, ***skill***, ***thoroughness*** and ***preparation reasonably necessary for the representation***."
- Rule 1.2(c): "A lawyer ***may*** limit the scope of representation ***if*** the limitation is ***reasonable under the circumstances*** and the ***client gives informed consent***."

LIMITED SERVICE AGREEMENTS, A/K/A A "PERILOUS PATH"

- As always, examples of what ***not*** to do abound:
  - Tedocco v. DeLuca (In re Seare), 515 B.R. 599 (B.A.P. 9th Cir. 2014)
  - In re Collmar, 417 B.R. 920 (Bankr. N.D. Ind. 2009)
  - In re Johnson, 291 B.R. 462 (Bankr. D. Minn. 2003)
  - In re Egwim, 291 B.R. 559 (Bankr. N.D. Ga. 2003)

PRE AND POST FILING BIFURCATION

- In re Slabbinck, 482 B.R. 576 (Bankr. E.D. Mich. 2012)
- In re Grimmett, No. 16-01094-JDP, 2017 Bankr. LEXIS 1492, 2017 WL 2437231 (Bankr. D. Idaho June 5, 2017)

"IF I HAD THAT MUCH MONEY, I WOULDN'T NEED TO FILE BANKRUPTCY"

- So…file Chapter 13 instead???

CHAPTER 13 COMPENSATION ISSUES

WAIT!!! WHAT ABOUT CHAPTER 7 TRUSTEES?

- H.R. 3553, the Bankruptcy Administration Improvement Act of 2017
- Amends the Bankruptcy Code to raise the compensation of trustees in chapter 7 bankruptcy cases from $60 to $120 per case and funds the raise by increasing the Chapter 7 filing fee by $60.
- Can debtors afford and increase to the filing fee? What if it was offset by elimination of the credit counseling requirement? What if creditors helped fund with a small filing fee for POCs ($5.00 or so)?

AND CREDITORS?

CHAPTER 13 COMPENSATION ISSUES

FOR REAL THIS TIME.

THE NEW BANKRUPTCY RULES REGARDING SERVICE IN CHAPTER 13 CASES

RULE 3015

- Rule 3015(c) now requires that the new national form plan (Official Form 113) be filed unless the judicial district where the case was filed has adopted a local form plan that complies with Rule 3015.1.
- Service of the plan is governed by Rule 3015(d):
  - Under the old Rule 3015(d), the plan or a plan summary was required to be included with the notice of the confirmation hearing sent pursuant to Rule 2002.
  - Now, Rule 3015(d) has eliminated the option of serving a plan summary, which means the entire plan must be served.
  - Also, Rule 3015(d) no longer requires the plan to be served with the notice of confirmation hearing. If the plan is not served with the notice of the confirmation hearing, the debtor must serve the plan when it is filed.

RULE 3015 (CONT.) - SERVICE REQUIREMENTS

- If a debtor includes a plan provision requesting a determination of an allowed secured claim, the plan must be served pursuant to Rule 7004. In other words, the plan must be served in the same manner as a summons and complaint in an adversary proceeding.
- In most cases, service via first class mail will suffice under Rule 7004(b).
- However, it is important to note that Rule 7004(b)(4) requires that service by first class mail on a corporation must be sent to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service.
  - Service of a plan that includes a provision determining the value of a secured claim held by a corporation cannot simply be mailed to a business address.
- As a side note, Rule 4003(d) states that debtors attempting to avoid a lien pursuant to 11 U.S.C. § 522(f) may do so by motion or through the plan; however, if they wish to avoid a lien in the plan, the plan must be served pursuant to Rule 7004.

RULE 2002

- Subsection (b)(3) now requires the bankruptcy clerk to give all parties in interest at least twenty-eight days' notice of the date of the confirmation hearing in a chapter 13 case.
- The new subsection (a)(9) requires the clerk to give all parties at least twenty-one days' notice of the time for filing objections.
  - Note: Rule 3015(f) now states the deadline to file objections to confirmation is seven days prior to the confirmation hearing. Previously, the rule merely stated that objections must be filed prior to the confirmation of the plan.

RULE 3012

- Pursuant to Rule 3012(b), debtors are now permitted to request a determination of the amount of an allowed secured claim through a chapter 13 plan provision.
- Such a determination may also be made by motion or in a claim objection.
- The prior rule only permitted such a determination be made by motion.
- A determination of the value of a secured claim held by a governmental unit must be made by motion or claim objection, not in a plan provision.
- A request to determine the amount of a claim entitled to priority may be made only be motion after a claim is filed or in a claim objection.

RULE 5009

Rule 5009(d) is a new subsection stating that if a claim that was secured by property of the estate is subject to a lien, the debtor may request the entry of an order declaring the claim satisfied and that the lien has been released pursuant to the plan.

Such a request must be made by motion and served pursuant to Rule 7004 (i.e., in the same manner as service of a complaint and summons).

PROOFS OF CLAIM AND CLAIM OBJECTIONS

- Rule 3002(a) now explicitly states that a secured creditor must file a claim for such claim to be allowed.
- However, that same subsection does state that a valid lien is not void due only to the secured creditor's failure to file a claim.
- Rule 3002 also shortens the claims bar date for all creditors other than governmental entities to 70 days.
- The proof of claim filing deadline for governmental entities has not changed
- Rule 3007(A) requires that objections to claims be served on a claimant by first-class mail to the person designated on the claim. If the objection is to a claim of the United States, it must be served in the manner of a summons and complaint pursuant to Rule 7004. Pursuant to Rule 7004(B), service shall also be made by first class mail on the debtor and the trustee.

SERVICE ISSUES IN CONSUMER BANKRUPTCY CASES

- The distinguishing feature of Rule 7004 is nationwide service by mail.
- So generally, service by mail is acceptable.
- Rule 7004(b) begins as follows:
  - Service by first class mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) - (j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

HOW TO SERVE AN INDIVIDUAL

- Paragraph (1) of Rule 7004(b) provides for service:
  - Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.
- Note that Rule 7004(b)(1) **does not** permit a mailing to a post office box.

HOW TO SERVE A DOMESTIC OR FOREIGN CORPORATION OR OTHER UNINCORPORATED ASSOCIATION

- Paragraph (3) of Rule 7004(b) provides for service:
  - Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
- This rule requires that the corporate officer or agent be identified by name. Hence, mailing a motion to "ABC Loan Company, 125 Main Street, Houston, Texas 77001" or to "President, ABC Loan Company" would not constitute sufficient service.
- The internet has become the easiest way to determine the name of an office. Otherwise, you can be "old school" and simply pick up the phone and call. The names of registered agents for service of process may be obtained from the secretary of state website in the state where the company is incorporated or has registered to do business.
- In preparing service, pay careful attention to the name of a business entity and include the full name of the entity in both the motion and the certificate of service. There are many corporations with similar sounding names or multiple affiliated corporations. Serving the wrong company may mean that the order or judgment is worthless.

FEE JUMPING

§ 330. COMPENSATION OF OFFICERS

- (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328 and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 --
- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

RULE 2016(A) APPLICATION FOR COMPENSATION OR REIMBURSEMENT

- An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

NORTHERN DISTRICT OF ILLINOIS LOCAL RULE 2016-1

- Every agreement between a debtor and an attorney for the debtor that pertains, directly or indirectly, to the compensation paid or given, or to be paid or given, to or for the benefit of the attorney must be in the form of a written document signed by the debtor and the attorney. Agreements subject to this rule include, but are not limited to, the Court-Approved Retention Agreement, other fee or expense agreements, wage assignments, and security agreements of all kinds. Each such agreement must be attached to the statement that must be filed under Fed. R. Bankr. P. 2016(b) in all bankruptcy cases. Any agreement entered into after the filing of the statement under Fed. R. Bankr. P. 2016(b) must be filed as a supplement to that statement within 14 days of the date the agreement is entered into.

LOCAL RULE 5082-2 - SPECIFIC TO CHAPTER 13

- B. Requirements
- (1) All requests for awards of compensation to debtor's counsel in Chapter 13 cases must be made using the Form Fee Application, which must be accompanied by a completed Form Fee Order specifying the amounts requested.
- (2) All requests for awards of compensation to debtor's counsel must include a certification that the disclosures required by Rule 2016-1 have been made.
- (3) Applications for original fees must be noticed for hearing on the Original Confirmation Date at the time for confirmation hearing.

LOCAL RULE 5082-2 CONT.

- C. Flat Fees
- (1) If debtor's counsel and the debtor have entered into the Court-Approved Retention Agreement, counsel may apply for a Flat Fee not to exceed the amount authorized by the applicable General Order. If the Court-Approved Retention Agreement has been modified in any way, a Flat Fee will not be awarded, and all compensation may be denied.
- (2) If debtor's counsel and the debtor have not entered into the Court-Approved Retention Agreement, the Form Fee Application must be accompanied by a completed Form Itemization.
- (3) The Flat Fee will not be awarded and all compensation may be denied if, in addition to the Court-Approved Retention Agreement, the debtor and an attorney for the debtor have entered into any other agreement in connection with the representation of the debtor in preparation for, during, or involving a Chapter 13 case, and the agreement provides for the attorney to receive: (a) any kind of compensation, reimbursement, or other payment; or
- (b) any form of, or security for, compensation, reimbursement, or other payment that varies from the Court-Approved Retention Agreement.

STATEMENT OF FINANCIAL AFFAIRS #16

- Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition? Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

CREDITOR RECOUPMENT

COST OF COLLECTION AND POST-PETITION FEE NOTICES

COST OF COLLECTION AND POST-PETITION FEE NOTICES

- Hanging paragraph of § 1325(a):

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

COST OF COLLECTION AND POST-PETITION FEE NOTICES

- What needs to be in the order allowing fees?
  - What was the process that brought the motion before the court;
  - The collateral
  - Amount of fees
  - How the fees are to be paid

QUESTIONS?

HOW DO CREDITORS GET PAID IN A CONSUMER BANKRUPTCY CASE?

CONSUMER CHAPTER 13 CASES

Introduction

Everyone wants to be paid. And creditors want the attorney's fees they pay out to be reimbursed. Getting the fees reimbursed is a common subject. Traditionally, the Chapter 13 plan addresses the issue of reimbursement of fees in general. In the Northern District of Illinois, however, the courts employ the National Plan. The National Plan is silent on this issue.

In Chapter 13, only a debtor can offer a plan. Therefore, the creditors are left with only one option; plan objection. It is through objections to the plan that a creditor may seek reimbursement of post filing/pre-confirmation fees. The relevant statutes in a chapter 13 are:

- Section 1322(b)(4): allowing for the concurrent payment of secured and unsecured creditors;
- Section 1326(b): controlling the order of distribution by requiring certain payments of fees and administrative expenses; and
- Section 1325(a)(5)(B): requiring equal monthly payments to secured creditors as well as payment in full and lien retention under applicable non-bankruptcy law.

Post-confirmation fees can be recovered through post-petition fee notices or motions for costs of collection. Neither are perfect vehicles for recovery of fees. Also, not all secured debts are treated similarly. Treatment changes if the collateral is a vehicle or real property.

Creditors secured with a motor vehicle

a) Pre plan confirmation: Debtor to retain vehicle

1 Motion / objection to confirmation

The first query is whether the attorney's fees are recoverable. This question has been addressed by several courts.

GMAC v. Jenkins 18 B 35297 (ND IL 2009): Applying the Supreme Court decision of Travelers Casualty v. PG&E, 549 U.S. 443, 127 S. Ct 1199, 167 L.Ed.2d 178 (2007): Attorney's fees are allowable unless otherwise prohibited.

11 USC Sec 506(b) provides that an under secured or unsecured creditor cannot recover attorney's fees. However, in a claim governed by 11 USC Sec. 1325(a)(5), Section 506 of the bankruptcy code does not apply.

Therefore, under non-bankruptcy circumstances, a creditor would be able to recover attorney's fees under their contract. In other words, if the underlying contract provides for recovery of the creditor's attorney's fees, those fees must be paid through the plan. See also In re Marks, 394 B.R. 198 (Bankr.N.D.Ill.2008).

The Marks case held that when a contract provided that the buyer agreed to pay reasonable attorney's fees, costs and expenses incurred in the collection or enforcement of the debt or recovery of the collateral, that is a valid contractual provision. As such, a vehicle purchased within 910 days of the filing of the bankruptcy, the debtor is obligated to pay the amount due the creditor under all the terms of the underlying retail installment contract, which includes fees and costs.

The purpose of the addition of the "hanging paragraph" of 11 USC Sec. 1325(a) is that to require debtors under the Bankruptcy Abuse Prevention and Consumer Protection Act (or BAPCPA) to pay the amount the agreed to pay under their contract, if the contract was entered into within 910 days of the filing of the filing of a bankruptcy case. The debtors may still reduce the interest on the contract, but creditors are entitled to object to treatment. See In re Trejos 374 B.R. 210 (B.A.P. 9th Cir. 2007).

Can a plan provide for the payment of debtor's attorney's fees ahead of payment to a creditor secured with a motor vehicle? There is a split in decisions, but in the ND of Illinois, we follow the case of In re Williams 583 B.R. 453 (Bankr. N.D. IL 2018). There, the court held that a plan that only provided adequate protection payments to a secured creditor with a step up in payments after the debtor's attorney's fees are paid in full cannot be confirmed over creditor's objection.

Fee jumping:

1. for support Debtor's counsel will likely cite to *In re Marks*, 394 B.R. 198, 202 (Bankr. N.D. Ill. 2008) (Cox, J.); *but c.f., In re Sanchez*, 384 B.R. at 577; *In re Denton*, 370 B.R. 441, 443 (Bankr. S.D. Ga. 2007); *In re Willis*, 460 B.R. 784, 791 (Bankr. D. Kan. 2011); *In re Williams*, 385 B.R. 468, 475 (Bankr. S.D. Ga. 2008); *In re Henning*, 420 B.R. 773, 789 (Bankr. W.D. Tenn. 2009); In re Wagner, 342 B.R. 766, 771 (Bankr. E.D. Tenn. 2006); *In re Leath*, 389 B.R. 494, 501 (Bankr. E.D. Tex. 2008); *In re Espinoza*, 2008 WL 2954282, at *4 (Bankr. D. Utah Aug. 1, 2008); *In re Kirk*, 465 B.R. 300, 305 (Bankr. N.D. Ala. 2012); *In re Romero,* 539 B.R. 557, 560 (Bankr. E.D. Wis. 2015).

In re Carr and In re Lindsey

A threshold question to be answered, however, is whether the failure of a secured creditor to object to confirmation of the plan renders section 1325(a)(5)(A) satisfied in these circumstances. If it does, then section 1325(a)(5)(B) would not have any application, see Andrews, 49 F.3d at 1409 (noting the disjunctive "or"), and the objection to the accelerated treatment of debtors' attorneys' fees under section 1326(b)(1) on the basis that such treatment causes the monthly payments to certain secured creditors to be unequal would have no merit.

A majority of courts consider section 1325(a)(5)(A) to be satisfied as to the debtor's secured creditors where secured creditors have had proper notice and no secured creditor is objecting. See, e.g., In re Jones, 530 F.3d 1284, 1291 (10th Cir. 2008); In re Lorenzo, No. BAP PR 15-011, 2015 WL 4537792, at *6 (B.A.P. 1st Cir. July 24, 2015) (citing In re Flynn, 402 B.R. 437, 443 (B.A.P. 1st Cir. 2009)), aff'd, 637 F. App'x 623 (1st Cir. 2016); In re Olszewski, 580 B.R. 189, 192 (Bankr. D.S.C. 2017). The court

finds that secured creditors, in this case the auto lenders, have had adequate notice of the debtor's plan in both cases. Neither has objected to the current plans being proposed. Section 1325(a)(5)(A) is therefore satisfied. Because section 1325(a)(5)(A) is satisfied, section 1325(a)(5) is satisfied. See Andrews, 49 F.3d at 1409 (noting the disjunctive "or"). The cramdown requirements housed separately in section 1325(a)(5)(B),such as section 1325(a)(5)(B)(iii)(I), are simply not implicated. No other independent, freestanding confirmation requirement found in section 1325(a) is being transgressed by these plans, nor are these plans violating any other self-executing provision located in the Bankruptcy Code. See United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 276–77 (2010). The trustee's objection to confirmation on the grounds that section 1325(a)(5)(B)(iii)(I) is being transgressed by this plan is therefore overruled, since no properly noticed secured creditor is objecting.

[So creditors need to file an objection to the plan]

And it's not bad faith to do what the Code allows you to do:

In re Carr/Lindsay

There is no per se rule that a plan proposing to pay attorneys' fees ahead of the debtor's creditors is a violation of section 1325(a)(3)'s good faith requirement. In re Crager, 691 F.3d 671, 675–76 (5th Cir. 2012).… The court otherwise finds that there is no good faith deficiency with respect to the proposal of this chapter 13 plan. See In re Rimgale, 669 F.2d 426, 431–33 (7th Cir. 1982).

But see

In re Jimmar

The plan proposed by Debtor in this case, and arguably by Semrad Law in their other cases, reflects a "fundamental [un]fairness in dealing with her creditors." *In re Smith*, 286 F.3d 461, 466 (7th Cir. 2002). The problematic pattern is evident when auto lender terms in this case and others are examined. In an effort to ensure that their fees are paid first and at an accelerated

rate, Semrad Law is proposing plans with artificially low set payments to secured creditors, regardless of the circumstances. Debtor's case certainly reflects that trend. She seeks to repay debts on two vehicles worth about $2,500 and $17,000, yet the "adequate protection" payments are *$15 and $50* to be paid each month for *14 months*. First, that equates to about one (1) month of the contractually required car payment being paid by the time she is almost halfway through a 36-month plan. If her case were dismissed at that point, she would be in a much worse position as the full amount (as supposed to the more favorable "crammed down" value of the vehicles), plus compounded interest would be due at once, forcing Debtor to either surrender the vehicles or file another Chapter 13 bankruptcy petition Second, adequate protection is generally calculated in this district "by looking at the N.A.D.A. Guide to compare the value of the collateral at the time of filing the petition with the value of the collateral in the month immediately after filing." *In re Williams*, No. 17bk33186, 2018 WL 1747692, at *3 (Bankr. N.D. Ill. April 10, 2018), *quoting In re Marks*, 394 B.R. 198, 202 (Bankr. N.D. Ill. 2008). When questioned at oral argument about how Debtor could be acting in good faith by offering a $35 difference in monthly payments for an older car worth almost 10 times less than her newer car, counsel (Semrad Law) explained that different methods of calculating depreciation are used—interest-only, 1% of value, or difference in N.A.D.A. value—based on the particular case and experience with the creditor. (Hearing Tr. 51:10-25; 52:1-15; 56:9-25)….

By entering into agreements with debtors to prioritize counsel as a creditor *and* failing to adequately disclose that fact to the court *and* repeatedly proposing plans with artificially low set payments that extend through almost half of the plan term, for the sole purpose of ensuring that counsel is paid in full first, Semrad Law has easily called into question whether any of these plans are being offered in good faith. *See Smith*, 286 F.3d at 466 (asking if the debtor is "really

trying to pay the creditors to the reasonable limit of his ability or is he trying to thwart them").

To be clear, the court is not holding that every plan filed by any counsel containing a low set payment to secured creditors and accelerated fees for counsel automatically fails to comply with § 1325(a)(3). That finding requires a case-by-case analysis of the particular facts.

NOTE: *A CREDITOR MUST OBJECT* when a debtor files a claim that does not comply with the "hanging paragraph" of 11 USC Sec. 1325(a):

Chapter 13 debtors who chose to retain vehicles secured by purchase money security interests (PMSI) purchased within 910 days of their bankruptcy filings were required to pay full principal and interest on their claims, even though "hanging" paragraph added by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) provided that Code provision dealing with determination of creditor's secured status did not apply when debtor sought to "cramdown" plan, where no objections were filed to creditors' proofs of claim, and creditors' claims were valid under state law. 11 U.S.C.A. §§ 506, 1325. Citifinancial Auto v. Hernandez-Simpson, 369 B.R. 36, 57 Collier Bankr. Cas. 2d (MB) 34, Bankr. L. Rep. (CCH) P 81014 (D. Kan. 2007) (abrogated by, In re Ford, 574 F.3d 1279, 62 Collier Bankr. Cas. 2d (MB) 227, Bankr. L. Rep. (CCH) P 81551, 69 U.C.C. Rep. Serv. 2d 1044 (10th Cir. 2009)).

2 To recover fees prior to confirmation, what the order must provide.

The pre-confirmation order must provide for:

a) The amount of fees;
b) The amount of costs;
c) The amount of the claim INCLUDING fees and costs;
d) A provision that the plan is amended to provide for this amount; and
e) A provision that provides that the contract terms remain intact until underlying contract is satisfied or the case is discharged.

b) Pre-confirmation. Plan provides for the surrender of the vehicle:

When the vehicle is to be surrendered, the claim may be bifurcated. Therefore, an unsecured claim is allowed (if timely under Sec 506(a)) and shall be treated in the plan along with other general unsecured creditors.

"Hanging paragraph" added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) does not eliminate an under secured creditor's deficiency claim when, in a Chapter 13 plan, the debtors propose to surrender a "910-car"; unlike the retention option set forth in the Code, the surrender option does not speak to *satisfaction* of a claim, the Code does not prohibit bifurcation but, instead, the hanging paragraph simply removes the Code's method of bifurcation and has no effect on state-law rights, and nothing in the Code denies a creditor an unsecured deficiency claim. 11 U.S.C.A. §§ 506(a), 1325(a), (a)(5)(C). Capital One Auto Finance v. Osborn, 515 F.3d 817, 59 Collier Bankr. Cas. 2d (MB) 182 (8th Cir. 2008).

Additionally, the "hanging paragraph", while specifying that bankruptcy statute authorizing bifurcation of under secured claims shall not apply, not just when Chapter 13 debtor elects to retain motor vehicle securing purchase-money creditor's "910 claim" and cram down plan over such a creditor's objection, but also when debtor elects to surrender vehicle, did not affect creditor's right to *deficiency judgment* if the surrendered vehicle could not be sold for sum sufficient to satisfy its claim, which right to deficiency arose, not under Code provision that was rendered inapplicable to "910 claims," but under non-bankruptcy law. 11 U.S.C.A. §§ 506(a), 1325(a), (a)(5)(A-C). In re Particka, 355 B.R. 616, 57 Collier Bankr. Cas. 2d (MB) 278, Bankr. L. Rep. (CCH) P 97113 (Bankr. E.D. Mich. 2006) (rejected by, In re Brown, 68 Collier Bankr. Cas. 2d (MB) 1771, 69 Collier Bankr. Cas. 2d (MB) 1334, 2012 WL 6021469 (Bankr. M.D. Ga. 2012).

c) Post Plan Confirmation

1 Secured creditor

Post confirmation issues tend to be treated in motions. Motions are brought under two main sections: 11 USC Sec. 362(d) for relief from the automatic stay, or 11 USC Sec. 1307 (c) to dismiss for unreasonable delay, failure to make payments, or failure to comply with a material plan term, material default.

a) Motions under 11USC Sec. 362(d): A creditor can bring a motion for stay relief if there is a default under the terms of the underlying contract (failure to provide insurance coverage) or under the plan. The motion can reference the attorney's fees incurred and the creditor can require recovery of its fees and costs to resolve the motion.

   If the motion for relief from the automatic stay is granted, it's not likely attorney's fees will be granted. If the debtor moves to vacate the order modifying the stay, one of the material terms to be corrected must also be repayment of fees and costs for the motion for relief and the motion to vacate. The fees and costs may be paid directly to the creditor or through the plan via an order.

b) Motion to dismiss under 11 USC Sec 1307(c): The resulting order of dismissal would moot any request for attorney's fees. If the motion was proper but resolved without dismissal, attorney fees may be considered via an order approved by the Court.

2 Surrendering a vehicle post confirmation:

If a debtor confirms a plan that provides for the retention of a vehicle then later moves to modify that plan to surrender it, what about the claim of the creditor and attorney's fees for the motion for relief under 11 USC Sec. 362(d).

Some courts do not allow the debtor to reclassify a secured claim into an unsecured claim post confirmation. See In re Nolan, 383 B.R. 391 (6th Cir. 2008). Regardless, if the debtor modifies their plan post confirmation to surrender a vehicle and the creditor is required to file a motion for relief, it could be argued that the attorney's fees and costs should be awarded. In the event the court follows Nolan, it would follow that fees should be paid as secured. However, if

the court does not follow Nolan, then the creditor would be left with an unsecured claim for the deficiency. While the contract will control and allow for fees, if the claim is reclassified to an unsecured claim, the creditor may only be paid a percentage of its debt and it would be unlikely that fees and costs would be recovered.

One exception to the unsecured claim fee allowance:

Creditor was entitled to include in its unsecured claim post-petition attorney fees pursuant to its various contracts with debtors. 11 U.S.C.A. §§ 502(b), 506(b). In re Qmect, Inc., 368 B.R. 882, 57 Collier Bankr. Cas. 2d (MB) 300 (Bankr. N.D. Cal. 2007).

Creditors secured with mortgage

a) Pre plan confirmation

1. Motion

- **Costs of collection**: Allows recovery of post-petition, pre-confirmation fees. Not used anymore. The chapter 13 plans no longer provide for the payment of the orders for costs of collection.

- **PPFNs**: Post-Petition Fee Notices. These are notices of fees incurred by lender's attorney's. A copy of the form is attached.

  The PPFNS are a notice of fees incurred and the intent to collect. How are the fees recovered, as a practical matter? Are they actually paid in the Chapter 13 bankruptcy cases? Some courts and chapter 13 trustees treat these as if they are a claim and pay them in accordance with how the claim is treated.

Interesting twist: A creditor can only recover fees in accordance with the actual collection resulting from foreclosure. In other words, other fees, costs are NOT recoverable.

Mortgage that Chapter 13 debtor had executed in favor of her brother, to secure her obligation to brother for funds that he advanced as debtor's share of purchase price ocean-front apartment units that they had purchased as tenants in common, and brother's concomitant entitlement to legal fees, pursuant to attorney fee provision in mortgage documents, related only to brother's interest in property as lender and not as co-tenant, and did not permit brother, in his capacity as over-secured creditor, to recover attorney fees that he incurred in defending debtor's partition action, except upon showing that fees were related to foreclosure of mortgage. 11 U.S.C.A. § 506(b). In re Campbell, 402 B.R. 453 (Bankr. D. Mass. 2009).

b) Post plan confirmation

1. Secured creditor

Post-petition Mortgage Fees, Expenses and Charges Notice (Form B10S2). This form is attached. The creditor will incur attorney's fees for asking its attorney to review the Chapter 13 plan and schedules, for preparing and filing the proof of claim, for monitoring the docket prior to the confirmation hearing and for monitoring filings by the trustee, the debtor or other creditors all of which may affect repayment of its debt. The creditors want to recover these fees but doing that has been difficult.

The National Plan (which is in use in the ND of Illinois) does not address payment of creditor's attorney's fees. Therefore, the parties are somewhat left to plow their own path. It is not unusual that the PPNFs are not paid during the course of the bankruptcy.

Creditor holding long-term residential mortgage debt with which Chapter 13 debtor proposed to deal under cure-and maintenance provision of the Bankruptcy Code had no obligation to give debtor notice, or to obtain court approval, of post petition legal expenses to which it was allegedly entitled under attorney fee provision in mortgage document in order to collect such legal expenses not from bankruptcy estate, but from debtor after completion of her plan payments and entry of discharge order; while imposition of such an obligation might make sense as matter of policy, no such obligation was imposed by Code provision dealing with rights of over secured creditors, by cure-and-maintenance provision itself, or by Bankruptcy Rule that

imposed disclosure obligations only upon creditors seeking payment from bankruptcy estate. 11 U.S.C.A. §§ 506(b), 1322(b)(5); Fed.Rules Bankr.Proc.Rule 2016(a), 11 U.S.C.A. In re Padilla, 389 B.R. 409 (Bankr. E.D. Pa. 2008).

The chapter 13 plans can provide that the debtor will cure the default and maintain monthly mortgage payments. In that event, if the debtor fails to make payments either to the lender and/or to the chapter 13 trustee, the creditor will bring a request for relief from the stay under 11 USC Sec. 362 (d). When the creditor brings such a motion, then it can demand full reimbursement of the fees and costs for the motion before it considers its motion resolved. There are several different ways to resolve the recovery of payment.

CONSUMER CHAPTER 7 CASES

Creditors secured with a motor vehicle

a) If the Debtor elects to reaffirm the debt

Pursuant to Sec. 521 (a)(2), an individual debtor must file his or her Statement of Intention indicating whether to reaffirm. A debtor may reaffirm any dischargeable debt that has not already been discharged. At paragraph D of the new form, the agreement requires disclosure of Agreed repayment terms:

D. Reaffirmation Agreement Repayment Terms *(check and complete one)*:
___ $_____ per month for _____ months starting on_____.

____ Describe repayment terms, including whether future payment amount(s) may be different from the initial payment amount.

_____

_____

_____

Reasonable attorney's fees incurred for the preparation of the agreement must be disclosed. They can be disclosed in this paragraph with specificity.

b) Vehicle surrendered

In the event the debtor surrenders their vehicle there is an unlikely recovery of fees. The recovery would be through the sale (typically an auction sale) of the vehicle. Unless there is an order allowing fees, they will not be recovered. Even if there IS an order allowing fees, there is likely no equity in the vehicle.

Creditors secured with mortgage

a) Asset case. Creditor can recover attorney's fees after notice and motion before the court.

In re Stoecker, 114, B.R. 980 (ND Il 1990):

The court held that an application for attorney's fees under 11 USC Sec. 506(b), The Bank (or applicant) must satisfy four requirements:

i) The Bank must prove that it has a secured claim;

ii) the Bank must be over secured;

iii) the underlying documents must provide for such fees and costs; and

iv) the claim for fees must be reasonable.

Stoecker further citing In re Josephs, 108 B.R. 654, 656 (Bankr.N.D.Ill.1989); In re Rutherford, 28 B.R. 899, 902 (Bankr.N.D.IL 1983); In re Salazar, 82 B.R. 538, 540 (9th Cir BAP 1987); In re Reposa 94 B.R. 257, 259-90 (Bankr.D.R.I.1988).

b) No Asset Case:

In the event of a no asset case, and the creditor's collateral is real estate, the likelihood of fee recovery is small. Again, the debtor could elect to reaffirm and the fees could be added. However, most debtors do not reaffirm their mortgages.

CHAPTER 11 CASES

Fees: Fees are allowed pursuant to contract.

Oversecured creditor's failure to provide notice of its intent to invoke financing agreement's attorney fee provision, as required under state law, did not bar it from recovering post-petition attorney fees in debtor's voluntary Chapter 11 case, even though attorney fee claim would not have been allowed if debtor had not filed bankruptcy petition. 11 U.S.C.A. §§ 502, 506(b); West's Ga.Code Ann. § 13-1-11. JP Morgan Chase Bank v. ELL 11, LLC, 414 B.R. 881 (M.D. Ga. 2008).

DEBTOR'S ATTORNEY'S FEES IN CHAPTER 13

I. Why is this so important?

A. Potential for overreaching.

In re Jackson, 401 B.R. 333 (Bankr. N.D. Ill. 2009).

Section 329 reflects the Congressional concern that a debtor's payments to his attorney present a "serious potential for evasion of creditor protection provisions of the bankruptcy laws." H.R.Rep. No. 95–595, at 329 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6285. It also reflects a concern that the payments present a "serious potential for overreaching by the debtor's attorney," *id.*—in other words, that a "failing debtor" will be tempted " 'to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure,' " *In re Perrine,* 369 B.R. 571, 580 (Bankr.C.D.Cal.2007) (quoting *Conrad, Rubin & Lesser v. Pender,* 289 U.S. 472, 477–78, 53 S.Ct. 703, 77 L.Ed. 1327 (1933) (internal quotation omitted)); *see also Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.*), 4 F.3d 1556, 1565 (10th Cir.1993). Payments a debtor makes to his attorney should therefore be subjected to "careful scrutiny." H.R.Rep. No. 95–595, at 329 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6285.

To that end, an attorney must "lay bare all [his] dealings" with the debtor concerning compensation. *In re Saturley,* 131 B.R. 509, 517 (Bankr.D.Me.1991). The disclosures he makes must be "precise and complete." *Berg,* 356 B.R. at 381 (internal quotation omitted). "Coy or incomplete disclosures" that force the court "to ferret out pertinent information" will not do, *Saturley,* 131 B.R. at 517; *see also Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park–Helena Corp.),* 63 F.3d 877, 881 (9th Cir.1995), even if they are merely the result of negligence or inadvertence, *Jensen v. U.S. Trustee (In re Smitty's Truck Stop, Inc.),* 210 B.R. 844, 848–49 (10th Cir. BAP 1997). Very simply, "[a]nything less *340 than the full measure of disclosure" is unacceptable. *Saturley,* 131 B.R. at 517.

B. Integrity of the system.

In re Andreas, 373 B.R. 864 (Bankr. N.D. Ill 2007).

Timely disclosure under § 329 and Bankruptcy Rule 2016(b) is central to the integrity of the bankruptcy process. *In re TJN, Inc.,* 194 B.R. 400, 403 (Bankr.D.S.C.1996). Failure to disclose (in this case fully disclose) is sanctionable and can include partial or total denial of compensation, as well as partial or total disgorgement of fees already paid. *See In re Prod. Assocs., Ltd.,* 264 B.R. 180, 186, 189 (Bankr.N.D.Ill.2001)

In re Brent, 458 B.R. 444 (Bankr. N. D. Ill. 2011)

Compensation of debtors' attorneys is a matter critical to "the integrity of the bankruptcy process." *In re Nelson,* 424 B.R. 361, 363 (Bankr.N.D.Ill.2009); *see also In re Kindhart,* 160 F.3d 1176, 1177 (7th Cir.1998) (calling the question of attorney's fees "an important matter not only to attorneys, but also to the courts and the public"). Because of its importance, the subject is treated extensively in both the Bankruptcy Code and Rules. Section 329(a) of the Code requires every attorney for a debtor to file "a statement of the compensation paid or agreed to be paid ... for services rendered ... in contemplation of or in connection with the case...." 11 U.S.C. § 329(a). Rule 2016(b) establishes when a statement disclosing the compensation—often called a "Rule 2016(b) statement"—must be filed. Fed. R. Bankr.P. 2016(b). All compensation must be disclosed, whether the attorney will be compensated from the estate or from some other source. *In re Redding,* 263 B.R. 874, 878 (8th Cir. BAP 2001); *In re Jackson,* 401 B.R. 333, 339 (Bankr.N.D.Ill.2009).

II. What are the requirements?

A. Applicable statutes and Rules

1. §330(a)

§ 330. Compensation of officers

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

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

(B) reimbursement for actual, necessary expenses.

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

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

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

(i) unnecessary duplication of services; or

(ii) services that were not--

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

(II) necessary to the administration of the case.

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

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

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

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

2. Rule 2016(a) and (b).

(a) Application for compensation or reimbursement

An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the

particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) Disclosure of compensation paid or promised to attorney for debtor

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

B. Local Rules

1. Northern District of Illinois Local Rule 2016-1

Every agreement between a debtor and an attorney for the debtor that pertains, directly or indirectly, to the compensation paid or given, or to be paid or given, to or for the benefit of the attorney must be in the form of a written document signed by the debtor and the attorney. Agreements subject to this rule include, but are not limited to, the Court-Approved Retention Agreement, other fee or expense agreements, wage assignments, and security agreements of all kinds. Each such agreement must be attached to the statement that must be filed under Fed. R. Bankr. P. 2016(b) in all bankruptcy cases. Any agreement entered into after the filing of the statement under Fed. R. Bankr. P. 2016(b) must be filed as a supplement to that statement within 14 days of the date the agreement is entered into.

2. Local Rule 5082-2 - Specific to Chapter 13

B. Requirements
(1) All requests for awards of compensation to debtor’s counsel in Chapter 13 cases must be made using the Form Fee Application, which must be accompanied by a completed Form Fee Order specifying the amounts requested.

(2) All requests for awards of compensation to debtor’s counsel must include a certification that the disclosures required by Rule 2016-1 have been made.

(3) Applications for original fees must be noticed for hearing on the Original Confirmation Date

at the time for confirmation hearing.

C. Flat Fees
(1) If debtor's counsel and the debtor have entered into the Court-Approved Retention Agreement, counsel may apply for a Flat Fee not to exceed the amount authorized by the applicable General Order. If the Court-Approved Retention Agreement has been modified in any way, a Flat Fee will not be awarded, and all compensation may be denied.

(2) If debtor's counsel and the debtor have not entered into the Court-Approved Retention Agreement, the Form Fee Application must be accompanied by a completed Form Itemization.

(3) The Flat Fee will not be awarded and all compensation may be denied if, in addition to the Court-Approved Retention Agreement, the debtor and an attorney for the debtor have entered into any other agreement in connection with the representation of the debtor in preparation for, during, or involving a Chapter 13 case, and the agreement provides for the attorney to receive:
(a) any kind of compensation, reimbursement, or other payment; or

(b) any form of, or security for, compensation, reimbursement, or other payment that varies from the Court-Approved Retention Agreement.

D. Notice
(1) All fee applications must be filed with the clerk, served on the debtor, the trustee, and all creditors, and noticed for hearing as an original motion. However, a fee application need not be served on all creditors if:
(a) the Creditor Meeting Notice is attached to the application, has been served on all creditors, and discloses the amount of original compensation sought; and

(b) the hearing on compensation is noticed for the Original Confirmation Date.

(2) Rule 9013-1(E)(2), which governs the dates for the presentment of motions, does not apply to requests under this Rule.

C. Forms

1. Form B2030 - Disclosure of Compensation of Attorney for Debtor(s)

What *you* have received in fees

a. does not include costs

b. *does* include from other parties.

In re Jackson, 401 B.R. 333 (Bankr. N.D. Il 2009).

All compensation an attorney receives in the applicable period must be disclosed; it makes no difference whether the attorney will be compensated from the estate or from some other source. *In re Redding,* 263 B.R. 874, 878 (8th Cir. BAP 2001); Lundin, *supra,* § 294.1 at 294–2 to –3.

In re Varan, 2014 WL 2881162 (Bankr. N.D. Ill 2014) where the debtor's LLC made the payments to the attorneys. Timely disclosure of the fee statement is mandatory and central to the integrity of the bankruptcy process: "a belated disclosure is insufficient to cure the failure to timely disclose fees received ." *In re Valladares,* 415 B.R. 617, 623 (Bankr.S.D.Fla.2009). "If every attorney waited until he or she is caught to file a statement of disclosure, the entire concept of mandatory disclosure would become a farce."

2. Form B107: Statement of Financial Affairs #16:

Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition? Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

What the *Debtor* has paid in the last year. Note: In re Jackson -

The Rule 2016(b) disclosure is the *attorney's* statement; the SOFA is the *debtor's* statement.

a. The two amounts listed in these forms can be different, but the differences need to be explained.

i. Prepaid expenses

ii. Fees received for another case

iii. Payments that aren't fees paid by the debtor to someone else (credit repair/loss mitigation, etc.)

b. Double check the math

III. How Do I Get Fees Approved?

A. The Rise of Flat or "No Look Fees"

In re Brent

[B]ankruptcy courts have increasingly adopted systems under which attorneys for chapter 13 debtors can be awarded a presumptively reasonable standard fee for each case. *See In re Williams,* 357 B.R. 434, 439 n. 3 (6th Cir. BAP 2007) (noting that "[a] growing number of

bankruptcy courts" have implemented these fees); *In re Debtor's Attorney Fees in Chapter 13 Cases,* 374 B.R. 903, 904–05 (Bankr.M.D.Fla.2007) (same). These flat fees are sometimes called "no look" fees because they are awarded without the kind of detailed application and itemization of services that Rule 2016(a) would otherwise demand. *Williams,* 357 B.R. at 439 n. 3. Often the flat fee is contingent on the execution of a "Rights and Responsibilities" agreement between the attorney and the debtor detailing the obligations of each. *In re Smith,* 331 B.R. 622, 629–30 (Bankr.M.D.Pa.2005). As such, the flat fee represents a kind of agreement not only with the debtor but with the court: in exchange for the attorney's commitment to perform specified legal services for the debtor, the court awards a flat fee and dispenses with the usual application. *Id.* at 629.

By simplifying the compensation process in a large number of fairly routine cases, the adoption of flat or "no look" fees has proven immensely advantageous to both the courts and bar. Flat fees benefit the bar in two ways: they save attorney time otherwise devoted to maintaining extensive records and preparing elaborate fee applications in small cases, and they encourage the efficient practice of law. *Eliapo,* 468 F.3d at 599. Flat fees benefit courts because they save judicial time "that a busy bankruptcy court would otherwise be required to spend dealing with detailed fee applications." *Id.; see also In re Cahill,* 428 F.3d 536, 540–41 (5th Cir.2005). Indeed, the large volume of chapter 13 cases makes full judicial review of a detailed fee application in each case not only "administratively burdensome," *Eliapo,* 468 F.3d at 599 (internal quotation omitted), but, as one noted authority has suggested, "almost inconceivable," Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy,* 4th ed., § 294.1 at ¶ 27, sec. rev. June 17, 2004, www.Ch13online. com.

B. Section 329 authorizes the Court to determine what is reasonable instead of the parties.

1. In re Geraci, 138 F. 3d 314 (7th Cir, 1998).

Section 329(b) authorizes the court to assess the reasonable value of the services counsel provided to the debtor and to compare that value with the amount the debtor paid or agreed to pay for the attorney's services. If the court determines that the fee charged by the attorney is excessive—*i.e.,* that it exceeds the reasonable value of the services provided—then it may cancel any compensation agreement between the attorney and his client, or it may order the return of the excessive portion of the fee to the debtor's estate or to the entity making the payment. 11 U.S.C. § 329(b); *see In re Wiredyne, Inc.*, 3 F.3d 1125, 1127 (7th Cir.1993); *see also In re Mahendra,* 131 F.3d 750, 758 (8th Cir.1997); *In re Hargis*, 895 F.2d 1025, 1025 (5th Cir.1990). In making the "reasonable value" determination, the bankruptcy court is to be guided by section 330 of the Bankruptcy Code, which sets forth a number of factors that Congress deemed relevant to an assessment of the value of professional services. *See Wiredyne*, 3 F.3d at 1128; *In re Basham,* 208 B.R. 926, 931 (9th Cir. BAP 1997); Lawrence P. King, *Collier on Bankruptcy* para. 329.04 [1][c], at 329–19 (15th ed.1996).

2. Bundling of Services

In re Geraci

Geraci did not charge his clients by the hour, but quoted the clients a flat fee for the bundle of legal services required in a no-asset consumer bankruptcy. Thus, the bankruptcy court was unable to compare the hourly rates of Geraci lawyers to the rates charged by comparably skilled practitioners in non-bankruptcy cases. Rather, the court was left to contemplate what such a practitioner would charge for a comparable bundle of services in a non-bankruptcy case. Yet nothing in the record establishes what attorneys in the community would charge in a non-bankruptcy context for such a comparable bundle of services. Indeed, nothing in the record indicates that there even exists a comparable bundle of legal services to which the services here may be compared. The bankruptcy court seemed to view this type of bankruptcy case as unique, given its straightforward, uncomplicated nature, and the fact that the Geraci firm quoted its clients a flat fee for the limited legal services provided. In assessing the reasonable value of those services, then, the court looked to comparable charges in the locale for this type of simple no-asset consumer case. We find that in the circumstances of this case, the bankruptcy court did not abuse its discretion in doing so.

C. Flat Fee Forms - Chapter 13 Northern District of Illinois

1. Rights And Responsibilities Agreement Between Chapter 13 Debtors And Their Attorneys (Court-Approved Retention Agreement, Use for cases filed on or after September 19, 2016) (called the "CARA")

Exerpts from the CARA

…The terms of this court-approved agreement take the place of any conflicting provision in an earlier agreement. This agreement cannot be modified in any way by other agreements. Any provision of another agreement between the debtor and the attorney that conflicts with this agreement is void.

A. Before the case is filed

The Attorney agrees to:

1. Personally counsel the debtor regarding the advisability of filing either a Chapter 13 or a Chapter 7 case, discuss both procedures (as well as non-bankruptcy options) with the debtor, and answer the debtor's questions.

2. Personally explain to the debtor that the attorney is being engaged to represent the debtor on all matters arising in the case, as required by Local Bankruptcy Rule, and explain how and when the attorney's fees and the trustee's fees are determined and paid.

3. Personally review with the debtor and sign the completed petition, plan, statements, and schedules, as well as all amendments thereto, whether filed with the petition or later. (The schedules may be initially prepared with the help of clerical or paralegal staff of the attorney's office, but personal attention of the attorney is required for the review and signing.)

4. Timely prepare and file the debtor's petition, plan, statements, and schedules.

5. Explain to the debtor how, when, and where to make all necessary payments, including both payments that must be made directly to creditors and payments that must be made to the Chapter 13 trustee, with particular attention to housing and vehicle payments.

6. Advise the debtor of the need to maintain appropriate insurance….

B. After the case is filed

The Attorney agrees to:

1. Advise the debtor of the requirement to attend the meeting of creditors and notify the debtor of the date, time, and place of the meeting.

2. Inform the debtor that the debtor must be punctual and, in the case of a joint filing, that both spouses must appear at the same meeting.

3. Provide knowledgeable legal representation for the debtor at the meeting of creditors (in time for check-in and the actual examination) and, unless excused by the trustee, for the confirmation hearing.

4. If the attorney will be employing another attorney to attend the 341 meeting or any court hearing, personally explain to the debtor, in advance, the role and identity of the other attorney and provide the other attorney with the file in sufficient time to review it and properly represent the debtor.

5. Timely submit to the Chapter 13 trustee properly documented proof of income for the debtor, including business reports for self-employed debtors.

6. Timely respond to objections to plan confirmation and, where necessary, prepare, file, and serve an amended plan.

7. Timely prepare, file, and serve any necessary statements, amended statements, and schedules and any change of address, in accordance with information provided by the debtor.

8. Monitor all incoming case information (including, but not limited to, Order Confirming Plan, Notice of Intent to Pay Claims, and 6-month status reports) for accuracy and completeness. Contact the trustee promptly regarding any discrepancies.

9. Be available to respond to the debtor's questions throughout the term of the plan.

10. Prepare, file, and serve timely modifications to the plan after confirmation, when necessary, including modifications to suspend, lower, or increase plan payments.

11. Prepare, file, and serve necessary motions to buy or sell property and to incur debt.

12. Object to improper or invalid claims.

13. Timely respond to the Chapter 13 trustee's motions to dismiss the case, such as for payment default or unfeasibility, and to motions to increase the percentage payment to unsecured creditors.

14. Timely respond to motions for relief from stay.

15. Prepare, file, and serve all appropriate motions to avoid liens.

16. Prepare, file, and serve a notice of conversion to Chapter 7, pursuant to § 1307(a) of the Bankruptcy Code and Local Bankruptcy Rule 1017-1.

17. Provide any other legal services necessary for the administration of the case.

2. Cannot exempt:

In the Northern District of Illinois, when using the CARA

The following is *not* ok to exempt from the fee disclosure:

> Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

Because all these actions are included in the above responsibilities.

3. Agreements are in writing

a. Second Amended General Order No 11-2 Regarding Disclosure of Agreements Between Debtors and their Attorneys in all Cases and Compensation in Chapter 13 Cases (effective April 15, 2011) states in relevant part:

> IT IS ORDERED that every agreement between a debtor and an attorney for the debtor in a case under ANY CHAPTER of the Bankruptcy Code *that pertains, directly or indirectly, to the compensation paid or given, or to be paid or given, to or for the benefit of the attorney* must be in the form of a written document signed by the debtor and the attorney. Agreements subject to this rule include, but are not limited to, the Court-Approved Retention Agreement as posted on the court's website, other fee or expense agreements, wage assignments, and security agreements of all kinds. Each such agreement must be attached to the statement that must be filed under Fed. R. Bankr. P. 2016(b) in all bankruptcy cases. Any agreement entered into after the filing of the statement under Rule 20 16(b) must be filed as a supplement to that statement within 14 days of the date the agreement is entered into.

b. Do Not Contradict the CARA

<u>In re Gillam</u>

The CARA only prohibits agreements contrary to the CARA and, as established previously, the CARA does not address the method or priority by which counsel are paid. Semrad concedes as much in its sur-reply. Additional agreements, therefore, regarding this method and priority of

payment are not prohibited by the CARA. Bankr. N.D. Ill. R. 5082-2(C)(3)(b) (only agreements which conflict with the CARA are prohibited). Nor does the duty to discuss compensation with clients set forth in the CARA supplant the express duties in Local Rule 2016-1 and the General Order. The CARA procedures themselves make clear that compliance with Local Rule 2016-1 and the General Order are preconditions to eligibility.

4. Personally entered into by the parties

In re Jimmar

One of the many important obligations under the CARA is to "personally explain to the debtor. . .how and when the attorney's fees and the trustee's fees are determined and paid." CARA, ¶ (A)(2), Dkt. #15**)**. To fulfill that obligation, counsel must have walked Debtor through the plan and explained the implications of the default distribution scheme in Section F—prioritizing payments to secured creditors

5. Filed with the Court

In re Carr

The understandings that existed in these cases surely fall within this definition. In disclosing to the debtors that the attorneys would be paid under the plan ahead of the debtors' creditors, and in the debtors' acknowledgement of that fact and subsequent acquiescence, there was a mutual understanding between the parties at least of the attorneys' rights going forward to the money that the debtor would be paying into the plan, and, in Geraci's case, of the actual effect of the debtor's future performance under the plan on the status of the debtor's other obligations owed to creditors. These understandings, then, were agreements, and they clearly pertained to compensation.

Yet they were never signed by both and filed with the court as required by the Local Rule. The attorneys' reason for not disclosing these agreements initially as required is roughly that, based on an interpretation of the Local Rules regarding no-look fees, the CARA is the only agreement required to be disclosed, and indeed that if they had filed any other agreement other than the CARA, they would have lost their ability to seek a no-look fee. They also reason in any event that these understandings were not separate agreements within the meaning of Local Rule 2016–1.

D. File a Fee Application

1. Northern District of Illinois

a. The Fee Application requires:

The attorney hereby certifies that:

1. All disclosures required by General Order No. 11-2 have been made.

2. The attorney and the debtor(s) have either:

(i) not entered into any other agreements that provide for the attorney to receive:

a. any kind of compensation, reimbursement, or other payment, or

b. any form of, or security for, compensation, reimbursement, or other payment that varies from the Court-Approved Retention Agreement; or

(ii) have specifically discussed and understand that:

a. the Bankruptcy Code may require a debtor's attorney to provide the debtor with certain documents and agreements at the start of the representation;

b. the terms of the Court-Approved Retention Agreement take the place of any conflicting provision in an earlier agreement;

c. the Court-Approved Retention Agreement cannot be modified in any way by other agreements; and

d. any provision of another agreement between the debtor and the attorney that conflicts with the Court-Approved Retention Agreement is void.

b. Each Judge will have a different requirement for documents to be attached to the fee application.

Ex: Northern District of Indiana

CONTENTS OF THE APPLICATION

An interim or final application for compensation for services and reimbursement of expenses of a professional should include:

A. A detailed statement of the services rendered, time expended, expenses incurred, and the amounts requested. Fed.R.Bankr.P. 2016; Cohen &Thiros, P.C. v. Keen Enterprises, Inc., 44 B.R. 570, 573 (N.D. Ind. 1984).

B. A statement as to what payments have been made or promised to the applicant for services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and the sharing of compensation. Fed.R.Bankr.P. 2016.

C. A statement containing a list of professionals and paraprofessionals providing services, their respective hourly billing rates, the aggregate hours spent by each

professional and paraprofessional,a general description of services rendered, a reasonably detailed breakdown of the disbursements incurred, and an explanation of billing practices.

D. A statement indicating the period of time which the application covers.

2. In the Northern District of Illinois, flat fees have been allowed since 11/26/2002. Currently, the flat fee is $4,000 through the closing of the case. www.ilnb.uscourts.gov
3. In the Eastern District of Wisconsin, flat fees are allowed in the amount of $4,500.00 and $5,000.00 if the debtor moves to participate in the mortgage modification mediation program. For cases that are dismissed before confirmation, the presumed reasonable fee is $1,000.00 and that may be allowed without a fee application. www.wieb.uscourts.gov
4. In the Northern District of Indiana, flat fees have been allowed since 2005. Currently, the flat fee is $3,400.00. www.innb.uscourts.gov

IV. When Do I Get Paid? Chapter 13 fee jumping in the Plan:

In re Gilliam

There is no question, however, that the additions are asserted for the benefit of the attorneys alone, not the debtors in whose plans they are contained, and are, therefore, an act of self-dealing. Regarding the compensation related to such plan modifications, Semrad alone has over 50 cases under advisement, another 25 where compensation requests have been deferred pending a resolution of the matters under advisement4 and countless others which have not yet come on for consideration. In all of these cases where compensation is under advisement or where compensation is deferred for later consideration, the Chapter 13 Trustee has objected to compensation on the grounds discussed below.

In its objection, the Chapter 13 Trustee raises two issues. First, the Chapter 13 Trustee challenges Semrad's right to compensation given the self-dealing that has allegedly occurred. Second, the Chapter 13 Trustee argues that Semrad did not adequately disclose its agreements with affected debtors regarding the plan modification.

As noted above, there is no question that the revisions are asserted for the benefit of the attorneys alone, not the debtors in whose plans they are contained. Had this been a case under another chapter, Semrad would be in danger of disqualification. *See, e.g.*, *Crivello*, 134 F.3d at 835 (a professional is not disinterested if it possesses an "interest or relationship that would even faintly color the independence and impartial attitude required by the Code." (*quoting In re BH & P Inc.,* 949 F.2d 1300, 1308 (3d Cir. 1991)); *In re Pillowtex, Inc.*, 304 F.3d 246, 249 (3d Cir. 2002) (attorney's status as a creditor beyond that approved by the court, even if nebulous, made such counsel not disinterested). There is little doubt that counsel's attempt to change the *status quo* regarding its compensation colors its independence and impartiality.

In re Carr

The court is well aware that the CARA already contractually obligates the attorney to explain how attorney's fees are determined and paid. To the extent the attorney fulfills the fiduciary obligation to ensure that the client understands the implications of the payment of attorney's fees, the attorney will more than likely simultaneously fulfill that contractual obligation. To the extent the attorney does not fulfill the fiduciary obligation in entering into the CARA, but later explains how the fees are paid and ensures that the client fully understands the implications of how those fees are paid, the client might be taken to have waived any breach of the attorney's fiduciary obligation in entering into the CARA by continuing the representation.

In sum, the court concludes that imposing on the attorneys a fiduciary obligation to deal fairly and make a full disclosure as to compensation prior to entering into the retention agreement is appropriate in these cases.

V. Remember the purpose

"Debtors are not just objects with a $4,000 dollar sign pasted on their foreheads. They are individual clients with needs who deserve to have counsel who is willing to actually represent their best interests. " In re Jimmar

B 10S2 (Supplement 2) (12/11)

UNITED STATES BANKRUPTCY COURT

In re _____, Debtor

Case No. _____

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ☐ No
- ☐ Yes. Date of the last notice: _____ mm/dd/yyyy

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor.

❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date _____
Signature mm/dd/yyyy

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Reset Save As... Print