

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**IN RE:** §

**FIXED FEE ORDERS** §

**NOTICE**

General Order 2004-5 provides that the Court will approve—“at the commencement of chapter 13 bankruptcy cases”—fixed fee arrangements that conform to the requirements of the order. During a transition period, some divisions of the Court have approved fixed fee agreements that were filed after significant delays. In addition, the Court is receiving applications that vary from the particulars set forth in the order. After discussion among the judges, the Court has concluded that more consistent compliance with the order is necessary.

Therefore, notice is given that:

Applications for approval of a fixed fee arrangement must be filed within fifteen (15) days after the case is filed. Failure to file fixed fee agreements within fifteen (15) days shall be deemed to be a representation to the Court that counsel for the Debtor(s) has elected to provide services on an hourly basis, in which event counsel shall submit fee applications pursuant to applicable law.

Any application for a fixed fee arrangement filed after fifteen (15) days will not be routinely approved. Counsel may file an application for approval of an agreement, but it must be set for hearing as any other motion.

Applications for fixed fee orders will only be approved in the exact form attached to General Order 2004-5. Any variations from this form will not be recognized by the Court. The application will be approved, but the order approving the application will strike all variations.

Implementation of the procedures will be immediate in divisions where prior forms of notice were given, but may be deferred a few weeks in other divisions to allow time for compliance.

Notice issued March 10, 2005.

Michael Milby, Clerk  
At the direction of the Court

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**In re:**

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**Chapter 13 Fee Applications**

**GENERAL ORDER NO. 2004-5**

**ORDER REGARDING CHAPTER 13 DEBTORS' COUNSEL'S FEES**

This Court<sup>1</sup> has determined that, under the circumstances set forth in this Order, the Court will accept fixed fee arrangements for counsel's representation of debtors in chapter 13 cases. If counsel elects to utilize one of the fixed fee arrangements set forth in this Order (providing for fixed fees with a \$2,050.00 maximum or a \$2,460.00 maximum), no fee application will be required.

Bankruptcy Courts often face the difficult question of how to approach chapter 13 fee applications for debtors'<sup>2</sup> counsel. The Bankruptcy Courts for the Southern District of Texas have been no exception. For example, the Court, *en banc*, issued *In re Robinson*, case no. 98-41812 (Slip Op., September 4, 2002). *Robinson* rejected a standard benchmark for chapter 13 fee applications, adopted a market approach, and established streamlined procedures for approval of chapter 13 fee applications. Within a few months, the Honorable Letitia Clark rejected *Robinson*. *In re Wilson*, 2003 WL 21501786 (Bankr. S.D. Tex. 2003). *Wilson* announced Judge Clark's intention to apply a lower level of scrutiny to chapter 13 fee applications that fall below certain threshold levels. In many ways, *Wilson* adopted an improved method of utilizing the old

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<sup>1</sup> The reasoning set forth in this Order is Judge Isgur's. As indicated by the signatures below, all of the Bankruptcy Judges of the Southern District of Texas fully adopt the procedures set forth in this Order. However, the Judges who join in the procedures do not necessarily join in all of the legal reasoning set forth in this Order.

<sup>2</sup> The use of "debtors" rather than "debtor" in this Order merely reflects that most cases are joint cases with a primary debtor and a spouse. The same fee arrangements apply whether a case is for an individual debtor or for joint debtors.

benchmark standard that was replaced by *Robinson*. See *In re Wilkins*, case no. 93-45078 (Slip. Op., June 14, 1994).

This Court struggles with how to meet its responsibility with respect to chapter 13 fee applications. This Order sets forth an alternative fee arrangement and the Court's reasons for this alternative. The alternative set forth in this Order is non-exclusive. The Court will utilize the standards in § 330(a)(4)(B),<sup>3</sup> § 330(a)(3)<sup>4</sup> and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) for the review of more traditional fee applications.

There are approximately 26,000 chapter 13 cases pending before the Bankruptcy Courts for the Southern District of Texas. Approximately 12,000 new cases will be filed in the next 12 months. Accordingly, the issues addressed in this Order are of great importance to debtors, creditors, counsel and the Court. In determining how the Court should handle fee applications, the Court must first define its responsibilities.

### **Statutory Requirements**

Section 329(a) requires debtors' counsel to disclose a statement of compensation paid or agreed to be paid in connection with the representation of debtors in a chapter 13 bankruptcy case. However, § 329 does not explicitly subject chapter 13 debtors' counsel's fees to a fee application process. Section 329(b) provides that the Court may cancel any compensation agreement and may order the return of any funds paid or payable by chapter 13 debtors to the extent that such compensation exceeds the reasonable value of counsel's services. The plain language of § 329 makes Court review and action permissive rather than mandatory.

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<sup>3</sup> All section references are to the Bankruptcy Code.

<sup>4</sup> As set forth below, § 330(a)(3) requires the Court to consider a number of factors not specifically listed in § 330(a)(3).

Section 330(a)(1) provides for the award of compensation to professionals employed under § 327 or § 1103 of the Code. However, neither § 327 nor § 1103 govern fee awards to chapter 13 debtors' counsel. Accordingly, the Court does not believe that chapter 13 debtors' counsel's fees are regulated by § 330(a)(1).

Section 330(a)(4) explicitly provides for reasonable compensation to debtors' attorney "for representing interests of the debtor in connection with the bankruptcy case." The factors to be considered are the benefit and necessity of the services and the other factors set forth in § 330. The other factors set forth in § 330 are set forth in § 330(a)(3). These are 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 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; and (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." 11 U.S.C. § 330(a)(3).

As with other provisions of the Bankruptcy Code utilizing the word "including" followed by a list of factors, the list of factors in § 330(a)(3) is not exhaustive. *In re Lan Associates XI, L.P.*, 192 F.3d 109 (3d Cir. 1999); 11 U.S.C. § 103(3). Indeed, § 330(a)(3) mandates the consideration of *all* relevant factors. As set forth in detail below, these factors generally include the twelve *Johnson* factors. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The *Johnson* factors are "(1) the time and labor required to litigate the matter; (2) the novelty and complicatedness of the issues; (3) the skill required to properly litigate the issues; (4)

whether the attorney had to refuse other work to litigate the case; (5) the attorney's customary fee; (6) whether the fee is fixed or contingent; (7) whether the client or case imposed time constraints; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorney; (10) whether the case was "undesirable"; (11) the type of attorney-client relationship and whether the relationship was long-standing; and (12) awards made in similar cases." *Green v. Adm'rs of Tulane Educ'l Fund*, 284 F.3d 642, 661 (5th Cir. 2002).

Bankruptcy Rule 2016(a) requires that an entity seeking compensation from a chapter 13 bankruptcy estate must file an application with the Court. When chapter 13 debtors' counsel seeks payment out of future earnings either directly from the debtors or through a chapter 13 plan, the requested compensation is from the chapter 13 estate. *See* 11 U.S.C. § 1306(a).

Section 1326(b) provides for the mandatory payment of all § 507(a)(1) claims prior to or contemporaneously with the payment of creditor claims under the plan. Section 1326(a) provides for the payment of § 503(b) claims if a case is dismissed. Section 503(b)(1) provides for the allowance of administrative expenses for the actual and necessary costs and expenses of preserving the estate. Section 507(a)(1) establishes that claims arising under § 503(b) are first priority claims.

### **Market Approach**

*Robinson's* market approach has proven unsatisfactory. The Court's statutory responsibility under § 330(a)(4) is a serious one. The hundreds of small fee applications filed each month mandate adoption of a practical policy that allows the Court fully to meet its statutory obligations. With the pending chapter 13 case load in this District, no bankruptcy judge can thoroughly review each fee application. *In re Phillips*, 291 B.R. 72 (Bankr. S.D. Tex. 2003). *Robinson* requires the review of each fee application to assure that it meets the lodestar

approach<sup>5</sup> from a market perspective. Nevertheless, the logic of *Robinson* is compelling; the market should control prices charged in chapter 13 cases.

However, in most chapter 13 cases, market forces are distorted. In some instances, the fee burden is borne by the creditors of the estate by creating a reduction in distribution to unsecured creditors. In other cases, the fees are borne by debtors by requiring debtors to adjust their budget to meet the plan confirmation requirements in chapter 13<sup>6</sup>. However, most chapter 13 debtors are relatively unsophisticated in the purchase of legal services. There are significant market distortions created by unsophisticated debtors contracting for fees that are frequently borne by creditors.

#### **Use of Benchmark as Threshold Fee**

The Court is concerned that the use of a benchmark as a threshold fee (below which there will be a lower level of scrutiny) also has limited use. It appears that the traditional benchmarks were set at a level to reflect the average fees in a chapter 13 case. By definition, that means that half of the cases should exceed the benchmark. Moreover, the use of benchmarks does not assist the problems with the market.

*Wilson* provides that the Court will not aggressively scrutinize a fee of up to \$1,750.00 for services rendered through the date of confirmation. Because most chapter 13 cases are routine, \$1,750.00 may be a reasonable average fee for services rendered. However, one

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<sup>5</sup> The lodestar approach provides for multiplying the time spent on a project by the rate charged by the professional. Presumably, the market approach allows the market to dictate the appropriate hourly rates (and the Court can always determine the reasonableness of the rates and the time spent on a project).

<sup>6</sup> Theoretically, debtors' budgets are derived based on debtors' true forecast of income and expenses. However, it is apparent that debtors' budgets frequently reflect the realities of the requirements of confirmation of a chapter 13 plan. The debtors' disposable income must produce a large enough stream of payments to pay all secured and priority claims in order to be eligible for confirmation. If debtors' budget cuts too much out of the debtors' true monthly spending requirements, the tight budget will render the debtors unable to perform under the plan and will doom the reorganization to failure.

unexpected motion that requires counsel to write a response, confer with opposing counsel, and attend a hearing could easily take 1.5 hours of professional time. At a \$235.00 hourly rate, the fee for such a motion would result in a 20% increase over the \$1,750.00 benchmark. Similarly, in a case that proceeds with no pre-confirmation hearings, the actual lodestar fee might be substantially less than the \$1,750.00.

Such small variations in the conduct of the case cannot reasonably be predicted by counsel. Moreover, the establishment of a review threshold does not provide an incentive for the efficient administration of cases. Because the use of the review threshold only has application *after* the fees are incurred (rather than on a prospective basis as is the case with a fixed fee arrangement), the review threshold provides no effective means of regulating fees in less complicated cases. By definition, one-half of all cases produce market fees that are at or below the average. The mere fact that the fees are below average does not make them reasonable; some cases turn out to be less complicated. In an uncomplicated case, with lodestar fees, an average fee may be too high. Conversely, if complications arise, the additional scrutiny applied to a case with fees somewhat higher than the review threshold will not be useful.

The approach set forth in this Order attempts to harmonize these competing concerns by allowing counsel with fixed fee arrangements to absorb the bad with the good and obviate the need for further review.

### **Fixed Fee Alternative**

The methods previously utilized by the Southern District of Texas assume that the standard method for allowance of fees in a chapter 13 case should be a variable fee based on the services performed (hours) and rates charged. There are many talented chapter 13 lawyers practicing in the Southern District of Texas; their rates vary widely. *See In re Phillips*, 291 B.R.

72, n.2 (Bankr. S.D. Tex. 2003). Some lawyers may be able to produce more work in fewer hours (justifying a higher hourly rate), while others may take more time for the same task and charge a lower hourly rate.

Nothing in the statute precludes chapter 13 debtors' counsel from charging a fixed fee. Indeed, in many judicial districts, fixed fee charges by debtors' counsel in chapter 13 cases are customary. See *In re Argento*, 282 B.R. 108 (Bankr. D. Mass. 2002); *In re Szymczak*, 246 B.R. 774 (Bankr. D. N.J. 2000).

Although the Court agrees with *Robinson's* market rate principle, it does not believe that *Robinson's* application should be limited to lodestar cases. Moreover, the Court believes that a *Wilson-type* threshold would best reflect market conditions if it were applied to fixed fee cases. The market can and should determine the appropriateness of fixed fees.

#### **Application of § 330 and Approval of Fixed Fee Payments**

As set forth above, the Court must apply the methodology required in § 330 of the Bankruptcy Code. To apply § 330 in a lodestar context, the Court must review each fee application. The Court will continue to do so for traditional applications and to consider all fee applications in accordance with the standards set forth in § 330.

However, nothing in § 330 precludes the Court from approving a fixed fee arrangement in advance, rather than approving a fee after the fact by a retrospective evaluation of hours worked and rates charged. Accordingly, one proper way to apply § 330 is to determine, from time-to-time, a flat fee amount that will be accepted by the Court prospectively and approving the fixed fee at the commencement of the case. Determination of the fixed fee involves the application of the same § 330 standards, but applies them prospectively rather than retrospectively. In this opinion, the Court establishes a fixed fee arrangement that the Court will



approve without a retrospective fee application and without a hearing. Hereafter, from time-to-time, on motion by a party-in-interest or *sua sponte*, the Court will consider changes in fixed fee contracts that will be prospectively approved.

Counsel has the option to forego the pre-approved fixed fee arrangement described in this Order in favor of traditional fee applications based on a lodestar analysis, the other factors specified in the statute, and all other applicable factors. Moreover, counsel may accept cases on a fixed fee basis that does not meet the standards set forth in this order. The purpose of this order is to establish a standard that is optional, simple, and efficient, but that meets both practical and statutory considerations.

#### **Fixed fee Arrangements Governed by this Order**

For the reasons set forth below, the Court has determined that the Court will approve, at the commencement of chapter 13 bankruptcy cases, fixed fee arrangements as set forth in this section of this Order.

#### **Format of BR 2016 Disclosure and Application**

If counsel determines to accept a fixed fee arrangement that meets the standards set forth in this Order, counsel will be required to file only the following with respect to counsel's fees— (1) Bankruptcy Rule 2016(b) Disclosure and Application for Approval of Fixed Fee Agreement in the form attached to this Order as Exhibit "A" (no order is necessary; the Court will approve the application with its own form of order). The Bankruptcy Rule 2016(b) Disclosure and Application for Approval of Fixed Fee Agreement must be filed as a separate docket item from the original petition. It should be docketed as a "Chapter 13 Approved Form Fixed Fee

Application”<sup>7</sup> (this is a new event recently made available in the Court’s CM/ECF system); and (2) a provision in the chapter 13 plan providing for the payment of the remainder of the unpaid fixed fees in the amount contained in the Rule 2016 disclosure.

No retrospective fee application will be required.

Exhibit “A” must be utilized without variation to take advantage of the procedures described in this Order. Counsel is free to elect a more traditional approach.

### **Work That is Covered by Fixed Fee Arrangement**

The actual work that is governed by the fixed fee arrangement is set forth in Exhibit “A”.

To be workable, the fixed fee arrangements that will be approved without the necessity of a fee application must provide comprehensive services to debtors for a period ending not less than 120 days after confirmation of the debtors’ chapter 13 plan<sup>8</sup>. Counsel must agree to prepare, review and file the plan, the schedules, the statement of financial affairs, amended plans, and all other papers and motions required in the case. Counsel must answer motions filed against the debtors—even if the answer is that the debtors do not oppose the relief. Counsel must attend the § 341 meeting and, if required, attend the confirmation hearing. Counsel must advise debtors concerning their obligations and duties pursuant to the Bankruptcy Code, Bankruptcy Rules, applicable court orders and the provisions of their chapter 13 plan. Counsel will not be required to respond to—or to commence—adversary proceedings as part of the fixed fee arrangement.

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<sup>7</sup> This procedure ensures that the fixed fee agreement is presented to the Court at the inception of the case. If it is filed as an attachment to the petition, statement or schedules, it will not routinely be presented to the Court for approval.

<sup>8</sup> Nothing in this Order terminates counsel’s continuing representation of debtors following the expiration of the 120 day period. Counsel is excused from continued representation only by order of the Court. However, counsel electing the fixed fee arrangement set forth in this Order may seek additional compensation for work on matters first set for hearing after the expiration of 120 days.

As set forth on Exhibit “A” (and as subsequently evaluated in this Order), counsel may elect one of two separate fixed fee arrangements. Counsel undertaking a fixed fee arrangement with counsel’s payments being made on a “first out” basis under the plan may charge a fixed fee up to a maximum of \$2,050.00, including expenses but not including the \$185.00 filing fee. Counsel undertaking a fixed fee arrangement with payments being made on a shared basis—with counsel only receiving one-half of the initial plan distributions until counsel is paid in full—may charge a fixed fee up to a maximum of \$2,460.00, including expenses, but not including the \$185.00 filing fee<sup>9</sup>. In neither instance will a fee application be required. The Court will approve fixed fee contracts that are at or below the maximum levels, with the market to determine variations up to the maximum amount. Exhibit “A” permits debtors and counsel to agree to an amount less than the maximum allowed in this Order; such lesser amount may *not* result in fewer services.

### **Basis of Approval of Fixed Fee Arrangement**

#### **High Risk Nature of Chapter 13 Fees**

The leading commentator on chapter 13 cases has raised the question—“Where are the reported chapter 13 cases recognizing that contingent fees are appropriately allowed at higher than normal hourly rates?” Keith M. Lundin, CHAPTER 13 BANKRUPTCY § 294.1 (3d ed. 2002). Historically, whether a fee is contingent has been one of the factors utilized by the Fifth Circuit in determining the reasonableness of a fee award. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In analyzing “all relevant factors” under § 330(a)(3), Courts rely on the *Johnson* factors. *In re Miniscribe Corp.*, 309 F.3d 1234, 1244 (10th Cir. 2002); *In re*

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<sup>9</sup> These are initial amounts set by the Court. The Court anticipates amending these amounts from time-to-time with the amended amounts to apply only to cases filed after the Court announces the amendments.

*Celotex Corp.*, 227 F.3d 1336, 1341 (11th Cir. 2000); *In re Lan Associates XI, L.P.*, 192 F.3d 109 (3d Cir. 1999).

Although the term “contingent” does not accurately describe counsel’s fees in a chapter 13 bankruptcy, there is an analogous risk to that in a contingency fee case. A large portion of chapter 13 fees are not paid because chapter 13 plans fail and debtors are unable to pay the fees. In that sense, chapter 13 fees have a risk that is similar to the risk in contingency fee cases.

In most chapter 13 bankruptcy cases, the payment of fees to debtors’ counsel is an inherently risky proposition. Typically, payment of a substantial portion of the fees is made by the debtors under the debtors’ chapter 13 plan. With few exceptions, debtors may obtain the dismissal of his case “at any time,” resulting in no source of payment other than the deposits already made with the chapter 13 trustee. 11 U.S.C. § 1307(b). Most chapter 13 debtors are at risk of loss of their home and their car; consequently, the expectation of payment to counsel in a failed chapter 13 case is extremely low. Moreover, the Court recognizes that a substantial percentage of chapter 13 cases fail. Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion not Shown*, 9 AM. BANKR. INST. L. REV. 557, 564-65 (2001) [hereinafter “Braucher”]. Nationally, it is estimated that one-third to one-half of all awarded fees are never collected by debtors’ counsel. Keith M. Lundin, CHAPTER 13 BANKRUPTCY § 294.1 (3d ed. 2002).

With such a high risk of non-payment, the Court concludes that—in most cases—chapter 13 debtors’ counsel’s fees are “contingent”<sup>10</sup> on success by the chapter 13 debtors. The Bankruptcy Code provides some protection for counsel. Section 1326(a)(2) provides for the

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<sup>10</sup> The Court recognizes that this contingency is different than the type of contingency addressed in *Johnson*. However, the Court applies this factor from *Johnson* because the economic reality in a chapter 13 case is similar to that of contingency fee counsel.

distribution of interim payments in a failed chapter 13, with the interim payments first being paid to holders of administrative claims. 11 U.S.C. § 1326(a)(2).

In addition, § 1326(b) provides that “[b]efore or at the time of each payment to creditors under the plan, there shall be paid—(1) any unpaid claim of the kind specified in section 507 (a)(1) of this title . . . .” Although some courts have interpreted § 1326(b) in a manner that is inconsistent with its plain meaning (*see, e.g., In re Pappas & Rose, P.C.*, 229 B.R. 815 (Bankr. W.D. Okl. 1998) and cases cited therein), the vast majority of cases hold that administrative expenses (including debtors’ counsel’s fees) must be paid in full prior to or at the same time as the commencement of payments to other creditors. *In re Harris*, 304 B.R. 751 (Bankr. E.D. Mich. 2004); *In re Shorb*, 101 B.R. 185 (B.A.P 9th Cir. 1989). This Court will apply § 1326(b) according to its plain meaning.

Nevertheless, counsel may waive the applicability of § 1326(b). *In re Harris*, 304 B.R. at 757; *In re Shorb*, 101 B.R. at 187. This may occur when a waiver is necessary in order to allow counsel’s clients to retain a vehicle by making adequate protection payments or for other reasons negotiated by counsel. Counsel who elect to waive the “first payment” requirements of § 1326(b) are agreeing to an even greater risk under a contingent fee analysis<sup>11</sup>. Counsel’s acceptance of such a greater risk probably enhances the feasibility of plans, provides greater involvement of counsel in shepherding the clients’ case through post-confirmation difficulties, and provides less risk to the general creditors. *See Braucher* at 574. The Court believes that such additional (and highly beneficial) risk should be fairly compensated. The Court has carefully weighed this additional risk and finds that counsel who agrees to accept not more than

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<sup>11</sup> The Court does not imply that such an arrangement would preclude a creditor from alleging that the creditor is not adequately protected by its receipt of its share of the remainder of payments. Such an issue will be addressed on its merits, if it arises. It is beyond the scope of this Order.

one-half of the trustee's monthly distributions until such time as counsel is fully paid is entitled to a fixed fee that is 20% higher than the basic fixed fee.

The Fifth Circuit has been unambiguous with respect to an “after the fact” review of the terms and conditions of employment. Absent circumstances “not capable of being anticipated at the time of the fixing of” the establishment of the terms and conditions (typically, a contingent fee arrangement), the fee arrangement should not be set aside because of the lodestar or other factors. *In re Texas Secs., Inc.*, 218 F.3d 443, 445-46 (5th Cir. 2000); *In re Barron*, 325 F.3d 690 (5th Cir. 2003). Although the Fifth Circuit's opinions apply § 328<sup>12</sup>, the Court believes that the policies underlying § 328 should be applied in chapter 13 cases.

Accordingly, applying the principles established in § 328, the Court will not require the filing of fee applications in fixed fee cases. Inasmuch as the Court does not have the authority—absent circumstances “not capable of being anticipated”—to alter the fixed fee arrangement, the Court will not require counsel to file fee applications in these instances. If the fixed fee arrangement is challenged based on a change in circumstances that could not have been anticipated, the Court will address the issue at that time. As indicated by the Fifth Circuit, circumstances justifying a change in the fee arrangement will be circumstances that could not have been anticipated, not just circumstances that were not anticipated. *In re Barron*, 325 F.3d 690 (5th Cir. 2003).

Of course, the establishment of a fixed fee does not make counsel's *work* immune from a retrospective review—only the fee arrangement itself is protected. The fixed fee arrangement

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<sup>12</sup> Section 328 provides that the Court must approve the terms and conditions of employment for persons hired by a trustee, committee or debtor-in-possession. Chapter 13 debtors may retain counsel on any basis, without prior court approval. As set forth above, disclosure is required and the Court has the duty to approve payments. The Court may also order fee disgorgement. 11 U.S.C. § 329. The policy enunciated in § 328 is nevertheless applicable to a chapter 13 debtors' attorney. Once a contingent fee arrangement has been established, the Court should not change the arrangement based on unanticipated good fortunes by the debtors.

constitutes an agreement by counsel to provide a specified range of services—if the services are necessary in a particular chapter 13 bankruptcy case. If counsel fails to perform under the agreement, § 329(b) authorizes the Court to order the return of any excessive portion of the fee. If, for example, counsel fails to file required documents in accordance with applicable statutes and rules, the Court would have the authority to determine that the fixed fee was excessive. The Court anticipates that such situations will be infrequent; nevertheless, the procedures contained in this Order are intended for use by responsible counsel, performing their work with diligence.

### **Consideration of Factors Establishing Fixed fee Amounts**

In selecting the fixed fee amounts, the Court has considered the principle established in § 330(a)(4) along with the factors set forth in § 330(a)(3) and the twelve *Johnson* factors.

#### **Section 330(a)(4)**

Section 330(a)(4) requires the Court explicitly to consider the benefit and necessity of services to the debtors. In determining the appropriate fee amount, the Court has only considered those matters that the Court believes are reasonably likely to lead to a benefit to debtors. All of the matters considered by the court are of necessity to debtors.

Nevertheless, the Court recognizes that a significant number of cases fail. If a case is not confirmed or is dismissed within 120 days of confirmation, the benefits to the debtors are minimized. In the event of a dismissal of a case or the absence of confirmation, the Court believes that the benefit to the debtors is generally minimal. Nevertheless, the services were still “necessary” in order to attempt the debtors’ reorganization. If a case is dismissed within 120 days of confirmation, the authorized fixed fee will be reduced to a maximum of \$1,800.00. The Court has chosen such a reduction because of the diminution in the benefit to the debtors, the reduction in the amount of time that counsel will be required to spend on the case as a result of

its early termination, and the reduced benefit of the work performed. A larger reduction would not fairly account for the time and effort spent by counsel, the necessity of the work, and the risk involved in the fixed fee arrangement set forth herein.

**Section 330(a)(3) and the *Johnson* Factors**

**1. The time spent on the services. (Section 330(a)(3)(A) and *Johnson* factor 1).**

Because the Court is determining the reasonableness of a fixed fee arrangement, the issue considered by the Court is the amount of time that is typically spent in a chapter 13 bankruptcy case through 120-days following confirmation. The Court has reviewed a substantial number of filed fee applications and concludes that the following are reasonable time estimates for completing a typical chapter 13 case:

Category	Estimated Attorney Time	Estimated Paralegal Time
Prepetition client consultations	0.5	0.3
Postpetition client consultations	0.7	1.0
Schedules and plan	0.8	2.0
Amendments	0.7	0.5
Section 341 meeting	1.0	0.0
Creditor contacts	0.3	0.5
Proof of claim review	0.1	0.6
Responding to Trustee motions to dismiss	0.3	0.0
Responding to motions for relief from the stay <sup>13</sup>	0.5	0.0
Plan confirmation	0.5	0.0
Post confirmation matters	.3	.4
<b>Total</b>	<b>5.7</b>	<b>5.3</b>

**2. The rates charged for services. (Section 330(a)(3)(B) and *Johnson* factor 5).**

The Court is mindful that not all attorneys have the same level of chapter 13 competence. Some attorneys work faster or better than others. The purpose of this analysis is to determine the

<sup>13</sup> Not every case includes a motion to lift stay. As with all other categories, this estimate is intended to reflect an average of all cases, including those with no motions or multiple motions for relief from the stay.



customary rates for chapter 13 services in this district. Attorneys who charge more can, presumably, perform the work set forth in the foregoing chart faster. Moreover, attorneys who believe that their reasonable hourly rate exceeds the rate set forth in this paragraph are free not to utilize the fixed fee billing methodology approved in this Order. Those attorneys may seek approval of fees through the customary fee application process. Judge Steen's recent survey of rates in *In re Phillips*, 291 B.R. 72, n. 2 (Bankr. S.D. Tex. 2003) provides some guidance to this estimate. The Court also reviewed rates charged by various attorneys practicing before this Court. On consideration of Judge Steen's opinion and the Court's experience, \$235.00 is a reasonable and customary hourly rate for chapter 13 practitioners in this area and \$75.00 is a reasonable and customary hourly rate for chapter 13 paralegals in this area.

**3. The necessity of the services. (Section 330(a)(3)(C) and Johnson factor 8).**

All of the services set forth in the estimate of the average time required to complete a chapter 13 case are necessary. Although *Johnson* contemplated a *downward* reduction if unnecessary time was spent on a case, the fixed fee arrangement justifies an *upward* departure. By definition, the fixed fee arrangement places all of the time burden on counsel and limits compensation to matters that are necessary, on average. Accordingly, the Court believes that this factor justifies an upward adjustment in the lodestar calculations.

**4. Whether the services were timely and fully performed. (Section 330(a)(3)(D) and Johnson factor 7).** As set forth above, the fixed fee arrangement that approved by the Court requires counsel timely to respond to issues that arise. If the Court determines that counsel has failed to meet the obligations set forth above, the Court will take appropriate action, including acting pursuant to § 329(b) to require a return of a portion of the fees.

**5. Whether the compensation is customary for comparably skilled non-bankruptcy practitioners. (Section 330(a)(3)(E) and *Johnson* factors 3 and 9).** In applying these factors, the Court is relying on its own experience within this District. The rates set forth above are comparable to the rates charged by non-bankruptcy attorneys with comparable skill as the skill required to handle a chapter 13 bankruptcy case. The Court does not believe that this factor justifies an increase or decrease in the lodestar calculation.

**6. The novelty and complicatedness of the issues, whether the attorney had to refuse other work to litigate the case, and whether the case was undesirable. (*Johnson* factors 2, 4 and 10).** Chapter 13 debtor work is specialized work, performed by lawyers mostly on a volume basis in a collegial atmosphere. The Court does not believe that these factors justify an increase or decrease in the lodestar calculation.

**7. Whether the fee is fixed or contingent. (*Johnson* factor 6).** As set forth in detail above, the Court finds that the payment risk in chapter 13 cases is analogous to contingent fee cases. Accordingly, the Court finds that this factor justifies an upward adjustment in the lodestar calculation.

**8. Whether the client or case imposed time constraints. (*Johnson* factor 7).** Counsel in chapter 13 cases are generally able to handle their courtroom work on a volume basis. Counsel can appear for a single hearing and dispose of multiple cases. Moreover, this Court has recently adopted scheduling procedures that reduce the time required in Court. This factor justifies a slight downward adjustment in the lodestar calculation.

**9. The type of attorney-client relationship and whether the relationship was long-standing. (*Johnson* factor 11).** Most chapter 13 work is not with established clients. The Court does not believe that this factor justifies an increase or decrease in the lodestar calculation.

**10. Awards made in similar cases. (*Johnson* factor 12).** In reaching the conclusions set forth in this Order, the Court has reviewed hundreds of fee applications. The Court concludes that no adjustment in the lodestar calculation is required by this factor.

#### **Calculation of Fixed Fee Amounts**

Based on the foregoing, the Court finds that an upward adjustment in the lodestar calculation of the average chapter 13 case is appropriate. In addition, the Court finds that the typical chapter 13 case requires \$80.00 in expenses to be incurred by counsel, in addition to the filing fees in a case.

The lodestar calculation produces a typical fee of \$1,737.00 (i.e., 5.7 attorney hours at \$235.00 per hour and 5.3 paralegal hours at \$75.00 per hour). With expected expenses, this totals to \$1,817.00. The Court finds that an upward adjustment in the lodestar factor of 15% is appropriate for fixed fee arrangements. This results in a maximum, basic, fixed fee of \$2,050.00, which may be charged without the necessity of further court review. As set forth above, counsel who consent to receive their fees out of one-half of future plan payments (rather than on a “first out” basis) may charge a maximum, fixed fee of up to \$2,460.00, including expenses, but not including the \$185.00 filing fee, also without the necessity of further court review.

For cases that are dismissed before confirmation or within 120 days after confirmation, the foregoing maximum fees are reduced to \$1,800.00.

As stated previously, if either of these alternatives is selected, counsel will be required to file only the following with respect to counsel’s fees—(1) a Rule 2016 disclosure setting forth the agreement; and (2) a provision in the debtors’ plan providing for the payment of the remainder of the unpaid fixed fees in the amount contained in the 2016 disclosure. The Court reiterates that

this is intended as an alternative fee arrangement, and is not exclusive. As such, counsel may continue to be engaged on an alternative basis, if they choose.

### **Option to Include Fixed Fee Arrangement for Post Confirmation Services**

The preceding analysis covers services provided up to 120 days after plan confirmation. However, many debtors require further legal services. These services typically include the defense of motions to lift the automatic stay, the modification of the debtors' plan, and responses to motions to dismiss following a default. The fixed fee contracts set forth in this Order may include arrangements for the provision of those services on a fixed fee basis. Based on the same analysis set forth in this Order with respect to services through 120 days after confirmation, the Court will approve fixed fees for the following matters if the first hearing set on the matters is 120 days or more after confirmation: (i) \$250.00 for the defense of a motion for relief from the stay which is resolved by agreement; (ii) \$250.00 for the defense of a chapter 13 trustee's motion to dismiss and on which there is an agreement or no opposition, and (iii) \$400.00 for the modification of a plan.

### **Fee Arrangements Not Governed by This Order**

For the reasons set forth above, the Court declines to follow *Robinson* or *Wilson*. Chapter 13 debtors' counsel may either use the procedures explained above, or may elect not to use the procedures. If counsel elects to provide services on an hourly fee basis, counsel must submit fee applications under the following procedures:

1. Fee applications must include a cover sheet in the form set forth on Exhibit "B".
2. Detailed time records must be attached to the fee application.
3. A statement must be included setting forth the basis of the retention; i.e., whether the retention was on a fixed or hourly fee basis and any other pertinent details.

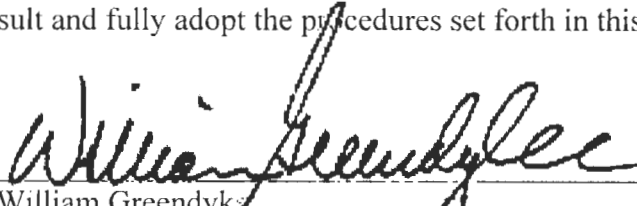
4. The fee application must include a narrative description setting forth any unique, unusual or time consuming issues particular to the chapter 13 case. If no unique, unusual or time consuming issues are set forth in the fee application, the Court will presume that none existed.
5. A copy of the fee application, with required attachments, must be sent to the Court's case manager.

Signed at Houston, Texas on April 14, 2004.



**Marvin Isgur**  
**UNITED STATES BANKRUPTCY JUDGE**

The following judges concur in the result and fully adopt the procedures set forth in this Order:

  
\_\_\_\_\_  
William Greendyk  
UNITED STATES BANKRUPTCY JUDGE

  
\_\_\_\_\_  
Letitia Z. Clark  
UNITED STATES BANKRUPTCY JUDGE

  
\_\_\_\_\_  
Richard Schmidt  
UNITED STATES BANKRUPTCY JUDGE

  
\_\_\_\_\_  
Karen K. Brown  
UNITED STATES BANKRUPTCY JUDGE

  
\_\_\_\_\_  
Wesley W. Steen  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT "A"**  
**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE SOUTHERN DISTRICT OF TEXAS**  
**HOUSTON DIVISION**

**In re:**

§  
§  
§

**Case No.** \_\_\_\_\_  
**(Chapter 13)**

**BANKRUPTCY RULE 2016(b) DISCLOSURE AND**  
**APPLICATION FOR APPROVAL OF FIXED FEE AGREEMENT**

[NAME OF ATTORNEY] files this Bankruptcy Rule 2016(b) Disclosure and Application for Approval of Fixed Fee Agreement.

1. I have agreed to provide the following services to the Debtors on a fixed fee basis:
  - A. Counsel with the Debtors on an as needed basis.
  - B. Prepare and file a proposed chapter 13 plan and any required amendments to the plan.
  - C. Prepare and file the required schedules and statements and any required amendments.
  - D. Prepare and file miscellaneous motions required to protect the Debtors' interests in the case.
  - E. Prepare and file responses to motions filed against the Debtors—even if the response is a statement that the Debtors do not oppose the relief.
  - F. Attend the § 341 meeting.
  - G. Attend the confirmation hearing, if required under the circumstances, pursuant to an order entered in the chapter 13 case, or pursuant to local rules.
  - H. Advise the Debtors concerning their obligations and duties pursuant to the Bankruptcy Code, Bankruptcy Rules, applicable court orders and the provisions of their chapter 13 plan.
2. The fixed fee agreement does not include the following services:
  - A. Representation of the Debtors in an adversary proceeding, either as a plaintiff or a defendant.
  - B. Representation of the Debtors in a contested matter, the subject of which is extraordinary in the context of chapter 13 cases in the United States Bankruptcy Court for the Southern District of Texas.
  - C. Representation of the Debtors in any matter in which the Court orders fee shifting pursuant to which fees are to be paid by a person other than the Debtors.
  - D. Except as set forth in paragraph 4 below, representation on matters for which the first hearing is set more than 120 days following confirmation.
3. Check the box for subparagraph A or B and check the box for subparagraph C if applicable.:

A. [Check box if applicable]. I have agreed to a fixed fee (including all expenses except reimbursement of the filing fee) in the amount of \$ \_\_\_\_\_ [insert amount not to exceed \$2,460.00]. I have received \$ \_\_\_\_\_ for representing the Debtor in this case. Therefore the balance due from the trustee as an administrative expense is \$ \_\_\_\_\_. I agree that my fee shall be paid from one half of the funds available for distribution by the Trustee until I am paid in full, except that if the case is dismissed before confirmation or less than 120 days after confirmation, the maximum fee allowed under this provision is \$1,800.00 and I shall be paid pro rata with other administrative expenses from the trustee's distribution on dismissal.

B. [Check box if applicable]. I have agreed to a fixed fee (including all expenses except reimbursement of the filing fee) in the amount of \$ \_\_\_\_\_ [insert amount not to exceed \$2,050.00]. I have received \$ \_\_\_\_\_ for representing the Debtor in this case. Therefore the balance due from the trustee as an administrative expense is \$ \_\_\_\_\_. If the case is dismissed before confirmation or less than 120 days after confirmation, the maximum fee allowed under this provision is \$1,800.00.

C. [Check box if applicable]. I have advanced the filing fee of \$ \_\_\_\_\_. Therefore, in addition to the amounts set forth above, the trustee shall reimburse to me that sum as an administrative expense of the estate.

4. The following services will also be provided, if needed, on a fixed fee basis [check none to three boxes]. Payment may be made directly by the Debtors or through the confirmed plan:

A. [Check box if applicable]. Motions for relief from the stay for which the first hearing date is more than 120 days following confirmation and which are resolved by agreement. The fixed fee is in the amount of \$ \_\_\_\_\_ [insert amount not to exceed \$250.00].

B. [Check box if applicable]. Motions filed by the chapter 13 trustee seeking dismissal of the case, for which the first hearing date is more than 120 days following confirmation, and for which there is an agreement or no opposition. The fixed fee is in the amount of \$ \_\_\_\_\_ [insert amount not to exceed \$250.00].

C. [Check box if applicable]. Debtors' motion to modify plan for which the first hearing date is more than 120 days following confirmation. The fixed fee is in the amount of \$ \_\_\_\_\_ [insert amount not to exceed \$400.00].

5. I have not shared or agreed to share any of the compensation paid or to be paid. The following sets forth all of the compensation that is being paid by any person or entity other than the Debtor(s). Describe: \_\_\_\_\_

I certify that the foregoing is a true and correct statement of the compensation that I have been paid or that has been agreed to be paid to me.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Counsel to the Debtor(s)



Exhibit "B"  
**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**In re:**

§  
§  
§

**Case No.** \_\_\_\_\_  
**(Chapter 13)**

Name of applicant		
Applicant's professional role in case (e.g., "Debtors' counsel")		
Indicate whether this is an application for pre or post confirmation services		
	Beginning of Period	Ending of Period
Time period covered in application		
Time periods covered by any prior applications		
Total amounts awarded in all prior applications		
Amount of retainer received in case		
Total fees applied for in this application and in all prior applications (including any retainer amounts applied or to be applied)		
Total fees applied for in this application (including any retainer amounts to be applied)		
Total professional fees requested in this application		
Total actual professional hours covered by this application		
Average hourly rate for professionals		
Total paraprofessional fees requested in this application		
Total actual paraprofessional hours covered by this application		
Average hourly rate for paraprofessionals		
Reimbursable expenses sought in this application		
Amount of attorneys fees provided for in plan		
Total to be paid to unsecured creditors under the plan		
Percentage dividend to unsecured creditors under the plan		
Total to be paid to all pre-petition creditors under the plan		
Date of any scheduled dismissal hearing		
Date of confirmation hearing		
Indicate whether plan has been confirmed		