

IT IS ORDERED as set forth below:



Date: May 22, 2007

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: R06-42225-PWB
	:	
NELLIE H. HAYES,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

The Chapter 13 Trustee contends that the proposed compensation of the Debtor's lawyer of a flat fee of \$4,200 for "base services" and additional fees for "non-base services" is not reasonable. The Court concludes that payment of \$4,200 under the modified flat fee arrangement proposed by the lawyer, interpreted as explained below, constitutes reasonable compensation as 11 U.S.C. § 330(a) requires and will allow it as interim compensation under § 331 and the provisions of this Court's General Order No. 6-2006.¹

¹This Court has authority to hear and determine this proceeding under 28 U.S.C. § 157(b)(1) as a core proceeding under 28 U.S.C. § 157(b)(2)(A) within the District Court's jurisdiction under

The Debtor's chapter 13 plan and her attorney's Rule 2016(b) statement reflect that the Debtor has agreed to pay her attorney, Fuller & McKay, \$4,200 for "base services" and additional fees for "non-base" services upon application and the Court's approval. "Base services" do not include postconfirmation matters or representation of the Debtor in adversary proceedings or contested matters. For such non-base services, charges are as follows: all postconfirmation amendments, \$300 plus service postage; motion to disburse, motion to employ counsel (presumably in connection with any special litigation matters that may arise, such as a personal injury action), motion to suspend payments, motion to sell, motion to substitute collateral, \$350 plus service postage; responses to motion for relief from stay or motion to dismiss, \$500 plus service postage; and any matter not listed specifically, \$300 per hour plus costs and expenses.

The Chapter 13 Trustee objected to payment of \$4,200 under this arrangement on the ground that "the fee does not appear to be reasonable in this case given its routine nature." (Trustee's Response, ¶ 5, Docket No. 24). In response, the Debtor's attorney proposed to modify the fee arrangement by adding the following:

The fee set out above will cover all customary and usual work required during the course of a standard Chapter 13 case. In the event that a matter requires more than the usual and customary time or is a matter that does not usually occur during the course of a normal Chapter 13 case Debtor's attorney reserves the right to file an application with the Court for additional fees, serving all parties-in-interest with notice of the application and providing an opportunity to be heard on the matter. If the additional fee is

28 U.S.C. § 1334(b) that the District Court has referred under 28 U.S.C. § 157(a) and L.R. 83.7, N.D.Ga.

approved by the Court, then the fee shall be paid up to \$50 per month, and the distributions to creditors shall be reduced, pro rata, by that amount until the additional fee is paid in full.

The Court will consider allowance of payment of \$4,200 and the Trustee's objection thereto on the assumption that the fee agreement between the Debtor and her attorney is thus modified.² Further, the Court's analysis is premised on its interpretation of the modification as providing for a flat fee of \$4,200 for all customary legal services that debtors may commonly require in a chapter 13 case, including postconfirmation matters that often arise in chapter 13 cases,³ and as permitting additional compensation only to the extent that the Debtor requires extraordinary services due to unusual circumstances.

As thus interpreted, the fee agreement as modified provides the Debtor continued legal representation through the conclusion of her case for no additional charge even if postconfirmation problems, currently not expected, nevertheless arise, unless the matters requiring legal services differ in quantity or quality from those that regularly arise in chapter 13 cases.⁴ For the flat fee of \$4,200, the Debtor is effectively purchasing legal services that she hopes she will never need, but

²The record does not show whether the Debtor has agreed to this modification of the fee agreement. Because the change is clearly in her favor, it would seem that she would readily agree to the change.

³In particular, the Court construes the modified language as eliminating the general exclusion in the original language of contested matters. As the Court sees it, the flat fee arrangement, as modified, encompasses representation on routine and commonly occurring matters such as objections to claims, motions for stay relief, and motions to dismiss.

⁴The Court interprets the agreement in the context of the law firm's explanation of its intent in a related case involving the same circumstances, *In re Kyle*, Case No. 06-42057-MGD, Apr. 4, 2007 (slip op. at 1 n. 1), that "in reality, [the fee for base services] is going to take us through the totality of the case, except in those very special circumstances where a lot of stuff is going on." The Court's explication of the meaning of the modification seeks to state more formally and specifically the lawyer's colloquial expression of its intent.

she will not have to pay anything more if she encounters only the types of problems that many chapter 13 debtors face after confirmation despite everyone's hopes, expectations, and best intentions.

Having thus interpreted the terms of the lawyer's engagement, the Court turns to the circumstances of this case. The Debtor's second amended chapter 13 plan provides for payment of \$700 per month and a dividend of 100% to unsecured creditors, whose claims total \$14,167.57. The Debtor has no prior bankruptcy cases. The Debtor owns a house and nine acres of land located in Rocky Face, Georgia secured by the lien of America's Servicing Company; a mobile home, secured by the lien of Greentree; and two and one-half acres of land with no liens. The Debtor's plan provides for payments of \$75 monthly on the arrearage to America's Servicing Company in the amount of \$2,225.31; \$25 monthly on the arrearage to Greentree; and \$150 monthly until November 2007 and thereafter \$558 monthly to Ford Motor Credit Company on its claim of \$14,599 secured by a 2002 Ford Windstar. Debtor's attorney's fees are to be paid up to \$4,194 from the initial disbursement upon confirmation of the plan and thereafter at the rate of \$408 per month. The Debtor has filed two amended plans and resolved an objection to confirmation filed by Ford Motor Credit Company.

The Debtor's plan was confirmed on January 17, 2007, with the issue of attorney's fees reserved for further consideration, which the Court now undertakes.

The Bankruptcy Court for the Northern District of Georgia has adopted General Order No. 6-2006 with respect to compensation of attorneys in chapter 13 cases filed on or after October

1, 2006.⁵ General Order No. 6-2006 replaced the “no look” fee approach with a market-based approach. The Order recognized that cases filed under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) may be more complex and require more paperwork for both the chapter 13 debtor and debtor’s counsel. The Order observed, “Issues presented in Chapter 13 cases vary and debtor’s counsel is in the best position to evaluate each case and to determine the legal services required and the fees that are appropriate for the performance of those services.” The Order clearly states the professional obligation of the debtor’s lawyer to charge a reasonable fee: “The fee and method of payment agreed to between the attorney and the debtor should be reasonable in accordance with 11 U.S.C. 330(a)(1) and the ethical requirements of the State Bar of Georgia.”

A professional's compensation must be for actual, necessary services and such compensation must be reasonable. 11 U.S.C. § 330(a)(1)(A). Section 330(a)(3) states the standards governing the allowance of professional compensation:

(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;

⁵General Order No. 6-2006 requires the debtor’s plan to state with specificity “the nature of the fee to be paid through the plan, if any, and the method of payment.” If there are no objections, payment of the fee occurs in accordance with the terms of the confirmed plan. Such allowance of fees is interim in nature, subject to review, and subject to disgorgement at any time upon request of any party in interest or *sua sponte* by the Court. The provisions of the chapter 13 plan and the attorney’s Rule 2016 disclosure statement effectively constitute an application for allowance of compensation, and confirmation constitutes interim allowance of the fees (in the absence of an objection) in compliance with the requirements of FED. R. BANKR. P. 2016(a).

(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.

In a chapter 13 case, § 330(a)(4)(B) provides for allowance of “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.”

Bankruptcy Courts often utilize the “lodestar” approach to the review of attorney’s fees and consider twelve factors set forth in the seminal case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d. 714 (5th Cir. 1974). Those factors are: the time and labor required; the novelty and difficulty of the legal questions; the skill required to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee for similar work in the community; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience,

reputation, and ability of the attorney; the undesirability of the case; the nature and length of the professional relationship with the client; and awards in similar cases. *Johnson*, 488 F.2d at 717-719. For the most part, these are the same things that govern determination of a reasonable fee under standards of professional responsibility that govern a lawyer's conduct. GEORGIA RULES OF PROFESSIONAL CONDUCT R. 1.5. *See also* MODEL RULES OF PROFESSIONAL RESPONSIBILITY R. 1.5 (2002).

The “lodestar” method focuses on time spent multiplied by an hourly rate for that time; the product is subject to adjustment based on the other factors. This approach, which had its genesis in fee-shifting statutes awarding attorney's fees to a prevailing party, is not well suited to allowance of compensation when, as in this case, the client and attorney have agreed to compensation based on a flat fee. By definition, the amount of time *actually* expended becomes immaterial because the attorney has agreed to provide all specified services within the scope of the engagement no matter how long it takes.

To be sure, the amount of time that it will *likely* take the lawyer to provide competent representation within the scope of the matter is an appropriate consideration in assessing the reasonableness of a flat fee. But it is not the only factor, and a precise calculation of how much time a lawyer has actually spent is obviously not essential to allowance of fees premised on a compensation method that does not depend on how much time was spent.⁶

The charging of flat fees in consumer cases is common-place and commendable. A flat

⁶Implicit in the Court's analysis is the proposition that § 330's standards for determination of reasonable compensation do not prevent retention of an attorney on a flat fee basis. Section 328(a), which expressly authorizes a trustee or committee of creditors to employ a lawyer on a fixed fee basis, does not apply to the retention of attorneys for chapter 13 debtors. Court approval of the retention of counsel for a chapter 13 debtor is not required. *See* § 327(a).

fee is particularly useful in a chapter 13 case, for reasons Judge Diehl articulated in analyzing the reasonableness of a chapter 13 debtor's fee request in *In re Kyle*, Case No. 06-42057-MGD, slip op. at 4-5 (Bankr. N.D. Ga. Apr. 4, 2007:

[T]he Chapter 13 Debtor's attorney and the client both desire to provide for the payment of the fee through the Chapter 13 Plan and thus must determine on the front end what the fee will be, before the number of hours to be expended can be determined. Many of the Chapter 13 cases are filed by specialized volume practices in which the fee is more an average fee than an individualized fee. This approach has the advantages of simplicity, efficiency and economy and is certainly not unreasonable. [Citations omitted].

The Court agrees with Judge Diehl's conclusion that, in a chapter 13 case, "the consideration of a lodestar fee in retrospect where the attorney and client have agreed to a flat fee in advance is inappropriate." *Id.* at 5. The proper approach, rather, is to evaluate the amount of the flat fee for reasonableness in light of the statutory standards of § 330, which effectively incorporates traditional considerations for determining a reasonable fee. It is in this sense that *Johnson* remains instructive in considering the reasonableness of a flat fee.

In *Kyle* and five other chapter 13 bankruptcy cases,⁷ Judge Diehl analyzed the reasonableness of the flat fees of the debtors' attorney with reference to the *Johnson* factors, taking into account the added complexity of bankruptcy practice under BAPCPA, citing *In re McNally*,

⁷The six cases are: *In re Mitchell T. Kyle and Mary M. Kyle*, Case No. 06-42057-MGD; *In re Jason Anthony and Jennifer Anthony*, Case No. 06-42098-MGD; *In re Randall Evans*, Case No. 06-42115-MGD; *In re Jimmy Killian*, Case No. 06-42131-MGD; *In re Michael Stewart*, Case No. 06-42146-MGD; and *In re Jacqueline Kendrick*, Case No. 06-42160-MGD.

2006 WL 2348687 (Bankr. D. Colo. 2006).⁸ The fees approved in those cases ranged from \$4,000 to \$4,200 for cases that required varied amounts and types of work.

The Court has considered the flat fee arrangement in this case, modified and interpreted as set forth above, in light of the statutory standards of § 330(a) and the expanded and more specific considerations that govern determination of a reasonable fee identified in *Johnson* and that govern a lawyer under rules of professional responsibility. For the reasons Judge Diehl articulated in her analyses of the flat fees in the chapter 13 cases before her; in accordance with the Court's observations above concerning the potential services that the Debtor might need in this case in the future; and based on the satisfactory results achieved so far, the Court concludes that the fee of \$4,200 under the flat fee arrangement, modified and interpreted as set forth above, is within the range of reasonableness.

Because this case does not appear to be particularly complicated when compared to some,⁹ the fee is, perhaps, on the high end of the range. Nevertheless, the flat fee pays for all services that the Debtor is likely to require for the life of this case, barring extraordinary

⁸The court in *McNally* stated, 2006 WL 2348687 at *12:

[BAPCPA] introduced all of us – the Court, the Clerk's office, trustees, practitioners and their clients – to a new, more complicated bankruptcy process. The complexity of the decision-making processes concerning the filing of a bankruptcy case increased exponentially, regardless of chapter. Even the simplest of tasks under the old law became novel and difficult questions given the dire consequences that could befall a client (and counsel) for failing to meet any number of these multiple new requirements.

⁹The Court notes that a case might not appear to be "particularly complicated" for one of two reasons. It might, of course, actually be a simple, uncomplicated case. But it could also appear that way because the lawyer did a good job of anticipating and resolving difficult issues out of view of the Court, in ways that might not show up on the record.

circumstances – a benefit of significant, if currently unascertainable, value to the Debtor. When, as here, the circumstances indicate that a proposed flat fee covering all services that are likely to be required in the case falls within the range of reasonableness, the lawyer has met the burden of demonstrating its reasonableness. The Court cannot fairly reduce it in the absence of an objection that articulates reasons that it is excessive and provides the Court with an appropriate basis for disallowing it in whole or in part.¹⁰

The Court notes that the chapter 13 trustee's objection was well founded and resulted in a modification of the fee arrangement beneficial to the Debtor. And the Court reminds counsel for the Debtor in this case, as well as other lawyers representing debtors in chapter 13 cases, that they are officers of this Court with important professional obligations. The fair and proper implementation of General Order 6-2006 depends in substantial part on their willingness and ability to charge reasonable fees for the important work they do and to tailor the fees to the circumstances of the case.

Based on, and in accordance with, the foregoing, it is hereby **ORDERED and ADJUDGED** that the flat fee of \$4,200 is allowed on an interim basis in accordance with General Order 6-2006 and that the Chapter 13 trustee is authorized to make disbursements to pay it in accordance with the provisions of the confirmed plan.

Because the Court has based its ruling on its assumption that the Debtor and her lawyer have agreed to the modified arrangement as described herein and on its interpretation of its effect,

¹⁰If the circumstances of the case do not demonstrate that the fee is not within the range of reasonableness, of course, or if a lawyer does not appear to be handling a debtor's work in a competent manner, the Court may exercise its authority to review the fee *sua sponte* and disallow it in whole or in part.

the Court will stay this Order for ten days to provide time for the Debtor or her lawyer to file a motion to reconsider it if that they have not so agreed or if the Court has not properly interpreted the agreement. If such a motion is filed within ten days, this Order will remain stayed pending disposition of the motion. If no motion is filed within ten days, the Order will become final.

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Distribution List

Mitchell Tracy Kyle
824 Mountain Leaf Drive
Tunnel Hill, GA 30755

Mary Michelle Kyle
824 Mountain Leaf Drive
Tunnel Hill, GA 30755

James R. McKay
Fuller & McKay
P. O. Box 1654
Rome, GA 30162-1654

Mary Ida Townson
Chapter 13 Trustee
Suite 2700 Equitable Bldg.
100 Peachtree Street, NW
Atlanta, GA 30303