HOT TOPICS CONCERNING THE ALLOWANCE OF ATTORNEYS’ FEES AGAINST THE BANKRUPTCY ESTATE

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CHAPTER 8
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Robert L. Jones was appointed April 4, 2000, by the United States Court of Appeals, Fifth Circuit, as the Bankruptcy Judge for the Lubbock, Abilene, Amarillo, and San Angelo Divisions of the Northern District of Texas.

Prior to his appointment, Judge Jones was a partner with the firm of Crenshaw, Dupree & Milam, L.L.P., Lubbock, Texas. From August 1982 to September 1985, prior to joining Crenshaw, Dupree & Milam, Judge Jones was an attorney with Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Texas. He concentrated his practice in the areas of bankruptcy and commercial litigation. His bankruptcy practice included representation of both secured and unsecured creditors, trustees, and debtors. He is a 1978 graduate of Texas Tech University and a 1982 graduate of Texas Tech University School of Law, where he was a member and an Associate Editor of the Law Review.

Judge Jones served as Co-Chairman of the Eighth and Ninth Annual Farm, Ranch, and Agri-Business Bankruptcy Institutes, Lubbock, Texas, 1992-93. He is a frequent speaker on bankruptcy and commercial law issues.

Judge Jones is a member of the State Bar of Texas, the Lubbock County Bar Association, and the West Texas Bankruptcy Bar Association, of which he is a former President. He has been elected a Fellow of the Texas Bar Foundation.

Judge Jones grew up in Lubbock, and he and his wife, Betsy, have two children, Callie, a junior at Vanderbilt University, and Ben, a sophomore at Cornell University. Judge Jones enjoys reading, music, and attending his children’s activities. He is also an avid sports fan and finds time to play an occasional round of golf.
Judge Nelms has received no honors or awards during his tenure on the bench. He is not a member of any organization whose membership is limited to professionals who have demonstrated exemplary service. Nevertheless, Judge Nelms has a dog and two cats who are very fond of him.
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HOT TOPICS CONCERNING
THE ALLOWANCE OF
ATTORNEYS’ FEES AGAINST
THE BANKRUPTCY ESTATE

I. Hot Topic #1: Is it
A. attorney fees
B. attorney’s fees
C. attorneys fees, or
D. attorneys’ fees?

* See last page of paper for the answer

II. Hot Topic #2: Are post-petition attorneys’ fees incurred by unsecured creditors allowable against the bankruptcy estate?

A. Applicable Code Provisions
   - Section 101(5) defines “claim” to include a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .”
   - Section 502(b)(1) provides a claim is allowed “except to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured . . . .”
   - Section 506(b) provides that “to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there should be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.”

B. What the Supremes have said – The United States Supreme Court in Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co., 549 U.S. 443, 127 S. Ct. 1199 (2007) addressed the validity of the Ninth Circuit’s Fobian Rule which provided that attorneys’ fees incurred litigating pure bankruptcy issues are not allowable. Travelers, an unsecured creditor in the case, filed a proof of claim for attorneys’ fees and other expenses in an amount in excess of $167,000. The Court disposed of the Fobian Rule, finding no basis in the Code for the disallowance of attorneys’ fees solely because the matter litigated was one peculiar to bankruptcy law. The Court noted that the right to attorneys’ fees under a contract is a claim against the estate and is therefore analyzed under section 502 of the Code. The Court declined to answer the question whether the fees sought by Travelers were allowable under section 502(b)(1), however. The Court addressed only the issue of the validity of the Fobian Rule. The Court remanded the case and also declined the opportunity to address section 506(b) of the Code, which had been raised as a basis for disallowing the fees.


1. Cases holding that an unsecured creditor is entitled to recover post-petition fees from the estate on the basis that fees incurred in litigation concerning the creditor’s prepetition debt are a contingent claim, and because nothing under the Code prohibits their allowance, fees are allowable under section 502:


2. Cases holding that unsecured creditors are not entitled to post-petition attorneys’ fees as section 506(b) of the Code is the only provision that permits a creditor to recover post-petition fees, and it only allows fees for oversecured creditors:

   Rushton v. State Bank of S. Utah (In re Gledhill), 164 F.3d 1338 (10th Cir. 1999); Adams v. Zimmerman, 73

3. Cases holding that unsecured creditors are entitled to post-petition fees where the debtor is solvent:


4. The Taylor-Mertens article advocates the position that section 506(b) is ultimately controlling as “applicable law” (see § 502(b)(i)), and it dictates that unsecured creditors cannot, under the plain reading of section 506(b), recover post-petition attorneys’ fees.

D. Recent Cases – post Travelers

● In re SNTL Corp., 571 F.3d 826 (9th Cir. 2009).

The Ninth Circuit Court of Appeals (adopting the opinion of the Bankruptcy Appellate Panel) held that an unsecured creditor may recover post-petition attorneys’ fees if their recovery is provided for under applicable law or agreement. In re SNTL, 571 F.3d at 844. The court began its analysis with a discussion of section 506 of the Code and rejected the argument of many courts that section 506(b) prevents the recovery of post-petition attorneys’ fees for all except oversecured creditors. Id. at 841. Instead, the court determined that section 502(b) controlled the issue. Id. at 843. The court stated that where the parties execute a prepetition agreement containing an attorneys’ fee provision, such provision gives rise to a contingent, unliquidated claim for fees that are not specifically disallowed under section 502(b). Id.

The court further determined that the critical question is whether the right to collect the fees existed prior to the filing of the petition. Id. The court also addressed whether the Supreme Court’s decision in United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) controlled. Timbers held that post-petition interest is permitted under section 506(b), but only “to the extent” that a creditor is oversecured. Timbers, according to the Ninth Circuit, merely disallowed claims for interest on unsecured debt. Id. at 844. The court reasoned that the holding of Timbers was consistent with section 502(b)’s disallowance of unmatured interest but was not determinative of claims for post-petition attorneys’ fees because section 502(b) does not specifically prohibit such claims. Id. Thus, since section 502(b) does not disallow post-petition claims for attorneys’ fees, the Ninth Circuit found such claims are allowable as long as the right to recover fees exists under contract or other nonbankruptcy law. Id.

● Ogle v. Fid. & Deposit Co. of Md., 586 F.3d 143 (2nd Cir. 2009).

Fidelity issued surety bonds to insurers of Agway, a chapter 11 debtor. Under agreements between Fidelity and Agway, Agway indemnified Fidelity for any payments Fidelity made under the bonds as well as legal fees incurred in enforcing the indemnity agreements. Agway did not default on its obligations to its insurers until after it filed chapter 11. Upon Agway’s defaults to its insurers, the insurers sought payment from Fidelity, and Fidelity paid the insurers in accordance with its obligations under the bonds. Fidelity incurred significant legal fees enforcing its indemnity rights against Agway. The issue, therefore, was whether the post-petition fees of $884,506.28 were allowable. The liquidating trustee of the Agway Liquidating Trust conceded that Fidelity had a right to the fees under state contract law, but refused to pay the fees on the basis that the Bankruptcy Code bars such recovery.

The bankruptcy court held that Fidelity could collect the $884,506.28 in post-petition attorneys’ fees. The District Court affirmed. The Second Circuit also affirmed, concluding that the Code does not prohibit an unsecured creditor from collecting post-petition attorneys’ fees pursuant to an otherwise enforceable pre-petition contract of indemnity.

The Second Circuit couched the issue before it as follows: “Under the Bankruptcy Code, is an unsecured creditor entitled to recover post-petition attorneys’ fees that were authorized by a pre-petition contract but were contingent on post-petition events?” The court acknowledged that the cases addressing the issue are closely divided. The court noted the Ninth Circuit opinion in SNTL for the proposition that such attorneys’ fees are allowable. The court also looked to its prior decision in United Merchs. & Mfrs., Inc. v. Equitable Life Assurance Soc’y of the U.S., 674 F.2d 134 (2nd Cir. 1982), in which it decided the issue under the former bankruptcy act and held that post-petition attorneys’ fees were allowable. In doing so, the court commented on the soon to be enacted Bankruptcy Code, and specifically section 506(b) of the Code.

In its analysis, the court first looked to section 502(b), under which the court is to determine the amount
of the claim as of the date of the filing of the petition. The court then looked to section 101(5)(A), which defines “claim” to mean a right to payment that includes unliquidated, contingent, unmatured, and unsecured claims, in addition to claims that are fully liquidated at the time of the filing of the case. The court construed the indemnity claims to constitute contingent claims on the basis that, under contract law, a right to payment based on an indemnification contract arises at the time the indemnification agreement is executed. The court looked to the Supreme Court opinion in Travelers and, specifically, how the Court broadly couched the issue: “We are asked to consider whether federal bankruptcy law precludes an unsecured creditor from recovering attorney’s fees authorized by a prepetition contract and incurred in post-petition litigation.” Ogle, 586 F.3d at 146 (citing Travelers, 549 U.S. at 445). The court emphasized that the manner in which the issue was framed by the Supreme Court in Travelers defines the scope of the Travelers opinion. This is important because, under Travelers, section 502(b) “interposes no bar to an unsecured creditor’s ability to recover post-petition attorneys’ fees.” Id. at 147. The court therefore concluded that section 502(b) does not bar the recovery of post-petition attorneys’ fees.

The court then looked to section 506(b) and simply noted that, per Travelers, the question is whether the Code disallows post-petition attorneys’ fees, and whether it does so expressly. “It was therefore decisive in Travelers that ‘the Code says nothing about unsecured claims for contractual attorney’s fees incurred while litigating issues of bankruptcy law.’” Id. at 148 (citing Travelers, 549 U.S. at 453). The court acknowledged that while the Travelers court declined to address section 506(b) because it had not been raised by the parties, “it is decisive here that the Code says nothing about such fees incurred litigating things other than issues of bankruptcy law.” Id. The court therefore concluded that section 506(b) does not implicate unsecured claims for post-petition attorneys’ fees and therefore does not bar recovery of such fees. The court went on to distinguish its holding from that of United Savs. Ass’n of Tex. v. Timbers of Inwood Forest Assoc’s, Ltd., 484 U.S. 365 (1988), which explained that section 506(b) allows an oversecured creditor to receive post-petition interest only out of the “security cushion,” but that an unsecured creditor “falls within the general rule disallowing post-petition interest.” The court concluded that construing section 502(b)(2) of the Code (which disallows a claim for interest that is unmatured), in conjunction with section 506(b), creates a limited exception for oversecured creditors from the general rule in section 502(b) that disallows a claim for unmatured interest. It noted that while section 502(b)(2) bars claims for unmatured interest, it does not similarly bar claims for post-petition attorneys’ fees. Ogle, 586 F.3d at 148.


The bankruptcy court in Smith followed the reasoning set forth in In re SNTL and allowed an unsecured creditor to recover post-petition attorneys’ fees “to the extent allowable under nonbankruptcy law.” In re Smith, 2008 WL 185784 at *6. The court reasoned that since section 506(b) does not apply to unsecured claims, section 502 governed whether the claim for post-petition attorneys’ fees may be allowed. Id. The court held that since section 502(b) “does not contain an express exception for post-petition attorneys’ fees,” the claim should be allowed if the claim is enforceable under other law or agreement. Id. Thus, the court found the claim could only be disallowed if the claim was unenforceable under other law or agreement. Id.


In In re QMECT, a case decided shortly after the Supreme Court issued the Travelers opinion, the bankruptcy court held that an unsecured creditor may recover post-petition attorneys’ fees if provided for prepetition by other law. In re QMECT, 368 B.R. at 886. The court found that section 506(b) was inapplicable to this question because 506(b) “does not distinguish between prepetition and post-petition attorneys’ fees.” Id. at 885. The court also found the lack of a provision disallowing such claims under section 502(b) indicated such claims are allowed under the Code. Id.
The court in Electric Machinery took the opposite approach and did not permit unsecured creditors to recover post-petition attorneys’ fees. Id. at 552. The court noted that Travelers left open the question regarding the allowance of post-petition attorneys’ fees. The court declined to follow what it deemed a minority line of cases permitting unsecured creditors’ claims for post-petition attorneys’ fees. Id. The court found support for this position in the plain language of section 506(b) of the Code. Id. at 551. It reasoned that the language of section 506(b) indicates such section was meant “to create an exception to the general rule that claims are to be determined as of the petition date, exclusive of post-petition interest, attorneys’ fees and other charges.” Id. The court further stated, “if Congress intended for unsecured creditors to receive post-petition attorneys’ fees, then it would have done so explicitly by authorizing unsecured creditors to collect fees under section 506(b).” Id.

The court also based its decision on the Supreme Court’s reasoning and opinion in Timbers (see discussion of Timbers in SNTL Corp. case discussed above). Id. The court explained that because only post-petition interest on oversecured claims was permitted under Timbers, unsecured creditors are not covered under the rule and are thus left without a claim for post-petition attorneys’ fees incurred. Id. The court also relied upon the 502(b) authority (claim determined “as of the date of . . . the petition”) and found that cases disallowing post-petition attorneys’ fees did not include post-petition interest, attorneys’ fees or costs in determining the amount of claims on the date of the petition unless the creditor was oversecured and thus allowed to accrue fees and costs under section 506(b). Id.

In re Hitch, No. 07-70803, 2009 WL 1542791 (Bankr. C.D. Ill. May 29, 2009). The bankruptcy court here agrees with the holding in Electric Machinery, stating as follows:

Under the plain language of § 506(b), a secured creditor can recover post-petition interest, fees, costs, and charges provided by contract or state law only to the extent that its collateral is worth more than the claim. Section 506(b)’s silence with respect to unsecured and under-secured creditors points to the conclusion that these creditors are not entitled to post-petition fees and costs. . . . Section 506(b) provides an exception for over-secured creditors to the general rule that claims are to be determined as of the petition date, exclusive of post-petition fees and costs. If Congress had intended for unsecured and under-secured creditors to receive post-petition fees and costs, then it could have easily done so.

Id. at *3-4 (citing Electric Machinery, 371 B.R. at 550; and Pride Companies, L.P., 285 B.R. at 372).

III. Hot Topic # 3: What is the standard for determining whether to allow attorneys’ fees for services performed by counsel employed as a professional (to represent, for example, the debtor, the debtor in possession, the trustee, or a committee)? Is it enough to simply do “good” work?

A. Applicable Code Provisions

Section 330, as amended by BAPCPA, states as follows:

(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 compensation that is less than the amount of compensation that is requested.

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman appointed under section 333, or a professional 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.

11 U.S.C. § 330 (emphasis added)

B. What the Supremes have said – The United States Supreme Court in Lamie v. U. S. Trustee, 540 U.S. 526 (2004) resolved a circuit split in holding that a debtor’s attorney is not eligible for compensation under section 330(a)(1) of the Bankruptcy Code for services performed after a trustee was appointed.

C. Cases holding that, in evaluating professional fees, a strict hindsight or “material benefits” test is employed.

• In re Pro-Snax Distrib., Inc., 157 F.3d 414, 425 (5th Cir. 1998).

The Fifth Circuit in Pro-Snax addressed two issues. It first took up the issue of whether a chapter 11 debtor’s attorney may be compensated for work done after the appointment of a trustee under section 330(a) of the Bankruptcy Code. The debtor’s attorney, Andrews & Kurth, had indeed provided services for the debtor both before and after a chapter 11 trustee had been appointed. After considering the language of section 330 (which, by then, excluded “debtor’s attorney”), the Fifth Circuit concluded that section 330, on its face, clearly precludes any award of fees to debtor’s attorney for services provided after a chapter 11 trustee had been appointed.
This holding was later vindicated by the Supreme Court in *Lamie*.

The second issue, which, by comparison with the first issue, was discussed in much less detail, concerned the standard to apply in assessing whether to award compensation to Andrews & Kurth for services it rendered to the debtor before the trustee was appointed. Andrews & Kurth argued that the court should use a “reasonableness” test and thus determine whether the services were objectively beneficial toward the completion of the case at the time they were performed. The objecting creditors, on the other hand, advanced a hindsight approach by which the court would determine whether the services actually resulted in an identifiable, tangible, and material benefit to the bankruptcy estate. The Fifth Circuit adopted the stricter “hindsight” or “material benefits” test, specifically noting that it was disinclined to hold that any services performed at any time need only be reasonable to be compensable. The court stated as follows:

[W]e believe it important to stress that any work performed by legal counsel on behalf of a debtor must be of material benefit to the estate. *See In re Melp, Ltd.*, 179 B.R. 636 (E.D. Mo. 1995).

The district court’s instruction to the bankruptcy court, to consider strongly the debtor’s lack of success in obtaining confirmation of the Chapter 11 plan, is consistent with the standards identified by Congress in § 330, which require that – at the time the services are performed – the chances of success must outweigh the costs of pursuing the action.

157 F.3d at 426.


The court considered whether Hughes & Luce, which was counsel for the Committee of Equity Security Holders, was entitled to compensation for its representation of the Committee during the chapter 11 proceeding of Gadzooks, Inc., which was a mall-based specialty retailer of casual apparel and related accessories for young men and women. The Equity Security Holders Committee had proposed a reorganization plan that involved a rights offering. This plan was initially supported by both the debtor-in-possession and the Creditors Committee. The chapter 11 case was filed February 3, 2004. However, by December 2004, it was apparent that the debtor’s sales numbers would not support the reorganization plan that had been proposed by the Equity Security Holders Committee. The Creditors Committee, in January of 2005, requested that Hughes & Luce stop incurring fees by working on the case and that the Equity Security Holders Committee dissolve. The Committee did in fact dissolve on January 11, 2005. In February 2006, the bankruptcy court confirmed a plan of liquidation proposed by the debtor and the Creditors Committee. Hughes & Luce filed its fee applications, requesting total fees and expenses for services provided through January 24, 2005, in excess of $950,000. The Creditors Committee and the liquidating trustee objected to the fees on the basis that the fees were not compensable under the *Pro-Snax* standard which requires review of the fees in hindsight and a material benefits analysis.

The bankruptcy court employed a reasonableness test and approved the fees. The court focused on whether the fees were objectively reasonable and necessary at the time they were provided. The court rejected a hindsight, material benefits test on the basis that the only courts that had previously employed such a test were drawing a distinction between services rendered pre-appointment of a trustee and services rendered post-appointment of a trustee. In particular, the material benefits test, which could only be determined in hindsight, was employed to evaluate the services provided post-appointment of a trustee as a way to prevent an award of fees for services that duplicated work performed by the trustee.

The district court reversed the bankruptcy court and remanded the case. The court held that the Fifth Circuit’s use of the material benefits standard in *Pro-Snax* in evaluating attorneys’ services prior to appointment of the trustee was not mere dictum, as was suggested by the bankruptcy court. The court held that the standard under section 330 and the requirements of *Pro-Snax* are harmonized by employing a two-step inquiry in evaluating attorneys’ services. *Id.* at *9.* The bankruptcy court must first determine, under section 330(a)(1)(A), whether an attorney’s services were “actual” and “necessary.” *Id.* at *9.* The services satisfy the actual and necessary requirement if, considered in hindsight, they resulted in an identifiable, tangible, and material benefit to the estate. *Id.* at *9* (citing *Pro-Snax*, 157 F.3d at 426; and *In re Quisenberry*, 295 B.R. 855, 865 (Bankr. N.D. Tex. 2003)). Then, once the threshold of necessity is satisfied, the court then proceeds to calculate the amount of fees to be awarded. *Id.* at *9.*

In the Fifth Circuit, this is done by computing the “lodestar” amount, which is the product of the multiplication of the reasonable number of hours expended times the prevailing reasonable hourly rate in the
community. See Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 323-24 (5th Cir. 1995). The lodestar is then adjusted based on the factors outlined in § 330(a)(3) (one of which is whether the services were beneficial at the time rendered) and the twelve factors listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). See In re Cahill, 428 F.3d 536, 539-40 (5th Cir. 2005); In re Teraforce Tech. Corp., 347 B.R. 838, 846 (Bankr. N.D. Tex. 2006).

Id. at *9. The court set forth the Johnson factors in a footnote.¹


In assessing fees of special litigation counsel for the trustee, the court addressed Pro-Snax and found three different, yet related, ways courts have applied Pro-Snax. First, some courts have taken a strict hindsight approach and thus ask whether the professional’s services resulted in an identifiable, tangible, and material benefit to the bankruptcy estate. Id. (citing Quisenberry, 295 B.R. at 865; and In re Weaver, 336 B.R. 115, 119 (Bankr. W.D. Tex. 2005)). Second, some courts, while stating that they are applying a pure hindsight approach, also include a prospective viewpoint in their analysis. The two cases employing this approach are In re Harbor Financial Group, Inc., No. 99-37255-SAF-7, 2001 WL 1041785 (N.D. Tex. Sept. 5, 2001); and In re JNS Aviation, LLC, No. 04-21055-RLJ-7, 2009 WL 80202 (Bankr. N.D. Tex. Jan. 9, 2009). Third, other courts have applied a hybrid approach that explicitly includes prospective and hindsight viewpoints: “the services must both be beneficial toward completion of the case at the time they are rendered and they must produce an identifiable, tangible, and material benefit to the estate.” In re Cyrus, 2009 WL 2855725 at *5 (citing In re Spillman Development Group, LTD., 376 B.R. 543, 550 (Bankr. W.D. Tex. 2007)). It was recognized in Spillman that in this combined analysis, it appears the latter consumes the former as it would be difficult to imagine any situation where the latter exists and the former does not. However, the former clearly could exist without the latter.

After canvassing the cases, the court in Cyrus chose the hybrid approach.

Prospectively, this Court will require that Gordon Arata’s services “were necessary to the administration of, or beneficial at the time at which the services were rendered toward the completion of, a case” under Title 11 of the United States Code. 11 U.S.C. § 330(a)(3)(C). Retrospectively, this Court will require that the services resulted in “identifiable, tangible and material benefit to the estate.” Id. at *5 (internal citation omitted).

With respect to the retrospective analysis, the court, looking to the JNS Aviation case, recognized that services may benefit the estate under Pro-Snax even though the service does not directly result in a quantifiable or monetary benefit. The court in JNS Aviation had stated that it does not “construe the benefits analysis to require that each expenditure of time result in a quantifiable benefit to the estate.” Id. (citing JNS Aviation, 2009 WL 80202 at *8).

The court also addressed section 328 of the Bankruptcy Code, which allows counsel to be employed on “any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.” Section 328 further provides that the court may allow compensation different from the method approved “if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.” The court noted that sections 328 and 330 are mutually exclusive of one another and that, in awarding fees, a court cannot vary from the terms unless the bankruptcy court finds that the original arrangement was improvident due to unanticipated circumstances. Id. at *9 (citing In re Texas Sec., Inc., 218 F.3d 443, 445 (5th Cir. 2000) and In re Nat’l Gypsum Co., 123 F.3d 861, 862 (5th Cir. 1997)). After a court has approved fees in accordance with § 328, the court cannot later engraft a § 330 lodestar requirement into the fee application. But the converse is also true, according to the court. If the court were to apply Pro-Snax to limit counsel’s fee awards to matters in which the trustee was the prevailing party, then the court would be

¹The Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717-19.
impermissibly converting the lodestar fees to contingent fees. “Just as courts may not convert a contingency fee approved pursuant to § 328 into an hourly fee, the Court here may not convert the pre-approved hourly fee into a contingency fee.” *Id.* at *10.


The bankruptcy court for the District of New Hampshire, located in the First Circuit, has adopted a test similar to that of the Fifth Circuit’s “material benefits” test. The court held that a bankruptcy court can award attorneys’ fees only “for services that actually benefit the estate.” *Id.* (emphasis added).

D. **Cases holding that a “reasonably likely to benefit” or “reasonableness” test should be employed:**

- **In re Top Grade Sausage, Inc.**, 227 F.3d 123, 132 (3rd Cir. 2000) (abrogated on other grounds by Lamie v. U.S. Trustee, 540 U.S. 526 (2004)).

The Third Circuit Court of Appeals has adopted a “reasonably likely to benefit” test, also referred to as a “reasonableness” test. Under this view, a court should award attorneys’ fees if the attorney can show that at the time the attorney performed his services, the services were “reasonably likely to benefit . . . the estate.” *Id.* at 132. The Third Circuit held that this lower standard is justified based on 11 U.S.C. § 330(a)(4)(A) which provides that a court cannot award attorneys’ fees for “services that were not reasonably likely to benefit the debtor’s estate.” *See id.* at 132 (citing 11 U.S.C. § 330 (2005)). The Third Circuit reasoned that if the Bankruptcy Code directly prevents the court from awarding fees for services that were not reasonably likely to benefit the estate, then, by the reverse, the court can award fees for services that were reasonably likely to benefit the estate. *See id.*

- **In re Ames Dep’t Stores, Inc.**, 76 F.3d 66, 71–72 (2nd Cir. 1996) (citing *In re UNR Indus.*, Inc., 986 F.2d 207, 208–209 (7th Cir. 1993)).

The Second Circuit Court of Appeals has also adopted the reasonableness test, holding that the test “accords with ‘the statute’s aims that attorneys be reasonably compensated and that future attorneys not be deterred from taking bankruptcy cases due to a failure to pay adequate compensation.’ ” The Second Circuit argued that a heightened “material benefits” or “hindsight” test, where an attorney must prove an actual benefit to the bankruptcy estate, might cause fewer attorneys to willingly accept bankruptcy cases. *Id.* The Second Circuit further added an objective component to the reasonableness test, holding that the court should view an attorney’s services “based upon what services a reasonable lawyer or legal firm would have performed in the same circumstances.” *Id.* at 72.

- **In re Mednet, MPC Corp.**, 251 B.R. 103 (9th Cir. B.A.P. 2000).

The Ninth Circuit B.A.P. in *Mednet* adopted the reasonableness test, using the plain language of 11 U.S.C. § 330 to justify the court’s holding. In *Mednet*, the court first looked at 11 U.S.C. § 330(a)(3)(C), which states that when determining whether to allow attorneys’ fees, courts shall consider “whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case.” *See id.* at 108 (citing 11 U.S.C. § 330(a)(3)(C)) (emphasis added). The court noted that the statutory language does not mention that there must be an actual benefit at the close of the case, but rather, that, at the time the attorney rendered the services, the services must have been beneficial to the case. *See id.* at 108. The court further looked at 11 U.S.C. § 330(a)(4)(A)(ii), which states that a court cannot award attorneys’ fees for “services that were not reasonably likely to benefit the debtor’s estate[,] or necessary to the administration of the case.” *See id.* at 108 (citing 11 U.S.C. § 330(a)(4)(A)(ii)). The court noted that this provision does not mandate that the services provide an actual benefit at the close of the case, only that they were reasonably likely to benefit the estate. *See id.* at 108. The B.A.P. determined that the reasonableness test accords with both provisions of the statute, while the material benefits test goes beyond the plain meaning of the statute. *See id.* The court also noted that there are other factors the court should consider in assessing whether to award attorneys’ fees, including: whether the services were authorized, whether the services were “adequately documented,” whether the fees were reasonable (assessed by the factors set out in section 330(a)(3)), and “whether the professional exercised reasonable billing judgment.” *Id.* at 108.


The United State Bankruptcy Court for the Northern District of Ohio, located in the Sixth Circuit Court of Appeals, has likewise adopted the reasonableness test, adding that the reasonableness test “seeks to encourage professionals to not unnecessarily delay in making judgments by providing that their
decisions will not be second guessed under the light of hindsight.”


The United States Bankruptcy Court for the Eastern District of Michigan, Southern Division, also located in the Sixth Circuit Court of Appeals, has applied the reasonableness test, holding that “the dismissal of [a] case, by itself, does not suggest that the attorney’s services were not reasonably likely to benefit the estate, unless the attorney was a substantial cause of the dismissal, or unless the attorney reasonably should have known that the case would be dismissed.”


E. Related Issues

1. Fees incurred in preparing fee applications are allowable, but fees incurred in defending or prosecuting the motion for approval of attorneys’ fees are not. *See In re Teraforce Tech. Corp.*, 347 B.R. 838 (Bankr. N.D. Tex. 2006) (court held that while debtor’s counsel is entitled to compensation for the preparation of the fee application pursuant to section 330(a)(6), counsel is not entitled to compensation for defending a fee application against objections filed in good faith).

2. Section 328(a) of the Code, which potentially allows for the preapproval of the terms and conditions of employment of counsel, does not necessarily provide an avenue to avoid the material benefits test employed in the Fifth Circuit. *See In re Energy Partners, Ltd., et al.*, 409 B.R. 211 (Bankr. S.D. Tex. 2009). In this case, investment bankers sought an up-front, nonrefundable payment for their services aggregating $1.0 million. The bankruptcy court stated that it “declines the opportunity to endorse such arrogance.” The court determined that the proposed retention was not in the estate’s best interest. It further found that the hindsight test employed in Pro-Snax applies to all professionals under section 330 and that it necessarily followed that the bankruptcy court should apply this same test to professionals seeking to be compensated under section 328. The court found that since the record on what tangible, identifiable, and material benefits the proposed services would provide was “severely lacking,” the court’s “preemptive”

* While I don’t know if it is stylistically or grammatically correct, BAPCPA amended the Code to uniformly use the term “attorneys’ fees” throughout the Code. *See Jennifer M. Taylor & Christopher J. Mertens, Travelers and the Implications on the Allowability of Unsecured Creditors’ Claims for Post-petition Attorneys’ Fees Against the Bankruptcy Estate, 81 AM. BANKR. L.J. 123 (2007).*