Attorney Fees In Chapter 13 - A Crisis In the Making

(As of 6/21/15)

The sad truth is that a base fee of $3,700 is just not cutting it. There are at least 2 reasons:

$3,700 Ain't Worth It

One, as a result of BAPCPA, we now have the experience to safely conclude that Chapter 13 work, done right, is now just as complicated, cumbersome and involved as Chapter 11 work. Think about it. Why do you think Chapter 11 attorneys don't do Chapter 13? Answer: There ain't no money in it.

63.97% of $3,700 is NOT EQUAL to $3,700

Two, Chapter 13 attorneys don't on average collect $3,700. At best, most attorneys, on average, collects only 70% of fees approved by the court in Chapter 13 cases. The reason is simple: Life does not stop happening for clients just because they have filed bankruptcy, regardless of how hard the debtor attorney works or how diligent his or her staff.

Trustee Bledsoe data: Sometimes, the attorney, by no fault of the attorney, gets paid nothing. As the attached data regarding cases closed in Trustee Bledsoe's office in the last 12 months shows (including cases discharged and dismissed), a significant number of cases never make it past plan confirmation. A case that does not get confirmed is basically all work and no money (except for whatever money is collected up front before filing). Without doubt, confirmed or not, if a case is filed, there was significant work done, work done and, in most cases, not paid for. Here are the facts from the Trustee Bledsoe data:

- Attorneys other than Orcutt: 29% did not get confirmed.
- Attorney Orcutt cases: 11% did not get confirmed.

Those facts aside, the local rule says that the "reasonable" fee for the services provided in a Chapter 13 case is $3,700. Therefore, by definition, anything less would be considered "less than reasonable" or "unreasonable". If the attorney, on average, is unable to collect the full $3,700 base fee (or some or all of any extra fees approved), the attorney is, in effect, being forced to work for significantly less than what the court has itself deemed "reasonable".

Again referencing the attached data kindly supplied by Trustee Bledsoe's office, combining data from confirmed cases and folding in "guestimates" for losses incurred for "nonconfirmed" cases, the numbers would seem to indicate effective collection rates as low as the following:

- Attorneys other than Orcutt: 60% of "amounts allowable in plan".
- Attorney Orcutt cases: 70 to 75% of "amounts allowable in plan".

Trustee Logan data: Attached is similar data retrieved from Chapter 13 Trustee Logan. Unlike the Trustee Bledsoe data, this data included information making it unnecessary to make "guestimates" concerning losses in unconfirmed cases. Again, as with Trustee Bledsoe, the data includes all cases closed in the last 12 months, regardless of whether discharged or dismissed. Unlike the Bledsoe data, this data includes data on all debtor attorneys (that is, it does not parse out the Orcutt cases). As you can see on page 29 of this data, the average collection rate in Chapter 13 cases of 71.46%.

Also included herewith, in a separate report, is the Trustee Logan data which includes ONLY Orcutt cases. As you can see on page 13 of this data, the average collection rate on Orcutt cases was 81.33%.

Mathematically separating out the Orcutt data yields these numbers:

Fees Allowed	
Direct:	$ 418,615
In Plan:	$2,988,786
Total:	$3,407,401

Fees Received	
Direct:	$ 418,615
Thru Plan:	$ 1,761,203
Total:	$ 2,179,818

This equals average collection rate for all attorneys (except Orcutt) of only **63.97%**.
(Computed as follows: $2,179,818/$3,407,401).

Bottom lines:

Assuming an average collection rate of **63.97%** for all Chapter 13 cases (not including slightly higher numbers in Orcutt cases) and a current base fee of $3,700, the average base amount collected per case is only **$2,367**. A far cry from the $3,700 that the court has deemed "reasonable" compensation.

Assuming an average collection rate of **63.97%**, in order to insure that an attorney is actually able to collect, on average, at least the $3,700 fee the court has deemed "reasonable", the base fee would need to be raised to at least **$5,783.96** (Here is the math: $5,783.96 x 63.97% = $3,700).

Parenthetically, all this does not even take into account the myriad of services provided to people the court never sees. For example, the people who never retain the attorney. The nature of 'people-in-debt' forces the consumer bankruptcy attorney to offer a free initial consultation. But the consultation is only free to the public. It is not free to the attorney. The attorney has to suffer

the financial loss of time spent on every potential client who does not retain (and also those who retain, put the attorney to more work, but fail to follow through with the filing). If the average initial consultation take approximately 2 hours and if, at best, only 1 out of 3 retain the attorney, at even only $200/hour, the attorney has, expended $1,200 in services for every 3 people seen, with nothing to show for it in terms of money received, with only the hope of breaking even somewhere down the line.

We need more young debtor bankruptcy attorneys.

Unfortunately, this is not happening and our consumer debtor bankruptcy bar is headed for a crisis. The seasoned practitioners are mostly baby boomers and, as such, they are retiring at an ever increasing pace. (This is not even taking into account the ones that will die or become disabled, as opposed to retiring.) The problem is that, for the most part, they have not trained their replacement. As a result the collective expertise of the debtor bankruptcy bar is rapidly diminishing. The problem stems from the fact that, by and large, debtor bankruptcy attorneys are sole practitioners (or the sole bankruptcy attorney in a multi-attorney law firm). The problem is aggravated by the fact that BAPCPA made Chapter 13 practice infinitely more complicated and cumbersome, full of red tape requirements and rife with traps for the unwary. The seasoned practitioners, by and large, adjusted to these changes. Unfortunately, in not having taken on proteges, the knowledge necessary to successfully conduct a Chapter 13 practice is not being passed on and is being lost with each retirement.

This problem has got to be solved. If not, it is only a matter of probably less than 5 years before the bankruptcy court system will be faced with not enough attorneys to properly function or, equally bad, more and more attorneys who simply don't know what they don't know.

Chapter 13 is hard.. Without proper incentives in place, new, young attorneys will not take up, much less stick with, consumer debtor bankruptcy work.

2 things need to be done: The first is easy. The second is not.

First, the attorney fees for Chapter 13 have to be brought more in line with Chapter 11, or at least high enough for new, young attorneys to be enticed into at least trying consumer bankruptcy law, and hopefully willing to suffer through the trauma of the inevitable mistakes inherent in getting their feet under them. An attorney fee of $5,000 is the absolute minimum. Experience has taught us that anything less is simply not "reasonable". Furthermore, $5,000 is a nice round number which multiplies easily in terms of new, young attorneys projecting necessary revenue. Psychologically, it seems vastly bigger than say $4,800.

Second, the remaining seasoned attorneys need to be given some sort of strong incentives to take on a protégé. This has to happen now. Many have already retired and more are on the cusp of retiring. This is the only way we can guarantee the transfer of necessary knowledge and the continued health of the consumer debtor bankruptcy bar. A $5,000 base fee (plus perhaps the

reminder that "you're the attorney in your Chapter 13 cases until the court says otherwise") would help. If any attorney is forced to stay with a Chapter 13 case all the way to completion, not being allowed out of the case would incentivize the attorney to take on a protégé to teach and take over the practice, thereby accelerating the seasoned attorneys timetable for retiring.

How fast those fees are paid is a huge factor

The sad truth is that generally speaking, unless a Chapter 13 debtor attorney requires a lot of money up-front to pay for attorney fees, the attorney is forced to bankroll his Chapter 13 cases. The bulk of the work in a Chapter 13 case is done on or before confirmation of the plan. Therefore, since no money is paid to the debtor attorney by the Chapter 13 Trustee until after confirmation, unless the attorney gets a bunch of money up front before filing, the attorney is forced to personally bankroll the overhead cost (including salaries, rent, etc.) for the work done out of his or her own pocket. Unfortunately, a lot of attorneys, especially new attorneys coming out of school, cannot afford to do so. The tendency is to try to get clients to pay more and more up front. This does not work. The reason is simple: Most clients cannot afford to pay a large lump sum up front and requiring them to do so only loses them as clients. The reality is that the more money you demand up front, the less clients you will have. The bottom line is that if we want to promote Chapter 13 practice, the quicker attorneys can be paid the fees they put in the plan for payment, the less money attorneys will feel constrained to get up front, and the more likely these attorneys will continue to embrace Chapter 13 cases. It is simple economics.

Settled law puts payment of attorney fees first
(or at least nearer to first)

If the court wants to pay attorney fees faster, there is settled law to backstop the court in doing so. It all started with the DeSardi case out of Texas, followed by the Hill case in the Middle District of North Carolina. The rule, as defined in these cases, is this:

> Adequate protection payments to secured creditors continue until attorney fees are paid in full (without regard to the date of plan confirmation). Therefore, the generally higher required "equal" payments to secured creditors do not start until attorney fees are paid in full. In the meantime, the difference between the amount of the equal payments and the amount of adequate protection would be used to pay attorney fees.

Basically, following the settled law from these cases, and other follow-up cases like Erwin and Marks (Not including Denton, which ruled the opposite, but which completely failed to address the mandate set forth in section 1326(b)), payments would be paid in the following order:

Simultaneously pay:
- Mortgage "conduit" payments, and
- Trustee's monthly commission, and
- Adequate protection payments (on allowed secured claims secured only by personal

property, since there is no requirement to pay adequate protection on "real estate"), and

- All the rest of the money to attorney fees until paid in full

Note: There should be no payment on mortgage arrears until attorney fees are paid in full.

Then, after attorney fees are paid "in full", the Trustee would start using money, no longer necessary to pay attorney fees, to:

Start paying "equal" payments to allowed secured creditors (including things like vehicles and mortgage arrears (including pre-petition arrears and post-petition administrative arrears), and then, when all allowed secured debts are paid in full,

Use money to pay allowed priority debts, and when all allowed priority debts are paid in full,

Use money to pay allowed co-sign protect debts, and when all allowed co-sign debts are paid in full,

Use any residual money to pay allowed unsecured debts.

Intuition would tell us that adequate protection payments would stop and "equal" payments would start on confirmation, but the statutes hold otherwise, as interpreted in DeSardi and its progeny, Hill, Erwin, and Marks

Bottom line: Adequate protection payments (computed as per local rule) continue until attorney fees are paid in full, whether that occurs before or after plan confirmation. Then, and only then, should the Trustee start to make the higher "equal" payments to secured creditors.

The upshot of all this is that, following this rule, attorney fees get paid faster, especially in cases that include vehicle loans and mortgage arrears.

Note: I have attached copies of DeSardi, Hill, Erwin, Marks and Denton. Denton is included to proof the point that Denton completely failed to address the mandate of section 1326(b).

Administratively: It should be just a one-time coding change in the Chapter 13 Trustee's office.

Conclusion:

Sprinkle in lower and lower cases filing for at least the short term (if not also the long-term) and we have a crisis in the making.