University of the District of Columbia Law Review

Volume 6 | Issue 1 Article 10

9-30-2001

Rethinking The Discharge Of Pre-Petition Attorney Fees In Chapter 7 Bankruptcy: A Debtor Oriented Perspective

James L. Neher

RETHINKING THE DISCHARGE OF PRE-PETITION ATTORNEY FEES IN CHAPTER 7 BANKRUPTCY: A DEBTOR ORIENTED PERSPECTIVE

James L. Neher*

INTRODUCTION

The courts are split over a provision of the Bankruptcy Code,[1] in which the majority courts hold that upon the filing of a Chapter 7 bankruptcy,[2] unpaid attorney fees, for pre-petition work in connection with preparing and filing bankruptcy, are discharged.[3] In contrast, the minority view holds that attorney fees in connection with preparing and filing a bankruptcy are not dischargeable whether prepaid or not, as long as they are not excessive.[4]

The problem with the majority view is that indigent debtors may be deprived of access to legal counsel unless they can pay all or most of their attorney fees in advance.[5] In addition, any attorney that represents debtors who cannot afford to pay the entire fee in advance, runs the risk of having a conflict of interest with the debtor.[6]

The minority view holds that Congress simply assumed that attorney fees in contemplation of bankruptcy would not be dischargeable unless they were excessive,[7] and these courts find support from provisions in the Code and Rules which clearly contemplate and provide for the disclosure and court supervision of such fees.[8]

---

* J.D., University of the District of Columbia David A. Clarke School of Law, 2001; B.S. George Mason University, 1990.

1 All Code and Section references refer to 11 U.S.C. §§ 101-1330 (2000). All Rule references refer to Fed. R. Bankr. P. 1001-9036.

2 *See* In re Haynes, 216 B.R. 440, 444 (Bankr. D. Colo. 1997)(holding that attorney fees are dischargeable under Chapters 9, 11, 12, and 13 as well).

3 *See* In re Perry, 225 B.R. 497, 499 (Bankr. D. Colo. 1998).

4 *See id.* at 500.

5 *See id.* at 498.

6 *See Perry*, 225 B.R. at 498; In re Mills, 170 B.R. 404, 410-11 (Bankr. D. Ariz. 1994); In re Martin, 197 B.R. 120, 127 (Bankr. D. Colo. 1996)(agreeing that there are important public policy concerns about access to the bankruptcy system for indigent debtors, although noting that they are not all one-sided); In re Nieves, 246 B.R. 866, 873 (Bankr. E.D. Wis. 2000)(stating that the court fully recognized that debtors who could not afford to pay attorney fees before filing might have difficulty in obtaining legal counsel) *But see* Joshua D. Morse, Comment, *Public Policy Is Never a Substitute for Statutory Clarity: Rejecting the Notion That Pre-petition Attorney Fees Are Nondischargeable in Chapter 7 Bankruptcies*, 40 Santa Clara L. Rev. 575, 604 (2000)(arguing that public policy concerns about lack of access to the bankruptcy system are misplaced because the number of Chapter 7 cases filed each year continues to rise).

7 *See Mills*, 170 B.R. at 410-11.

8 *See* 11 U.S.C. § 329 (2000). It reads in pertinent part:

This comment will compare and contrast the majority and minority opinions, and then argue that the minority approach is preferable from both a public policy perspective and in keeping with Congress' intent in enacting the Bankruptcy Code. By adopting the majority view, courts may deprive indigent citizens of the only practical means of paying for legal assistance in the bankruptcy context.

I. HISTORY

A. *The Majority View*

The court in *In re Nieves*,[9] decided the issue of the dischargeability of attorney fees by holding that fees for pre-petition legal services constitute a dischargeable debt, and that post-petition attorney fees are dischargeable to the extent they are excessive.[10]

The Court reasoned that Section 727(b)[11] discharges should be read broadly, and that in this case, it was undisputed that the un-paid pre-petition legal services created a debt which arose before the date of the order for relief.[12] Also, the Court found that it was undisputed that Section 523[13] does not contain a specific exception for unpaid pre-petition attorney fees, and that exceptions to discharge should be narrowly construed. Therefore, the Court reasoned, unpaid pre-petition attorney fees are a dischargeable debt, notwithstanding an agreement the debtor had signed to the contrary.[14] "A debtor may not contract away the right to a discharge in bankruptcy."[15]

(a) Any attorney representing a debtor in a case under this title. . . shall file with the court a statement of the compensation paid or agreed to be paid. . . for services rendered or to be rendered in contemplation of or in connection with the case. . . .

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive. . . .

See also Fed. R. Bankr. P. 2016(b). Every attorney for a debtor. . . shall file and transmit to the United States trustee. . . within 15 days after the order for relief. . . the statement required by § 329 of the Code.

9 In re Nieves, 246 B.R. 866 (Bankr. E.D. Wis. 2000).

10 *See Nieves*, 246 B.R. at 873.

11 11 U.S.C. §727(a) The court shall grant the debtor a discharge. . . .

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter. . . .

12 *Nieves*, 246 B.R. at 872.

13 11 U.S.C. §523 (2000).

(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt. . . (this section then lists 18 different categories of exceptions, none of which could be construed as including attorney fees).

14 *See Nieves*, 246 B.R. at 872.

15 *Id.* at 872.

In stating its position, the Court added that "a court must be careful not to engage in legislation," and that "where a statute's language is plain, the sole function of the courts is to enforce the statute according to its terms."[16] By doing, so the Court aligned itself with the majority view and its interpretive position that Code Sections 727(b) and 523 should be given their plain meaning.[17]

The Court recognized that its holding could create public policy problems, in that debtors who cannot afford to pay attorney fees before filing for Chapter 7 bankruptcy may have difficulty in obtaining legal counsel.[18] The *Nieves* Court proposed options whereby indigent debtors could obtain legal counsel, although the court acknowledged problems with each of its recommendations. One option was for the debtor to sign a reaffirmation agreement,[19] but the court pointed out that reaffirmation agreements create a conflict of interest between the debtor and debtor's attorney for which yet another attorney may be required.[20] Alternatively, the court suggested that a debtor's attorney file the petition immediately, but defer filing of the bankruptcy schedules and statement of affairs, as well as performing other legal services until after the petition has been filed. Such activity would not be dischargeable since it would be performed post-petition. The Court added in closing, that it would not establish a judicial exception to discharge, since that request should be made to Congress, not to the courts.[21]

Through this holding, the *Nieves* court aligned itself with the majority view which was well articulated by the court in *In re Martin*.[22] Finding no precedent in the Tenth Circuit for determining whether pre-petition attorney fees are dischargeable or not, the *Martin* court had made an in-depth analysis of the majority opinion. It applied the plain language rule of statutory construction stating, "Rules of statutory construction compel a strict and literal interpretation of §727 and §329,"[23] and admonished other courts to apply this principle of statutory construction:

"[I]f the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"[24]

---

16 U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989).

17 *See Nieves*, 246 B.R. at 872.

18 *See id.* at 873.

19 *See Perry,* 225 B.R. at 498 (reaffirmation agreements are separate agreements entered into after filing the bankruptcy petition in which the debtor agrees to pay the unpaid balance of the attorney's fee).

20 *See Nieves*, 246 B.R. at 873.

21 *See Nieves*, 246 B.R. at 873.

22 In re Martin, 197 B.R. 120 (Bankr. D. Colo. 1996).

23 *Id.* at 127.

24 *Martin*, 197 B.R. at 120 (quoting United States v. Turkette, 452 U.S. 576, 580(1981)).

The *Martin* Court did not find that the existence of Section 329[25] and Rules 2016[26] and 2017[27] constituted a clearly expressed legislative intent to allow attorneys to collect fees for pre-petition services after filing, which would be contrary to the plain language of §727(b)[28] and §523.[29] The *Martin* Court, in fact, found no conflict at all between the provisions of §329 and §727, determining that they serve different purposes.[30] The purpose of §329, it concluded, is to regulate all transactions between the debtor's attorney and the debtor in all cases under the Code, and to prevent overcharging by the debtors' attorneys in the bankruptcy process. Section 329, does not address the effect of a discharge on the debtor's obligation to pay his or her attorney for pre-petition fees. In contrast, §727 addresses the fundamental goal of bankruptcy, a fresh start for debtors, and should be read broadly.[31] The *Martin* Court concluded that Congress must have intended for §329 and related provisions to apply only to the areas where they do not overlap with §727 and §523.[32] Where these provisions do overlap — where pre-petition attorney fees incurred in preparation of a Chapter 7 bankruptcy remain unpaid at the time of filing — such fees constitute a dischargeable debt.[33]

Under this reasoning, §329 allows the courts to oversee and review attorney fees for reasonableness in Chapter 9, 11, 12, and 13 cases,[34] and Chapter 7 cases where the debtor has non-exempt assets, or where the debtor has paid the attorney an excessive amount for pre-petition, or post-petition services.[35] Expanding on this holding, some courts adopting the majority view, have held that unpaid

---

25 11 U.S.C. § 329.

26 Fed. R. Bankr. P. 2016(b).

27 Fed. R. Bankr. P. 2017.

(a) Payment or transfer to attorney before order for relief.

[T]he court. . . may determine whether any payment of money. . . by the debtor, made directly or indirectly and in contemplation of the filing of a petition. . . to an attorney for services rendered or to be rendered is excessive.

(b) Payment or transfer to attorney *after* order for relief.

[T]he court. . . may determine whether *any payment* of money. . . *or any agreement therefor*, by the debtor to an attorney *after entry of an order* for relief. . . *is excessive*. . . if the payment. . . is for services in any way related to the case.

28 11 U.S.C. §727(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter. . . .

29 11 U.S.C.A. §523.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt. . . (this section then lists 18 different categories of exceptions, none of which could be construed as including attorney fees).

30 *Martin*, 197 B.R. at 127.

31 *See Martin*, 197 B.R. at 127.

32 *Id.*

33 *Id.*

34 11 U.S.C.A. § 901, et al.; 11 U.S.C.A. § 1101, et al.; 11 U.S.C.A. § 1201, et al.; 11 USCA § 1301, et al.

35 *Martin*, 197 B.R. at 127.

pre-petition attorney fees are likewise dischargeable under Chapters 9, 11, 12, and 13.[36]

B. *The Minority View*

In *In re Perry,* the debtor filed a Chapter 7 bankruptcy petition on April 28, 1998, and disclosed that she had paid her attorney $350.00 on April 9, 1998.[37] The attorney timely filed a disclosure statement, as required by Rule 2016(b),[38] on April 16, 1998, which provided that the unpaid balance for services in connection with the bankruptcy petition was $400.00. The Debtor received a discharge on July 30, 1998.[39]

The Court had to decide whether the $400.00 balance that remained unpaid was dischargeable.[40] At that time, other bankruptcy courts in Colorado were holding all unpaid attorney fees to be discharged on filing, if they were for pre-petition services.[41] In this case, the attorney had not made a distinction between pre-petition and post-petition fees in her Rule 2016(b)[42] disclosure statement. Instead, the attorney was relying on a reaffirmation agreement that the debtor had agreed to sign, which in theory, would have reaffirmed the debtor's intention to pay the debt despite its having been discharged.[43]

The *Perry* Court, aligning itself with the minority view, concluded that although Congress had contemplated and set out an elaborate scheme for the disclosure and regulation of pre-petition attorney fees,[44] "Congress has failed to set out explicit rules regarding the treatment of attorney fees in Chapter 7 cases,"[45] by neglecting to make an explicit exception for them in §523 of the Bankruptcy Code.[46] This minority view, previously articulated by the *Mills* Court,[47] found a conflict between the various provisions of the Code that affect such fees.[48] Specifically, the *Mills* Court found that while Section 329,[49] and Rules 2016[50] and 2017,[51] allow for post-petition payment of such fees, the discharge provisions of

---

36 *See* In re Haynes, 216 B.R. 440, 444 (Bankr. D. Colo. 1997).

37 *See Perry*, 225 B.R. at 497.

38 Fed. R. Bankr. P. 2016(b).

39 *See* Perry, 225 B.R. at 498.

40 *See id.* at 498.

41 *See Martin*, 197 B.R. at 120; *Haynes*, 216 B.R. at 444-45.

42 Fed. R. Bankr. P. 2016(b).

43 *See Perry*, 225 B.R. at 498 (the Court declared the reaffirmation agreement to be unenforceable).

44 *See Perry*, 225 B.R. at 498.

45 *Perry*, 225 B.R. at 498.

46 *See Perry*, 225 B.R. at 498.

47 *See Mills*, 170 B.R. at 404.

48 *See Perry*, 225 B.R. at 500.

49 11 U.S.C. § 329.

50 *See* Fed. R. Bankr. P. 2016(b), *supra* note 9.

51 *See* Fed. R. Bankr. P. 2017, *supra* note 28.

Section 727(b)[52], and the limited exceptions to discharge in Section 523,[53] indicate that these fees constitute a dischargeable claim.[54]

The *Perry* and *Mills* courts found that these provisions are in conflict, and held that although they seem to be irreconcilable, they should be harmonized as much as possible.[55] They noted that the Supreme Court has stated,"[S]tatutory construction is a holistic endeavor."[56] Under the holistic method of statutory construction, specific provisions should be read in context.[57] Since it is not consistent with the enactment of Section 329 to discharge reasonable attorney fees, Congress must have anticipated such fees and must not have intended for them to be dischargeable under Sections 727(b) and 523.[58]

II. ANALYSIS

A. *Methods of Statutory Interpretation*

Both the plain language and the holistic methods of statutory construction have been sanctioned by the Supreme Court and are well-regarded principles of construction.[59]

The *Nieves* and *Martin* courts, however, rejected the holistic method of statutory construction used by the *Mills* and *Perry* courts in an attempt to reconcile Sections 329 and 727. The court in *Martin* stated,"Rules of statutory construction compel a strict and literal interpretation of Sections 727 and 329."[60] The *Martin* Court quoted *Consumer Product Safety Commission v. GTE Sylvania, Inc.*,[61] stating, "[I]f the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"[62]

The *Martin* Court then determined that there is no conflict between Sections 329 and 727 because they can be seen to serve different purposes:[63]

---

52 11 U.S.C. § 727(b)(2000).

53 11 U.S.C. § 523 (2000).

54 *See Perry*, 225 B.R. at 499.

55 *See Perry*, 225 B.R. at 499; Mills, 170 B.R. at 404.

56 United Savings Association of Texas, v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

57 *See generally Timbers*, 484 U.S. at 370-82.

58 *See Perry*, 225 B.R. at 499; *Mills*, 170 B.R. at 412.

59 *See* U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235(1989); *Timbers*, 484 U.S. at 371; U.S. v. Turkette, 452 U.S. 576 (1981); Bailey v. U.S., 516 U.S. 137 (1995); Carlos J. Cuevas, *Public Values and the Bankruptcy Code*, 12 Bankr. Dev. J. 645, 646 (1996); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. Rev. 585, 588 (1996).

60 *Martin*, 197 B.R. 127.

61 *Consumer Product Safety Comm'n. V. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

62 *Id.* at 108.

63 *See Martin*, 197 B.R. at 127.

> Section 329 regulates transactions between the debtor's attorney and the debtor in all cases under the Code. Its purpose is to prevent the overreaching of debtor's attorney in the bankruptcy process. It does not speak to the effect of a discharge upon a debtor's pre-petition obligation to the attorney. In contrast, Section 727 creates and defines the substantive rights of discharge. It addresses the fundamental goals of bankruptcy, a fresh start for the debtor and equal treatment of creditors.[64]

Perceiving no conflict, the *Martin* court concluded,"[H]ad Congress intended to create an exception to discharge for unpaid attorney fees presumably it would appear in Section 523."[65]

The Court in *U.S. v. Turkette*,[66] which *Martin* relied on, however, did not stop its analysis at the language of the statute. It explained, "[W]e first look at [the statute's] language",[67] but continued its analysis, stating, "[T]here is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language. [A]bsurd results are to be avoided and internal inconsistencies in the statute must be dealt with."[68] Further, the *Turkette* Court weighed and rejected the appropriateness of the First Circuit Court of Appeals' use of the rule of *ejusdem generis*,[69] considered whether terms in the statute would create internal inconsistencies in the statute,[70] whether language in the statute would be rendered superfluous,[71] and analyzed the history of the statute and the legislative history for indications of Congress' intent.[72]

The reasoning expounded in *Martin* and embraced in the majority view leaves several questions unanswered. If the disclosure provisions of §329 do not apply to pre-petition attorney fees still unpaid at the time of filing, are such fees not required to be disclosed? Why do the Bankruptcy Rules expressly mention such fees at length but never indicate any limitation on their applicability to Chapter 7 cases? Would Congress change the way debtors may pay for bankruptcy, without ever mentioning such a change, in a statute as contested as the Bankruptcy Code?[73]

---

64 *Id.* at 127.

65 *Id.* at 127.

66 U.S. v. Turkette, 452 U.S. 576 (1981).

67 *Id.* at 580 (citing *GTE*, 447 U.S. at 102).

68 Turkette, 452 U.S. at 580 (citing Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061 (1978); Commissioner v. Brown, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166 (1965)).

69 *Ejusdem generis*: where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. Black's Law Dictionary, 517 (6th ed. 1990). *See Turkette*, 452 U.S. at 581-82.

70 *See id.* at 582.

71 *See id.* at 582-85.

72 *See id.* at 586-93.

73 *See Ron Pair*, 489 U.S. at 240 (noting that Congress worked on the formulation of the Bankruptcy Code for nearly a decade).

The courts in *Perry* and *Mills*, on the other hand, following the minority view, relied on *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.* in which the Court was trying to ascertain the meaning of the term "interest in property."[74] The *Timbers* Court stated that although viewed in the isolated context of the Code section in which it was found[75] the term "interest in property" could reasonably be given the meaning urged by the petitioner, it would not end its analysis at a plain language reading because "[S]tatutory construction is a holistic approach."[76] The Court concluded that the holistic approach should be used because "[A] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear," or alternatively, "because only one of the permissible meanings [of the term] produces a substantive effect that is compatible with the rest of the law."[77]

The *Martin* court and the other majority courts also relied on *Watt v. State of Alaska*,[78] in which the Supreme Court stated that even though the plain meaning of a statute appears to be clear, "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'"[79] "The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect."[80]

The *Watt* Court reviewed the history of the Bankruptcy Code provision at length, and employed other maxims of statutory construction:[81] "repeals [of provisions of statutes] by implication are not favored,"[82] the intention of the legislature to repeal must be "clear and manifest. . ."[83] and "[W]e must read the statutes to give effect to each if we can do so while preserving their sense and purpose."[84]

Bailey v. United States,[85] provides a recent example of meticulous and systematic statutory construction being employed by the Supreme Court in a District of Columbia case. In *Bailey*, the Supreme Court attempted to ascertain the meaning

74 *See* United Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

75 11 U.S.C. § 362(d)(1) (2000).

76 *See Timbers*, 484 U.S. at 371.

77 *Timbers*, 484 U.S. at 371.

78 Watt v. State of Alaska, 451 U.S. 259(1981)(Burger, C.J., Stewart, J., and Marshall, J., dissenting).

79 *Id.* at 266 (quoting Boston Sand Co. v. United States, 278 U.S. 41, 48(1928).

80 *Id.* at 266.

81 *See generally Watt,* 451 U.S. at 266 - 273.

82 Id. at 267 (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

83 *Id.* at 267 (quoting United States v. Borden Co., 308 U.S. 188 (1939).

84 *Id.* at 267.

85 Bailey v. United States, 516 U.S. 137 (1995).

of a provision in a statute which criminalized "use" of a firearm during and in relation to a drug-trafficking offense.[86] The Court started with the plain language of the Code,[87] and then looked at the placement and purpose of the statutory scheme, stating, "[T]he meaning of statutory language, plain or not, depends on context."[88] The Court then quoted *Ratzlaf v. United States*,[89] "Judges should hesitate. . . to treat [as surplusage] statutory terms."[90] Additionally, the Court quoted *Platt v. Union Pacific R. Co.*,[91] for "a legislature is presumed to have used no superfluous words."[92] In the last part of the Court's analysis, it looked to the amendment history of the Code to cast further light on Congress' intent.[93]

Legal scholarship on the subject of statutory construction, both in and out of the bankruptcy context, provides further support for the use of both the plain language and the holistic methods of statutory construction. Although, even when employing the plain language approach, courts will at a minimum consider the context of the language and review the legislative history.[94]

Out of the primary cases the majority and minority view courts relied on for their statutory construction principles, such as *Turkette*, *Watt* and *Timbers*, none of the courts began and ended their analysis with the plain language of the Code. While the Court started with the plain language of the Code in each case, it went on to interpret the Code so as to give meaning to each provision, and analyzed whether its interpretation agreed with the purpose and policies of the Code. In order to determine Congress' intent, the Court considered the context and legislative history of the provision in question. In *Bailey*, the Supreme Court employed every one of these principles.

B. *Applying These Statutory Construction Principles to the Bankruptcy Code*

1. The Plain Language of the Bankruptcy Code

A plain language reading of Sections 727[95] and 523[96] indicates that pre-petition attorney fees are discharged on filing.[97] However, even though the plain meaning of these provisions appears to be clear, as the Supreme Court showed in

86 *See generally id.* at 144-48.

87 *See id.* at 144.

88 *Id.* at 145 (quoting Brown v. Gardner, 513 U.S. 115 (1994)).

89 Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994).

90 *Bailey,* 516 U.S. at 145 (quoting Ratzlaf, 510 U.S. at 140-41).

91 Platt v. Union Pacific R. Co., 99 U.S. 48, 58 (1879).

92 *Bailey*, 516 U.S. at 145 (quoting Platt, 99 U.S. at 58).

93 *See Bailey*, 516 U.S. at 144-48.

94 *See generally* Carlos J. Cuevas, *Public Values and the Bankruptcy Code*, 12 Bankr. Dev. J. 645, 646 (1996); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. Rev. 585, 588 (1996); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

95 *See* 11 U.S.C. § 727.

96 *See* 11 U.S.C. § 523.

97 *See Perry*, 225 B.R. at 499; *See Martin*, 197 B.R. at 127; *See Nieves*, 246 B.R. at 872.

Turkette, Watt, Timbers and *Bailey*, the analysis is not over. Sections 329 and 330[98] of the Bankruptcy Code, Bankruptcy Rules 2016 and 2017, Committee Notes,[99] and an opposing minority view,[100] all signal that there may be some ambiguity. Confronted with such divergent views, a court should be reluctant to begin and end its analysis with the plain meaning of the language.[101]

2. Interpretation that Gives Meanings to Each Provision

Sections 727 and 523 make no mention of attorney fees.[102] The majority view holds that since these sections should be accorded their plain meaning, pre-petition attorney fees which are yet unpaid are discharged on filing.[103] This is interpreted to mean that the way Congress chose to deal with pre-petition attorney fees was to have them constitute a dischargeable debt if they remained unpaid upon filing.[104]

Section 329 and Bankruptcy Rules 2016 and 2017, however, also deal with attorney fees. Congress created an elaborate mechanism for the disclosure, oversight and discharge of both pre-petition and post-petition attorney fees, both paid at the time of filing and not paid.[105] Section 329 requires the debtor's attorney to file "a statement of the compensation paid *or agreed to be paid*. . . for services rendered in connection with the case. . . ."[106] Bankruptcy Rules 2016 and 2017 discuss the timing and implementation of Section 329.[107]

It is not at all apparent from Section 329 that Congress wanted the debtor to disclose attorney fees "agreed to be paid" only to discharge those fees. In fact, there are numerous Committee Notes explaining the purpose and workings of the statutory scheme, and which speak extensively about attorney fees, the his-

98 *See* 11 U.S.C. § 330, Notes to Committee on the Judiciary Senate Report No. 95-595 (indicating that § 330 applies to Officers of the Estate, "and other professionals." The notes and legislative statements speak extensively about compensating and attracting competent attorneys to the bankruptcy field, but never mention that such fees might be subject to discharge).

99 *See* 11 U.S.C. § 329, Notes to Committee on the Judiciary Senate Report No. 95-989; 11 U.S.C. § 330, Notes to Committee on the Judiciary Senate Report No. 95-595, and Legislative Statements; Fed. Bankr. R. 2016, Committee Notes to 1987 and 1991 Amendments; Fed. Bankr. R. 2017, Committee Note and 1991 Amendments, Committee Note.

100 *See* In re Symes, 174 B.R. 114, 119 (Bankr. D. Ariz. 1994) (finding no express provision by Congress for non-dischargeability of attorney fees we should not read it in).

101 *See id.* at 119.

102 *See* 11 U.S.C. §§ 727 and 523 (§ 523(d) grants the debtor attorney fees incurred defending against a creditor who unjustifiably contested the discharge of a consumer debt).

103 *See Martin*, 197 B.R. at 120; *Nieves*, 246 B.R. at 873.

104 *See Martin*, 197 B.R. at 127 (stating that "Had Congress intended to create an exception to discharge for unpaid attorney fees presumably it would appear in § 523"); *Biggar*, 110 F.3d 685, 687 (9th Cir. 1997)("Section 523's failure to except debts for attorneys' fees from the Code's discharge provisions leads us to conclude that the debts at issue in this case are dischargeable.").

105 *See* 11 U.S.C § 329; Federal Bankruptcy Rules 2016 and 2017; *Perry*, 225 B.R. at 500.

106 11 U.S.C. § 329 (emphasis added).

107 *See supra* notes 26-28.

tory of abuse of the debtor-attorney relationship, and the need to ensure that such fees are not excessive.[108]

In the minority's view, the type of "plain reading" approach taken by the majority courts makes the disclosure and regulation provisions of the Code and Rules superfluous in violation of both the "holistic" and "plain view" statutory construction approaches.[109] "[T]he 'cancellation' provisions of Section 329(b) are meaningless if Congress intended the obligations to be automatically discharged."[110]

The majority view's answer to this argument is that the provisions do not conflict, and Section 329 is not superfluous because the disclosure provisions also apply to Chapter 11 and 13 cases.[111] "In [Chapter 11 and 13 cases] a debtor's plan might call for post-petition payments to her attorney. Under those circumstances a court may review and, if necessary cancel payments for excessive pre-petition fees."[112] Unfortunately, using such an interpretation, the courts would not be entitled to review pre-petition attorney fees for reasonableness under Chapter 7 cases as long as the fee was paid at the time of filing.

Other majority view courts hold that no pre-petition attorney fees are excepted from discharge under any chapter of the Code.[113] Under such an interpretation, are the courts entitled to review paid pre-petition attorney fees for reasonableness at all?

C. *Consistency with the Code's Purpose and Policies*

Congress clearly articulated the purpose of Section 329 and the Rules that implement it: "[T]o permit the court to deny compensation to the attorney, to cancel an agreement to pay compensation, or to order the return of compensation paid, if the compensation exceeds the reasonable value of the services provided."[114] Although Congress spoke extensively about the need for judicial scrutiny of attorney fees in the Code, Rules, and Committee Notes, dismissal of such fees was always discussed to the extent they are excessive. No inquiry was suggested or apparently even contemplated, about whether such fees are pre-petition yet unpaid or a dischargeable debt.[115]

Congress clearly stated that it hoped to attract competent attorneys to the field of bankruptcy who would enable the system to operate smoothly, efficiently, and

---

108 *See supra* note 101.

109 *See Mills*, 170 B.R. at 411-12.

110 *Mills*, 170 B.R. at 411-12.

111 *See* In re Biggar, 110 F.3d 685, 688 (1997).

112 *Biggar*, 110 F.3d at 688 (citing *Symes*, 174 B.R. at 118).

113 *See Haynes*, 216 B.R. at 444.

114 11 U.S.C. § 329, Notes to Committee on the Judiciary Senate Report No. 95-989, Section (b).

115 *See* 11 U.S.C. §§ 101-1330.

expeditiously.[116] Congress articulated its concern that if attorneys could not be reasonably compensated, "[T]he bankruptcy field would be occupied by those who could not find other work. . . ."[117] Congress also explained that Section 330 was designed to ensure that the estate, not the attorney, bears the cost of administering the bankruptcy, to the benefit of both the estate and the attorneys involved.[118]

The plain language approach, as implemented by the majority courts, would make it difficult for attorneys to be compensated.[119] As a result, competent attorneys would be driven from the field as Congress feared, and debtors would have a harder time obtaining quality legal assistance.[120]

Some of these courts suggest reaffirmation agreements and other payment schemes as ways for indigent debtors to pay their bankruptcy attorneys.[121] These same courts, however, are forced to acknowledge that such agreements create a conflict of interest for which the debtor may need yet another lawyer.[122] This is a good example of the type of absurd result that the *Turkette* court, which *Martin* relied on, meant to avoid.[123]

The holistic approach, as implemented by the minority courts, allows attorneys to be compensated for all work they do in connection with a bankruptcy. Attorneys must disclose the totality of their fees, both paid at the time of filing and those to be paid after filing. Those fees are subject to the review, and return or diminishment provisions of the Code, to the extent such fees are unreasonable.[124] Under this scenario, Congress' intent that individuals in need of bankruptcy legal services should receive the same competency of counsel as other cases will be realizable. This will encourage bankruptcy specialists to remain in the field which will be beneficial to the individuals and attorneys.[125]

---

116 *See supra* note 100.

117 *Id.*

118 *See* 11 U.S.C. § 330, Notes to Committee on the Judiciary Senate Report No. 95-595. (The compensation is to be reasonable, for economy in administration is the basic objective.); 11 U.S.C. §330, Notes to Committee on the Judiciary, House Report No. 95-595. (The policy of this section is to compensate attorneys and other professionals serving in a case under Title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under Title 11.)

119 *See Martin*, 197 B.R. at 127.

120 *See Martin*, 197 B.R. at 127.

121 *See Nieves*, 246 B.R. at 873; *Martin*, 197 B.R. at 127; In re Perez, 177 B.R. 319, 321 (Bankr. D. Neb. 1995); *Symes*, 174 B.R. at 119.

122 *See Nieves*, 246 B.R. at 873 (Entering into a reaffirmation agreement "will create a conflict of interest between the debtor and debtor's attorney and may well necessitate the debtor obtaining independent counsel in connection with negotiating and signing the reaffirmation agreement.")

123 *See Turkette*, 452 U.S. at 580.

124 *See Perry*, 225 B.R. at 500.

125 *See* 11 U.S.C. § 330, Notes to Committee on the Judiciary Senate Report No. 95-595 and Legislative Statements.

The courts which have adopted the majority view have been unable to articulate any reasonable means for indigent debtors to hire competent attorneys to assist them in navigating through Chapter 7 bankruptcies, short of paying all pre-petition attorney fees in advance.[126] Such a system is clearly contrary to what Congress intended when it laboriously spelled out provisions by which debtors' payments to attorneys would be fully disclosed, reviewed, and subject to reduction or dismissal.[127]

Finally, the courts should consider the public policy implications of the alternative methods of interpreting the provisions of the Bankruptcy Code in question.[128] For what reason would Congress choose to discharge pre-petition attorney fees rather than make them reviewable for excessiveness? The majority concludes on this issue that the goal of bankruptcy is to make a fresh start, and therefore, there are good or at least conceivable policy reasons for discharging attorney fees.[129] But on closer examination, that reasoning is untenable. For one thing, the courts find themselves weighing the benefits of a fresh start for the debtor against the debtor's ability to gain access to legal counsel. While they applaud the debtor's fresh start, they suggest the debtor pay for the assistance of counsel by deferring payment of other debts, borrowing from family and friends, or finding a third party guarantor.[130] Alternatively, they suggest the attorney split the fee between pre-petition and post-petition services, requiring only payment for pre-petition services prior to filing.[131] Each of these suggestions means that an indigent debtor will still have to make payments to someone after filing, perhaps a family member or friend who can afford it little more than the debtor.

The courts following the minority view do not need to articulate why Congress would want the Code interpreted in the way they suggest, because Congress has already done that for them: "Attracting competent counsel to the field, by ensuring that they are reasonably paid based on the time, nature, extent, and the value of the services rendered, who in turn enable the system to operate smoothly, efficiently, and expeditiously."[132]

Conclusion

In this comment I have compared and contrasted the majority and minority opinions on the issue of the dischargeability of pre-petition attorney fees in Chap-

126 *See Martin*, 197 B.R. at 120; *Nieves*, 246 B.R. at 866; *Haynes*, 216 B.R. at 440; *Symes*, 174 B.R. at 114; *Biggar*, 110 F.3d at 688; In re Perez, 177 B.R. 319 (1995).

127 *See supra* note 127.

128 *See generally* 11 U.S.C. § 329; Fed. R. Bankr. P. 2016 and 2017; 11 U.S.C. § 727(b); 11 U.S.C. § 523.

129 *See Martin*, 197 B.R. at 127.

130 *See id.* at 127.

131 *See id.* at 127.

132 11 U.S.C. § 330, Notes to Committee on the Judiciary Senate Report No. 95-595.

ter 7 bankruptcies. Clearly, employing the holistic method of statutory construction, as a minority of courts do, is preferable in this instance from both public policy positions and in keeping with Congress' intent in enacting the Bankruptcy Code. Without allowing debtors who need the assistance of counsel to navigate the Chapter 7 bankruptcy process, to enter into whatever type of payment arrangements they deem to be in their best advantage, creates an unnecessary and undue hardship with no apparent advantage to the debtors.

While the majority courts rally under the banner of "plain language," the end result of their interpretation of the Code is a lack of access to the courts and to counsel in the bankruptcy context, for those who are least able to bear the cost.