

**UNITED STATES BANKRUPTCY COURT**  
**Eastern District of California**  
**501 I Street, Suite 3-200**  
**Sacramento CA, 95814-7303**

**Chambers of**  
**FREDRICK E. CLEMENT**  
**Chief Bankruptcy Judge**

**916-930-4540**

May 19, 2023

re: Chapter 13 Flat Fees  
LBR 2016-1 (revised)

An Open Letter to the Bar:

In the Eastern District of California, Chapter 13 practice is like that old car in your driveway; it works about one-half of the time. A 10-year study shows that represented Chapter 13 debtors receive a discharge 46% of the time. While the discharge rate is not the only measure of success in Chapter 13, it is probably the only objective measure. And though our rate is not markedly different than the national average, I am troubled by what I perceive to be an unnecessarily high washout rate.

**The Problem**

In my view, part of the problem is the flat fee we pay Chapter 13 practitioners is inadequate to compensate debtor's counsel for the time necessary to prosecute a case. Consumer cases presently pay debtor's counsel \$4,000 (including costs) and business cases pay debtor's counsel \$6,000 (including costs). Those fees have not been adjusted--even for inflation--in 11 years. But that isn't really the problem.

The real problem is that the flat fee does not adequately compensate counsel for the work required. A recent survey of fees approved for Chapter 13 practitioners who opt out of the flat fee, and seek compensation by motion, shows that it takes an average of 35-40 hours to take a consumer Chapter 13 case from intake to discharge. The same study shows that it takes an additional 50% of time, i.e., 50-60 hours, to prosecute a business case from beginning to end. Using even a modest hourly rate, it is easy to justify a flat fee for consumer Chapter 13 cases in the high single digits (measured in thousand-dollar increments) and a flat fee for business Chapter 13 cases in the low double digits.

**Concerns from the Bench**

Unlike opt-out compensation, in most instances, flat fees operate without court supervision. In the past, the bankruptcy bench has expressed concern that incremental increases of the flat fee really only rewards bad lawyering. Some segments of the Chapter 13 debtor's bar opt-in to the flat fee, take large retainers or front load fees in the plan and then perform minimal work. Frequently, the plans proposed--and in some cases confirmed--are not crafted with sufficient consideration of the trustee's objections, potential or actual, or of the debtor's long run ability to perform the plan. When the Chapter 13 trustee objects to confirmation or the debtor fails to perform the plan, the attorney allows the case to be dismissed and

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keeps whatever monies have been paid. Though probably limited to a small segment of the Chapter 13 bar, this practice caused the bench to be hesitant to increase the Chapter 13 flat fee.

### **A Possible Solution**

To address these crosscurrents, my colleagues and I have approved for consideration by the bar and by the public revised Rule 2016-1, which sets a different model for setting the amount of and paying Chapter 13 flat fees. A copy of the proposed rule is transmitted with this letter. Under this rule, debtors' lawyers may be compensated in one of two ways. First (though infrequently used), debtors' lawyers retain the option to opt out of the flat fee and seek compensation by motion, 11 U.S.C. § 330(a)(4)(B); Fed. R. Bankr. P. 2002(a), 2016(a). LBR 2016-1(b). Second, debtors' lawyers may elect compensation by flat fee. LBR 2016-1(c). But those opt-in to the Chapter 13 flat fee must agree to certain conditions attached to the flat fee. The proposed flat fee rule has five key components.

- 1. Amount.** Without leave of court, the attorney may be paid not more than \$8,500 in compensation and \$500 in costs for a consumer case; likewise, the attorney may be paid not more than \$12,500 in compensation and \$500 in costs for a business case. The phrase "business case" is now a defined term. Attorneys who are board certified in bankruptcy by the State Bar of California, Board of Legal Specialization or by the American Board of Certification may claim a fee enhancement of 20% of the otherwise applicable flat fee.
- 2. Retainer.** Attorneys opting into the flat fee may not seek or accept a retainer greater than 25% of the amount of the applicable flat fee plus the costs, i.e., \$500.
- 3. Payment.** Upon filing the petition, the attorney may withdraw all retainer of the retainer received (up to 25% of the flat fee plus costs) from his or her trust account; the remainder of the flat fee shall be paid by the trustee in equal monthly installments under the terms of the most recently confirmed plan. Frontend loading, whether by retainer or payment under the plan, is prohibited.
- 4. Dismissal or Conversion.** If the case is dismissed or converted, subject to 11 U.S.C. § 329(b), the attorney may retain any monies received, but shall not be entitled to any further payment from any source, e.g., the debtor, someone on the debtor's behalf, the Chapter 7 trustee.
- 5. Annual Adjustment for Inflation.** Starting December 2024, and continuing every December thereafter, the flat fee for consumer cases and business cases will be increased by the amount of the consumer price index as determined by the Bureau of Labor Statistics. The increased fee will apply to all cases filed on or after January 1, of the following year. The increased fee will be posted to the court's website.

### **An Example**

Suppose a debtor's lawyer takes a consumer Chapter 13 case, opts for the flat fee, receives a retainer of \$2,625 (\$2,125 (25% x \$8,500) plus \$500 in costs), and proposes and confirms a 60-month plan. If the

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debtor achieves plan confirmation three months after the case is filed, by the date of the Chapter 13 trustee's next disbursement cycle debtor's counsel will have received the following payments.

<b>Payment</b>	<b>When</b>	<b>Amount</b>
Fee retainer (\$8,500 x 25%)	On or before the petition date	\$2,125.00
Costs retainer	On or before the petition date	\$500.00
By the Chapter 13 trustee (\$106.25/month x three months)	Next Chapter 13 trustee disbursement after confirmation	\$318.75
<b>Aggregate at confirmation</b>		<b>\$2,943.75</b>
Remainder of fee, i.e., \$6,056.25, over the life of the plan	\$106.25 per month for additional 57 months	\$6,056.25
<b>Total</b>		<b>\$9,000.00</b>

### **Things to Know**

The flat fee model of Chapter 13 fees has limitations.

**1. Reasonableness as Measured Over Time.** Unlike the present flat fee rubric, the amount of the fee is designed to approximate the fee that the attorney would receive if compensation were calculated under the lodestar method (number of hours required multiplied by a reasonable hourly rate). Rather than calculating the reasonableness of the fee in any given case, it is designed to pay debtor's counsel reasonable compensation, 11 U.S.C. § 330(a), over the pool of all of the attorney's Chapter 13 cases. As to any given case, the flat fee may overcompensate or undercompensate counsel. If you wish the reasonableness of your fee to be calculated on a case-by-case basis, opt-out of the flat fee and move for compensation. 11 U.S.C. § 330(a)(4)(B).

**2. Flat Fees are Designed for the "Garden-Variety" Chapter 13 Case.** The flat fee is designed for a "typical" consumer and/or business Chapter 13 cases. The amount of the fee presumes average complexity, amount of work, and client sophistication, as well as cooperation. For Chapter 13 cases that bear atypical risk or work profiles, e.g., 11th hour filings to stop foreclosure sales, debtors with irregular income, or cases where unusual acrimony is anticipated, e.g., Chapter 13 cases involving disputes with former spouses or business partners, the flat fee will probably not fully compensate counsel. In those instances, debtor's counsel should opt out of the flat fee and seek compensation by motion.

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**3. Compensation for Substantial/Unanticipated Work No Longer Awarded.** If a debtor's lawyer elects payment under the flat fee, revised Rule 2016-1 makes no provision for counsel to seek additional fees. Existing Rule 2016-1 allows counsel to seek fees for "substantial and unanticipated post-confirmation work." LBR 2016-1(c)(3). This exception to the flat fee rule has been *eliminated* as inconsistent with the proposed fee rubric. Attorneys who are underpaid in a particular case may not seek additional compensation; excepting disgorgement, 11 U.S.C. § 329(b), an attorney who is overpaid in a particular case will not be required to refund monies to the debtor or the estate.

### Chapter 13 Flat Fee Committee

This proposed rule is the work of the collective efforts of the bench and of an ad hoc Chapter 13 fee committee. Members of the committee are Judges Lastreto and me, Career Law Clerk Lorraine Crozier, Judicial Assistant Jennifer Tillery, Chapter 13 trustees Michael Meyer, David Cusick and Russell Greer, attorneys Robert Williams, Peter Bunting, Benny Barco, Matthew Gilbert, Paul Bains, and Seth Hansen. We have met via Zoom three times, argued, debated, and discussed. We formed subcommittees which undertook further factual investigation of specific issues and reported back to the committee at large. I wish to extend my personal gratitude to each committee member for his and her hard work, time, and insights.

### Soliciting Your Comments

Proposed Rule 2016-1 has not been adopted. We, the collective bankruptcy bench, are interested in hearing from you about this proposal. Perhaps this rule is worthy of adoption; perhaps it is not. Please offer alternative flat fee rubrics or tweak the one we have proffered. Not later than close of business on Wednesday, June 28, 2023, send your comments and suggestions to me. You may do so by clicking [here](#). I will personally be sure that your comments are brought to the attention of each member of the bench and that your views are considered.

I look forward to hearing from you.

Sincerely,



Fredrick E. Clement