

Trustee compensation
11 U.S.C § 330(a)(7)

Robert and Toni Owens, Case No. 05-70329-fra7

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Debtors filed bankruptcy just prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which took effect generally on October 17, 2005. The Trustee sold the most significant asset of the estate, the Debtors' home, but the sale price was inadequate to cover the fees and costs generated by the sale. The effect was a net reduction to the amount available to unsecured creditors. The Trustee thereafter filed his Final Report, seeking the maximum amount allowed by Code § 326. The United States Trustee (UST) objected to the amount requested as unreasonable under the circumstances.

As the bankruptcy case was filed prior to the effective date of BAPCPA, the UST cited prior caselaw holding that the proper method for calculating a trustee's reasonable compensation should be determined by multiplying the amount of time spent by the trustee by a reasonable hourly rate. The percentage of distribution amounts found in Code § 326 should therefore be considered merely a ceiling.

Section 330(a)(7) was added to the Bankruptcy Code by BAPCPA and provides that reasonable compensation to be awarded to a trustee should be considered a commission, based on § 326. The Court concluded that trustee compensation should thus be presumed to be the percentage amounts found in § 326. However, the commission is subject to reduction if the maximum amount is substantially disproportionate to the value of the trustee's service to the estate.

The Court, citing Ninth Circuit caselaw which holds that an amendment which merely clarifies an existing provision should normally be applied retroactively, held that § 330(a)(7) should be applied retroactively to this case. However, the Trustee's presumptive fee was reduced to the extent necessary to restore to unsecured creditors the amount lost as a result of the sale of the residence.

1 fee, and that an order should be entered allowing compensation in the
2 amount of \$15,418.73.

3 II. BACKGROUND

4 The Debtors' schedules reflected assets, including a residence
5 valued at \$299,000 and personal property valued at roughly \$37,000. In
6 his administration of the case, the Trustee abandoned two vehicles as
7 burdensome to the estate, sold the remaining vehicles and other personal
8 property, and the residence. The residence sold for \$309,939.04.
9 According to the Trustee's notice of the proposed sale¹, it was expected
10 that the sale would yield approximately \$20,000 for the estate after
11 payment of liens, fees and costs. At the last minute, a lien holder made
12 demand for an additional \$8,000 as a prepayment penalty according to its
13 contract with the Debtors. The Trustee acquiesced and permitted the sale
14 to close.

15 The effect of the sale was to reduce the amount of money
16 available to unsecured creditors, since the fees and costs generated by
17 the sale exceeded the net return to the estate.

18 III. DISCUSSION

19 A. *Applicable Statutes:*

20 Code § 326(a) provides as follows:

21 (a) In a case under chapter 7 or 11, the court may
22 allow reasonable compensation under section 330 of
23 this title of the trustee for the trustee's services,
24 payable after the trustee renders such services, not
to exceed 25 percent of the first \$5,000 or less, 10
percent on any amount in excess of \$5,000 but not in

25
26 ¹ See Court Document No. 10: the document was not placed into evidence, but is subject to judicial notice. Fed.R.Evid. 201.

1 excess of \$50,000, 5 percent on any amount in excess
2 of \$50,000 but not in excess of \$1,000,000, ... upon
3 all moneys disbursed or turned over in the case by the
4 trustee to parties in interest, excluding the debtor,
5 but including holders of secured claims.

6 Code § 330, as amended in 2005, provides in part that: "[i]n
7 determining the amount of reasonable compensation to be awarded to a
8 trustee, the court shall treat such compensation as a commission, based
9 on section 326." § 330(a)(7).

10 B. *Retroactive Application of BAPCPA*

11 Section 330(a)(7) was added to the Bankruptcy Code by the
12 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which
13 took effect on October 17, 2005, several days after this case was filed.
14 The Act, by its terms, provides that it applies to cases filed after the
15 effective date. Accordingly, the U.S. Trustee relies on prior case law
16 such as In re Roderick Timer Co. v. Levy, 185 B.R. 601 (9th Cir. BAP
17 1995), which held that a trustee's reasonable compensation should be
18 determined by multiplying the amount of time spent by the trustee by a
19 reasonable hourly rate; thus, the limits set out in § 326 are a ceiling,
20 and no more.

21 The amendments to the Code dispense with that approach, by
22 providing that the trustee's remuneration is a commission. A commission,
23 in this context, is a remuneration for services or work done as or by an
24 agent, in the form of a percentage on the amount involved in the
25 transaction. Oxford English Dictionary. Section 326 establishes the
26 maximum amount to be paid as a commission. Reading §§ 326 and 330
together, the statutory scheme provides that a trustee is presumed to be

1 entitled to compensation in the amount specified in § 326. This
2 commission is subject to reduction if the maximum amount is substantially
3 disproportionate to the value of the trustee's services to the estate.
4 In re McKinny, 383 B.R. 490 (Bankr. N.D. Ca. 2008).

5 Notwithstanding BAPCPA's stated effective date, the addition of
6 §330(a)(7) should be retroactively applied. When a statutory amendment
7 acts to clarify an existing provision rather than to make substantive
8 changes to it, the amendment is normally applied retroactively. ABKCO
9 Music, Inc. v. LaVere, 217 F.3d 684, 689 (9th Cir. 2000). The new
10 language in § 330(a)(7) does no more than to clarify Congress's
11 understanding of § 326, which was enacted prior to, and unchanged by, the
12 2005 amendments.

13 *C. Reasonable Commission*

14 As the McKinny court observed, the presumptive commission
15 established by § 326 must be adjusted to the extent necessary to ensure
16 that the commission actually paid is reasonable. A court may find that a
17 presumed fee is substantially disproportionate to the value of the
18 trustee's services where it is excessive in light of the efforts actually
19 applied by the trustee. This is why courts continue to require that the
20 trustees account for the time expended in each case.

21 The presumptive fee will also be found to be substantially
22 disproportionate if errors or omissions on the part of the trustee result
23 in a material loss to the estate or unsecured creditors. In this case,
24 the Trustee's sale of the Debtors' residence operated to generate a
25 substantial commission for a real estate agent, and increased the
26 Trustee's commission, while reducing the amount ultimately payable to

