

JUL 25 2012

ORDERED PUBLISHED

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. ID-11-1389-MkHJu
)
ANDY N. SALGADO-NAVA,) Bk. No. 09-41646
)
Debtor.)

R. SAM HOPKINS, Chapter 7
Trustee,
Appellant,

v.

O P I N I O N

ASSET ACCEPTANCE LLC; RECOVERY)
MANAGEMENT SYSTEMS CORP.;)
BONNEVILLE BILLING &)
COLLECTIONS; NCO PORTFOLIO)
MANAGEMENT; EASTERN IDAHO RMC;))
SPRINT NEXTEL CORRESPONDENCE;)
AMERICAN INFOSOURCE LP,)
Appellees.*)

Argued and Submitted on June 14, 2012
at Boise, Idaho

Filed - July 25, 2012

Appeal From The United States Bankruptcy Court
for the District of Idaho

*Appellant named all unsecured creditors who filed proofs of claim in the debtor's bankruptcy case as appellees. While none of them actively participated in the bankruptcy court proceedings leading up to this appeal or in the appeal itself, naming them as appellees was not inappropriate because each of them might be affected by the relief appellant seeks on appeal. See generally Int'l Ass'n of Firefighters, Local 1186 v. City of Vallejo (In re City of Vallejo), 408 B.R. 280, 298-99 (9th Cir. BAP 2009) (discussing criteria for appellee standing).

1 Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

2
3 Appearances: Monte Gray of the Gray Law Offices, PLLC argued
4 for appellant R. Sam Hopkins, chapter 7 trustee;
5 Ronald R. Peterson of Jenner & Block LLP argued
6 for amici curiae Jeremy Gugino and the National
7 Association of Bankruptcy Trustees; and
8 Cameron M. Gulden argued for amicus curiae the
9 Office of the United States Trustee.

10
11 Before: MARKELL, HOLLOWELL and JURY, Bankruptcy Judges.

12 MARKELL, Bankruptcy Judge:

13
14
15 **INTRODUCTION**

16 R. Sam Hopkins ("Hopkins") sought \$1,315.41 in fees for his
17 service as a chapter 7¹ bankruptcy trustee. He based his request
18 on the trustee compensation rates set forth in § 326(a). The
19 bankruptcy court, however, found that the reasonable value of his
20 services only amounted to \$750 and limited Hopkins's fees to that
21 amount.

22 We REVERSE the bankruptcy court's fee award and REMAND with
23 instructions to enter a fee award of \$1,315.41, the full amount
24 Hopkins requested.

25
26 **FACTS**

27 Andy N. Salgado-Nava ("Salgado-Nava") commenced his
28 voluntary chapter 7 bankruptcy case by filing his bankruptcy
petition on October 22, 2009. Hopkins was then appointed to

¹Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 serve as trustee for Salgado-Nava's chapter 7 bankruptcy estate.

2 Hopkins initially determined that there were no non-exempt
3 assets to distribute to creditors. He thus categorized Salgado-
4 Nava's case, in line with most chapter 7 cases, as a no-asset
5 case.² Hopkins had reached his decision after performing a
6 number of tasks, including reviewing Salgado's schedules, his
7 statement of financial affairs, his tax returns, and his
8 responses to Hopkins's examination questions at the first meeting
9 of creditors held pursuant to § 341(a). Because of Hopkins's no-
10 asset determination, creditors and other parties in interest were
11 told in January 2010 not to file proofs of claim in the case.
12 See Rule 2002(e). Hopkins's only income expectation was a small
13 \$60 fee.³

14
15 ²Approximately 90% of all chapter 7 cases are classified as
16 no-asset cases. LOIS R. LUPICA, THE CONSUMER BANKRUPTCY FEE STUDY FINAL
17 REPORT 47 (2011), available at
18 <http://bapcpafeestudy.com/tag/final-report/> (last visited July
19 20, 2012) (finding 89.4% of chapter 7 cases after the 2005
20 Bankruptcy Code amendments are no-asset cases); see also W.
21 Clarkson McDow, Jr., Protecting the Integrity of the Bankruptcy
22 System in Chapter 7 No-Asset Cases, NABTALK (Fall 2001),
23 available at
24 [http://www.justice.gov/ust/eo/public_affairs/articles/docs/nabtal](http://www.justice.gov/ust/eo/public_affairs/articles/docs/nabtalkfall2001.htm)
25 [kfall2001.htm](http://www.justice.gov/ust/eo/public_affairs/articles/docs/nabtalkfall2001.htm) (last visited July 20, 2012) (estimating
26 approximately 96% of chapter 7 cases were no-asset cases).

27 That no-asset cases are all-too-common is underscored by
28 Rule 2002(e), which allows trustees and clerks generally to tell
creditors to dispense with filing proofs of claim unless the
creditors are later notified that there will be assets to
disburse.

³In a no-asset case such as Salgado-Nava's, Hopkins and all
other trustees receive only a \$60 fee, regardless of how much
work is undertaken. § 330(b)(1) & (2). This amount has not
changed since 1994, and Congress has not made this amount subject
to the Code's provision indexing various amounts for inflation.

(continued...)

1 But Hopkins had also sent routine notices to various taxing
2 authorities, including the State of Idaho. These notices told of
3 Salgado-Nava's bankruptcy filing. They also requested that the
4 recipients advise Hopkins of any tax refunds owed to Salgado-
5 Nava, as Hopkins claimed that such refunds were property of the
6 bankruptcy estate under § 541.

7 These notices brought results. As it turned out, Salgado-
8 Nava had overpaid his state taxes for 2009 and 2010 by
9 approximately \$10,000. In compliance with the notices, Idaho
10 sent Hopkins Salgado-Nava's tax refunds. Hopkins then withdrew
11 his no-asset report. He also issued a new notice advising
12 creditors that there might be a distribution of assets and
13 directing them to file proofs of claim in order to share in that
14 distribution. Seven creditors, appellees here, did so.

15 After Hopkins received the tax refunds, Salgado-Nava amended
16 his bankruptcy schedules to list the tax refunds as assets and to
17 claim \$4,160 of his 2009 refund as exempt. No one contested
18 Salgado-Nava's exemption claim. As a consequence, the exemption
19 was deemed allowed pursuant to § 522(1) and Rule 4003(b). Part
20 of his 2010 refund also was excluded from the estate.⁴

21 When all was said and done, Hopkins collected \$11,099 in
22 assets. He paid \$5,445 to Salgado-Nava in respect of his allowed
23 exemptions, which left \$5,654 available to pay creditor dividends

24
25 ³(...continued)
See § 104.

26 ⁴Hopkins paid Salgado-Nava \$1,285 of the 2010 refund because
27 he determined that it had accrued postpetition, and thus was not
28 property of the estate as it related to postpetition service
income. See § 541(a)(6).

1 and Hopkins's chapter 7 trustee fees and expenses. Based on the
2 trustee compensation rates set forth in § 326(a),⁵ Hopkins filed
3 a request in March 2011, along with his Final Report, asking the
4 bankruptcy court to award him fees in the amount of \$1,315.41,
5 plus actual expenses of \$46.10.⁶

6 Before hearing the matter, the bankruptcy court requested
7 Hopkins provide additional information. Specifically, the court
8 requested Hopkins file:

9 a sworn affidavit in support of his requested
10 compensation and expenses which includes an itemization
11 setting for[th] the date and time spent providing all
12 services rendered by Trustee for which he seeks
13 compensation, together with a narrative discussion or
14 explanation of any other information he wishes the
15 Court to consider in support of his application.

16 Order to Trustee to File Supplementation of Record (April 12,
17 2011) at p. 1.

18 In response, Hopkins filed a one-page document entitled
19 "Supplement to Trustee Fee Application," which provided a brief
20 narrative summary of the services that Hopkins had provided in

21 ⁵Those rates are based on amounts disbursed or turned over
22 by the trustee to parties in interest other than the debtor
23 according to the following schedule: 25% of the first \$5,000 or
24 less; 10% for amounts in excess of \$5,000 but not in excess of
25 \$50,000; 5% for amounts in excess of \$50,000 but not in excess of
26 \$1,000,000; and 3% for amounts in excess of \$1,000,000. See
27 § 326(a).

28 ⁶The Idaho district court had jurisdiction over the fee
request as a matter "arising under" title 11, 28 U.S.C.
§ 1334(b), and then referred to the bankruptcy court from the
district court under the district court's general order of
reference permitted by 28 U.S.C. § 157(a). THIRD AMENDED GENERAL
ORDER No. 38 (D. Idaho April 24, 1995). The fee request was a
core matter under 28 U.S.C. § 157(b)(2)(A), and thus the
bankruptcy court could hear and determine the matter under 28
U.S.C. § 157(b)(1).

1 the bankruptcy case. It also summarized the results of those
2 services: Hopkins had cash on hand which he estimated would be
3 sufficient, after the payment of his requested trustee's fees, to
4 pay \$4,292 to unsecured creditors who had filed proofs of claim.
5 This would result in a 39% dividend to creditors.

6 The Trustee also filed time records detailing the amount of
7 time and services he and his staff had performed in the
8 bankruptcy case. According to Hopkins, he and his staff spent
9 approximately 14 hours on the case: Hopkins personally spent
10 3 hours, his bankruptcy administrator spent 6 hours, his office
11 clerk spent 1 hour, and his paralegals accounted for the final
12 4 hours.

13 After the hearing, the bankruptcy court issued a memorandum
14 decision awarding Hopkins only \$750 of the \$1,315.41 in fees
15 requested. Relying on In re B & B Autotransfusion Servs., Inc.,
16 443 B.R. 543 (Bankr. D. Idaho 2011), and on the other cases cited
17 in B & B, the court held that \$750 was a reasonable fee for
18 Hopkins's services. According to the court, based on its
19 consideration of the extent and difficulty of the services
20 Hopkins and his paralegals had provided, the requested fees were
21 unreasonable. In making this determination, the court reasoned:

22 The only assets requiring administration by Trustee in
23 this case were Debtor's tax refunds. Trustee has not
24 shown that any significant efforts on his part were
25 required to secure the refunds from Debtor; apparently,
26 Debtor surrendered them to Trustee promptly. Beyond
27 accepting and holding the tax refunds, Trustee was
28 required to perform only routine, simple administrative
tasks in this case. While all of those services are
compensable (i.e., actual and necessary), they required
no special skills or expertise, and required no
significant amounts of time to complete. Indeed, most
of those services were not performed personally by
Trustee at all, but, instead, were provided by

1 Trustee's support staff of "paralegals" and
2 others. . . . When the Court focuses upon only those
3 services of Trustee and his paralegals, and assigns
appropriate reasonable value to those services, the
requested fee is not a reasonable one.

4 Mem. Dec. (June 23, 2011) at pp. 3-4 (footnote omitted).

5 In addition, the bankruptcy court rejected Hopkins's
6 argument that, under § 330(a)(7), he should receive \$1,315.41 in
7 fees as a commission based on the compensation rates set forth in
8 § 326(a). As the court put it, § 326(a) in essence "caps"
9 trustee compensation but does not alter or limit the court's duty
10 and authority to determine a reasonable fee.

11 On June 30, 2011, the bankruptcy court entered its order
12 approving Hopkins's Final Report and awarding Hopkins \$750 in
13 fees and \$46.10 in expenses. The Trustee timely filed a notice
14 of appeal on July 13, 2011, which gave us jurisdiction under 28
15 U.S.C. § 158(b).

16 DISCUSSION

17 A. Standard of Review

18 Although this Panel reviews a bankruptcy court's fee award
19 pursuant to § 330(a) for abuse of discretion, Ferrette & Slater
20 v. U.S. Trustee (In re Garcia), 335 B.R. 717, 723 (9th Cir. BAP
21 2005), we still must "determine de novo whether the [bankruptcy]
22 court identified the correct legal rule to apply to the relief
23 requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th
24 Cir. 2009) (en banc). And that is the issue here: what is the
25 "correct legal rule" set forth in § 330(a)(7)?

26 B. Interpreting § 330(a)(7)

27 We start with the paragraph's provenance. Congress added
28 § 330(a)(7) when it adopted § 407 of the Bankruptcy Abuse

1 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
2 § 407, 119 Stat. 23, 106 (2005) ("BAPCPA"). To determine what
3 this new paragraph means and what it added, we begin with the
4 text of the statute itself. Ransom v. FIA Card Servs., N.A., ---
5 U.S. ----, 131 S. Ct. 716, 723-24, 178 L. Ed. 2d 603 (2011)
6 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235,
7 241 (1989)).

8 Section 330(a)(7) provides:

9 In determining the amount of reasonable compensation to
10 be awarded to a trustee, the court shall treat such
11 compensation as a commission, based on section 326.

12 Somewhat surprisingly, the published decisions construing this
13 paragraph conclude that it added little to the law of trustee
14 compensation. These decisions rest primarily on the view that
15 trustee compensation is always subject to a review for
16 reasonableness. See, e.g., In re B & B Autotransfusion Servs.,
17 Inc., 443 B.R. 543, 550 (Bankr. D. Idaho 2011); In re Healy, 440
18 B.R. 834, 835-36 (Bankr. D. Idaho 2010); In re Ward, 418 B.R.
19 667, 675-78 (W.D. Pa. 2009); In re Coyote Ranch Contractors, LLC,
20 400 B.R. 84, 94-95 (Bankr. N.D. Tex. 2009); In re McKinney, 383
21 B.R. 490, 493-94 (Bankr. N.D. Cal. 2008); In re Phillips, 392
22 B.R. 378, 389-90 (Bankr. N.D. Ill. 2008) In re Mack Props., Inc.,
23 381 B.R. 793, 799 (Bankr. M.D. Fla. 2007); In re Clemens, 349
24 B.R. 725, 729-31 (Bankr. D. Utah 2006).

25 There is, however, an alternate view of § 330(a)(7). This
26 view, adopted by the Office of the United States Trustee,⁷

27 ⁷Trustee Compensation, in FREQUENTLY ASKED QUESTIONS (FAQS) FOR
28 TRUSTEES (2006), available at

(continued...)

1 focuses on § 330(a)(7)'s terms - particularly the use of the term
2 "commission" - which seem to alter the court's role in reviewing
3 trustee compensation. See Kenneth N. Klee & Brendt C. Butler,
4 The Bankruptcy Abuse Prevention and Consumer Protection Act of
5 2005 - Business Bankruptcy Amendments, 28 CAL. BANKR. J. 270, 336
6 (2006) (stating that § 330(a)(7) is "supposed to ensure that the
7 court will award compensation to a trustee on a commission basis
8 using the upper limit in section 326 as a standard"); see also
9 Tally M. Wiener & Nicholas B. Malito, On the Nature of the
10 Chapter 7 Bankruptcy Trustee Fee, 18 NORTON J. BANKR. L. & PRAC.
11 No. 2, Art. 3 (2009) ("The nature of the Chapter 7 trustee fee
12 under the revised Bankruptcy Code is that it is a commission. It
13 makes sense from a policy perspective to award Chapter 7 trustees
14 commission-based awards because this method of compensation
15 focuses on results achieved."); Samuel K. Crocker & Robert H.
16 Waldschmidt, Impact of the 2005 Bankruptcy Amendments on Chapter
17 7 Trustees, 79 AM. BANKR. L.J. 333, 364 (2005) (stating that
18 § 330(a)(7) "appears to overrule the circuit court decisions
19 which have computed trustee compensation pursuant to the lodestar
20 method, adjusted by enhancing factors such as the complexity of
21 the case and extraordinary results.").

22 **1. Parsing § 330(a)(7)**

23 It is against this background of published cases,
24 administrative commentary, and academic opinion that we interpret
25 § 330(a)(7). On its face, § 330(a)(7) is made up of an

27 ⁷(...continued)
28 http://www.justice.gov/ust/eo/bapcpa/trustees_faqs.htm#trust_issue4
(last visited July 20, 2012).

1 introductory dependent clause - "In determining the amount of
2 reasonable compensation to be awarded to a trustee" - followed by
3 an independent clause - "the court shall treat such compensation
4 as a commission, based on section 326." In reading this
5 statutory directive, we think the most natural reading of this
6 provision is that the independent clause states a mandatory rule,
7 while the dependent clause states when that rule applies.

8 **a. The Commission Clause**

9 If this reading is accepted, it means that we should start
10 with the independent clause - which we will call the commission
11 clause. On its face, this clause requires bankruptcy courts to
12 treat a trustee's fee request as if the trustee were requesting
13 payment of a commission - a fixed amount - based on the rates set
14 forth in § 326. If correct, this reading would change our prior
15 view that § 326 simply "capped" trustee compensation by setting
16 forth maximum compensation rates. See Arnold v. Gill (In re
17 Arnold), 252 B.R. 778, 788 n.12 (9th Cir. BAP 2000).

18 This change is warranted. Congress's addition of the
19 commission clause changed both the function of § 326 and its
20 relationship with § 330(a). The amendment fixed a statutory
21 commission for chapter 7 trustees tied to - or, in the language
22 of the last provision of the commission clause, "based on" -
23 § 326's compensation scheme.

24 No other reading of the phrase "based on section 326" seems
25 plausible, especially given the use of the word "commission." If
26 Congress did not want to link a trustee's commission to the rates
27 set forth in § 326, it could have ended the commission clause
28 after the word "commission;" that is, it could have omitted the

1 phrase "based on section 326." Or it could have created a new
2 and separate list of commission rates. Moreover, if Congress had
3 merely meant to reiterate in § 330(a)(7) that a trustee's
4 commission was subject to the caps set forth in § 326, it could
5 have used the phrase "subject to section 326." For an example of
6 how that phrasing would work, one only has to look at § 330(a)(1)
7 ("subject to section[] 326, . . . the court may award . . .").

8 But Congress chose to use different words to refer to § 326
9 in §§ 330(a)(1) and (a)(7). The use of different words
10 presumably means that Congress intended that the different words
11 had different meanings and effects. See Sosa v. Alvarez-Machain,
12 542 U.S. 692, 711 n.9 (2004). Put another way, standard canons
13 of statutory interpretation require us to give "based on section
14 326" a different interpretation from one we would give if the
15 phrase read, as its cognate phrase in § 330(a)(1) does, "subject
16 to section 326." In short, we follow established precedent by
17 giving each word and provision of the commission clause meaning.
18 See Corley v. United States, 556 U.S. 303, 314 (2009) ("[a]
19 statute should be construed so that effect is given to all its
20 provisions, so that no part will be inoperative or superfluous,
21 void or insignificant . . ." (internal quotation marks omitted));
22 see also Meyer v. Renteria (In re Renteria), 470 B.R. 838, 843
23 (9th Cir. BAP 2012) (interpreting § 1322(b)(1) so as to give
24 effect to all of the words and phrases in the statute).

25 That said, we need to examine the remainder of the
26 commission clause, including the relationship the phrase "based
27 on" has to the word "commission" and, in turn, the meaning of the
28 word "commission." One key indicator of the substantive

1 relationship among these terms and phrases is indicated by the
2 spatial relationship of each in the statute's text. The words
3 "based on" follow the main portion of the commission clause, a
4 placement and ordering which generally means that the former
5 limits, qualifies or refines the meaning of the latter. See In
6 re Renteria, 470 B.R. at 842 (citing 2A NORMAN J. SINGER, SUTHERLAND
7 ON STATUTORY CONSTRUCTION § 47.33 (7th ed. 2011) (explaining the rule
8 of the last antecedent). In short, the use of "commission"
9 before the words "based on" indicates that the normal meaning of
10 commission starts the analysis of the main text, with the
11 addition of "based on section 326" indicating a refinement or
12 limitation of that accepted meaning.

13 Turning to the accepted meaning of "commission" in normal
14 parlance, a "commission" is a form of compensation set as a fixed
15 percentage of what is sold or transferred. See BLACK'S LAW
16 DICTIONARY 306 (9th ed. 2009) (defining commission as "[a] fee
17 paid to an agent or employee for a particular transaction,
18 usu[ally] as a percentage of the money received from the
19 transaction <a real-estate agent's commission>."); OXFORD ENGLISH
20 DICTIONARY (2d ed. 1989), available at
21 <http://www.oed.com/view/Entry/37135> (last visited July 20, 2012)
22 (defining commission as "[a] remuneration for services or work
23 done as agent, in the form of a percentage on the amount involved
24 in the transactions; a pro rata remuneration to an agent or
25 factor.").

26 Outside of bankruptcy, commissions generally are not subject
27 to a review for reasonableness unless an agreed-upon commission
28 rate is not duly fixed before the commission is earned. As

1 stated in the Restatement (Third) of Agency:

2 The amount of compensation due may be determined by the
3 terms of agreement between principal and agent and may
4 be fixed in amount or made contingent on whether the
5 agent achieves stated outcomes or on other
6 criteria. . . . If an agent has a right to be paid
7 compensation by a principal but the amount due cannot
8 be determined on the basis of the terms of the parties'
9 agreement, the agent is entitled to the value of the
10 services provided by the agent.

11 RESTATEMENT (THIRD) OF AGENCY § 8.13, Comment d (2006).⁸

12 Much the same analysis applies in bankruptcy when, for
13 example, a court pre-approves a professional's percentage-based
14 fee or a contingency fee arrangement before the work is
15 performed. See § 328. If the fee arrangement is properly
16 authorized under § 328, the bankruptcy court does not conduct a
17 standard § 330(a) reasonableness review of contingency fees or
18 percentage-based fees it has pre-approved under § 328. See
19 Friedman Enters. v. B.U.M. Int'l, Inc. (In re B.U.M. Int'l,
20 Inc.), 229 F.3d 824, 829 (9th Cir. 2000) (citing Pitrat v.
21 Reimers (In re Reimers), 972 F.2d 1127, 1128 (9th Cir. 1992));
22 see also In re Confections by Sandra, Inc., 83 B.R. 729, 731-32
23 (9th Cir. BAP 1987). Indeed, a bankruptcy court only can disturb
24 such pre-approved fees when it finds that the pre-approval of
25 such fees turned out to be "improvident in light of developments
26 not capable of being anticipated at the time" the court fixed the
27 fees. § 328(a); see also In re Reimers, 972 F.2d at 1128.

28 ⁸This concept is not new to the law of agency. Both the
Restatement (Second) of Agency and the initial Restatement of
Agency articulate the same concept and reference cases and
annotations reflecting the existence of this concept. See
RESTATEMENT (SECOND) OF AGENCY § 443 (1958) and accompanying comments,
annotations and cases; RESTATEMENT OF AGENCY § 443 (1933) and
accompanying comments, annotations and cases.

1 As a result of this analysis, the plain language of the
2 commission clause leads us to conclude that § 330(a)(7) sets
3 commissions for bankruptcy trustees based on the rates set forth
4 in § 326. Given this, if the commission clause stood alone,
5 independent of the rest of § 330, we could immediately hold that
6 trustee fees should not be disturbed absent circumstances like
7 those required in order to disturb fees pre-approved under § 328,
8 or like the circumstances that might justify reformation or
9 rescission of a commission agreement outside of bankruptcy.

10 **b. Section 330(a)(7)'s Dependent Clause**

11 But the commission clause does not stand alone. We still
12 must construe the remainder of § 330(a)(7), because ascertaining
13 the plain meaning of statutory text requires a contextual
14 reading. State Comp. Ins. Fund v. Zamora (In re Silverman), 616
15 F.3d 1001, 1006 (9th Cir. 2010) ("To determine plain language we
16 consider the language itself, the specific context in which that
17 language is used, and the broader context of the statute as a
18 whole." (internal quotation marks omitted)); Carpenters Health &
19 Welfare Trust Funds for Cal. v. Robertson (In re Rufener Constr.,
20 Inc.), 53 F.3d 1064, 1067 (9th Cir. 1995) ("When we look to the
21 plain language of a statute in order to interpret its meaning, we
22 do more than view words or sub-sections in isolation. We derive
23 meaning from context, and this requires reading the relevant
24 statutory provisions as a whole.")

25 This requires us to look at the dependent clause that
26 immediately precedes the commission clause. Its wording and
27 placement suggests that bankruptcy courts still must consider the
28 reasonableness of trustee fees because it specifies that

1 bankruptcy courts must apply the commission clause "in
2 determining the amount of reasonable compensation to be awarded
3 to a trustee" We should not ignore the contents of this
4 dependent clause any more than we should ignore the contents of
5 the commission clause itself.⁹

6 The starting place for a reasonableness analysis component
7 of trustee compensation might be § 330(a)(3). Before BAPCPA's
8 enactment in 2005, § 330(a)(3) required bankruptcy courts, when
9 considering the reasonableness of all trustee fees under all
10 relevant chapters, including chapters 7, 11, 12, and 13, to
11 consider:

12 (A) the time spent on such services;

13 (B) the rates charged for such services;

14 (C) whether the services were necessary to the
15 administration of, or beneficial at the time at which
16 the service was rendered toward the completion of, a
17 case under this title;

18 (D) whether the services were performed within a
19 reasonable amount of time commensurate with the
20 complexity, importance, and nature of the problem,
21 issue, or task addressed; and

22 (E) whether the compensation is reasonable based on the
23 customary compensation charged by comparably skilled
24 practitioners in cases other than cases under this
25 title.

26 BAPCPA changed this. It amended § 330(a)(3) so that the
27 only types of trustees that come within its ambit are chapter 11
28 trustees; chapter 7 trustees no longer are subject to its terms.
BAPCPA, Pub. L. 109-8, § 407, 119 Stat. 23, 106 (2005). As a

⁹Nor can we ignore the language in § 326 and elsewhere in
§ 330(a) indicating that bankruptcy courts are authorized to
award trustee fees only to the extent those fees are reasonable.

1 consequence, the factors of reasonableness specified in paragraph
2 (3) no longer directly apply to chapter 7 trustees such as
3 Hopkins when reviewing their fee requests.

4 Section 330(a)(7), however, applies to all trustees under
5 all chapters. This indicates a shift in treatment and analysis
6 of chapter 7 trustee fees from paragraph (3) and its catalogue of
7 factors, to paragraph (7) and its explicit incorporation of
8 commission rates.

9 But the shift was not complete. Notwithstanding the
10 applicability of paragraph (7) to chapter 11 trustees, they are
11 still specifically included in paragraph (3) with its litany of
12 reasonableness factors. As a result, we cannot construe
13 paragraph (7) to require a fixed commission in all cases
14 regardless of chapter. Otherwise, we would create an absurd
15 situation in which § 330(a)(3) requires what § 330(a)(7)
16 prohibits.

17 This requires us to search for an interpretation of the
18 § 330(a)(7) that harmonizes the various provisions. See, e.g.,
19 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S.
20 644, 661-66 (2007); Mountain States Tel. & Tel. Co. v. Pueblo of
21 Santa Ana, 472 U.S. 237, 249 (1985). In this endeavor, it is not
22 our role to pick and choose between statutory provisions and only
23 give effect to some of them. See Nigg v. U.S. Postal Serv., 555
24 F.3d 781, 785-86 (9th Cir. 2009) (citing Morton v. Mancari, 417
25 U.S. 535, 551 (1974)).¹⁰

26
27 ¹⁰If either provision had to give way, it would be
28 § 330(a)(3). As later enacted and more specific, § 330(a)(7)
(continued...)

1 **c. Synthesis: Fixed Commissions for Non-extraordinary**
2 **Duties**

3 The challenge is, if possible, to give a meaning to both
4 § 330(a)(3) and § 330(a)(7) that can be applied in all cases
5 regardless of the applicable chapter.¹¹ In the process, we must
6 try to minimize any potential conflict between the two
7 provisions. Fortunately, non-bankruptcy federal law suggests a
8 possible solution. There are certain instances outside of
9 bankruptcy when federal law requires federal agencies and federal
10 courts to consider the reasonableness of percentage-fee or
11 commission-based compensation. See Bjstrom v. Trust One Mortg.
12 Corp., 322 F.3d 1201, 1207-08 (9th Cir. 2003) (applying a two-
13 part test developed by the U.S. Dept. of Housing and Urban
14 Development to determine whether certain fees paid to mortgage
15 brokers were reasonable and hence permissible under § 8(c) of the
16 Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C.
17 § 2607(c)); Schuetz v. Banc One Mortg. Corp., 292 F.3d 1004, 1014
18
19
20

21 ¹⁰ (...continued)
22 would be entitled to primacy. See Bulova Watch Co. v. United
23 States, 365 U.S. 753, 758 (1961).

24 ¹¹We could give an alternate and plausible meaning to both
25 § 330(a)(3) and § 330(a)(7) if we were to assume that Congress
26 actually meant for § 330(a)(7) to apply to all trustees except
27 chapter 11 trustees, who would be subject only to § 330(a)(3).
28 But we cannot assume that Congress inadvertently included chapter
11 trustees within the scope of § 330(a)(7). If Congress's
inclusion of chapter 11 trustees in § 330(a)(7)'s coverage was
inadvertent, it is up to Congress to fix the statute. See Lamie
v. U.S. Trustee, 540 U.S. 526, 542 (2004).

1 (9th Cir. 2002) (same);¹² see also Bank of Lexington & Trust Co.
2 v. Vining-Sparks Sec., Inc., 959 F.2d 606, 613-14 (6th Cir. 1992)
3 (applying test articulated by Municipal Securities Rulemaking
4 Board to determine whether securities broker's markup on certain
5 securities constituted an unreasonable and hence fraudulent fee
6 under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b),
7 and under SEC Rule 10b-5).¹³

8 While these types of reasonableness reviews vary somewhat,
9 their overarching purpose is consistent and clear: to determine
10 whether there is a rational relationship between the duties to be
11 compensated by the commission rate and the nature and range of
12 services actually provided. When a rational relationship exists,
13 the fee is presumed reasonable. Moreover, in each of these
14 instances, federal courts applied standards that did not require
15 a lodestar analysis to determine the reasonableness of the fees
16 in question.

17 We acknowledge that these nonbankruptcy commission cases are

18 _____
19 ¹²The Bjustrom/Schuetz test provides that a mortgage
20 broker's fees are reasonable for purposes of RESPA § 8(c) when:
21 "(1) the mortgage broker performed services that contributed to
22 the transaction, and (2) . . . the total compensation received by
23 the mortgage broker . . . was reasonably related to the services
24 provided." Bjustrom, 322 F.3d at 1207 (citing Schuetz, 292 F.3d
25 at 1006).

26 ¹³The Bank of Lexington test "requires brokers to sell
27 municipal securities at a price that is 'fair and reasonable,
28 taking into consideration all relevant factors, including the
best judgment of the broker . . . as to the fair market value . .
. , the expense involved in effecting the transaction, the fact
that the broker . . . is entitled to a profit, and the total
dollar amount of the transaction.'" Bank of Lexington & Trust
Co., 959 F.2d at 613 (quoting Municipal Securities Rulemaking
Board Manual-General Rules, G-30 (CCH) ¶ 3646 (1985)).

1 not directly comparable with § 326's commission rates. Most
2 significantly, Congress has set chapter 7 trustee commission
3 rates rather than the market. But we know of no reason why
4 courts should second-guess Congress's clearly expressed intent to
5 fix trustee commission rates for the vast majority of cases,
6 especially given that Congress has set the duties that trustees
7 such as Hopkins must perform to earn that commission.

8 Accordingly, absent extraordinary circumstances, chapter 7,
9 12 and 13 trustee fees should be presumed reasonable if they are
10 requested at the statutory rate. Congress would not have set
11 commission rates for bankruptcy trustees in §§ 326 and 330(a)(7),
12 and taken them out of the considerations set forth in
13 § 330(a)(3), unless it considered them reasonable in most
14 instances. Thus, absent extraordinary circumstances, bankruptcy
15 courts should approve chapter 7, 12 and 13 trustee fees without
16 any significant additional review. Indeed, the Office of the
17 United States Trustee has indicated that it will not object in
18 these circumstances if the trustee does not even keep
19 contemporaneous time records.¹⁴

21 ¹⁴The statement appears on the United States Trustee's web
22 site in the form of a Frequently Asked Question on Trustee
23 Compensation as follows:

24 Q: Are time records necessary to support a
25 trustee's compensation?

26 A: United States Trustees will not require a
27 trustee to provide time records to support trustee
28 compensation with regard to cases filed after October
17, 2005. It may, however, be prudent for a trustee to
keep time records to address objections raised by other
parties or to satisfy requirements of the court.

FREQUENTLY ASKED QUESTIONS (FAQS) FOR TRUSTEES, available at

(continued...)

1 Against this background, we must assume that Congress
2 already has approved fees set as commissions in § 326 as
3 reasonable for the duties it has set out for such trustees in
4 § 704 and elsewhere in the Code. In effect, Congress has set
5 both the duties of a trustee and the "market" rate for
6 compensation related to the delivery of those services.

7 On the other hand, if extraordinary circumstances exist, or
8 if chapter 11 trustee fees are at issue, the bankruptcy court may
9 be called upon in those cases to determine whether there exists a
10 rational relationship between the amount of the commission and
11 the type and level of services rendered. In the case of a
12 chapter 11 trustee, this determination necessarily requires
13 consideration of the § 330(a)(3) factors, and also ordinarily
14 includes a lodestar analysis. As for chapter 7, 12, and 13
15 trustee fees, when confronted with extraordinary circumstances,
16 the bankruptcy court's examination of the relationship between
17 the commission rate and the services rendered may, but need not
18 necessarily include, the § 330(a)(3) factors and a lodestar
19 analysis. But bankruptcy courts still must keep in mind that
20 tallying trustee time expended in performing services and
21 multiplying that time by a reasonable hourly rate ordinarily is
22 beyond the scope of a reasonableness inquiry involving
23 commissions. Simply put, a bankruptcy court that diminishes a
24 trustee's compensation from the statutorily-set rate errs if the
25 only basis offered for this diminution is a lodestar analysis.

26
27 ¹⁴ (...continued)
28 http://www.justice.gov/ust/eo/bapcpa/trustees_faqs.htm#trust_issue4
(last visited July 20, 2102).

1 Although the legislative history is silent on the specific
2 meaning and purpose of § 330(a)(7), our construction of
3 § 330(a)(7) generally is consistent with the overall purpose of
4 § 330, pursuant to which Congress sought to balance the general
5 bankruptcy interest of conserving estate assets with the goal of
6 fairly compensating bankruptcy trustees and professionals.¹⁵
7 Especially now, when the most a chapter 7 trustee can expect in
8 90% of his or her cases is a flat \$60 fee, a commission-based
9 system for the other 10% has a certain symmetry to it. Under the
10 system as Congress envisaged it, competent individuals with
11 marketable skills and experience will have incentives to work in
12 the bankruptcy area. In that sense, § 330(a)(7) represents
13 Congress's latest effort to balance various competing policy
14 interests with respect to the work assigned and the compensation
15 paid to chapter 7 trustees.

16 **C. Applying § 330(a)(7) to This Case**

17 Based on the law set forth above, the bankruptcy court erred
18 in determining Hopkins's fees. The bankruptcy court did not
19 treat Hopkins's compensation as a commission based on § 326(a).
20 Instead, the court compared the fees requested to what it
21 considered a reasonable rate of compensation for the time Hopkins
22 and his paralegals actually spent working on the case. The court
23 offered no other grounds for its decision. In short, the
24 bankruptcy court substituted a different standard for the

25
26 ¹⁵For a detailed discussion of this legislative history, see
27 Burgess v. Klenske (In re Manoa Fin. Co.), 853 F.2d 687, 689-90
28 (9th Cir. 1988) (citing H.R. Rep. No. 95-595, at 329-30 (1978),
reprinted in 1978 U.S.C.C.A.N. 5963, 6286; and, 124 Cong.Rec.
33,994 (1978), reprinted in 1978 U.S.C.C.A.N. 6505, 6511).

1 appropriate method and rate of compensation for Hopkins in place
2 of the method and rate set by Congress.

3 When the bankruptcy court does not select and apply the
4 correct law, we typically remand so that the bankruptcy court can
5 apply the correct law to the facts of the case. However, an
6 appellate court may decide a case on the facts previously found
7 when the record is sufficiently developed and there is no doubt
8 as to the appropriate outcome. See, e.g., Wharf v. Burlington N.
9 R.R. Co., 60 F.3d 631, 637 (9th Cir. 1995); see also Weisgram v.
10 Marley Co., 528 U.S. 440, 456 (2000); Cuddeback v. Florida Bd. of
11 Educ., 381 F.3d 1230, 1236 n.5 (11th Cir. 2004).

12 In this instance, no further proceedings are necessary to
13 apply the facts to the correct law. The record is complete and
14 establishes that there was nothing unusual, let alone
15 extraordinary, about the bankruptcy case or Hopkins's services.¹⁶

17 ¹⁶We thus leave for another day the issue of what facts
18 might qualify as extraordinary for purposes of activating the
19 bankruptcy court's duty to determine the reasonableness of the
§ 326(a) commission rates.

20 Cf. Trustee Compensation, in the United States Trustee's
Frequently Asked Questions about trustee compensation:

21 Q: Is a trustee entitled to full statutory trustee
fees in all circumstances?

22 A: 11 U.S.C. § 330(a)(7) provides that the trustee
23 fee is to be "treated as a commission." Absent
24 extraordinary factors, the United States Trustee will
not object to a trustee receiving full commission on
25 all "moneys disbursed or turned over in the case by the
trustee to parties in interest, excluding the debtor,
26 but including holders of secured claims." Extraordinary
factors are expected to arise only in rare and unusual
27 circumstances and include situations such as where the
trustee's case administration falls below acceptable
standards, or where it appears a trustee has delegated

28 (continued...)

1 Indeed, the bankruptcy court described both the case and
2 Hopkins's services as "routine." Based on the law we have
3 articulated above, we are left with no doubt that, on these
4 facts, the court should have awarded Hopkins \$1,315.41 in fees -
5 the full amount Hopkins had requested based on the compensation
6 rates set forth in § 326(a).

7 **CONCLUSION**

8 For the reasons set forth above, we REVERSE the bankruptcy
9 court's fee award and REMAND this matter, with an instruction to
10 enter a new fee award in the full amount requested by Hopkins,
11 \$1,315.41.

12
13
14
15
16
17
18
19
20
21
22
23
24
25 ¹⁶(...continued)

26 a substantial portion of his duties to an attorney or
27 other professional.
28 FREQUENTLY ASKED QUESTIONS (FAQs) FOR TRUSTEES, available at
http://www.justice.gov/ust/eo/bapcpa/trustees_faqs.htm#trust_issue4
(last visited July 20, 2012).