No. 14-103

IN THE
Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER P.C., PETITIONERS

v.

ASARCO LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE STATE BAR OF TEXAS BANKRUPTCY LAW SECTION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The State Bar of Texas was created to "provide specialized professional advice to those with the ultimate responsibility of governing the legal profession in serving the public" and has the stated mission to "support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law and promote diversity in the administration of justice and the practice of law."[2] The State Bar of Texas authorizes and maintains various sections "for the purpose of promoting the objectives of the State Bar

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have all consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of TBLS. No judicial member of TBLS participated in the decision to file this brief, nor did any such member review it before filing (including Richard S. Schmidt, United States Bankruptcy Judge for the Southern District of Texas, who presided over the ASARCO LLC bankruptcy case). Counsel for petitioner Baker Botts L.L.P., Omar Alaniz, is Vice-President-Professional Education of TBLS, but he did not participate in the decision to file this brief or review it before filing.

[2] State Bar of Texas Board of Directors Policy Manual 5 (rev. Jan. 2014), *available at* http://goo.gl/tGH3Sa.

within the particular field designated by the bylaws of each section."[3]

Amicus curiae, the State Bar of Texas Bankruptcy Law Section (the "TBLS") is a section within the State Bar of Texas that was organized approximately ten years ago and currently has approximately 1,500 members who are attorneys licensed to practice law in the State of Texas.[4] TBLS has the stated purposes of (a) providing a platform for practitioners of bankruptcy law (wherever located) who are licensed to practice law in the State of Texas to exchange information and ideas on a regular basis and (b) providing opportunities for lawyers practicing bankruptcy law to attain and build upon the skills, experience, and relationships that will enhance the practice of bankruptcy law in the State of Texas.[5]

The petition presents the question whether 11 U.S.C. § 330(a) authorizes a bankruptcy judge, in an exercise of judicial discretion, to award compensation to a professional employed by a bankruptcy estate for the defense of the professional's fee application where a party in interest has objected to that fee application. The answer to this question directly affects the structuring of fee arrangements between attorneys and their clients, payments under which are subject to court approval in bankruptcy cases pursuant to 11 U.S.C. § 330. The Fifth Circuit

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[3] *Id.* at § 5.01.01.

[4] Membership in TBLS is also open to non-attorney members.

[5] See TBLS Mission Statement, *available at* http://www.statebaroftexasbankruptcy.com.

decision[6] below conflicts with the Ninth Circuit's position on this issue.

As a result of the circuit split, the compensation for attorneys and other professionals employed by debtors-in-possession or trustees in federal courts in bankruptcy matters is subject to different rules based on happenstance of geography, and, consequently, the ability of professionals to predictably and consistently structure fee arrangements with their multiple clients across various jurisdictions will be needlessly hindered, despite all such fee arrangements being governed by the same federal statute.

The inconsistent attorney compensation standards among the federal circuits directly affects the administration of bankruptcy cases and the employment of lawyers in such cases who are licensed to practice law in the State of Texas (many of whom practice in bankruptcy courts nationwide).[7] Accordingly, TBLS files this brief as *amicus curiae* to urge this Court to grant the petition and resolve the important and recurring question it presents.

SUMMARY OF ARGUMENT

TBLS files this brief to provide broader perspective about the practical uncertainty the Fifth Circuit's ruling injects into the administration of bankruptcy cases and the practice of bankruptcy law.

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[6] See Pet. App. 1a-21a. The decision is also reported at 751 F.3d 291.

[7] As discussed in more detail *infra*, while the case below involves *lawyer* compensation, the governing statute, § 330(a), applies to compensation of *all* estate professionals, including *non-lawyers*.

While TBLS takes no position at this time on the merits of the issue presented in the petition, TBLS files this brief in support of the petition because it is in the best interest of all estate professionals for the law regarding professional compensation to be consistent among the circuit courts of appeal. This Court should grant the petition in order to resolve the circuit split created by the Fifth Circuit's ruling and, thus, eliminate the practical strains on estate attorneys and other estate professionals resulting from inconsistent rulings among the circuits. The circuit split creates uncertainty and geographic disparity regarding attorney fee arrangements and also creates uncertainty and constraints on forum choice and the prevalence of bankruptcy practice in many forums. The uncertainty stemming from the circuit split is substantial and national in scope, and uniform national treatment of this issue is also supported by the legislative history of § 330. The petition should be granted in order to eliminate the tension the circuit split has created for all bankruptcy estate professionals.

ARGUMENT

Under this Court's Rule 10(a), the Fifth Circuit's holding and the conflict of authority with the Ninth Circuit are sufficient grounds to warrant granting certiorari. TBLS files this brief to underscore the far-reaching effects of practical importance of the conflict between the Fifth Circuit's ruling and Ninth Circuit precedent.

The split in the circuit courts of appeal regarding whether § 330(a) permits awards of fees for defense of fee applications imposes administrative and financial

burdens on professionals employed by debtors and trustees in bankruptcy cases. For the reasons discussed below, this Court should grant the petition in order to resolve the circuit split and eliminate the potentially far-reaching practical repercussions of the circuit split on bankruptcy law practitioners and other estate professionals.

A. A Circuit Split Exists Regarding Whether Bankruptcy Judges Are Authorized Under Bankruptcy Code § 330 to Exercise Discretion to Award Estate Professionals Compensation for Defense of Fee Applications

The Fifth Circuit's opinion below stands in conflict with established Ninth Circuit precedent. The statute at the heart of that conflict is 11 U.S.C. § 330(a), which governs the compensation of all professionals whose fees are paid by a bankruptcy estate. It provides in pertinent part:

> [T]he court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 – (A) reasonable compensation for *actual, necessary services rendered* by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1) (emphasis added). Further:

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including – (A) the time spent on such services; (B) the rates charged for such services; *(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title*; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and *(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.*

11 U.S.C. § 330(a)(3) (emphasis added). Additionally:

> * * * [T]he court shall not allow compensation for . . . services that were not – (I) reasonably likely to benefit the debtor's estate; *or* (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A) (emphasis added). And, finally:

> Any compensation awarded for the *preparation of* a fee application shall be based on the level

> and skill reasonably required to prepare the application.

11 U.S.C. § 330(a)(6) (emphasis added).

The conflict among the federal circuits stems from those courts' analysis of §§ 330(a)(1), (a)(3)(C), (a)(3)(F), (a)(4), and (a)(6). It is undisputed that § 330(a)(6) allows reasonable compensation for the *preparation of fee applications*. However, if an objection to a fee application is filed, and the applicant must then defend the application in court, there is now a split in circuit authority as to whether the time spent defending the application by preparing for and participating in litigation is compensable under an analysis of the relevant subsections of § 330(a). That analysis distills down to the following three questions:

> (a) whether defense of fee applications in bankruptcy cases constitutes "actual, necessary services," such that those services are compensable (§ 330(a)(1)), involving consideration of (i) whether the services were necessary to the administration of, or beneficial at the time rendered toward the completion of, a bankruptcy case (§ 330(a)(3)(C)) and (ii) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title (§ 330(a)(3)(F));
>
> (b) whether the defense of fee applications has a reasonable likelihood of benefitting the estate, *or* whether such defense is necessary to

> the administration of the case (§ 330(a)(4)(A)); and
>
> (c) whether the fact that § 330(a)(6) places certain limits on compensation for the *preparation* of fee applications affects whether fees for *defense* of fee applications that are objected-to by parties-in-interest are compensable.

The Fifth Circuit's analysis with respect to these questions below led it to conclude that fees for defense of fee applications are never to be authorized by bankruptcy courts under § 330(a), see Pet. App. 1a-21, while, conversely, the Ninth Circuit has concluded that fees for defense of fee applications may be authorized by bankruptcy courts in an exercise of judicial discretion under § 330(a). *Smith* v. *Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 928-29 (9th Cir. 2002).

In the opinion below, citing to its prior decision in *Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414, 418 n.7 (5th Cir. 1998), the Fifth Circuit opened its analysis of the issue by focusing on whether the defense of fee applications brings a benefit "to the estate," and concluded that it does not, observing that, normally (but not in this case), creditors bear that cost. Pet. App. 15a.[8] The Fifth Circuit also

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[8] That the Fifth Circuit gravitated directly to the "benefit to the estate" inquiry is unsurprising in light of the Fifth Circuit's *Pro-Snax* opinion, cited in the opinion below, which established a heightened test regarding when professional fees are compensable under § 330 that requires a "stricter 'hindsight' or 'material benefit' measure" than is apparent from the plain language of § 330. See *Matter of Pro-Snax Distributors, Inc.*,

found support for its ruling in an Eleventh Circuit opinion, which found "absolutely no benefit to the estate, the creditors, or the debtor" with respect to appeals regarding an attorney's services rendered in administration of a bankruptcy estate. *Id.* (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-83 (11th Cir. 1990)). The Fifth Circuit additionally determined that defense of fees litigation was different from and could not be fit into the "preparation" of fee applications covered by § 330(a)(6) and, further, that interpreting § 330(a)(3)(C) to authorize "compensation for professional fee applications" would render § 330(a)(6) superfluous.[9]

The Fifth Circuit next continued its focus on the "benefit to the estate" analysis by contrasting the Ninth Circuit's opinion in *In re Smith*, explaining that *Smith* "actually demonstrates the tension in applying the test of reasonableness and necessity *to*

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157 F.3d at 426. The *Pro-Snax* test is the prevailing standard in the Fifth Circuit; but application of that stricter test has been controversial, as evidenced in a recent Fifth Circuit decision:

> [A]ny argument that *Pro-Snax* was wrongly decided is irrelevant to the key question before us: whether the bankruptcy court erred by applying the wrong standard. Just as the district court said, whether "*Pro-Snax* was a wrongly decided, errant opinion * * * is an argument properly addressed to higher tribunals," but *Pro-Snax* is still the governing standard [in the Fifth Circuit].

In re Woerner, __ F.3d __, No. 13-50075, 2014 WL 3443653, at *7 (5th Cir. July 15, 2014).

[9] As noted by respondent in its brief in opposition, the Fifth Circuit's discussion of § 330(a)(6) appears to contain a typographical error as it references § 330(a)(4) rather than § 330(a)(6). See Resp. Br. 6 n.2; see also Pet. App. 16a.

the debtor's estate when it comes to litigation over fee applications in bankruptcy." Pet. App. 16a. The court explained that in "ordinary cases," payments for professional fees detract from the recovery of unsecured creditors, and "almost everyone loses something," so, according to the Fifth Circuit, it follows that it is inappropriate to award fees for fee defense litigation under § 330(a) in all bankruptcy cases. *Id.* at 16a-17a.[10]

The Fifth Circuit also justified its denial of fees for fee defense under § 330(a)(4) by finding that a $5 million reduction in petitioners' fees (while seemingly "drastic" in "absolute terms") was not a substantial enough reduction in relative terms to render the fees paid to petitioners non-comparable to the compensation that would be paid to equally skilled practitioners in other areas of law. *Id.* at 18a-19a. In sum, the Fifth Circuit concluded that: "Section 330 is not fairly read to include 'fees for defense of fees' either as reasonable, necessary costs of case administration or to prevent the dilution of the professional firm's core fees." *Id.* at 20a.[11]

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[10] The court also hypothesized generally that professionals who properly submit detailed, itemized billing records in compliance with the Federal Rules of Bankruptcy Procedure "ordinarily" will face fewer fee challenges, and that any such satellite litigation that is instituted "ordinarily" will be less successful. See *id.* at 17a.

[11] The court also justified its ruling against awarding fees for defense of fees by citing the perceived frequent collusion in other cases between debtors' counsel and counsel for *official creditor committees* where those parties do not object to each other's fees in an effort to secure payment of fees for both. *Id.* (citing *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir.

The Ninth Circuit's *Smith* opinion is utterly at odds with the Fifth Circuit ruling. The Ninth Circuit began its analysis of the issue in *Smith* with § 330(a)(6), which sets forth parameters for compensation for the *preparation* (but not defense) of fee applications, but explained that nothing in § 330 forbids compensation for litigation in defense of fee applications if such compensation otherwise meets the requirements of § 330. *Smith*, 317 F.3d at 928. The Ninth Circuit's position in *Smith* as to fees for fee defense is consistent with prior Ninth Circuit precedent in *In re NuCorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985), which was the impetus for the legislative enactment of § 330(a)(6). See 3 Collier on Bankruptcy ¶ 330.03 [16][a][i] (Alan Resnick & Henry J. Sommer eds., 16th ed.) ("Section 330(a)(6), added to the [Bankruptcy] Code in 1994, represents a codification of *NuCorp* * * * ."). In *NuCorp*, the Ninth Circuit ruled that professionals' costs to comply with fee *application* requirements in bankruptcy courts are necessarily compensable under § 330 because they are "actual and necessary services," and the court further explained, in dicta, that time spent *litigating* fee awards should also be compensable for the same reasons. See *NuCorp*, 764 F.2d at 658-62; *Smith*, 317 F.3d at 928.

In awarding fees for fee defense, the Ninth Circuit in *Smith* reasoned that failure to award fees for

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1986)). But this rationale does not speak directly to the facts of this case in which the objections in the bankruptcy case below to petitioners' fee applications were initiated by the *parent company of petitioners' client* (after petitioners secured, for the benefit of the estate, a fraudulent transfer judgment valued at $7 to $10 billion against that parent company).

successful defenses to fee challenges would unfairly dilute fee awards, thereby reducing the "effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." *Id.* Where the professionals in *Smith* successfully defended their fee awards, the court concluded that refusing to compensate them for defending those fees would dilute their compensation for "actual and necessary services" provided and would "encourage debtors to file meritless objections to fee applications." *Id.* at 929. The court also found the fees for defense of fees to be necessary for administration of the case and that they provided a benefit to the estate in determining the amount of administrative fees owed by the estate. *Id.*[12]

It is clear from the comparison of the two circuit decisions that the circuits are in conflict, and this Court should grant the petition to resolve the conflict.

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[12] The rationale in *Smith* for awarding fees for defense of fees is in direct alignment with the rationale espoused in *NuCorp*, which articulated that its ruling is consistent with the legislative intent behind § 330 of ensuring (a) compensation for bankruptcy attorneys commensurate with that earned by attorneys in non-bankruptcy cases and (b) the repudiation of judicial decisions which had held that compensation of attorneys in bankruptcy proceedings were to be subject to the overriding concern of preserving the estate. See *id.* at 928; *NuCorp*, 764 F.2d at 658-62.

B. The Circuit Split Regarding Whether Estate Professionals May Be Compensated for the Defense of Fee Applications Creates Uncertainty for Estate Attorneys and Other Estate Professionals

1. The Circuit Split Creates Uncertainty and Geographic Disparity Regarding Attorney Fee Arrangements

The Fifth Circuit's decision below that professionals can never be compensated under § 330(a) for defending their fee applications in bankruptcy cases creates uncertainty and inconsistency in the national practice of bankruptcy law. This uncertainty is apparent in the acknowledgement by the Fifth Circuit below that: "When firms become aware that they may not be reimbursed for defending core fee applications [in the Fifth Circuit], they can anticipate this possibility in their hourly rates and by thoroughly documenting fee applications." Pet. App. 18a n.7.[13] Here, the Fifth

[13] This notion of factoring defense fees into rates charged in bankruptcy matters was raised by the American Bankruptcy Institute ("ABI") in a report on professional compensation published in 1991 (the "Report"), which noted that the survey data from judges and lawyers "suggest that professionals have not adjusted their hourly rates in those districts where no such compensation [for defense of fee applications] is available." G. RAY WARNER & KEITH J. SHAPIRO, AMERICAN BANKRUPTCY INSTITUTE NATIONAL REPORT ON PROFESSIONAL COMPENSATION IN BANKRUPTCY CASES, 61 & n.49 (LRP Publications, 1991), *available at* http://goo.gl/Eqryym. In the Report, which reflects the most recent relevant data gathered on this issue, the ABI admits that: "One might expect that professionals who do not generally receive compensation for the time spent preparing *and presenting* fee application[s] might adjust their hourly rates

Circuit suggested that its ruling should lead practitioners to conclude that they ought to inflate their fees, subject to approval under *federal law*, in such a way as to build in compensation for possible later dilution of fees (at least in the Fifth Circuit) resulting from their potential defense of fee applications. But those same practitioners, who are also frequently employed by trustees and debtors-in-possession in cases filed in *non*-Fifth Circuit courts, would not need to likewise modify their fee arrangements with clients in their non-Fifth Circuit cases to account for the possibility of fee defense. Countless professionals will confront the conflicting compensation scenarios in the various circuits as the practice of bankruptcy law is increasingly nationalized and not limited by state or circuit borders.[14] Moreover, attorneys who practice in courts

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upward to recover this cost. The survey data, however, do not indicate that lawyers have responded in this fashion." *Id.* at 198 (emphasis added), *available at* http://goo.gl/5uPpQM.

[14] See, e.g., Daniel Pouladian & Leslie Reed, *"You Are Now Free to Move About the Country:" Why Bankruptcy Lawyers Should Be Free to Engage in Multijurisdictional Practice*, 52 U.C.L.A. L. Rev. 937, 977 (2004-05) (explaining that "bankruptcy practice is more national than ever before – indeed, it is now global"); Richard E. Mikels & David Hadas, *Pro Hac Vice: Pro or Con?* (American Bankruptcy Institute, 2001), *available at* http://goo.gl/emW5OR (referencing the "increasing nationalization of bankruptcy practice" and the "ever-increasing multi-jurisdictional aspect to bankruptcy practice"). Indeed, it is common practice for bankruptcy attorneys to use the admission *pro hac vice* procedure to appear in bankruptcy courts across the country where they are not already admitted, and such admission is governed by local rules adopted by nearly all bankruptcy courts. *Id.* & n.3 (explaining that "local rules adopted by bankruptcy courts largely govern this practice" and

in the Fifth Circuit will be subject to fee structuring requirements as a result of the decision below not applicable to other bankruptcy attorneys practicing in other jurisdictions.

2. The Circuit Split Creates Uncertainty and Constraints on Forum Choice and the Prevalence of Bankruptcy Practice in Many Forums

It is easy to conceive that clients of attorneys with such a national practice may be incentivized to direct their counsel, wherever possible, to file bankruptcy cases on their behalf in courts with proper venue outside of the Fifth Circuit rather than inside it in order to avoid a higher fee structure accounting for potential fee defense costs and to provide certainty of bargained-for compensation. With respect to cases filed in the Fifth Circuit, professionals now will be compelled to strike a harder fee bargain in order to maintain the potential to earn the same effective rate of compensation to which they would be otherwise entitled in other jurisdictions. Or, the inverse scenario may occur – clients may require counsel to file cases in the Fifth Circuit, even if alternative venues are available, while refusing to agree to protective provisions for the professionals' potential defense of fees in such cases. In the absence of an alternative venue outside the Fifth Circuit, or in the face of clients refusing to agree in advance to pay rates that account for possible dilution of professional fees in the Fifth Circuit, counsel doing work in the

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noting that "the vast majority of bankruptcy courts" provide local rules allowing for non-resident practitioners to seek admission *pro hac vice*).

Fifth Circuit may be disadvantaged compared to counsel in other circuits. Or, as a result of fee differential in the Fifth Circuit, counsel may simply refuse to represent clients in bankruptcy cases that must be filed in that jurisdiction.

Under any of these scenarios, it is easy to see that the circuit split on the issue presented in the petition may substantially affect bankruptcy practice and bankruptcy attorney compensation and encourage forum shopping. Certainly, the venue of bankruptcy cases should not turn on issues relating to the employment and compensation of professionals, but the circuit split injects these issues into the venue decision.

3. The Uncertainty Created By the Circuit Split Is Substantial and National in Scope

The effect of the ruling below on the administration of bankruptcy cases and the employment of professionals is substantial and far-reaching. During the twelve-month period ending June 30, 2014 alone, over one million bankruptcy cases were filed across the United States.[15] The Fifth and Ninth Circuits account for approximately one quarter of all bankruptcy filings nationally; if the Eleventh Circuit is included in the split, the figure climbs to forty percent.[16] And now that there is a circuit split as to whether § 330 allows for awards for

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[15] See U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced by Chapter of the Bankruptcy Code During the 12-Month Period Ending June 30, 2014, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f2.pdf.

[16] See *id.*; see also Resp. Br. 14 (supporting 40% figure).

the defense of fees, it will be increasingly difficult for practitioners to know how to structure fee arrangements in the other circuits where sixty to seventy-five percent of bankruptcy cases are filed, as it will be impossible to anticipate with which circuit's precedent these other circuits will side. A consistent rule is needed. Moreover, although the rule prevailing prior to *ASARCO* was that fees for fee defense *were* available at the discretion of bankruptcy judges,[17] in light of the Fifth Circuit's decision, trustees, debtors, and reorganized debtors will have new incentives to challenge the fees of estate professionals in order to effectively reduce the net fees they must pay to estate professionals, which will likely increase fee litigation.[18] In a nationwide

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[17] See Pet. Br. 167a-171a.

[18] Until now, most defense fee requests were likely to be decided in unreported orders of various bankruptcy courts in light of the fact that previously no circuit split on this issue under the current version of § 330 existed, and bankruptcy courts had no incentive to report opinions on the heretofore-largely uncontroversial issue of defense fees. But this practice will likely change with the added incentives to trustees, debtors, and reorganized debtors to challenge estate professional fees in order to reduce fees payable by the estate because such costs would be absorbed by the estate professionals under the Fifth Circuit rule. Moreover, the fees of estate professionals are frequently litigated. According to a 2005 ABI study, in chapter 11 cases alone, based on data from 2004, in approximately 10% of cases, parties objected to the lead debtor's counsel's fees, and in large chapter 11 cases, that percentage swelled to almost 20%. See PRESENTATION OF THE LANDMARK ABI FEE STUDY: CONCLUSIONS AND RAMIFICATIONS 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007, *available at* http://goo.gl/zZltxr; STEPHEN J. LUBBEN (REPORTER), CHAPTER 11 PROFESSIONAL FEE STUDY 35 (American Bankruptcy

practice like bankruptcy, such uncertainty and potential gamesmanship based on mere geography should not be permitted.

The Court should grant the petition now in order to prevent a waste of judicial, professional, and bankruptcy estate resources that will occur where, because of the circuit split, (1) estate professionals will increasingly encounter objections to their fees asserted purely for the sake of reducing the net fees owed to such professionals (which will increase costs either to estates or estate professionals), and (2) parties will be forced to keep litigating the issue presented by the petition in the face of conflicting circuit authority and the absence of clear Supreme Court guidance.

4. The Legislative History of § 330 Supports Uniform National Treatment of This Issue

The legislative policy behind 11 U.S.C. § 330 also supports uniform national treatment of this issue. As recognized in the legislative history to § 330, if bankruptcy specialists are required to accept fees in all their cases that are consistently lower than fees they would receive elsewhere, they "will not remain in the bankruptcy field."[19] Moreover, if bankruptcy

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Institute, 2007). With changed incentives under the Fifth Circuit rule, the objection statistics are likely to rise.

[19] See H.R. Rep. No. 95-595, at 330 (1977) (explaining that § 330 is intended to incentivize "bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously" to keep practicing law in the "bankruptcy arena" in order to prevent the field from being occupied only by attorneys who could not find other work or who practice bankruptcy law occasionally "almost as a public service").

specialists are required to accept fees in their cases that are lower than they would receive (or are forced to bargain for financial protections in the face of fee dilution) in some jurisdictions but not others, they will be compensated differently circuit-by-circuit for work performed in what would otherwise be a nationwide practice, or, worse, incentivized to refuse to practice bankruptcy law in jurisdictions that are perceived to impede their practice and compensation. Where one jurisdiction imposes the cost of defense of fee applications as a non-compensable cost of doing business but other jurisdictions do not, such disparity in the rules regarding compensation of estate professionals will be felt throughout the nationwide practice of bankruptcy law.

5. The Issue Is of National Importance to All Estate Professionals, Not Only Attorneys

Not only does the decision below affect the petitioners and other bankruptcy lawyers, as the Fifth Circuit itself explicitly acknowledged, it affects *all* professionals a bankruptcy estate employs: "The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of *all professionals* whose fees are paid by the bankruptcy estate" including "a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103," including any "attorney" and "any paraprofessional person employed by any such person * * * ." Pet. App. 14a & n.6 (emphasis added). Accordingly, not only will the employment and compensation of attorneys in bankruptcy cases be

affected, but, so, too, will the employment and compensation of other estate professionals who fall within the scope of § 330, causing the ripple effects of the circuit split to be felt by many types of professionals, including accountants, appraisers, financial advisors, sale advisors, and experts engaged by bankruptcy estates. The decision below warrants review because it is of consequence to all estate professionals across the nation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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