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BY BRITTANI BUSHMAN

# Conflicting Interpretations: A Chapter 13 Trustee's Compensation After Pre-Confirmation Dismissal or Conversion\*

By Brittani Bushman<sup>†</sup>

## I. Introduction

Although the Bankruptcy Code has been around for decades, bankruptcy courts continue to be faced with significant disputes regarding the interpretation of its provisions. An emerging issue that has gained traction in recent years involves the compensation of a chapter 13 trustee upon the dismissal or conversion of a case prior to confirmation.<sup>1</sup> This issue turns on courts' interpretation of the seemingly conflicting directives of 28 U.S.C. § 586(e),<sup>2</sup> which provides that a trustee's fee is collected and calculated from "all payments received" under plans,<sup>3</sup> and 11.U.S.C. § 1326(a)(2),<sup>4</sup> which states that if a plan is not confirmed, all plan payments are to be returned to the debtor, less any administrative expenses under § 503(b).<sup>5</sup> Because a trustee's compensation is not considered an administrative expense under § 503(b),<sup>6</sup> a conflict arises as to whether a trustee is entitled to his or her fee upon a pre-confirmation dismissal or conversion.

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<sup>†</sup>Ms. Bushman is a judicial law clerk to the Hon. John T. Gregg in the United States Bankruptcy Court for the Western District of Michigan. This article is only intended to summarize the majority and minority approaches. Nothing contained herein should be construed as the views or opinions of the author. For more extensive analyses, practitioners are encouraged to review the actual decisions referenced herein.

<sup>1</sup>While tangentially related, the Supreme Court case *Harris v. Viegelahn* involved the disposition of funds held by the chapter 13 trustee post-confirmation upon conversion to chapter 7. *Harris v. Viegelahn*, 575 U.S. 510 (2015). Confusion still remains regarding post-confirmation dismissals as well. See, e.g., Hon. John T. Gregg & Elizabeth K. Lamphier, Esq., *Ball of Confusion—Disposition of Funds Upon Dismissal in Chapter 13*, 29 NORTON J. BANKR. L. & PRAC. 202 (2020).

<sup>2</sup>All future references to "§ 586" or "§ 586(e)" is a reference to 28 U.S.C. § 586 (2020).

<sup>3</sup>§ 586(e)(2).

<sup>4</sup>Unless otherwise noted, all future chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (2020).

<sup>5</sup>§ 1326(a)(2).

<sup>6</sup>Section 503(b)(2) allows a court to grant an administrative expense for "compensation and reimbursement awarded under section 330(a)." § 503(b)(2). Section 330(a), in turn, states that trustees may be awarded compensation, but makes it subject to § 326, which does not allow compensation for a standing trustee "under subchapter V of chapter 11 or chapter 12 or 13 . . . appointed under section 586(b) of title 28 . . ." § 326(b); § 330(a)(1); see also *In re Evans*, 615 B.R. 290, 293

The courts that have been presented with this question have differed in their interpretations and conclusions.<sup>7</sup> On the one hand, a slight majority of courts have determined that the most "harmonious" reading of the two statutes is to interpret § 586(e) as requiring trustees to "collect and hold" plan payments until confirmation, whereas § 1326 specifies "when and how" payments are to be distributed before and after confirmation.<sup>8</sup> In contrast, a slight minority of courts have determined that the "plain language" of § 586(e) is clear, and the trustee's fee is to be collected from all payments received, and the amount to be returned to the debtor under § 1326 excludes the trustee's fee.<sup>9</sup> While two bankruptcy appellate panels have considered this issue, their decisions are unpublished and non-precedential opinions. Currently, no court of appeals in any circuit has considered this issue. As various decisions in

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n.3 (Bankr. D. Idaho 2020) ("Because the Trustee is appointed under § 586(b), allowance of her fees and costs as a § 503(b)(2) claim is not at issue.").

<sup>7</sup>*Compare* Skehen v. Miranda (*In re Miranda*), 285 B.R. 344 (table), 2011 WL 1538003 (10th Cir. B.A.P. 2001) (unpub.) (concluding that a trustee is not entitled to their fee if case is dismissed pre-confirmation), *In re Evans*, 615 B.R. 290 (Bankr. D. Idaho 2020), *appeal docketed sub nom.* McCallister v. Evans, No. 20-00112 (D. Idaho March 4, 2020) (same), *In re Lundy*, 2017 WL 4404271 (Bankr. N.D. Ohio 2017) (same), *In re Dickens*, 513 B.R. 906 (Bankr. E.D. Ark. 2014) (same), *In re Acevedo*, 497 B.R. 112 (Bankr. D. N.M. 2013) (same), *In re Rivera*, 268 B.R. 292 (Bankr. D. N.M.) *aff'd sub nom.* Skehen v. Miranda, (*In re Miranda*), 285 B.R. 344 (table), 2011 WL 1538003 (10th Cir. B.A.P. 2001) (unpub.) (same), *In re Ward*, 132 B.R. 417 (Bankr. D. Neb. 1991) (concluding, without analysis, that when a plan has not been confirmed, the trustee is not entitled to the statutory percentage fee), *and* Order on Debtor's Motion to Disgorge Fees, *In re Littrell*, No. 12–01510 (Bankr. S.D. Cal. Feb. 7, 2014), ECF No. 97 (agreeing with conclusion reached in *In re Acevedo*), *with* McCallister v. Harmon (*In re Harmon*), 2021 WL 3087744 (9th Cir. B.A.P. 2021) (unpub.) (concluding that a trustee is entitled to their fee), *In re Soussis*, 624 B.R. 559, 573 (Bankr. E.D.N.Y. 2020) (same), *Nardello v. Balboa* (*In re Nardello*), 514 B.R. 105 (D.N.J. 2014) (same), *In re Hightower*, 2015 WL 5766676 (Bankr. S.D. Ga. 2015) (concluding, without analysis, that a trustee's fee is calculated upon receipt of all payments, citing *In re Nardello*), Order on Trustee's Motion to Determine Statutory Fee, *In re Wade*, No. 13-51209 (Bankr. S.D. Miss. May 6, 2014), ECF No. 66 (ordering, without analysis, that the trustee is to collect the percentage fee on all payments received, including cases that are dismissed or converted prior to confirmation), Order Granting Trustee's Motion to Determine Statutory Percentage Fee Pursuant to 28 U.S.C. § 586(e) (Doc. 59), *In re Cryder*, No. 11-56676, (Bankr. S.D. Ohio June 15, 2021), ECF No. 68 (concluding, based on trustee's brief and no responsive pleadings, that trustee is to collect fees on all payments received, including cases that are dismissed or converted prior to confirmation), *and* Order Allowing Trustee Fees Under 28 U.S.C. § 586(e), *In re Antonacci*, No. 08-23349 (Bankr. D. Nev. Dec. 27, 2011), ECF No. 171 (ordering, after hearing, that trustee is to collect fees even on cases dismissed or converted prior to confirmation). *See also* Henry E. Hildebrand, III, *Behind the Curtain: The Chapter 13 Trustee's Percentage Fee*, AM. BANKR. INST. J., Dec. 2014, at 24, 109; Hon. Gregg & Lamphier, *supra* note 1, at 209 n.100; Michael Brown et al., Panel Discussion at the 33rd Annual Bankr. Section Seminar: Fed. Bar Ass'n W. Dist. of Mich. (Sept. 24, 2021); Bill Rochelle et al., Panel Debate titled Hot Topics with Bill Rochelle at the Am. Bankr. Inst. 2021 Consumer Practice Extravaganza (Nov. 4, 2021).

<sup>8</sup>*See In re Miranda*, 285 B.R. 344; *In re Evans*, 615 B.R. 290; *In re Lundy*, 2017 WL 4404271; *In re Dickens*, 513 B.R. 906; *In re Acevedo*, 497 B.R. 112; *In re Rivera*, 268 B.R. 292.

<sup>9</sup>*See In re Harmon*, 2021 WL 3087744; *In re Soussis*, 624 B.R. 559, 573; *In re Nardello*, 514 B.R. 105; *In re Hightower*, 2015 WL 5766676.

the lower courts have highlighted, the issue touches not only on the interpretation of sections 586 and 1326, but also related sections 1194 and 1226.<sup>10</sup>

This article does not purport to provide an answer to this question; rather, it is intended to provide practitioners with an overview of the contrasting interpretations of the interplay between § 586(e) and § 1326. This emerging issue is a question of first impression for many courts, and varying interpretations will likely persist as this question works its way to the appellate courts.

## II. Statutory Overview

To begin, a brief review of sections 586, 1326, 1194, and 1226 is helpful. Section 586(e) provides for the overall compensation structure for standing trustees under subchapter V of chapter 11, chapter 12, and chapter 13.<sup>11</sup> The Attorney General fixes the annual compensation of the trustee and the percentage fee, which is to be collected "from all payments received by [the trustee] under plans in the cases under subchapter V of chapter 11 or chapter 12 or 13 . . . ."<sup>12</sup> However, the provision is silent as to when the trustee has a right to the fee.

Section 1326 governs the payments made in a chapter 13 plan. A debtor is required to make his or her proposed plan payments to the trustee within thirty days after the filing of the petition.<sup>13</sup> The trustee is then obligated to retain the payments "until confirmation or denial of confirmation."<sup>14</sup> If confirmed, the trustee is directed to distribute the funds according to the debtor's plan.<sup>15</sup> But if a plan is not confirmed, § 1326 directs the trustee to return all payments to the debtor after deducting any allowed

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<sup>10</sup>See discussion *infra* Part II.

<sup>11</sup>See § 586(e)(1).

<sup>12</sup>§ 586(e)(2).

<sup>13</sup>See § 1326(a)(1)(A).

<sup>14</sup>§ 1326(a)(2).

<sup>15</sup>*Id.*

administrative expense(s) under § 503(b).<sup>16</sup> However, § 1326 does not mention the trustee's statutory percentage fee. Unlike § 1326(a), § 1326(b) specifies that "[b]efore or at the time of each payment to creditors under the plan," priority claims under § 507(a)(2) and the trustee's percentage fee under § 586(e)(1)(B) "shall be paid."<sup>17</sup>

Like chapter 13, subchapter V of chapter 11 also contains a provision governing payments made pursuant to a plan. While not requiring a subchapter V debtor to make payments before confirmation, § 1194 includes identical language to § 1326 directing the trustee to retain all payments and funds received "until confirmation or denial of confirmation."<sup>18</sup> This provision differs from chapter 13 in an important way: if a plan is not confirmed, the trustee is directed to return all payments to the debtor after deducting any allowed administrative expense(s) under § 503(b) as well as "any fee owing to the trustee."<sup>19</sup>

Finally, chapter 12 also includes provisions governing payments made under a plan. Section 1226, mirroring § 1194 and § 1326, specifies that the trustee is to retain all payments and funds received "until confirmation or denial of confirmation."<sup>20</sup> Like § 1194, a chapter 12 trustee is entitled to deduct his or her percentage fee when returning payments to a debtor if a plan is not confirmed.<sup>21</sup> Additionally, § 1226(b), nearly identical to § 1326(b), states that "[b]efore or at the time of each payment to creditors under the plan" priority claims under § 507(a)(2) and the trustee's percentage fee "shall be paid."<sup>22</sup>

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<sup>16</sup>*Id.*

<sup>17</sup>§ 1326(b).

<sup>18</sup>§ 1194(a).

<sup>19</sup>*Id.*

<sup>20</sup>§ 1226(a). Like subchapter V of chapter 11, a chapter 12 debtor is not required to make plan payments before confirmation. *Id.*

<sup>21</sup>*Id.*

<sup>22</sup>§ 1326(b). The language here differs slightly from § 1326(b), in that § 1226(b) does not reference § 586(e), but rather § 1202(c). One court has explained the discrepancy as follows:

When the Code was amended in 1986, §§ 1202 (c) and (d) were subject to a graduated repeal, based upon when the United States trustee system was enacted in each district. Following the repeal of §§ 1202 (c) and (d), the subject matter formerly covered by those sections was governed by §§ 586 (d) and (e). This renders § 1226(b)(2) and § 1326(b)(2) virtually identical.

A leading treatise has noted that the authority to deduct the fee granted to a chapter 12 trustee is "unique" because a chapter 13 trustee "is not authorized to deduct the standing trustee's percentage fee."<sup>23</sup> However, as detailed below, some courts have disagreed with this conclusion, allowing trustees to deduct their percentage fee. Courts across the country have reached conclusions vastly different from one another.

### III. Contrasting the Majority and Minority Interpretations

The majority and minority approaches differ as to (1) the interpretation of the use of "collect" in § 586(e); (2) the operative effect of parallel provisions in chapters 11 and 12 on the interpretation of § 1326(a)(2); and (3) the impact (or lack thereof) of legislative history and, to some extent, the Chapter 13 Standing Trustees Handbook. Both approaches have merit.

#### A. Illustrative Decisions (Majority Approach)

The U.S. Bankruptcy Court for the District of Idaho recently issued a thorough decision adopting the majority approach, holding "§ 586(e)(2) directs the trustee to collect and hold the payments pending plan confirmation, while § 1326(a)(2) tells the trustee when and how to disburse payments before or after confirmation."<sup>24</sup> As is the case with many of the decisions on this issue, *In re Evans* involved the debtors' filing a voluntary motion to dismiss after the failure to confirm their chapter 13 plan.<sup>25</sup> By that

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*In re Evans*, 615 B.R. 290, 295 n.4 (Bankr. D. Idaho 2020), *appeal docketed sub nom.* McCallister v. Evans, No. 20-00112 (D. Idaho March 4, 2020) (citing 8 COLLIER ON BANKRUPTCY ¶ 1202.06 (Richard Levin & Henry J. Sommer eds., 16th ed.)).

<sup>23</sup>8 COLLIER ON BANKRUPTCY ¶ 1226.01 n.4 (Richard Levin & Henry J. Sommer eds., 16th ed.). See also 8 COLLIER ON BANKRUPTCY ¶ 1326.02 (Richard Levin & Henry J. Sommer eds., 16th ed.) (identifying courts which have held that a trustee is not entitled to their percentage fee upon dismissal prior to confirmation); NORTON BANKR. L. & PRACT. § 152:2 (3d ed. 2021) (noting the difference between chapter 12 and chapter 13 and how courts have started to conclude that chapter 13 trustee's fees are not permitted to be paid); Keith M. Lundin, LUNDIN ON CHAPTER 13, § 54.9, at ¶ 2–4, LundinOnChapter13.com (last visited Sept. 23, 2021) (same).

<sup>24</sup>See *In re Evans*, 615 B.R. at 303.

<sup>25</sup>*Id.* at 292.

time, the trustee had received \$11,600 in payments.<sup>26</sup> The trustee filed her final report and account, withheld \$1,081.80 for her compensation, and returned the remaining balance to the debtors.<sup>27</sup> The debtors filed an objection and requested an order requiring the trustee to disgorge her fees under § 1326(a)(2), and the trustee and the United States Trustee ("UST") filed responses, arguing that the trustee is entitled to her fee under § 586(e) regardless of whether a plan is confirmed or not.

In analyzing the apparent conflict between § 586(e) and § 1326(a)(2), the *Evans* court first turned to various rules of statutory interpretation and looked at the plain language of the statute.<sup>28</sup> In particular, the court emphasized that it "must construe every statute in context to avoid superfluities and give every word some operative effect."<sup>29</sup> The court turned to the parallel provision in chapter 12, § 1226(a), reasoning that the trustee's argument would render § 1226(a)(2) superfluous.<sup>30</sup> Additionally, the trustee argued that § 1326(b) is further "acknowledgement that trustee fees should be paid regardless of plan confirmation."<sup>31</sup> The court again turned to the similar provision in § 1226(b), concluding that this interpretation would also make § 1226(a)(2) superfluous and have no operative meaning.<sup>32</sup> The court determined that § 1326(a)(2) "only allows the trustee to pay creditors after a plan is confirmed. If the trustee cannot pay creditors until a plan is confirmed pursuant to § 1326(a)(2), then § 1326(b) is not operative until a plan is in effect."<sup>33</sup>

The *Evans* court then turned to the specific language in § 586(e). Citing to *In re Dickens*,<sup>34</sup> the court agreed with the UST that the word "plans" in the statute refers to both confirmed and unconfirmed

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<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at 294.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 295.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 295–96.

<sup>33</sup>*Id.* (citing *In re Rivera*, 268 B.R. 292 (Bankr. D. N.M.) *aff'd sub nom.* Skehen v. Miranda, (*In re Miranda*), 285 B.R. 344 (table), 2011 WL 1538003 (10th Cir. B.A.P. 2001) (unpub.)).

<sup>34</sup>*In re Dickens*, 513 B.R. 906 (Bankr. E.D. Ark. 2014).

plans.<sup>35</sup> However, the court refused to adopt an interpretation advanced by the trustee that the definition of "collect" means that the fee is irrevocable.<sup>36</sup>

Finally, the *Evans* court concluded that the legislative history for § 586 and § 1326 was ambiguous and did not assist in the interpretation.<sup>37</sup> Additionally, the court held that the Chapter 13 Standing Trustees Handbook interpretation is not conclusive, nor binding, on the court,<sup>38</sup> and the conflicting public policy arguments cannot overcome the text of the statute.<sup>39</sup>

The *Evans* court cited to *In re Acevedo* favorably, and the *Acevedo* court appears to be one of the first courts to adopt the "collect and hold" approach under § 586(e).<sup>40</sup> Similar to the facts in *Evans*, *Acevedo* involved two debtors who filed motions to disgorge the trustee's expenses after both plans failed to get confirmed.<sup>41</sup> Interpreting § 586(e)(2), the court determined that there were three ways in which the first sentence<sup>42</sup> can be construed: (1) "mandatory construction" (obligating the trustee to collect fees from all payments received); (2) "collect and hold construction" (requiring the trustee to collect and hold the fees until confirmation); (3) "responsibility and source construction" (identifies the trustee as the party responsible for collecting the percentage fees and identifies the plan payments as the source for collection, but does not address when the fees are to be collected or paid).<sup>43</sup> While commenting that any of these approaches were "plausible," the court concluded that the "collect and

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<sup>35</sup>*In re Evans*, 615 B.R. at 297 (citing *In re Dickens*, 513 B.R. at 911).

<sup>36</sup>*Id.* (citing *In re Dickens*, 513 B.R. at 911).

<sup>37</sup>*Id.* at 298.

<sup>38</sup>The handbook essentially states that the trustee is to "reverse payment of the percentage fee" only if there is "controlling law in the district requiring such reversal." *Id.* at 299 (quoting U.S. DEPT OF JUSTICE, EXEC. OFFICE FOR THE U.S. TR. HANDBOOK FOR CHAPTER 13 STANDING TRUSTEES 2–3 (Oct. 1, 2021), [https://www.justice.gov/sites/default/files/ust/legacy/2015/05/05/Handbook\\_Ch13\\_Standing\\_Trustees\\_2012.pdf](https://www.justice.gov/sites/default/files/ust/legacy/2015/05/05/Handbook_Ch13_Standing_Trustees_2012.pdf)).

<sup>39</sup>*Id.* at 300 (citing *Skehen v. Miranda (In re Miranda)*, 285 B.R. 344 (table), 2011 WL 1538003 (10th Cir. B.A.P. 2001) (unpub.)).

<sup>40</sup>*See In re Acevedo*, 497 B.R. 112 (Bankr. D. N.M. 2013).

<sup>41</sup>*In re Acevedo*, 497 B.R. at 114. One case was dismissed, one case was converted to chapter 7. *Id.*

<sup>42</sup>The first sentence states "Such individual shall collect such percentage fee from all payments received by such individual under plans in the cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 for which such individual serves as standing trustee." § 586(e)(2).

<sup>43</sup>*In re Acevedo*, 497 B.R. at 122.



hold" construction is the most harmonious reading of the two statutes.<sup>44</sup> This interpretation is further bolstered and supported by the differences between § 1226(a)(2) and § 1326(a)(2).<sup>45</sup>

The *Acevedo* court also construed the meaning of "payments . . . in the amount . . . proposed by the plan to the trustee" in § 1326(a)(2). The trustee argued that the amount "proposed" does not include the trustee's fees because the fees are mandatory and cannot be "proposed."<sup>46</sup> The court disagreed, instead finding that the ordinary and natural meaning of the "amount" paid under the plan includes both "the trustee's percentage fee and the amount to be distributed to the creditors."<sup>47</sup> Further, because a creditor can only be paid under a confirmed plan, § 1326(b) does not allow for trustee's fees to be paid if confirmation never happens.<sup>48</sup>

The only appellate court to adopt the majority approach is the Bankruptcy Appellate Panel for the Tenth Circuit.<sup>49</sup> In *In re Miranda*, the trustee appealed the bankruptcy court's denial of her motions for allowance of the trustee's percentage fee in nine cases that were either dismissed or converted to chapter 7 pre-confirmation.<sup>50</sup> In an unpublished opinion, the BAP concluded that § 586(e)(2) must be read in conjunction with the bankruptcy code rather than in isolation.<sup>51</sup> The BAP further concluded that § 1326(a)(2) "unambiguously provides" that all payments are to be returned to the debtor, less any administrative claims, and a trustee's fee is not classified as such.<sup>52</sup> The BAP turned to § 1226(a) as further proof that Congress did not intend to allow chapter 13 trustees to retain their fee when plans are not confirmed.<sup>53</sup> According to the BAP, the difference makes sense, as chapter 12 debtors are not

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<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 123–24.

<sup>46</sup>*Id.* at 118.

<sup>47</sup>*Id.* at 119.

<sup>48</sup>*Id.* at 121 (citing *In re Rivera*, 268 B.R. 292 (Bankr. D. N.M.) *aff'd sub nom.* Skehen v. *Miranda*, (*In re Miranda*), 285 B.R. 344 (table), 2011 WL 1538003 (10th Cir. B.A.P. 2001) (unpub.).)

<sup>49</sup>*Skehen v. Miranda (In re Miranda)*, 285 B.R. 344 (table), 2011 WL 1538003 (10th Cir. B.A.P. 2001) (unpub.).

<sup>50</sup>*Id.* at \*1.

<sup>51</sup>*Id.* at \*2.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at \*2–3.

required to make plan payments prior to confirmation, unlike chapter 13 debtors.<sup>54</sup> While the BAP was mindful of policy concerns, it could not ignore its "foremost responsibility" of interpreting the statute.<sup>55</sup>

### ***B. Illustrative Decisions (Minority Approach)***

The Bankruptcy Appellate Panel for the Ninth Circuit recently issued a comprehensive unpublished decision adopting the minority approach, holding that § 586(e) is unambiguous and the "plain language of § 586(e)(2) means that a standing trustee is entitled to the statutory fee upon receipt of every payment under the plan."<sup>56</sup> In *In re Harmon*, the trustee appealed the bankruptcy court's order denying payment of her fee.<sup>57</sup> The debtors' plan was never confirmed, and the trustee had \$2,178.03 on hand by the time the court granted the debtors' motion to dismiss.<sup>58</sup> After debtors' counsel filed an application for compensation of \$1,839, the proposed order was modified by the bankruptcy court to remove the language initially inserted that provided for the trustee's fees because it was inconsistent with *In re Evans*.<sup>59</sup>

In addressing this issue of first impression, the BAP first discussed the history of the U.S. Trustee Program.<sup>60</sup> It observed how a trustee appointed under § 1302 may be awarded reasonable compensation for actual, necessary services and expenses, whereas "standing trustees are not compensated under the Bankruptcy Code and their compensation is not subject to adjustment by the bankruptcy court."<sup>61</sup> In a footnote addressing the dissent's discussion of legislative history, the BAP

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<sup>54</sup>*Id.* at \*3.

<sup>55</sup>*Id.* at \*4.

<sup>56</sup>*McCallister v. Harmon (In re Harmon)*, 2021 WL 3087744, \*1 (9th Cir. B.A.P. 2021) (unpub.). The *Harmon* decision includes three separate opinions, including a strongly worded dissent. The dissent found fault with the majority's statutory interpretation methods and their disregard of parallel statutes in chapter 12 and chapter 11. *Id.* at \*13, \*19–20 (Lafferty, J, dissenting).

<sup>57</sup>*Id.* at \*2

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at \*3

<sup>61</sup>*Id.* at \*3.

noted that the nationwide expansion of the U.S. Trustee Program "demonstrates congressional intent to separate a standing trustee's compensation from the Bankruptcy Code . . . ."62

The BAP then turned to the rules of statutory construction to interpret the phrase "collect such percentage fee" in § 586(e)(2).63 Looking to dictionary definitions of "collect" and "fee," the court concluded that the plain meaning is not ambiguous for several reasons.64 First, the BAP cited to § 586(e)(2) as the "only limitation" on the trustee's ability to keep the fees collected.65 Second, the court cited to the use of "collect" in related statutes, such as 28 U.S.C. § 589a (which provides that certain bankruptcy filing fees be "collected" and deposited into the United States Trustee System Fund) and 28 U.S.C. § 1930(e) (which provides that the clerk of the court may "collect only the fees prescribed.").66 The BAP concluded that this was evidence that once collected, the fees are not refundable.67 Third, the BAP identified the significance of the trustee's duties at the outset of a case, and determined that a trustee appointed under § 1302 has identical responsibilities as a standing trustee, and "it makes little sense for Congress to provide for compensation of one and deny it the other."68 The BAP reasoned that the alternative interpretation could lead to "misaligned incentives."69

In turning to the impact of § 1326 on § 586, the BAP held that a standing trustee's percentage fee is "not a disbursement made in accordance with the plan" and the trustee "is neither a creditor nor an administrative claimant."70 The BAP concluded that the percentage fee is not governed by any provision in the Bankruptcy Code and trustees are not paid under a bankruptcy plan.71 It is therefore

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<sup>62</sup>*Id.* at \*3 n.4.

<sup>63</sup>*Id.* at \*5.

<sup>64</sup>*Id.* at \*6.

<sup>65</sup>*Id.* The remaining provisions of § 586(e)(2) requires standing trustees to deposit excess funds received into the United States Trustee System Fund. *See* § 586(e)(2).

<sup>66</sup>*Id.* at \*7.

<sup>67</sup>*Id.* (citing *In re Mullins*, 10 B.R. 346, 347 (9th Cir. B.A.P. 1980); *In re Fortman*, 456 B.R. 370, 374 (Bankr. N.D. Ind. 2011)).

<sup>68</sup>*Id.* at \*8.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>*Id.* at \*9.

"unreasonable" in their view to "interpret this language to mean 'collect and hold' payments prior to confirmation, then rely on the same language to mean 'obtain payment' upon confirmation."<sup>72</sup>

Finally, the BAP chose not to apply the "negative inference canon" or the "canon against surplusage" regarding the explicit language of trustee compensation in § 1194(a)(3) and § 1226(a)(2).<sup>73</sup> The BAP stated that "[n]egative inferences from disparate provisions are 'strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.'<sup>74</sup> The BAP concluded that there is "no evidence" that Congress considered a chapter 13 trustee when language in the other statutes was added.<sup>75</sup> Therefore, § 1194(a)(3) and § 1226(a)(2) is "best understood as reiterating" that a trustee is to collect her fee from all payments received, regardless of whether a plan is confirmed.<sup>76</sup> While the BAP acknowledged that this interpretation may be superfluous, it reasoned that the "preference for avoiding surplusage constructions is not absolute."<sup>77</sup>

In another recent decision, the Bankruptcy Court for the Eastern District of New York held that trustees are entitled to their statutory fees regardless of whether a plan is confirmed.<sup>78</sup> In *In re Soussis*, the trustee had received \$362,100 from the debtor by the time the case was dismissed pre-confirmation, and the trustee retained \$20,592 for his fee.<sup>79</sup> The debtor filed a motion seeking, among other things, an order directing the chapter 13 trustee to disgorge a portion or all of the statutory fees and expenses.<sup>80</sup>

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<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* at \*10 (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)).

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004))

<sup>78</sup>*In re Soussis*, 624 B.R. 559, 573 (Bankr. E.D.N.Y. 2020)

<sup>79</sup>*Id.* at 565.

<sup>80</sup>*Id.*

The court first discussed the procedural deformities of the case.<sup>81</sup> The court concluded that a bankruptcy court cannot use its equitable powers to simply reduce the fees, because the trustee's fee is mandated by statute, and the statute directs the Attorney General to fix the amount of the fee.<sup>82</sup> Further, the court explained that a motion for disgorgement is not the proper procedure; an objection to the Final Report pursuant to Fed. R. Bankr. P. 5009 is the proper method.<sup>83</sup>

Notwithstanding the procedural problems, the court recognized that the debtor had raised a valid issue as to the interpretation of the relevant statutes.<sup>84</sup> The court held that a "plain reading" of § 586 reveals that the trustee can collect his or her fee whether the plan is confirmed or not.<sup>85</sup> The court did not believe that the word "collect" was ambiguous and therefore the meaning was clear.<sup>86</sup> It concluded that the fee is to be collected from each plan payment, and when that "fee is collected, it is severed from the portion of the plan earmarked towards creditors."<sup>87</sup> Further, "[o]nce the Trustee collects the fee, there is nothing in the Bankruptcy Code to indicate that these two categories of funds are recombined thereafter."<sup>88</sup>

The *Soussis* court also concluded that § 1326 supports its interpretation of § 586.<sup>89</sup> Section 1326(a)(2) "directs the trustee to return to the debtor only payments not previously paid and not yet due and owing to 'creditors.'"<sup>90</sup> Since § 586 directs the trustee to collect from each plan payment his or her fee, the trustee's fee is "never owed to creditors, regardless of whether the plan is confirmed."<sup>91</sup> Thus,

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<sup>81</sup>*Id.* at 566–70.

<sup>82</sup>*Id.* at 567.

<sup>83</sup>*Id.* at 569–70.

<sup>84</sup>*Id.* at 570.

<sup>85</sup>*Id.* at 571.

<sup>86</sup>*Id.* at 572.

<sup>87</sup>*Id.*

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* at 572–73.

<sup>91</sup>*Id.* at 573.

under § 1326, the debtor is only entitled to the return of the funds "earmarked for creditors, with carve outs for allowed § 503 administration claims."<sup>92</sup>

The court in *In re Nardello* similarly held that the mandate in § 586, for the collection of the percentage fee from all payments received regardless of confirmation, is mandatory.<sup>93</sup> However, the factual circumstances of *Nardello* differ from the decisions previously discussed. Two creditors moved for relief from the automatic stay for sale of the debtor's assets.<sup>94</sup> One creditor had a claim on personal property, and the other creditor had a claim on real property.<sup>95</sup> The court granted the relief, and the trustee was ordered to hold the proceeds from the sale of the real property pending further order of the court.<sup>96</sup> Confirmation of the proposed plan was delayed, and the debtor later voluntarily filed a motion to dismiss the case.<sup>97</sup> The trustee filed a final report and account, itemizing, among other things, the trustee compensation of \$9,730.79.<sup>98</sup> Relying on § 1326, the debtor filed an objection.<sup>99</sup> The bankruptcy court found § 1326 inapplicable because the funds on which the trustee's fees were based were not payments proposed by the plan, but rather orders from the court.<sup>100</sup> As such, the court concluded that only § 586(e) applies.<sup>101</sup> The debtor appealed.<sup>102</sup>

On appeal, the district court first concluded that § 586 is ambiguous because it does not define "all payments received under plans."<sup>103</sup> Turning to the legislative history, the court observed that this provision was the subject of an amendment in 1986.<sup>104</sup> Section 586(e)(2) as amended directs the fee to

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<sup>92</sup>*Id.* at 573.

<sup>93</sup>*Nardello v. Balboa (In re Nardello)*, 514 B.R. 105, 111 (D.N.J. 2014).

<sup>94</sup>*Id.* at 106.

<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* at 107.

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* at 108.

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>*Id.* at 110.

<sup>104</sup>*Id.*

be collected from "all payments received by [the trustee] under plans" as opposed to "all payments under plans."<sup>105</sup> Interpreting this change, and other courts' interpretations, the *Nardello* court concluded that "all payments received" is not synonymous with "all payments under plans," and the percentage fee is based on "all payments received" by the trustee, making the percentage fee mandatory.<sup>106</sup> This is also consistent with the Chapter 13 Standing Trustees Handbook interpretation, which the court found persuasive.<sup>107</sup>

The second issue addressed by the *Nardello* court was whether the trustee is entitled to the statutory fee on payments received in cases dismissed before confirmation.<sup>108</sup> The court answered in the affirmative because § 586 refers to all payments received, with the fee therefore mandatory, which necessarily includes cases dismissed before confirmation.<sup>109</sup> The court was unpersuaded by the argument found in cases such as *In re Acevedo* that § 1326(b) only contemplates payment of the fee where a plan has been confirmed.<sup>110</sup> Instead, the court interpreted §§ 1326(a) and (b) together to mean that confirmation is not required.<sup>111</sup> According to the court, the alternative interpretation would render the "mandatory language" of § 586 "meaningless."<sup>112</sup>

Finally, the court distinguished § 1226(b)(2), agreeing with the bankruptcy court's observation that § 1226 does not require the chapter 12 debtor to make payments like chapter 13 debtors, and § 1226 refers to "both payments and funds received by the trustee" unlike § 1326(b)(2), which refers only to "payments to creditors."<sup>113</sup> Under the specific facts, the court ultimately agreed with the bankruptcy court and concluded § 1326 is inapplicable, because the proceeds from the sale of the real property were

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 111.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 113.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 114.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 115 n.4.

not payments proposed under debtor's plan, and the trustee was required to hold the proceeds.<sup>114</sup> The court held that the proceeds were still "received" by the trustee and properly formed the basis for calculating the trustee's fee under § 586.<sup>115</sup>

#### **IV. Conclusion**

Whether a chapter 13 trustee is entitled to his or her statutory fee upon pre-confirmation dismissal or conversion is an issue with direct impact on debtors and chapter 13 trustees. Until this issue advances to the circuit courts of appeal, uncertainty will persist.

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<sup>114</sup>*Id.* at 115.

<sup>115</sup>*Id.* at 116.