IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

BAKER BOTTS, L.L.P., ET AL., :

Petitioners : No. 14-103

v. :

ASARCO, L.L.C. :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, February 25, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:19 a.m.

APPEARANCES:

AARON STREETT, ESQ., Houston, Tex.; on behalf of Petitioners.

BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

JEFFREY L. OLDHAM, ESQ., Houston, Tex.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:19 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next today in Case No. 14-103, Baker Botts v. ASARCO.

Mr. Streett.

ORAL ARGUMENT OF AARON STREETT

ON BEHALF OF THE PETITIONERS

MR. STREETT: Mr. Chief Justice, and may it please the Court:

At the end of a bankruptcy case, a professional must file a detailed fee application. Numerous interested parties may object and the court must hold a hearing to resolve those objections and make an independent assessment of reasonable compensation.

Each of those steps is indispensable to accurately determining the professional's core fees and the estate's administrative expenses, allowing the trustee to close the case and ultimately pay the estate's creditors.

Everyone agrees that preparing the application is compensable as reflected by Section 330(a)(6)'s guidance for determining the amount of that compensation. Defending the application against objections is an inseparable part of that same code-mandated process. There is no principle basis and

certainly no textual basis for categorically banning compensation for that next step.

To the contrary --

JUSTICE SCALIA: Well, the principle basis, as I understand it, is that when you prepare it, you're -- you're serving the -- the trustee. You're serving his needs but, you know, if he's disallowing it, you're, to the contrary, acting against the trustee's interest. Isn't that a principle distinction?

MR. STREETT: It would certainly not be in the vast majority of cases. For example, in the typical Chapter 7 case the trustee hires a professional, the trustee wishes to pay the professional fully for his good work, and the debtor comes in and objects.

By defending that application against the debtor's objections, the professional is serving the trustee. The same thing happened here where the debtor --

JUSTICE SCALIA: So you'd acknowledge it's okay if the trustee objects, then he doesn't have to pay, right?

MR. STREETT: I would not acknowledge that, Your Honor, but --

JUSTICE SCALIA: I didn't think you would.

MR. STREETT: But that is the reason there

should not be a categorical --

JUSTICE SOTOMAYOR: But the trustee is not the estate.

MR. STREETT: That's correct, and there's no --

JUSTICE SOTOMAYOR: The estate wants to keep as much money as it can to give to the creditors. That's the purpose, right?

MR. STREETT: Well, in this case, for example, the estate paid all of Baker Botts's core fees and wanted to pay all those fees, and you had ASARCO coming in as the reorganized company and objecting. So, again, I don't think that is true in the vast -- in many, many cases. And typically it's not the case in the Chapter 7 case. As the National Association of Bankruptcy Trustees point out as amicus, a trustee is not going to be able to retain competent and skilled counsel if the debtor is going to dilute that.

JUSTICE SOTOMAYOR: If you hired another law firm to fight this objection, would that other law firm have been entitled to fees too?

MR. STREETT: It would possibly be entitled to fees through 330(a)(1)(b). I think in your hypothetical you're assuming that the other law firm would not be approved by the trustee as an estate

professional. So that's the on/off switch for compensation under 330(a), a compensation as a service rendered. So the only possible way they could be compensated would be as an expense for rendering a service to the estate professional.

JUSTICE SOTOMAYOR: I just want to understand your rule completely. Anybody who prepares a fee application -- an accountant, an expert -- the bankruptcy court can pay all of their legal fees, if the trustee has hired their lawyer?

MR. STREETT: Yes.

JUSTICE SOTOMAYOR: Approved their lawyer? But if the trustee hasn't, then they have to assume the costs of fighting --

MR. STREETT: No, your Honor, that's not our position for two reasons. First of all, there's two ways to get compensated under 330(a). There's (a)(1)(a), which is compensation for services rendered by a professional hired by the estate. And then there's (a)(1)(b) which is expenses, and that's things like experts, outside contractors that the estate professionals hires to help him or her do the services.

So in the context of an accountant who hired a law firm to prepare and defend its fee application -- it happens all the time; accountants can't do it

themselves -- that outside law firm would be compensable as an expense to the accountant.

Now, of course, ASARCO's position would categorically ban all compensation for law firms, even those retained by the trustee that defend their fee application; it would categorically ban compensation by the accountants.

And the problem with ASARCO's position is that everything you can say about defending a fee application is also true about preparing fee application in the context of the statute. They both are paid out of the estate. They both diminish the estate in that way. They're both something that the code requires --

JUSTICE KENNEDY: I take it you -- excuse me. If the trustee objects and there's a lengthy hearing, I take it you would still say that you get fees for participating in that hearing.

MR. STREETT: Yes, that's correct.

JUSTICE KENNEDY: All right. So the fact that ASARCO came in is really irrelevant to the -- to this case.

MR. STREETT: I don't think it's irrelevant because it shows the error of the Fifth Circuit's way in adopting a categorical rule that prohibits compensation, even when the trustee wants to pay the professional the

full amount. That's the only reason I really made that particular point.

And that's the only argument that's before this Court, is a categorical ban under the statute on compensating the professional for defending his fee application regardless of who objects.

And I think this Court has already rejected the distinction that Justice Scalia suggested between preparing and defending the fee application. In its opinion in Jean, where the Court said there's, quote, no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that application.

And the Court --

JUSTICE SOTOMAYOR: That was in the context of a fee splitting statute though.

MR. STREETT: That's correct. And the fee shifting context is the proper analogy here. Of course we don't claim 330(a) is formally a fee shifting statute. We're seeking payment from the estate for work that the code requires us to do as part of our work.

But the fee shifting analogy is accurate for a couple reasons. First of all, in the fee shifting statute and in the bankruptcy statute, the professional must file an application and have his fees approved by

the court. And as in the fee-shifting regime, the bankruptcy professional's application is opened up to a wide range of objectors who are not the professional's client. So all of this leads to, in both the fee-shifting and the bankruptcy regime, a concern that the professional's fees for his core work will be diluted by the professional being forced to defend those core fees.

And, in fact, those concerns are heightened much more in the bankruptcy context for a few reasons, because in bankruptcy, the fee application is far more detailed and gives far more opportunity to -- to pick and -- and object and a far greater range of objectors are available, the U.S. trustee, the court itself, the creditors, the creditors committees. All of those can come in and object that do not exist in the fee-shifting context.

And Congress recognized this concern in Section 330(a)(3)(f) by codifying the factor that bankruptcy officials be compensated at parity with non-bankruptcy professionals.

CHIEF JUSTICE ROBERTS: Well, but just -- on the parity point, if you're not doing bankruptcy work and you send the client a bill and they don't pay it, if you've got to take litigation action or whatever, you

don't get paid -- you don't get those fees back. We follow the normal American rule and you pay your own fees and if you win, good; if not, you don't.

MR. STREETT: That's right. And that would, of course, also be true of preparing the bill or the invoice which is compensable under bankruptcy. So Congress departed from that regime and, again, it gets back to the two reasons the fee-shifting cases are analogous because, outside of bankruptcy, a professional doesn't have to go to the court to have his fees approved. It's a structural parity difference. Outside of bankruptcy, the professional doesn't submit his application to -- to a gallery of potential objectors, and that's why bankruptcy is structurally different. And that's why Congress recognized in Section 330(a)(4)(A)(ii) that services necessary to case administration do fall within the bankruptcy court's discretion to compensate.

And when you read Section 330(a)(6)'s reflection that preparing the fee application is compensable, it's clearly not authorizing compensation for preparing it, as ASARCO concedes that, it's authorized under Section 330(a)(1)(A) as a service rendered, and it's most naturally falls within Section 330(a)(4)(A)(ii) as a service necessary to case

administration. And that's because it assists the trustees. The trustee has to see the case all the way through to its completion. It has to make a final accounting of the case. It has to administer and close the case. And none of those things can happen until the fee application is not just prepared, but litigated.

Section 330(a)(1)(A) reflects that not only the application must be prepared but there may be objections by either of the parties in interest, the trustees, or the court itself, and then the court must hold a hearing. That's all -- those are all textual bases for compensating the defense of the fee application. Those are things that the code requires, and they're all compensable for the same reasons as compensating the preparation of the application.

JUSTICE GINSBURG: Mr. Streett, do you have a position on enhancements? If -- if the creditors say that enhancement is -- you did a good job but it's not worth the enhancement, is defending the enhancement also, under your rule, compensable?

MR. STREETT: We believe it would be compensable, in the sense that it passes by the minimal compensability threshold that puts it into the bankruptcy court discretion. Now, bankruptcy courts must consider the (a)(3) factors in determining whether

that will be actually compensated and the amount. And courts consider, for example, the nature and value of the service.

And a court could reasonably conclude in its discretion that the nature and value of seeking an enhancement is not the same as the nature and value of defending the core fee application. Many courts have reached that conclusion. At the end of the day, that's where the courts came out here, and we didn't -- we didn't challenge that on appeal.

JUSTICE BREYER: You practice in bankruptcy. I mean, you know it pretty well because what I was trying to think of, which is really balancing on the side, but the phrase "likely to benefit," it has -- it says "likely to benefit."

Now, it seems to me there must be instances where you, representing the -- the debtor, hire accountants or various others to do technical work, conveying and where -- where, in fact, it's quite clear that it won't mean more money for the debtor. It will mean less money for the debtor, because it will discover all kinds of assets it didn't even think the debtor had, but that's part of your job.

MR. STREETT: Correct.

JUSTICE BREYER: And you do it and it

benefits only the creditor. And I take it, it's rather clear, you get compensated for that.

MR. STREETT: Yes, and that --

JUSTICE BREYER: Is that right? Am I just --

MR. STREETT: That's absolutely correct, Your Honor, and that's why there are two prongs within Section 330(a)(4)(A)(ii). Congress recognized that not everything the professional does is going to produce an immediate, direct benefit to the estate. In the legislative history we discuss at pages 37 and 38 shows that Congress add the prong compensating tasks that were necessary to case administration.

JUSTICE BREYER: Well, then you're in trouble, because if -- if all those things -- I mean, there are a set of things, such that when you carry them out through accountants or conveyers or others, will in fact cost the estate a lot of money. Possibly more than they ever dreamt. And yet it's part of your job. Now, if that's not considered as being a benefit to the estate, but rather, part of the administration of the estate, then I don't see how this falls within benefit to the estate. I mean, if you're really making that distinction.

MR. STREETT: The way --

JUSTICE BREYER: That's administration of the estate, then this would have to be administration of the estate. But this isn't administration of the estate, and therefore, it's left out.

MR. STREETT: We agree that this is administration of the case for the --

JUSTICE BREYER: Oh, you're saying this is administration. In other words, you're not saying it falls within (a). You're saying it falls within (b).

MR. STREETT: It falls within either one. We think the most natural home for it is necessary to the administration of the case. And Congress -- the structure of section 330(a)(4)(A)(ii) reflects that the professional's service need only be necessary to the administration --

JUSTICE BREYER: I see.

MR. STREETT: -- of the case or beneficial to the estate, because Congress recognized there are going to be a lot of things that a professional has to do, as Justice Breyer said, that may cost money in the short run. But they're necessary to carry out the administration of the case. We think that's where preparing the fee application comes in, under (a)1 and (a)(4)(A)(ii), and the very next inseparable step is defending the fee application.

JUSTICE SOTOMAYOR: You're ignoring one important aspect of difference which is in everything else, you're acting for the estate. When you're defending fees, you're acting for yourself. There is a self-interest involved because you could just give up on the objections and walk away. The only reason you're fighting them is because it puts more money in your pocket.

MR. STREETT: I don't think --

JUSTICE SOTOMAYOR: Not because it puts more money in the estate's pocket.

MR. STREETT: Yes. But all of those things would be equally true of preparing the fee application. The professional could just work pro bono or could decide to discount 20 percent of its rights on the -- on the fee application. All of those things are -- ASARCO has tried to say that preparing and defending the fee application are adverse to the estate because it takes money out of the estate. Well, that cannot be the test.

JUSTICE KENNEDY: Well, except that preparing the fee application: A, it's specifically allowed by statute; and B, if they compensate you for that, there's -- then you'll do a very careful job, and there will be less necessity to have to defend it. So it -- so there -- there is certainly a rational reason

for the distinction.

MR. STREETT: Well, let me take that question in two parts, because I think if Congress drafted the statute to say preparing the fee application is compensable, then we would have a very different case. But it didn't say that. It said any compensation awarded for preparing the fee application shall be awarded at this rate. So it presupposed that preparing the fee application was authorized under Section 330(a)(4) -- (a)(1)(A) as ASARCO even concedes on 12 -- on page 12 of its brief.

So you can't draw any negative inference from the fact that it's mentioned for the purpose of limiting it, that defending a fee application would not also be compensable.

But to your second point, Your Honor, we agree Congress wanted to encourage people to do a careful job preparing the fee application. Baker Botts did that here. But that did not stop ASARCO from coming in and -- and mounting a barrage of objections that eat up professional fees. So just the careful preparation of the application doesn't solve the question. And that's why Congress codified Section 330(a)(3)(F) and the parity factor, and that's why bankruptcy courts for decades have been responsibly exercising the discretion

that Section 330(a)(1) gives them. Congress could have enumerated all of the tasks that are compensable in bankruptcy, but it didn't do that. It's --

CHIEF JUSTICE ROBERTS: But people know -- I mean, the American rule in the legal area is very fundamental, and it strikes me bankruptcy is one of those areas where they go into considerable detail telling you who pays what and when you can get it, just like you say here. You get compensation for preparing the fee at this particular level. And to say that somewhere in -- in all this, you sort of cut and paste these things together and you say, oh, there it shows that they meant fees on fees to be awarded. It seems to me that if they wanted to go against the basic American rule -- it's the American rule, patriotic -- they would have -- they would have spelled that out a little more clearly.

MR. STREETT: Congress certainly could have done that, but that's simply not the way it wrote 330(a). You're right, Your Honor, it listed in many other statutes nine options for things, but in this, it just said, courts may award reasonable compensation for services rendered with very narrow and express prohibitions. The Fifth Circuit erred by superimposing a categorical ban on that flexible statute.

And if I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Fletcher.

ORAL ARGUMENT OF MR. BRIAN H. FLETCHER

ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,

SUPPORTING PETITIONERS

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

We agree with Petitioners that when a bankruptcy professional is seeking compensation under Section 330(a) successfully defends its fee application, the bankruptcy court may increase the amount of the award to compensate for the time it reasonably spent on the fee defense. But we reach that result for a somewhat different reason.

In our view, preparing and defending a fee application are not themselves services rendered for a client within the meaning of Section 330(a)(1)(A). And they are not independent grounds for compensation.

Instead, compensation for the successful defense of a fee application may be appropriate because it ensures that the professional receives the statutorily prescribed reasonable compensation for the services it rendered in the underlying bankruptcy case.

JUSTICE BREYER: Where does it fall within the (4)(A)?

MR. FLETCHER: Justice Breyer, we don't think it's viewed as being subject to the (4)(A) at all. (4)(A) --

JUSTICE BREYER: If it's not subject to (4)(A) at all -- I mean, (4)(A) forbids certain -- it says you can't -- cannot allow compensation for, and then, you know, it has the list there. So -- so how do you -- where do you find the authority to give this to them?

MR. FLETCHER: Justice Breyer, (4) -- (4)(A), which appears on page 3(a) of the record of appendix, it describes limits on compensation for services. Our view is that when you are preparing and defending your own fee application, that does not fall within the category of services at all.

JUSTICE BREYER: So where -- where is the authorization to give it?

MR. FLETCHER: In the authorization in Section 330(a)(1)(A) that says you can allow reasonable compensation for the underlying service that the bankruptcy professional has rendered in the bankruptcy case.

So here, for example, Baker Botts prosecuted

the -- the fraudulent conveyance action, among many other things. And the bankruptcy court applied the lodestar method and it determined that reasonable hours times reasonable rates required a certain amount of compensation in order to make Baker Botts --

JUSTICE BREYER: Where does it say that you can get the money that's necessary for you to get the -- the money you pay to get the reasonable compensation. Where does it say you get that?

MR. FLETCHER: There's no explicit provision.

JUSTICE BREYER: All right. Well, then, I mean, suppose that you had to go through enormous trouble to get what they paid you. They paid you and you -- you know, some kind of Voltavian bonds or something -- you know, you can imagine all kinds of circumstances where it costs a lot of money to get the money they paid you, and I just wonder where does it say you can do that.

MR. FLETCHER: Well, Justice Breyer, what I think is different about this is that the things that you have to do to get paid when you're a bankruptcy professional that we're here concerned with here are things that are creatures of the bankruptcy system itself and 330(a) itself. Section 330(a) says if you're

a professional and you want to get paid reasonable compensation, you have to submit a very detailed fee application. And then in order to ensure that that application meets the statutory requirements, we're going to open it to scrutiny by the judge, by the U.S. Trustee, and by the parties in interest, and allow them to raise objections. And all of that --

JUSTICE SOTOMAYOR: So why isn't that in the administration?

MR. FLETCHER: I'm sorry, Justice Sotomayor.

MR. STREETT: Well, he claims that it could be on either a service, or a benefit, or a need in the administration of the estate.

MR. FLETCHER: So our view is that the problem with it is that sort of Section 330(a)(1)(A) is the sort of starting point, and it says reasonable compensation for actual necessary services rendered. And then (a)(4) limits which services are compensable. It says in order to be compensable, you either have to be necessary to the administration of the case or for the benefit of the debtor.

We don't think that preparing and defending your own fee application is a service rendered at all. And so we don't think it's subject to the (a)(4) limits.

JUSTICE ALITO: Why -- I'm sorry. Go ahead.

MR. FLETCHER: I was just going to say, instead, we think the question that the bankruptcy court should be asking is, do we need to provide some additional award to make the professional whole for the extra time and costs that they had to go through to vindicate their right to get their award of compensation for the underlying services that they --

JUSTICE SOTOMAYOR: Sounds like a policy judgment. You're basically saying it's not in the statute, but this is how we do it and as Justice -- as the Chief Justice pointed out, normal attorneys outside the bankruptcy court don't get compensated for fee disputes.

MR. FLETCHER: Well, we -- we do think it makes a good sense, the rule that we're advocating, but we also think it's grounded in the statute and in the way that this Court has addressed other statutes that also provide for awards of reasonable attorneys fees.

JUSTICE ALITO: Why isn't the problem here better dealt with by sanctions? If a party like ASARCO makes frivolous objections, then they -- then sanctions can be imposed on them. And the -- the fees fall on the party that caused the problem rather than on the estate.

MR. FLETCHER: I absolutely agree, Justice Alito. And we argue in our brief that if a

bankruptcy court is in a situation where the objections that were raised are not merely meritless, but actually sanctionable, the better course would be to impose sanctions, precisely because that puts the burden of the litigation on the party that raised the frivolous objection, rather than on the estate. But we think that there can be a broad range of objections that while not frivolous or not sanctionable are still found to be meritless, and that unless the professional is compensated for the time it has to spend in responding to those objections, it's underlying -- its award of compensation for its underlying services is going to be diluted to an unreasonable --

JUSTICE SCALIA: No more so than -- than the -- the lawyer who submits a bill outside of bankruptcy to a client, and the client objects, and the lawyer has to -- has to litigate. Would you say that dilutes the lawyer's recovery? No, I assume that the lawyer's fees are set at a high enough level that it -- that they take into account the fact that sometimes you will have to litigate to get the fees.

MR. FLETCHER: That's true.

JUSTICE SCALIA: And why can't bankruptcy lawyers do the same thing?

MR. FLETCHER: Well, I think that would be

contrary to the policy of the -- of the bankruptcy statute and the Section 330(a) in particular.

JUSTICE SCALIA: Why?

MR. FLETCHER: Because the -- the problem that we're dealing with here is that it's true that litigation can arise between lawyers and clients over fee issues.

JUSTICE SCALIA: Right.

MR. FLETCHER: But the Section 330(a) creates a structure where it's not just your client that you have to please, and the showing that you have to make isn't just that I perform services that are within the terms of our contract. You have to satisfy the bankruptcy judge and are subject to objections, not just from your client, but also from the U.S. Trustee and from lots of other parties in interest. And they can object not just on the grounds that you didn't perform within the meaning of the contract, but also on the grounds that you didn't satisfy any of the many requirements of the Section 330(a).

And we think that because that imposes extra costs on bankruptcy professionals, the reasonable approach, and the approach that's consistent with the way that this Court handles and others have handled the same sorts of costs that are imposed on attorneys

seeking fees under fee-shifting statutes, is to say that when you successfully defend your fee application, this doesn't apply when you fail, we don't -- we very strongly believe that if you are unsuccessful in defending your fee application, you should not receive an additional award.

JUSTICE BREYER: What was your reason for not going with the administration of the estate? And my intuitive judgment of it, which is pretty not totally informed, of course, is there -- there are loads of things that -- that -- that lawyers do who represent a trustee -- who represent debtors, that it will cost the estate a lot of money. And you can't say all of them are for the benefit of the estate. And there are loads of things they do to help administer the estate and hire all kinds of people. And -- and paying their fees is part of the administration, I would think, normally.

Why don't you see the paying of the lawyer as part of the administration of the estate? And if you see the part -- that part as part of the administration of the estate, then you'd see that the administrative expenses necessary to secure that payment are part of the administration.

I mean, so you had some reason over there in the Justice Department of saying, no, we don't follow

that route, and -- and I'm not. And so that -- of course, that creates a difficulty because I think, well, if your judgment is don't follow that route, then I -- I better be careful about following it myself. And -- and you know more about it in a sense, so -- so explain that to me.

MR. FLETCHER: Well, Justice Breyer, we -- we basically take an earlier term. In -- in our view, you don't get to (a)(4) in asking about the preparation of defense of a fee application because (a)(4) tells you which services are compensable.

JUSTICE BREYER: No.

MR. FLETCHER: Right.

JUSTICE BREYER: No, I understand your argument, and all know that's true about it. I just wonder you're -- you're studying this. You're trying to develop a position. And for some reason or other, you rejected what the -- what they started out with that this falls within 4(A)(ii) -- (i) or (ii), and I wondered why.

MR. FLETCHER: So I -- I think if you were going to -- you disagree with our position and your view is that this is a service, and so the question is, Does it fall within either of the categories under Section 4 that make it compensable. We think -- agree with

Petitioners that the stronger basis is to say, as you say, that it's administration.

JUSTICE BREYER: Yes.

MR. FLETCHER: It's not for the benefit of the estate.

JUSTICE BREYER: I know that. I already knew -- can see that. I just wondered why --

MR. FLETCHER: Because --

JUSTICE BREYER: -- you -- you rejected. You had a reason for not doing what seems linguistically the simplest thing and say it is part of the administration. And you had a reason, and I want to know what the reason is, if you can tell us.

MR. FLETCHER: Well, it's because linguistically -- I don't want to belabor the point -- but just linguistically, we don't think it's reasonable to describe this as a service rendered, and so we -- we don't get to the --

JUSTICE BREYER: The administration of the case.

MR. FLETCHER: But you only ask about administration of the case if you decide that it's a service rendered, right? Section (a)(4)(A) says, "The court shall not allow compensation for services that were not reasonably likely to benefit the estate or that

were not necessary to the administration of the case."

Our view is that defending your fee application --

JUSTICE BREYER: Service.

MR. FLETCHER: -- isn't a service that you're rendering to the client at all, and so you don't ask these questions.

JUSTICE BREYER: Ah.

MR. FLETCHER: But -- but I can also answer because if you disagree with us about that and you think it is a service and you think it is subject to the --

JUSTICE BREYER: Is -- is there another part that says it's service to the estate rather than service to the case or something like that?

MR. FLETCHER: It's -- it's -- the term is used in 330(a) -- (a)(1)(A), which describes compensation for -- reasonable compensation for actual and necessary services rendered by a trustee and examiner or a professional person.

JUSTICE BREYER: Render --

MR. FLETCHER: I think the most natural read --

JUSTICE BREYER: Okay. I see. Right.

MR. FLETCHER: But -- but just to answer the -- the question that you were posing before, you

know, why did we -- why are we hesitant to say that this is a service that can be compensable if it's reasonable or necessary? It's, frankly, because ordinarily, services are compensable whether the attorney wins or loses, and we are very concerned about making sure that people don't get paid for unsuccessfully defending their fee applications, and that's what's led us to this interpretation.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Oldham.

ORAL ARGUMENT OF JEFFREY OLDHAM

ON BEHALF OF THE RESPONDENT

MR. OLDHAM: Mr. Chief Justice, and may it please the Court:

Section 330(a) of the bankruptcy code compensates all types of professionals for their services rendered for the estate under Section 327(a). But when adversarial fee litigation arises and a professional either hires a lawyer or just happens to be a lawyer and engages in purely self-interested fee litigation work at the expense of the estate, that is not a service rendered on behalf of the estate within the meaning of Section 330(a). There is simply nothing in the statute that authorizes estate funds for a professional to engage in self-interested litigation,

particularly in light of the American Rule, which requires, and for 200 years plus, has required that Congress speak clearly when it wants to reallocate the costs of litigation.

And I'd like to --

JUSTICE SOTOMAYOR: So how does the fee fit into this?

MR. OLDHAM: I'm sorry?

JUSTICE SOTOMAYOR: The -- the fee, the fee -- the fee preparation fee.

MR. OLDHAM: And I want to go straight to that question. Justice Sotomayor and Justice Kennedy also put their finger on exactly the fundamental distinction between preparing a fee application and litigating over a fee application. And it's that when an accountant, for example, goes and hire -- excuse me, does accounting services and then provides an itemized bill to explain to the -- to their client why they are charging what they're charging, that is a benefit to the trustee. The -- the "please remit to" line may not be a benefit, but certainly the itemized -- itemization in that bill is a benefit to the trustee and to the estate. And at that point, they're still on the same team.

But when an accountant then gets into a fee dispute and has to go hire his or her own lawyer and is

in litigation against the estate, they're not on the same team anymore. There is no sense in which, at that point in time, the accountant is serving the estate. And I think that fundamental difference matters textually under Section 330(a), and it's very significant under the American Rule because --

JUSTICE GINSBURG: Mr. Oldham, why aren't they all tied together so you recognize that the application for the fee is compensable?

MR. OLDHAM: Correct.

JUSTICE GINSBURG: It's like the opening pleading. Then the objection is the answer to the application, and then the response to the objection is the -- the defense of it. It seems to me it's -- it's all one package, that it -- the application, and there's an answer to the application, and then there's a reply.

It -- why don't those three things go together?

MR. OLDHAM: Well, I don't think they go together because Congress didn't put them together. What Congress authorized under Section 330(a)(1), especially when read together with Section 327(a), is that professionals are entitled to compensation when they're working for the estate.

But when -- when professionals have hired

their own lawyers or happen to be lawyers and are litigating adverse to the estate, that is not -- they're not on the same team anymore. And so under 330(a)(1) and 327(a), Congress has just simply not allowed compensation for that, which is the same as it would be outside of bankruptcy.

And all we're asking for in this case is the same rule that generally applies outside of bankruptcy. Because outside of bankruptcy the American Rule controls and says that if you get into a fee litigation dispute with your client, then you pay your own way. And so the same rule should apply in bankruptcy.

And I want to address why Congress might have authorized compensation for preparation services inside the bankruptcy context when that also is not compensable outside of the bankruptcy context. And that is because certainly in 1994, when Congress enacted Section (a)(6), there's a vast difference in the amount of time and the amount of effort that goes into putting together a fee application in bankruptcy and putting together a bill for the client.

Now, certainly, it's -- as time has gone on, clients require more and more detail in bills and that -- that difference might be diminished. But there is -- because in bankruptcy a fee application is

required to be filed, it made perfect sense for Congress to come in in (a)(6) and say you get compensated for that.

But what's not different between bankruptcy practice and outside of bankruptcy practice is fee litigation. When fee litigation arises, the American Rule applies and says inside or outside of bankruptcy, you pay your own way. And so Congress did not need to say anything different about that in Section A -- in Section (A)(i).

CHIEF JUSTICE ROBERTS: Do lawyers these days actually charge private clients for fee preparation?

MR. OLDHAM: No. Well, there might be some extent to which overhead accounts for things like that, but certainly, no lawyer is going to put on a bill, you know, time spent preparing this bill, but the fact that they're not charging for it doesn't mean that it's not a benefit to the client because, again, when the -- I think most clients, when they get a bill and see that they have to pay, say, $100,000, it's a pretty good benefit to them to know why they have to pay $100,000, and to be able to object if they feel that there's, you know, an objection warranted to that bill for $100,000.

JUSTICE KENNEDY: Well, I've -- I've been

out of practice for half a century, but my -- my -- my thought was that -- that -- that lawyers do -- do charge for the amount of time preparing the bill. Maybe I'm wrong about that.

MR. OLDHAM: Well, again, I --

JUSTICE KENNEDY: We can -- we can check it out.

MR. OLDHAM: I think the only sense in which lawyers do that is to the extent that -- that it's built into overhead. But I don't think that generally, as a practice, otherwise, of lawyers marking down their time for it, and I think that would probably be a shock to most clients to hear that you --

CHIEF JUSTICE ROBERTS: You ought to think -- might want to think about it.

(Laughter.)

JUSTICE KENNEDY: Is -- is there any writing that says that when lawyers, outside bankruptcy, determine their -- their fee structures, that they include reimbursement for the risk that they might have to go into court to defend it? I've never heard that.

MR. OLDHAM: Well -- and we -- we cite the Gibbons-Grable case in our brief, but there's -- there's a number of things that go into, you know, rate setting of for law firms and one of them certainly is a risk of

nonpayment. Another one is a risk of collections.

If you -- if you have a particular client where you're afraid of collections, you might also have -- want a retainer and things like that. But, yeah, rates account for a variety of things like risk of nonpayment and risk of collection. And I think that goes to an important point about bankruptcy practice, which is that bankruptcy lawyers use non-bankruptcy market rates. And so, to the extent that they are using a non-bankruptcy market rate, they're already getting some -- you know, some amount in their rates that accounts for the risk of dilution.

JUSTICE BREYER: On that theory, if -- I mean, if -- if you're supposed to get some fees -- say, $100,000 -- and in that fee is -- is various risks of the extra money it'll cost to collect or the extra risk of you won't get it, you'll only get half and -- and you -- you set the rate at 100,000.

And so now a different risk is eventuated -- namely, you had to go to litigation -- and that wasn't in the 100,000. Well, then, if it's reasonable and everything, why shouldn't it be?

I mean, why is -- you're -- you're trying to, in that 100,000, give the employer something for their -- for their time and their effort and also

compensate certain risks. And here was one that wasn't in the 100,00. It turned up later. But how would you draw a line between some and the other? I think that's the government's theory.

MR. OLDHAM: That's right, Your Honor. And I think the American Rule draws the line, because if -- if it were the case that anytime a damages award or anytime a fee award had to be defended, therefore, we need to give them more, the American Rule wouldn't exist.

JUSTICE BREYER: Well, no, of course, it doesn't exist -- you're quite right -- outside of bankruptcy.

But now you're saying that the 100,000 does include all kinds of -- for various payments for things that might make it more expensive to get the money. And then what I don't see is saying some and not others.

MR. OLDHAM: Well, I think --

JUSTICE BREYER: And this is just one of them, I mean, the -- that you have to go into court and litigate, is just one of them. You wouldn't object, for example, if the fee -- the judge says, look. We're going to give the firm 120, why not 100?

Well, you know, there are risks in this; and one of the risks is they're going to have to go to court

and somebody will sue them and they have to go litigate that. So we'll give it to them upfront to pay for the risk, just as you pay for the risk of nonpayment.

MR. OLDHAM: Well, I think we would object to that, Your Honor, and I --

JUSTICE BREYER: Because?

MR. OLDHAM: Because if -- if -- if the conscious decision is made that $100,000 is reasonable compensation for the services they're about to render --

JUSTICE BREYER: No, no. It's -- it's not. Only -- actually, only 90 is. But it's reasonable compensation because 10 compensates for risks such as risks of nonpayment.

Am I being clear? Do you see where I'm going?

MR. OLDHAM: I do, Your Honor. If I can make two responses: The first is that, you know, building in for certain risks in a rate is one thing and the way that the bankruptcy system accounts for that is it looks to non-market --

JUSTICE BREYER: All right.

MR. OLDHAM: -- non-bankruptcy market.

JUSTICE BREYER: Maybe this is not worth pursuing.

JUSTICE KENNEDY: And that was -- that was

my question. Can you tell me, if -- if a distinguished law firm represents a trustee in bankruptcy, does the law firm charge its regular rate?

MR. OLDHAM: Yes. Generally speaking, they will -- they will -- they will --

JUSTICE KENNEDY: The same rate that it would charge to a -- to a non-bankruptcy client.

MR. OLDHAM: That's correct. I mean, Congress, you know, wanted parity in Section -- in -- in Section 330(a). And so, generally speaking, what -- what Congress effected in 1978 was to make clear that bankruptcy lawyers can get the same market rates that they would get outside of bankruptcy.

JUSTICE SOTOMAYOR: In the papers --

JUSTICE KAGAN: Mr. Oldham, you -- you agree, don't you, that in this system, the court can do enhancements? Yes.

MR. OLDHAM: Yeah, that's correct. Well, that -- that's not been -- certainly disputed in this case. Yes, that's --

JUSTICE KAGAN: Yeah. So some of the things that we've said are permissible for enhancements are exceptional delays in payment, extraordinary outlays of expenses, and unusually protracted litigation -- okay? -- that those count as enhancements. We said that in

Perdue v. Kenny A. Why isn't this just like that?

MR. OLDHAM: Well, there's -- I guess there's two responses to that. One is that when you're looking at enhancements and the -- the question when that was litigated below is not whether enhancements could be authorized, but instead, what the proper test was for enhancements in the bankruptcy context.

Here, the whole question is under Section 330(a)(1), has Congress even authorized a district court --

JUSTICE KAGAN: No, no, no. But I'm proceeding on the assumption of -- on the SG's assumption that what we're trying to do is to get a reasonable rate for the services that clearly have been authorized. And the question is: What's a reasonable rate?

And it seems to me that what this statute does is to say "reasonable" can include, like, lots of things. It's highly discretionary. Right?

And then on top of that, you know, it -- included in "what is reasonable" is this idea of sometimes you can do performance enhancements, but we haven't said performance enhancements are just for super-duper work. We've actually said performance enhancements are for things like unusually protracted

litigation and lots of expenses and exceptional delays, sort of like this.

You know, this is just an expense of your work, is having to go after the fees. So why doesn't that get into the mix, too?

MR. OLDHAM: Well, I would agree with your characterization of the government's position that it is effectively authorizing a broad scope for -- for bankruptcy courts to just give enhancements. That is effectively what they're arguing for.

And if I could respond to the government's position, because I think there's at least three things wrong with it. First is textually, the text simply will not permit their position.

JUSTICE KAGAN: No, it does, because the text just says "reasonable." And then the question is what's reasonable? And "reasonable" can include, you know, you're getting the same hourly rate as some other lawyer, but "reasonable" is, also, you had to do this over a very extended period of time and "reasonable" is, also, boy, you had to spend a lot of money in order to get them to pay you anything at all. All of those things count as what's part of "reasonable."

MR. OLDHAM: Well -- and if I could make one more point on the text. Section 330(a)(1), if it just

said "reasonable," that might be the right answer; but it says "reasonable compensation for services rendered."

The government agrees with us that fee litigation work is not a service rendered. So when Congress says --

JUSTICE KAGAN: Yeah, it's reasonable for all the other work you're doing. But then everything else goes into this question of reasonable, right? Is -- you know, I'll give you a hypothetical.

Suppose I hire somebody to shovel my driveway, and I say, I'm going to give you reasonable compensation. And everybody knows that it's $10 an hour to hire my driveway, right? That's the going rate.

But then I say, oh, did I not tell you -- did I not tell you I'm going to make you go down -- come down to the court so that I can pay you the $10? And that costs another $5. All right?

Now, it strikes me that if somebody said, what's reasonable compensation now, it would be $15. It wouldn't be $10. And it's the exact same thing here. It's like by the time you go through all this stuff that you have to go through to get paid, you should get paid more.

MR. OLDHAM: Well -- and to respond to that hypothetical, I think the difference is under -- in your

hypothetical, to apply to 330(a)(1), would be Congress came in and said, you're going to get -- or you -- you told your -- you know, whoever is helping you, I will not pay you for bringing it to the courthouse. That is not something I pay for, but then turning around and nonetheless saying but you can get paid for it anyway.

That's effectively --

JUSTICE KAGAN: But it doesn't say you can't get paid for it. There's no exclusion. All, you know -- you know, I think you and the SG agree, it's -- we're not counting this as the service. What we're saying is you have to be reasonably paid for the obvious services that you have performed, shoveling my driveway.

And in my -- in my hypothetical, that means you also have to be paid for the cab fare. And similarly, here, it means you also have to be paid for the cost of, like, making them sign a check to you.

MR. OLDHAM: Well -- and, again, textually -- I won't belabor -- but textually, I think it disassociates reasonable compensation for services rendered. I don't think textually that that works under a fair reading of the statute. But just to go beyond the text, the argument --

JUSTICE KAGAN: Well, it doesn't have to go be- -- I mean, I just don't understand what that means.

It's this -- it's the clear service rendered, it's shoveling my driveway, it's doing the work for the estate. What counts as reasonable? What counts as reasonable is not just the hourly rate, but all the things I've put you through to get the hourly rate.

MR. OLDHAM: And let me give you two other responses to that. One is that that argument is really just a straight shot at the American Rule, because it's true whenever there's a damages award, that if a damages award is given for, say, $1,000,000 and you have to spend a $100,000 going to defend that, every damages award will be diluted by that $100,000.

But this Court has said --

JUSTICE KAGAN: But here's the problem, I think, with that response. It's a reasonable response, but we're already out of the American rule here. I mean, the bankruptcy system puts you in a different universe than a statutory universe, and the question is what do those words of the statute say? It's not what would exist if the statute didn't exist.

MR. OLDHAM: Well, the American rule applies to litigation, and so obviously, in bankruptcy, you have some litigation, you have some non-litigation. But when you have a fee litigation matter arise, the American rule certainly applies, and Section 330, doesn't --

because it exists, doesn't mean the American rule, you know, is tossed out the window. The American rule still controls and you have to look at what Congress actually authorized.

And so I think, for example, the Court's decision in Cooter & Gell --

JUSTICE KAGAN: Well, the American rule can't trump the statute. The statute has to trump the American rule. And if the statute says reasonable compensation for services rendered -- the obvious services rendered, and -- and the only thing that counts as reasonable is taking into account things like how protracted the litigation is and how much risk you've had and the exceptional delay, and the fact that you've had to contest a lot, a lot, a lot of meritless objections, all of those things make for something -- go into the question of what's reasonable. They don't have to. I mean, in 90 percent of the cases, it might be that it's like, no, that's just a normal part of the process. But in that other 10 percent, where it's not a normal part of the process and you wouldn't be reasonably paid unless they were included, it seems to me the word reasonable demands that they be included.

MR. OLDHAM: Well, and I think if that's the rationale then this Court's decision in Cooter & Gell

would have come out the other way. That case dealt with whether, under Rule 11, an award for a reasonable attorney's fee -- or under Rule 11, whether you can get the cost for defending that on appeal. And the Court said no in determining that statute and --

JUSTICE SCALIA: What about other statutes? I was thinking the same thing, there are other statutes that provide -- that undo the American rule, and they say you're entitled, if you're victorious, to reasonable attorney's fees. Do they usually include fees for getting the fees?

MR. OLDHAM: Under -- under classics fee-shifting statutes where Congress -- the answer is yes, in a number of those cases, courts have said you get your fees on fees, but those statutes are very different textually, and, I think, in their rationale. Those statutes say that you get your reasonable attorney's fee incurred in an action. And so, fees on fees, when you have a dispute in that action fit within that express authorization by Congress, it is fees incurred in that action.

So textually, that's very different from Section 330, but I also think it's very, very different when you're thinking about the purpose of those fee-shifting statutes. In the fee-shifting context what

you have is an award to a private party who has vindicated their statutory rights. And the award is to that party, there's an award of attorney's fees on top of that, and throughout that process the award comes from the opponent. And so you never have the dynamic that you have in the bankruptcy context, where the lawyer and the -- and the client get on opposite teams. They're always on the same team. They're fighting for an award, they're fighting for fees on fees, and they both benefit by the more, you know, fees that they get.

That's fundamentally different from Section 330, which is a very limited authorization which says, it doesn't depend on success in litigation, because that's not the rationale for compensation. The rationale for compensation is that you provide services that benefit the estate or that re on behalf of the estate. But because the estate is going to pay no matter what, you have this dynamic where, when fee litigation arises, the professional is suddenly on the opposite team of the estate, because it's always going to be at the expense of the estate. And I also want --

JUSTICE SOTOMAYOR: Do you practice in bankruptcy?

MR. OLDHAM: I'm sorry?

JUSTICE SOTOMAYOR: Do you practice in

bankruptcy?

MR. OLDHAM: Yes, Your Honor.

JUSTICE SOTOMAYOR: And do you happen to know whether fee litigation is more common in bankruptcy than in other fields?

MR. OLDHAM: Well, there have been some studies that have tried to address that and see --

JUSTICE SOTOMAYOR: Okay.

MR. OLDHAM: -- whether -- I mean, I think the argument that we have seen is more of a logical one, that there are more potential objectors in bankruptcy because a -- a party has to file their fee application, and theoretically more people get to review it, but I think there's a very strong argument that some courts have accepted that, outside of bankruptcy practice, there's a paying client in every single case who has the full incentive, because they're footing the bill, to study and object and litigate if they want. And I think it's the rare case outside of bankruptcy and it's probably the rare case inside of bankruptcy, where you have full-blown litigation, but it certainly happens in both contexts and outside of litigation. And all we're asking for is for the same rule to be in bankruptcy as is out of bankruptcy.

JUSTICE BREYER: Well, all right, but if you

look at the fee-shifting statutes, we looked up a lot, we found quite a few which say that the court can award a reasonable attorney's fee.

MR. OLDHAM: Correct.

JUSTICE BREYER: It's broader than here. But the words, basic active words are reasonable attorney's fees, and almost all of them have been interpreted to allow compensation for the reasonable fee. So they throw that in. And so, they're counting it as part of the reason -- they're counting it as part of a reasonable attorney's fees. And here, reasonable attorney's fee is the same. That language is the same.

MR. OLDHAM: Well, it's reasonable --

JUSTICE BREYER: A reasonable compensation.

MR. OLDHAM: For services rendered, Your Honor.

JUSTICE BREYER: There is a reasonable attorney's fee. But it's hard to make a lot out of that.

MR. OLDHAM: Well, when you excerpt just those parts, I agree with you, but I think you have to look at the full language --

JUSTICE BREYER: Yeah.

MR. OLDHAM: -- which is in the fee-shifting context, it is reasonable attorney's fees and then

usually it says, incurred, and then it talks about a civil action, like in the Jean case, the Equal Access to Justice Act. It says fees incurred in a civil action. Well, it's within the express authorization to get fees on fees there because in that civil action, if there is a fee fight, fees were incurred in that civil action. So if Congress, in Section 330, had said -- instead of what it did say, if it had said professionals shall get reasonable attorney's fees in the bankruptcy proceeding, then that might be a different case, because there you're saying anything that happens in the bankruptcy proceeding you get compensation for. Congress didn't say --

JUSTICE BREYER: But that happens later, everything's closed and they discover that through some odd thing they have to spend $10,000 to get the $90,000 that was awarded to them. Any authority on that? You go back to court and say, Judge, I want $10,000 more. He says, But the case was closed. He says, Yeah, but I but to spend the $10,000 to get the $90,000. If there were such a case, one of you would have found it. Or somebody would have, I guess.

MR. OLDHAM: Well, if you're asking -- I mean, certainly the -- the bankruptcy court maintains some jurisdiction for a party to go back.

JUSTICE BREYER: But there's no -- just under all these other statutes, there is so many attorney's fees statutes that --

MR. OLDHAM: There are, and let me just say that if we're going to, you know, sort of think about what rule might make sense, I think it's important to remember that the -- the fee-shifting statutes, just like Your Honors talked about, where it's true fee shifting, that is, there's a dispute that arises, the loser has to pay the, you know, the attorney's fees for the winner, Congress used that in the bankruptcy code. For example, if there's an automatic stay. If there's somebody that commits a willful violation of the automatic stay, Congress identified that particular dispute and said that the loser in that particular case should have to pay it to the winner.

And so if we're thinking about what rule makes sense, I think the government put their finger on it in their brief and talking about it today -- and this goes to a question that Justice Alito asked about sanctions -- what would make far more sense is for Congress to have come in and created a true fee shifting in which it said that if there's going to a be dispute over a -- you know, over a fee application, then maybe the, you know, the prevailing party should have to --

should get the attorney's fees from the loser.

Congress didn't do that here. There's nothing like that under Section 330 or any other statute. Instead, what Congress did is it authorized compensation to a professional for the work that they do for the estate.

And I just want to emphasize too, because I've -- I've heard today that -- the suggestion that our rule is a per se rule, and that's not at all true. We're not saying that professionals can never get their fees and we embrace the discretion of bankruptcy courts to authorize fees under the long-standing exceptions to the American rule for sanctions such as for frivolous conduct or for bad-faith litigation misconduct. The argument has been made that those are, you know, two exceptional, but outside of the bankruptcy context, those longstanding exceptions to the American rule have stood alone as the only exceptions to the American rule. And there's never been any suggestion at all that those are not -- those are not sufficient outside of the bankruptcy context. And so I don't think there's any reason for a special rule just in the bankruptcy context.

I think it's also really important to keep in mind that Section 330(a) is not just for attorneys.

It's for all professionals. And so in the context of, say, an accountant that has to go hire their own lawyer, this Court's decision in Lamie made very clear that you can only get compensation under Section 330(a) if you're approved under Section 327(a) for employment.

It would -- it would candidly just go straight through that decision if it was okay for a Section 327(a) professional, to nonetheless go hire somebody, have them do professional services, and then just count it as, you know, the accountant's own professional services, or, as was suggested today, to simply call professional services necessary expense. Which goes against what Congress said in Section 330(a)(1)(A), where it -- and (B), where it made a very distinction difference between a necessary expense and a professional services.

And so, there -- there's -- the cases that have talked about this issue, about whether an accountant can hire a lawyer and get paid, have -- have -- more of them have said exactly what this Court said in Lamie, that you can't do that. Section 327(a) is the sole gateway to compensation for those professionals under 330(a).

The only exception has been -- that some courts have identified, which we think would be

inconsistent with Lamie and with Section 327(a), is where there's an engagement letter between the Section 327(a) professional and the debtor, where the debtor has agreed that the Section 327(a) professional is allowed to go and hire others to do particular work. But that, again, we don't think is sufficient, but that is a different context than -- than this case.

If there's no further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Streett, four minutes.

REBUTTAL ARGUMENT OF AARON STREETT

ON BEHALF OF THE PETITIONERS

MR. STREETT: Thank you.

The bankruptcy code uses broad, open-ended language and commits these questions to bankruptcy court discretion, and that's no different than the fee shifting statutes. We've said -- we've heard from my friend on the other side that this is a direct shot --

JUSTICE SCALIA: Will you answer his last point? Why does it make any sense to say that the lawyer can get -- make his fee reasonable by getting his litigation expenses, but the accountant, who's also entitled to reasonable fees, cannot? If he has to sue, he has to pay his own lawyer, and you don't assert that that -- that that is compensable, do you?

MR. STREETT: We -- we do assert that would be compensable, either as an expense to the accountant or it could be included as part of the accountant's reasonable compensation for his underlying services on the bankruptcy, as the government argues.

JUSTICE SCALIA: Oh, you do? Okay. I didn't realize you --

MR. STREETT: Yes, we --

JUSTICE SOTOMAYOR: I thought you said earlier the trustee had to approve it. And I'm wondering how the trustee could approve that, because it's for the benefit of the accountant, and not the trust.

MR. STREETT: The trustee would have to approve if those services were to be directly compensable, not if they were to be compensated as expenses or as part of the underlying reasonable compensation of the accountant. I think the hypothetical was, you have an accountant who is already a 327(a) professional, and it has to hire a lawyer. ASARCO wants to force that accountant to eat those costs.

JUSTICE KENNEDY: Are there case authorities supporting the answers you gave?

JUSTICE SCALIA: It does eat those costs.

MR. STREETT: Yes, we cite one that surveys the entire case law on this point in our reply brief, I believe it's footnote 4.

To get back to Justice Breyer's question, you cannot read "services" in isolation. You can't read "services rendered" in isolation from the rest of the statute. (a)(4) recognizes that there are services necessary to case administration, and (a)(3)(C) recognizes there are services that are beneficial toward the completion of the case. My friend on the other side read in a word, he said "services to the estate." It doesn't say that anywhere in the statute. It could be a service to the court, it could be a service to the trustee, which must administer and finally close the case.

JUSTICE SOTOMAYOR: Except -- except that in Woods, looking at the predecessor statute, which also talked about services rendered, we held that the phrase "reasonable compensation for services rendered," quote, this is us, "necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act."

MR. STREETT: And I'm glad Your Honor brought this up, because the idea that litigating a fee application is adverse to the estate, cannot be right.

The code requires you to litigate the fee application if it's challenged. Now, think about what happens if we file an interim fee application under Section 331. We can do that four months into the bankruptcy. The second somebody objects and we have to respond to that objection, ASARCO's position is, we're immediately adverse to the estate and we're disqualified.

But I did want to mention that all of the National Associations of Trustees support Baker Botts position on this point, because it's not just a small expense that can be counted as overhead. In Section -- Chapter 7 and Chapter 13 cases, these National Associations of Trustees point out that the litigation costs will frequently eat up the entire core fee, because it's a modest core fee and all it takes is one debtor rendering an objection or the Chapter 13 trustee rendering an objection.

JUSTICE GINSBURG: How do you answer the question about suppose the objection to the fee is sustained? Does the lawyer, nonetheless, get the work?

MR. STREETT: It would pass the minimal compensability threshold, but courts have consistently exercised their discretion for decades to deny that compensation, because the nature and value of unsuccessful defense is very different from that of a

successful defense.

And ASARCO is the one asking this Court to make a major change from the status quo that has prevailed across this country in the overwhelming majority of jurisdictions where courts have wisely and responsibly exercised their discretion to award fees where they are necessary to make the underlying fee reasonable, and to deny fees where the defense is unsuccessful or otherwise wasteful. Baker Botts is just asking this Court to allow the status quo to continue playing out in a way that's been effective for the bankruptcy system.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:15 p.m., the case in the above-entitled matter was submitted.)

8

9

90 37:11 44:18