

# In the United States Bankruptcy Court

## for the Northern District of Iowa

DALLAS L. BURMESTER, MYRNA BURMESTER  
Debtors.

Bankruptcy No. 86-00710M

### MEMORANDUM OF OPINION AND ORDER: EXAMINATION OF ATTORNEY FEES

The matter before the Court is an Examination of Fees on the Court's own motion concerning pre-petition compensation for services rendered for Dallas L. and Myrna Burmester (Debtors) by the law firm of Hobson, Cady and Drew (Firm). By order dated November 3, 1987, the matter was submitted to the undersigned for decision. The Court now issues this ruling which shall constitute Findings and Conclusions as required by F.R.B.P. 7052. This is a core proceeding pursuant to 28 U.S.C. sec. 157(b)(2)(A).

#### I.

Debtors first met with G. A. Cady, on January 2, 1986, to discuss their financial problems. Through March 3, 1986, Cady, G. A. Cady, III, and James M. Drew, all members of Firm, expended approximately 37 hours in service to Debtors on non-bankruptcy matters and in an effort to avoid bankruptcy. For these services, a retainer of \$2,500 was received on January 10, 1986. On March 5, 1986, Firm received an additional 2,560<sup>(1)</sup> "to handle the bankruptcy matters on behalf of the [Debtors]." Affidavit of G. A. Cady, III, filed September 30, 1987, at 3. Debtors filed a voluntary, business Chapter 7 petition on March 31, 1986, along with a statement of affairs and schedules. An interim trustee was appointed that same day. The court file shows the following activity: subsequent to the date of filing, Debtors, through Firm, amended their Joint Statement of Financial Affairs and Schedule B-4 (claim of exemptions); Firm filed its Disclosure of Compensation on April 15, 1986; five creditors filed claims against the estate; the section 341 meeting of creditors was held May 6, 1986; following motions for relief, Debtors, through Firm, consented to the Court's entering orders to lift stay on June 9, 1986, and on July 16, 1986; two objections to exemptions were handled by settlement; and the Order Allowing Administrative Expenses and the Orders on Distribution were filed August 25, 1987. Firm filed two affidavits in support of his Disclosure of Compensation. Hearings on these attorneys' fees for Debtors' counsel were held on September 3, 1987 and November 3, 1987.

Mr. Cady, III states that 72 hours of compensable time by Firm "were attributable to the bankruptcy filing." Affidavit of G. A. Cady, III, filed September 30, 1987, at 2. No expenses have been claimed.

#### II.

An attorney for a debtor is entitled to compensation for analyzing the debtor's financial condition, advising the debtor on whether to file for bankruptcy, preparing and filing the necessary petition, schedules, and statements, and representing the debtor at the section 341 meeting of creditors. In re Riverview Financial Services, Inc., 67 B.R. 714, 715 (Bankr. E.D. Mich. 1986); In re Kirlan, 55 B.R. 105, 105 (Bankr. S.D. Fla. 1985); In re Olen, 15 B.R. 750, 752 (Bankr. E.D. Mich. 1981); In re Nu-Process Industries, Inc., 13 B.R. 136, 138 (E.D. Mich. 1981). See also In re Taylor, 66 B.R. 390, 395 (Bankr. W.D. Pa. 1986). These services qualify as an administrative expense entitled to priority consideration under 11 U.S.C. section 507 with immunity from avoidance as a preference under 11 U.S.C. section 547. In re Kirlan, 55 B.R. at 105. The services provided must benefit the bankruptcy estate. Id. at 105-106. Other services performed by a debtor's attorney on any other matter are not compensable as an administrative expense. In re Riverview Financial Services, 67 B.R. at 716. A debtor's counsel should not be compensated for services which benefit only the debtor, In re Kirlan, 55 B.R. at 106, or which are within the province of the trustee. Id.; see also In re Taylor, 66 B.R. at 396; In re Spencer, 48 B.R. 168, 171 (Bankr. E.D. N.C. 1985); In re J. Bradley and Co., 6 B.R. 529, 538 (Bankr. E.D. N.Y. 1980).

The terms of the agreement between the debtor and his attorney are subject to the review and modification of the Court. 11 U.S.C. section 329(b); [\(2\)](#) F.R.B.P. 2017<sup>(3)</sup>; In re Nu-Process Industries, 13 B.R. at 137; In re Chapel Gate Apartments, Ltd., 64 B.R. 569, 575 (Bankr. N.D. Tex. 1986). The court may cancel any compensation paid a debtor's attorney if it exceeds the reasonable value of the services rendered. 11 U.S.C. section 329(b). Reasonable compensation is that:

compensation for actual, necessary services . . . based on the nature, the extent, and the value of such services, the time spent on such services and the cost of comparable services other than in a case under this title[.]

11 U.S.C. section 330(a)(1)[emphasis added]. The burden of proof to show entitlement to fees paid is always on the attorney. In re Pettibone Corp., 74 B.R. 293, 299 (Bankr. N.D. Ill. 1987); In re Olen, 15 B.R. at 753. The compensation for services performed by the attorney is to be determined on a case-by-case basis. In re Olen, 15 B.R. at 752; In re Nu-Process Industries, 13 B.R. at 138.

The appropriate starting point is the calculation of the actual and necessary hours reasonably expended at a reasonable hourly rate--the lodestar or initial point of reference. In re Pettibone Corp., 74 B.R. at 305. To calculate the lodestar amount, the court considers the hours expended by each of the attorneys, examines the services performed, eliminates the time which cannot be compensated, and estimates the reasonable time required to perform the compensable services. In re Wabash Valley Power Association, 69 B.R. 471, 477-79 (Bankr. S.D. Ind. 1987).

As the Supreme Court instructed in Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983), the lodestar amount should be adjusted upon consideration of other relevant factors. This circuit, in Doe v. Poelker, 515 F.2d 541, 548 (8th Cir. 1975), rev'd. 527 F.2d 605, 606 (8th Cir. 1976)<sup>(4)</sup>, as well as the bankruptcy court of this district, see In re Vander Schaaf, No. 84-04435, slip op. at 3-4 (Bankr. N.D. Iowa, Aug. 26, 1986), have recognized the factors considered in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717-19<sup>(5)</sup>. The Court's own knowledge and experience concerning reasonable and proper fees is appropriately considered in forming an independent judgment on value. In re WHET, Inc., 61 B.R. 709, 713 (Bankr. D. Mass. 1986); In re Pettibone, 74 B.R. at 306.

### III.

Upon review of the facts presented and in consideration of pertinent statutes and relevant case law, the Court finds that the retainer of \$2,500 received by Firm for bankruptcy related services rendered for Debtors is excessive.

The Court first thoroughly reviewed the itemized fee statement provided by Mr. Cady, III in his affidavit. Since there is no evidence to the contrary, the Court finds that the hours claimed by Firm are the reasonable and necessary hours required to perform the services rendered. Further, the Court finds that the hourly rate charged by each member of Firm (Mr. Cady, Sr., at \$100.00, Mr. Drew at \$50.00, and Mr. Cady, III at \$75.00) is within reasonable limits recognized in this district. See In re Wuebker, No. 8403178, slip op. at 3-10 (Bankr. N.D. Iowa, July 22, 1986).

Next, the Court eliminated those items which are not compensable. With few exceptions, the noncompensable items were those services not related to the filing, i.e., those services which did not contribute to analyzing the Debtors' financial condition, advising the Debtors on whether to file for bankruptcy, preparing and filing the necessary documents, or attending the section 341 meeting. It is important to note that Firm itemized services for more than one year after the petition was filed. These postpetition services, unless clearly shown otherwise, can only enure to the benefit of Debtors, not the estate. Accordingly, except as noted below, the post-petition items are not compensable administrative expenses. See In re Riverview Financial Services, 67 B.R. at 716.

Several post-petition services, besides the section 341 meeting of creditors, will be compensated here since they relate to the filing of the petition and related documents. These items include: preparing and filing the Disclosure of Compensation paid pursuant to F.R.B.P. 2016(b); filing the Notice to Individual Consumer Debtors, Statement of Affairs, and Schedules; researching the law and preparing and filing an amendment to exemptions; drafting and filing amendments to the exemption schedule and the Joint Statement of Financial Affairs<sup>(6)</sup>; reviewing the Trustee's final report; and, finally, filing the first affidavit on fees and appearing at the first hearing thereon.<sup>(7)</sup>

All items of service rendered from the date Firm received the retainer in contemplation of Debtors' filing for bankruptcy, March 5, 1986, through the date of filing, March 31, 1986, have been allowed except for four items. First, there is no explanation or justification for a "telephone conference with Wanda Spainhower" on March 11, 1986. Accordingly, compensation is not appropriate. In re Taylor, 66 B.R. at 395. Second, there is no explanation or justification for the necessity of two attorneys to handle "form work" (two entries) on March 19, 1986. Consequently, only one attorney for the time specified will be compensated. In re Pettibone Corp., 74 B.R. at 303. The rate of compensation for this form work is more reasonably established at the lower hourly rate charged by Mr. Drew since no justification for compensation at the higher hourly rate charged by Mr. Cady, III, has been provided. id. Finally, no explanation or description was provided for research conducted on March 24, 1986, and it too is appropriately excluded from consideration. Id. at 302; see also In re Grady, 618 F.2d 19, 20 (8th Cir. 1980); and In re Olen, 15 B.R. at 753.

Having eliminated those items which are non-compensable, the reasonable time required to perform the compensable services to arrive at the lodestar figure may be computed. In re Wabash Valley Power Association, 69 B.R. at 478. The Court's calculations find 2.95 hours of compensable service performed by Mr. Cady, Sr., 8.25 hours provided by Mr. Drew, and 10.10 hours provided by Mr. Cady, III. These hours, multiplied by the appropriate hourly rate charged by each attorney produce a lodestar sum of \$1,465.00.

Finally, the Court considered, upon review of the relevant Johnson factors,<sup>(8)</sup> whether this amount should be adjusted in light of the facts and circumstances of this particular case. The Court finds no evidence was presented to justify further modification<sup>(9)</sup>. This was not an extraordinary bankruptcy case. No excessive time or special legal skills were required. The allowed fee is comparable to other Chapter 7 business cases of like size and complexity. See In re Nu-Process, 13 B.R. at 138.

Therefore, upon consideration of the evidence presented pursuant to 11 U.S.C.A. 329(b) and in recognition of established case law, it is the opinion of this Court that the reasonable fee for the services rendered by Firm for Debtors is \$1,465.00. Since this is less than the retainer received on March 5, 1986, Firm shall be ordered to remit the difference to the Trustee with ten days from the date of order.

**ORDER**

IT IS THEREFORE ORDERED that fees in the sum of \$1,465.00 are allowed to the law firm of Hobson, Cady and Drew for services rendered to Dallas L. Burmester and Myrna Burmester, Debtors, and that the difference between that amount and the retainer of \$2,500.00 received from the Debtors shall be remitted to the Trustee within ten days from the date of this order.

SO ORDERED: December 8, 1987.

William L. Edmonds  
Bankruptcy Judge

Filed Stamped: December 11, 1987

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1. The Court will presume that \$60 of this retainer represents the filing fee, not attorney fees.

2. 11 U.S.C. section 329 provides:

Debtor's transactions with attorneys.

- a. Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
- b. If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment to the extent excessive, to--
  1. the estate if the property transferred--
    - A. would have been property of the estate; or
    - B. was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
  2. the entity that made such payment.

3. F.R.B.P. 2017 provides:

Examination of Debtor's Transactions with Debtor's Attorney.

- a. Payment or Transfer to Attorney Before Commencement of Case.

On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor, to an attorney for services rendered or to be rendered is excessive.

- b. Payment or Transfer to Attorney After Commencement of Case.

On motion by the debtor or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after the commencement of a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

4. The twelve factors considered in Johnson v. Georgia highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), comport with the six criteria recognized in this circuit in Levin v. Barker, 122 F.2d 969 (8th Cir. 1941), cert. denied, 315 U.S. 813 (1942). In Levin, the court stated the following elements should be considered in setting attorney fees: (1) the time spent, (2) the intricacy of the questions involved, (3) the size of the estate, (4) the opposition encountered, (5) the results obtained, and (6) the economic spirit of the Bankruptcy Act. Levin, 122 F.2d at 972; see In re Grady, 618 F.2d 19, 20 (8th Cir. 1980). The final element, the economic spirit of the Bankruptcy Act, has been eliminated under the Bankruptcy Code. The "cost of comparable services other than in a case under this title" is now an appropriate consideration. 11 U.S.C. section 330(a)(1); see In re National Paragon Corp., 74 B.R. 858, 861-62 (Bankr. E.D. Pa. 1987).

5. It should be noted that many of the Johnson factors are usually subsumed within the initial calculation of the hours reasonably expended at a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 434 n.9 (1983); see also Copeland v. Marshall, 205 U.S. App. D.C. 390, \_\_\_, 641 F.2d 880, 890 (1980) (en banc).

6. Counsel for a debtor will not be compensated for repeated or substantial modification of schedules if the only purpose

of the revisions is to maximize the debtor's exemptions. See *In re Taylor*, 66 B.R. 390, 396 (Bankr. W.D. Pa. 1986).

7. This Court adopts the reasoning proscribed in *In re Pettibone Corp.*, 74 B.R. 293, 304 (Bankr. N.D. Ill. 1987) and will permit professionals reasonable compensation for preparing and attending a hearing on fee related documents required under the Code or pursuant to court order. However, time spent on non-informative documents or repeated revisions will be no compensable as an administrative expense. *Contra In re J.A. & L.C. Brown Co.*, 71 B.R. 197, 199 n.7 (Bankr. E.D. Pa. 1987).

8. *See supra*, p. 4, n.2

9. The burden of proof for establishing the appropriateness of adjusting the lodestar sum is on the party proposing the adjustment. *See Copeland v. Marshall*, 205 U.S. App. D.C. 390, \_\_\_\_\_, 641 F.2d 880, 892 (1980)(en banc).