

In the United States Bankruptcy Court

for the Northern District of Iowa

ARTHUR R. WAGNER and SHERRY L.
WAGNER
Debtors.

Bankruptcy No. X90-00310M

Chapter 11

ORDER RE: APPLICATION FOR DEBTOR'S ATTORNEY FEES

The matter before the court is an application by debtors' attorney for an order fixing attorney's fees. At the time of the hearing, the court mistakenly considered that the application was the attorney's final application for compensation. However, this case remains pending because there has been no final determination of a proceeding to recover an alleged preferential transfer. Although the application is technically one for interim compensation, the court has examined it as though it were a final application for an award of fees. Absent extraordinary circumstances, the court will not re-examine this request for fees at the time it considers any subsequent request. A hearing was held in Mason City on October 8, 1991 pursuant to Fed.R.Bankr.P. 2017. This is a core proceeding under 28 U.S.C. 157 (b)(2)(A).

On February 23, 1990, Arthur R. and Sherry L. Wagner (DEBTORS or WAGNERS), filed a voluntary chapter 11 petition. On March 13, 1990, debtors submitted a request for appointment of counsel which was granted March 15, 1990, and Cady of the firm Hobson, Cady and Cady, was appointed attorney for debtors-in-possession. A \$15,000.00 retainer fee had been paid to Cady by the debtors on February 12, 1990.

With Cady's help, debtors were able to obtain confirmation of a chapter 11 plan. The case does not appear to have been exceptionally complicated. The number of creditors was not unusually large. The only creditors which negotiated extensively with debtors regarding the plan were Hampton State Bank which was the debtors' principle lender, and Metropolitan Life Insurance Co. Cady corresponded with only a few other creditors, and only to a lesser extent, in an effort to resolve their concerns and win approval of the plan. There was no claims litigation in the case. Trial on confirmation was not necessary.

The only major litigation was an adversary proceeding by debtors against Farmers Cooperative Elevator Co. (CO-OP) in which debtors sought to recover an allegedly preferential transfer of \$362,000. This is an important and major piece of litigation which is still pending before this court.

On December 7, 1990, Cady filed an interim fee application seeking compensation for work performed to that date. The amounts requested were \$20,016.00 in fees and \$1,047.99 in expenses. By order of this court dated February 5, 1991, Cady was granted \$15,012.00 in fees and \$1,047.99 in expenses. In an order dated February 19, 1991, the court explained that the amounts allowed represented the amount of fees and expenses requested less a 25 per cent "hold back" of fees pending a final outcome of the case. Although Cady had already applied debtors' retainer fee against the amounts he had requested, the court's order formally permitted debtors' attorney to apply the retainer

fee to the amounts allowed by the court; the balance of the interim allowance was to be paid to Cady as an administrative expense. In allowing the fees and expenses requested, no final determination was made as to the validity of the requested amounts. Debtors' attorney's motion for rehearing on the claim for interim fees was denied.

On May 16, 1991, following confirmation of debtors' plan, Cady filed a second application for fees and expenses. The amount requested for fees was \$20,344.50 which included the \$5,004.00 unpaid from the first fee application. The sum of \$15,340.50 represented work performed since the cut off date of the first application. Cady also requested reimbursement of \$970.98 in additional expenses.

Amounts requested by Cady in his two applications total \$35,356.50 in attorney fees and \$2,018.97 in expenses. Although no other party has objected to the final fee application, the court has chosen to review the requested fees on its own motion. On request of the court, Cady has submitted a separate breakout (Exhibit A) detailing the fees charged through March 13, 1991 on account of the litigation with Co-op. These fees totalled \$15,642.00. However, in examining the itemizations attached to the two fee applications, the court has identified at least four entries(**fn.1**) which were attributable to the adversary proceeding but which were not included in the breakout. These include the following entries:

March 13, 1990	.75	Letter on pre-trial statement .50 Travel at half-time
Jan. 6, 1991	4.00	Work on stipulation of facts
Total	5.25	

Two other entries on the itemizations reflect combined time spent on the adversary and the case. None of the combined time was broken out to the adversary proceeding. These entries were:

Feb. 22, 1990	16.00	Preparation of petition, schedules and <u>research on preference</u>
Jan. 25, 1991	3.00	<u>Briefing and research on Co-op case;</u> phone call; and work on disclosure statement.
Total	19.00	(emphasis added)

Of these 19 hours, the court will consider that three hours of research were applicable to the preference matter. The balance, 16 hours, was for work on the case in chief.

As a result of these adjustments, the court finds that debtors' counsel spent 182.05 hours on the preference action through March 13, 1991. For this he seeks compensation at the rate of \$90.00 per hour for a total of \$16,384.50. The balance of fees requested through May 10, 1991 total \$18,792.00, and these charges are for work on the bankruptcy case in chief.

II.

A claimant seeking payment of an administrative expense has the burden of proving the amount and legitimacy of his or her claim. 11 U.S.C. 503(a). See In re Burmester, Bankr. No.

86-00710M, slip op. at 3-7 (Bankr. N.D. Iowa, Dec. 11, 1987); In re Packard Properties, Ltd., 118 B.R. 61, 63 (Bankr. N.D. Tex. 1990). The fact that this court has previously granted interim compensation does not conclusively validate those fees and expenses. In issuing its final fee application order for debtors' attorney, this court will review in full all amounts previously granted to

debtors' attorney. In re D. DiOrio & Sons, Inc., 46 B.R. 648, 649 (Bankr. N.D. Ill. 1985). Interim fee awards are interlocutory, often require adjustment, and are fully reviewable. Matter of Evangeline Refining Co., 890 F.2d 1312, 1321-22 (5th Cir. 1989).

III. THE ADVERSARY PROCEEDING

This court has no misgivings about the importance of attorney's work on the preference litigation. However, after examining the breakout of work attributable to the litigation, the court is left with the conviction that excessive time was spent on aspects of the case. It must be said that in analyzing the application, the attorney's propensity to "lump" time entries has made it sometimes difficult, sometimes impossible to determine how much

time was expended on certain projects. "'Lumping' is the term used to refer to entries which contain several services under one general time expenditure." In re Bible Deliverance Evangelistic Church, 39 B.R. 768, 777 (Bankr. E.D. Pa. 1984). Courts have disallowed compensation for services lumped together because they have considered that lumping makes it impossible to determine the reasonableness of the time expended on the individual tasks. In re Westside Creek Ltd. Partnership, 93 B.R. 177, 180 (Bankr. E.D. Ark. 1988) ; In re Wildman, 72 B.R. 700, 709 (Bankr. N.D. Ill. 1987). As to Cady's application, the court is not going to disallow "lumped" time, but will estimate the allocation of that time for the purposes of ruling on the application.

In considering the time spent on the adversary proceeding, the court is most concerned with the expenditures of time for general research and the research for and drafting of briefs. It appears that through 1990, some 14 hours were spent on researching issues related to the preference. This research was unassociated with any briefing requirement. In 1991, immediately prior to trial, Cady spent 29.25 hours researching and preparing a pre-trial brief numbering nine pages. This does not include a portion of nine hours spent January 30, 1991 on briefing and on the preparation of a stipulation of facts. The application reveals that in addition to this time, approximately 14 other hours were expended on the stipulation. Between February 1 and February 10, 1991, Cady spent 22.50 hours preparing for trial, working on the stipulation of facts, corresponding with opposing counsel and researching. Because of the lumping in these two entries, it is impossible for the court to know exactly how many of these 31.50 hours were spent on researching and briefing prior to trial. The court estimates that one-half of the nine hours expended January 30, 1991 was spent on research and briefing. Of the 22.50 hours spent preparing for trial, the court estimates that 7.50 hours was spent researching and briefing. Thus a total of 41.25 hours was spent by Cady researching and briefing just prior to trial. Cady spent 24.75 hours working on his post-trial brief. This brief contained 11 pages.

To summarize, 14 hours of the application were for general research on preference issues; 41.25 hours were for research on the pre-trial brief; and 24.75 hours were for the post-trial brief. The total for research and briefing is 80 hours. Having examined the briefs and being fully aware of the nature of the proceeding, the court considers this excessive. Considering that Cady is an experienced bankruptcy counsel, and considering the issues and the briefs, the court finds that 55 hours should be allowed for this work. Twenty-five hours of work will not be compensated.

Four other adjustments will be made to the applications as they regard the adversary proceeding. On March 20, 1990, Cady spent .50 hours in phone conversation with Larry Eide, a Mason City attorney. The application provides insufficient basis for determining the necessity of this call. Compensation for it will not be allowed. On March 22, 1990, Cady reviewed a letter from Co-op regarding the preference, talked on the phone with Co-op's attorney, and prepared the complaint. Again, these items

have been lumped together as one time expenditure of three hours. The court has examined the complaint. It is a two-page pleading containing nine paragraphs. Half of those are assertions on jurisdiction and venue or are allegations of simple facts such as the filing of the case. The balance is not complex. Because of the lumping, it is difficult to determine how much time was spent among the three tasks, but the court considers that the drafting of the complaint would have taken up the most. Three hours for such tasks is excessive. One and one-half hours will be allowed.

On April 27, 1990, Cady spent one hour on a "review" of the answer filed by the defendant. The court takes "review" to mean "read." The answer is a two and one-half page document that would take no more than 15 minutes to read and understand. The time entry does not indicate that any work was done with the answer other than review it. The court will allow one-half hour for this task. Finally, on July 6, 1990, Cady reviewed the court's scheduling order and "enter[ed] deadline." One-half hour was expended. This also is excessive. Fifteen minutes will be allowed. These miscellaneous items result in non-compensation of 2.75 hours. In summary, as to the adversary proceeding, 27.75 hours of work will not be compensated.

IV. THE BANKRUPTCY CASE Monthly Reports

In his two applications, Cady seeks to charge the debtors for handling the monthly report received from Equity Control Corp. (EQUITY CONTROL). The latter company was a professional appointed to aid the debtors with various accounting work. At the fee application hearing, Cady stated that when he received the monthly report from Equity Control, he would review it, reconcile it with the previous month's report (in essence double-checking it), call the debtors, have them sign the report, and then file it with the clerk's office. Cady stated that it was necessary for him to spend time and review the report so that he could stay current with the cash flow situation of debtors' farming operations. This, he stated, helped him to develop the chapter 11 plan he was preparing for debtors.

The court is able to identify 11 dates on which the attorney reviewed and filed the monthly financial reports required for the debtor in the case. These are March 10, 1990, April 18, 1990, April 20, 1990, April 26, 1990, March 16, 1990, May 22, 1990, June 25, 1990, July 27, 1990, August 21, 1990, September 27, 1990 and October 5, 1990. For each instance save one, the entries were for one hour. On May 22, 1990, there are two entries--one for one hour and one for an hour and one-half. These entries total 12.50 hours.

Equity Control, for its second interim fee application, charged debtors \$300.00 for monthly accounting work for March through June, 1990. In its third application, now pending, Equity Control requests compensation for 10 months of general accounting work plus 15 hours of time spent filling out monthly reports for the period March, 1990 through April, 1991.

The \$1,125.00 in compensation sought by the attorney for monthly report work is excessive. Some of what attorney did was ministerial or clerical in nature--forwarding financial information to Equity Control, filing the finished report, serving the report on interested parties. These tasks could have been handled by clerical employees; they did not require the training of a professional attorney. The comparison of the report due to the previous month's report seems to be a duplication of work required of Equity Control. A review of the report is warranted but not for one hour per month, especially when the attorney from his extensive devotion of time to the case should have been thoroughly aware of debtors' financial condition. Attorney will be allowed one-fourth of the time shown for work with monthly reports. The allowable portion equals 3.13 hours.

One remaining entry deals with monthly reports. It is dated November 21, 1990 and is for five hours for meeting with Wagners to work on an amendment to the June monthly report. The court cannot find any entry in its docket indicating that an amended monthly report was filed. The November 21 entry also includes as work for the five hours, preparation of the attorney's first fee application. It is impossible to determine how much of the five hours went to the fee application versus the amended report. No time will be allowed for the work on the report. The time allowance requested for the attorney fee application will be discussed below.

Application to Incur Secured Debt

On November 28, 1990, Cady spent 3.00 hours preparing an application to incur secured debt so that debtors could obtain a loan with Commodity Credit Corporation (CCC). The entry involved discussions with debtor, representatives of ASCS and other drafting. The court considers this time excessive. From the beginning of the farm crisis in the mid-1980s to the present, applications to incur secured debt with the CCC have been considered fairly routine. They are rarely objected to and are handled on an expedited basis. The application to incur is little more than one page as is the notice of filing. The loan documents themselves are no doubt on Commodity Credit forms and are filled out by farmers on a regular basis without the aid of an attorney. The court considers that one and one-half hours rather than three hours is a satisfactory allowance for this work.

Fee Application

In his second application, Cady seeks compensation for work in preparing and defending his first interim application. The entries are as follows:

November 29, 1990	3.00	Prepare attorney fee application, notices to creditors
January 6, 1991	1.00	Preparation of Order approving and transmittal to Court; letter
February 12, 1991	2.50	Prepare motion for findings by Court re: fees allowed; research re: fee; prepare motion for rehearing on fees

These entries total 6.50 hours; in addition, Cady spent some time on November 21, 1990 preparing the fee application. The time spent was some portion of five hours lumped with other work. **(fn.2)**

This court presently has under submission in two other cases the issue of whether attorneys should be compensated for the preparation and defense of fee applications filed under 11 U.S.C. 330. The decisions in those cases may permit compensation for preparation of fee applications when the application is extraordinary in form. The court may also determine that fee applications are not compensable in any event, but are rather a cost of the attorney's doing business. If the court decides to permit compensation for fee applications when they, are extraordinary, then the qualities of compensable applications will over time have to be defined. The court need not make a decision as to which avenue to follow for the purposes of the present applications by Cady. These applications are no more than the ordinary billings that attorneys regularly provide their clients in order to get paid. The attorney's propensity to lump entries certainly takes the application out of the realm of the extraordinary. Finally, with regard to motions filed by Cady after the allowance of interim fees, time spent on these will not be compensated. Cady had requested an interim allowance of \$20,016.00 in fees and \$1,047.99 in expenses. All expenses were allowed, and 75 per cent of fees were allowed as interim compensation. This was an interlocutory order, adjustable at the time of the final award. In

seeking a rehearing and written findings, Cady spent 2.50 hours of time in research and drafting. This was to his potential benefit, not the bankruptcy estate's, and it will not be compensated by the estate. Eleven and one-half hours of work relating to fee applications will not be compensated.

SUMMARY

In his fee applications, Cady requests compensation for fees in the amount of \$35,356.50. Divided by \$90.00 per hour, this yields 392.85 hours. Cady concedes that two hours entered on March 10, 1990 were entered in error. Subtracting \$180.00 from the application, the balance requested is \$35,176.50 in fees. Of this, the court has attributed 182.05 hours to the adversary proceeding. This is arrived at by taking the attorney's calculation of 173.80 hours and adding 8.25 hours in adjustments. From this, the court has disallowed 27.75 hours. The remaining compensable hours for attorney's work on the adversary proceeding are 154.30. These will be compensated for at the rate of \$90.00 an hour for a total compensation on the adversary proceeding of \$13,887.00.

The net request for hours expended on the case in chief is arrived at as follows. The total fee request is \$35,356.50. One hundred eighty dollars and no cents (2 hours of work on March 10, 1990) is subtracted leaving \$35,176.50. From this, the court subtracts \$16,384.50 attributable in the application to the adjusted amount of time expended on the adversary proceeding, before the court disallowances. This is arrived at by taking 173.80 hours calculated by the attorney and adding 8.25 hours of work on the adversary not broken out by the attorney. The total hours, therefore, for the adversary without subtractions is 182.05. At a rate of \$90.00 per hour, such work would be compensated in the amount of \$16,384.50. When this amount is subtracted from \$35,176.50, the balance of fees requested for work on the case in chief is \$18,792.00. Divided by the \$90.00 per hour request, this yields 208.80 hours. From this, the court has disallowed 22.37 hours, leaving 186.43 hours in compensable time. This time will be allowed at \$90.00 per hour for a total allowance in the case in chief of \$16,778.70.

The two allowances together total \$30,665.70. Cady should be compensated this amount for attorney's fees. Cady will be allowed the entire amount requested as reimbursed expenses. This sum is \$2,018.97.

ORDER

IT IS ORDERED that G. A. Cady III is allowed compensation in the amount of \$30,665.70 in attorney's fees and \$2,018.97 in reimbursed expenses. From the total of these two amounts, \$32,684.67 must be subtracted from the prior interim allowance of \$16,059.99. Debtor shall therefore make payment to G. A. Cady III in the sum of \$16,624.68.

SO ORDERED ON THIS 31st DAY OF JANUARY, 1992.

William L. Edmonds
Bankruptcy Judge

(fn.1) An entry showing two hours of work on the adversary, dated March 10, 1990, was not shown on the breakout exhibit. It was part of the requested fee application, but attorney Cady acknowledges it was entered in error and should be deleted from his request.

(fn.2) Any portion dealing with the monthly report has been dealt with *supra* pp. 10-11.