

In the United States Bankruptcy Court

for the Northern District of Iowa

EMERSON MATTRESS INC.

Debtor(s).

Bankruptcy No. 95-12358KC

Chapter 11

RULING RE: U.S. TRUSTEE'S COMMENT TO COUNSEL'S FIRST INTERIM APPLICATION FOR

On June 6, 1996, the above-captioned matter came on for hearing pursuant to assignment on the U.S. Trustee's comment to an application for interim fees filed by Debtor's counsel. Debtor appeared by Attorney Dan Childers. U.S. Trustee appeared by John Schmillen. The parties argued their respective positions and the Court dictated its findings into the record. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

The uncontested facts establish that Debtor retained the firm of Childers & Fiegen ("Counsel") to represent it in filing a Chapter 11 bankruptcy petition. Before filing its bankruptcy petition, Debtor gave Counsel the sum of \$25,000 as a retainer. Certain fees were incurred prepetition and, as of the time of filing of the petition, \$16,255.25 of the retainer remained. From that period forward until the filing of this Application for Interim Compensation on May 15, 1996, Counsel incurred additional fees and expenses. In its application, Counsel, at paragraph 5, states:

Childers & Fiegen, P.C. herein applies for fees and expenses totaling \$33,510.84 for the period December 4, 1995 through April 15, 1996 and represents to the Court that \$16,255.25 has been paid on said requested fees and expenses, leaving an unpaid balance of \$17,255.59.

The U.S. Trustee filed a comment to this fee application on May 15, 1996. The U.S. Trustee states that a draw down of a retainer, as was done in this case pursuant to the foregoing statement, is contrary to 11 U.S.C. § 331 which states that the court may allow and disburse to an applicant appropriate compensation or reimbursement after notice and a hearing. The U.S. Trustee's office filed a Brief on this issue.

The position taken by the U.S. Trustee constitutes the majority rule. A substantial amount of case authority on this subject is cited in In re Pineloch Enterprises, Inc., 192 B.R. 675, 679 (Bankr. E.D.N.C. 1996), which states, in relevant part:

Although there is authority to the contrary, the majority rule in bankruptcy is that all retainers, whether general retainers, flat fee retainers, advance fee nonrefundable retainers, or advance fee security retainers, must be held in trust pending court approval.

Id. (emphasis in original), citing, among others, In re Independent Sales Corp., 73 B.R. 772, 774-75 (Bankr. S.D. Iowa 1987) (stating that prepetition general retainers must be held in trust to extent they are for services during pendency of case).

The Northern District of Iowa has endorsed the majority rule. Chief Judge William Edmonds recently stated:

It is essential that attorneys fully disclose all prepetition retainers and that they do not apply payments to billings without application to the court. Both disclosure and application are required by the rules. Attorneys must take seriously their obligation to file accurate fee disclosures with the court. Moreover, they should not take payment on fees absent the required application process.

In re Paquin, No. 95-40909XM, slip op. at 2 (Bankr. N.D. Iowa May 13, 1996) (Chapter 13 case). He followed the majority rule in In re Cargo, Inc., No. X90-00200S, slip op. at 6 (Bankr. N.D. Iowa Jan. 24, 1992), where he stated that "[o]nce the petition is filed, debtor's counsel may not charge against or draw down from the retainer without the permission of the court."

Counsel asks the Court to consider the minority rule which under certain circumstances allows a draw down on such a retainer without Court approval. The Court has considered the briefs filed in this case and the arguments of counsel. The Court has also considered the cases already decided in this District which follow the majority rule. After considering these matters, the Court concludes that the majority rule is correct and should be followed in all cases. As such, counsel may not take payments on fees absent the required application process under 11 U.S.C. §§ 330 and 331.

No sanctions have been sought in this case and, under the circumstances, the Court does not feel that sanctions are appropriate and none are imposed.

WHEREFORE, the Court will approve fees as appropriate by separate Order.

FURTHER, no sanctions are imposed in this interim application for compensation.

FURTHER, in all future cases, counsel are mandated to comply with this ruling. No payments shall be made from any type of retainer prior to compliance with the required application process and Court approval.

SO ORDERED this 7th day of June, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge