

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN
DISTRICT OF IOWA

IN RE:)

) Chapter 13

JOHN ROBERT LUND,)

) Bankruptcy No. 00-01683

Debtors.)

**ORDER RE APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF
EXPENSES OF ATTORNEY**

This matter came before the undersigned on November 18, 2003 pursuant to assignment. Attorney Joseph Peiffer appeared for Day Rettig Peiffer, P.C., attorney for Debtor (Peiffer). The U.S. Trustee was represented by Assistant U.S. Trustee Janet Reasoner. Carol Dunbar appeared as Chapter 13 Trustee. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (B).

STATEMENT OF THE CASE

Attorney Joseph Peiffer filed applications for compensation as attorney for Debtors in this case and three other Chapter 13 cases. These matters were jointly set for hearing. In all four cases, the Law Firm requests approval of additional attorney fees and expenses incurred postpetition and payment through the Chapter 13 plans.

STATEMENT OF FACTS

In this case, Peiffer is seeking court approval of \$7,757.72 of total fees and expenses as Debtor's Chapter 13 attorney. Of that amount, he previously was allowed fees and expenses of \$5,199.54, all of which have been paid by Trustee through the plan. Additionally, Peiffer received \$1,315 from Debtor prepetition for legal services. Thus, Peiffer has received \$6,514.54 to date. His current application for compensation requests approval of the additional \$1,243.18 to be paid through the Chapter 13 plan.

Trustee reports that if Peiffer's request for additional fees paid through the plan is granted, unsecured creditors will receive a total of \$5,095.50, or 17.53% of their claims. The Court notes that Debtor has now filed a Fifth Amended Plan which, if confirmed, anticipates that unsecured creditors will receive 8.61% of their claims. This Amended Plan provides for payment of the additional fees Peiffer has requested and projects that further fees and expenses of \$750 will be incurred and paid through the plan.

The U.S. Trustee objects to allowance of additional fees, arguing that Peiffer should be required to show that he exercised reasonable billing judgment and that the proposed compensation is reasonable under 11 U.S.C. § 330. Ms. Reasoner stated at the hearing that the itemization of legal services shows numerous revisions and amendments to schedules and the Plan. She questions whether some of the activities performed by attorneys could have been performed by Debtor instead.

Mr. Peiffer explained that Debtor was a somewhat difficult client. He discontinued making plan payments and retained income tax refunds without informing his attorney. Thus, additional legal services were required to respond to Trustee's motions to dismiss and plan amendments were necessary.

Trustee has not objected to allowance of Peiffer's additional fees. She reports that the confirmed plan remains feasible and conforms to the liquidation analysis if the additional fees are paid through the plan. At the hearing, Trustee stated that Attorney Peiffer does very thorough work for his debtor clients.

CONCLUSIONS OF LAW

The bankruptcy court has broad power and discretion to award or deny attorney fees, and, indeed, a duty to examine them for reasonableness. In re Clark, 223 F.3d 859, 863 (8th Cir. 2000) (considering fees for Chapter 13 attorneys). "The burden is on the attorney to prove that the agreed compensation is reasonable. . . . [A]bsent compliance with the Bankruptcy Code and Rules, an attorney has no absolute right to an award of compensation." Id. (citations omitted).

In this district, the base amount for Chapter 13 debtors' attorney fees is currently \$1,000. In re Jeanes, No. 01- 00760-W, slip op. at 3 (Bankr. N.D. Iowa Dec. 20, 2001). This base amount is presumptively acceptable without the need for formal application and notice under Rule 2016(a) and 2002(a)(6). IANB Local Rule 2016-1(b). Generally, the base amount is considered sufficient to compensate for basic services rendered by debtors' attorneys in Chapter 13 cases. Jeanes, No. 01-00760-W, slip op. at 2. These include counseling the debtors; preparing and filing the petition, schedules and plan; attending the creditors' meeting and the confirmation hearing; reviewing claims; and filing amendments and motions. Id.

If Chapter 13 debtors' attorneys seek fees which exceed the presumptively acceptable base amount, the requirements of § 330(a) and Federal Rule of Bankruptcy Procedure 2016 must be followed. Id.; IANB Local Rule 2016-1(b). This requires the

application of the conventional lodestar analysis. In re McKeeman, 236 B.R. 667, 671 (B.A.P. 8th Cir. 1999). The lodestar amount is the number of hours reasonably expended multiplied by a reasonable hourly rate. In re Apex Oil Co., 960 F.2d 728, 732 (8th Cir. 1992). The lodestar amount ordinarily reflects and includes issues such as: "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained." Id. Additional legal services rendered in Chapter 13 beyond basic services can include defense of a motion to lift the automatic stay, objections to claims, cramdown of undersecured mortgages and settlement of objections to confirmation. In re Szymczak, 246 B.R. 774, 782 (Bankr. D.N.H. 2000).

Under § 330(a)(4)(B), this Court considers the benefit and necessity of attorney services to the debtor or the estate and the other factors set forth in § 330(a). In re Nilges, B.R. , 2003 WL 22328237, *2 (Bankr. N.D. Iowa Sept. 15, 2003) (considering Chapter 12 fees). In Chapter 13 cases, courts have considered the effect on distributions to unsecured creditors when determining the reasonableness of debtors' attorney fees. Minimal payment to unsecured creditors while paying attorney fees over a period of months has also been considered in determining Chapter 13 debtors' good faith in proposing a plan. See In re San Miguel, 40 B.R. 481, 485 (Bankr. D. Colo. 1984); In re Strauss, 184 B.R. 349, 352 (Bankr. D. Neb. 1995); Keith M. Lundin, Chapter 13 Bankruptcy, 3d Ed. § 191.1 (2000 & Supp. 2002).

In In re Dewey, 237 B.R. 783, 789 (B.A.P. 10th Cir. 1999), the court denied attorney fees which, if paid through the Chapter 13 plan, would have resulted in unsecured creditors receiving less than they would have in a Chapter 7 liquidation. In In re Malewicki, 142 B.R. 353, 357 (Bankr. D. Neb. 1992), the court considered the "results obtained" from the viewpoint of the bankruptcy estate when applying the lodestar analysis to Chapter 13 debtors' attorney fees. Id. The court stated: "If unsecured creditors are paid nothing or only a nominal amount, this factor weighs in favor of limiting attorney compensation from the estate." Id. at 358 (noting that proposed payments to unsecured creditors were less than the proposed attorney fee). In Cornelison v. Wallace, 202 B.R. 991, 993 (D. Kan. 1996), paying the attorney fees requested through the plan would have extended administration of the case beyond five years. The court refused to include the additional attorney fees in the plan. Id. at 994.

Both Malewicki and Cornelison were decided based on the law in effect prior to the 1994 amendment to § 330 of the Bankruptcy Code. That amendment expanded allowable compensation by including a new subsection, § 330(a)(4)(B), providing for compensation for Chapter 12

and 13 debtors' attorneys "for representing the interests of the debtor in connection with the bankruptcy case." 11 U.S.C. § 330(a)(4)(B). Prior to the 1994 amendments, debtors' attorneys were included in § 330(a)(1) which provided for payment of reasonable compensation for actual, necessary services. 11 U.S.C. § 330(a)(1) (1993). Courts construed the pre-1994 language as requiring that services of debtors' attorneys benefit the bankruptcy estate in order to be compensable from the estate. See In re Harshbarger, 205 B.R. 109, 112 (Bankr. S.D. Ohio 1996) (considering fees in case filed prior to effective date of 1994 amendments).

Thus, since the 1994 amendment to § 330(a), the focus of compensable attorney fees for Chapter 13 debtors has broadened from those which produce a benefit for the bankruptcy estate to include those expended in "representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor." 11 U.S.C. § 330(a)(4)(B). Subsection (4)(B), however, continues to require that only "reasonable" compensation to the Chapter 13 debtor's attorney may be allowed by the court. The Eighth Circuit in Clark emphasized the Court's duty to examine fees requested in Chapter 13 cases for reasonableness. This Court concludes such examination includes consideration of the impact of allowance of attorney fees on the amounts distributed to unsecured creditors.

In Nilges, this Court recently considered reasonableness in awarding attorney fees in a Chapter 12 case. The following is applicable in considering these Chapter 13 debtors' attorney fees:

In [applying the lodestar analysis], the court must take into consideration whether the professional exercised reasonable billing judgment. Time spent "handholding" or reassuring debtors, or on matters which do not require attorney services, are simply not compensable at an attorney's regular hourly rates.

Counsel has a duty to supervise clients' conduct for compliance with the Bankruptcy Code. As a professional, an attorney must instruct the debtor on appropriate conduct and must develop client control. "To foster such client control, an attorney must be: . . . knowledgeable about the parameters and limits of available alternatives and remedies, and unwilling to allow a client to direct or dictate the progress or activity in a case, if such activity is inconsistent with the requirements of the law."

Nilges, 2003 WL 22328237, *3. In Szymczak, the court questioned whether the attorney acted in the most responsible and efficient way to complete certain additional legal tasks required by the debtors' Chapter 13 bankruptcy case. 246 B.R. at 783. It allowed fees of \$3,350, rather than the total requested of \$9,691. Id. at 784.

Under 28 U.S.C. § 586(a) (3) (A) (ii), the U.S. Trustee is instructed to file comments and objections to applications for compensation and reimbursement of expenses, when appropriate. One court has determined that reviewing fee applications and making objections are within the province of the Chapter 13 standing trustee. In re Ingersoll, 238 B.R. 202, 209 (D. Colo. 1999). This helps avoid the development of an adversary relationship between the bankruptcy judge and the applying attorney. Id. Likewise, in In re Kindhart, 160 F.3d 1176, 1178 (7th Cir. 1998), the court noted intervention by the trustee would be helpful in considering Chapter 13 debtor attorney fees. See also In re Eliapo, 298 B.R. 392, 401 n.14 (B.A.P. 9th Cir. 2003) (noting input from the Chapter 13 trustee or the U.S. Trustee would have been of great assistance to the bankruptcy court and the appellate panel). One court notes that it is the duty of the Chapter 13 trustee to review attorney fees for reasonableness.

Section 1302(b) (1) requires that the Chapter 13 Trustee review and object to any improper claim. This includes administrative claims for allowance of attorney fees. Thus, to the extent that attorney fees are not reasonable or proved in accordance with § 330, the Chapter 13 Trustee is required to object to their allowance as administrative expenses.

In re Kimber, 2001 WL 1329226, *4 (Bankr. D. Colo. Sep. 7, 2001).

Finally, it is important to note that only the amount of fees allowed by the court is collectible by the applicant. In re Gantz, 209 B.R. 999, 1002 (B.A.P. 10th Cir. 1997). Attorney fees may be paid to a debtor's counsel only if approved by the Court. In re Wyant, 217 B.R. 585, 588 (Bankr. D. Neb. 1998). Fees are (1) disallowed, (2) allowed as an administrative expense to be paid from the estate, or (3) allowed but must be paid by the debtor directly, not from the estate. Gantz, 209 B.R. at 1003. Absent court approval, neither the debtor nor the estate is ever liable. Id.

GENERAL CONCLUSIONS

Pursuant to the foregoing, the Court feels it is appropriate to make some general statements about Chapter 13 attorneys fees. In the future, the Chapter 13 standing trustee is directed to review applications for compensation by attorneys for debtors. She should expand her review to include the question of reasonableness of the fees under § 330(a). Trustee should file an objection to allowance of the fees if she determines it is appropriate in light of the law set out herein.

At the hearing, Attorney Peiffer asked the Court whether "project billing" is necessary when preparing fee applications. U.S. Trustee Guidelines for Reviewing Applications for Compensation states at paragraph II.D.1 that all time and service entries should be arranged by project categories to facilitate effective review of the application. Exhibit A to the Guidelines is a nonexhaustive list of "suggested project categories for use in most bankruptcy

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cases." These guidelines were promulgated at the request of Congress when it amended the Bankruptcy Code in 1994. In light of the foregoing, the Court finds that, although not explicitly required by the Code, fee applications under § 330(a) should comply with the U.S. Trustee Guidelines.

ANALYSIS

Mr. Peiffer's hourly fee in this case is \$165. The Court has reviewed other files which contain recent fee applications by attorneys who represent debtors. Mr. Peiffer's hourly fee is on the high end of the range of hourly fees the Court sees in applications for compensation from other debtor attorneys. Based on all the circumstances, however, the Court finds it is a reasonable hourly rate.

Next, the Court has reviewed the number of hours expended by Attorney Peiffer in the various projects of services rendered to Debtor in this case. The Court notes that Peiffer is charging much more than the base amount of \$1,000 for basic services such as preparing schedules and plan. The compensation Peiffer requests in the categories "Schedules and Statement of Affairs" and "Plan" is \$3,762.50. An additional \$1,138.50 is requested in the general category of "Communication with the Client and Trustee."

The Court has no reason to doubt that Mr. Peiffer put in the hours he has detailed. He has practiced primarily in bankruptcy and debtor/creditor work for almost 20 years. Mr. Peiffer produced very detailed and thorough explanations of his fee applications and has fully cooperated with the Court.

Attorney Peiffer explained that he had difficulty getting his client to cooperate. This can be inferred by the multiple Motions to Dismiss and amended plans. Such problems require additional time and energy to be spent to protect the debtor's interests. There is, however, little benefit to the estate or to unsecured creditors.

The Court has fully reviewed Peiffer's Application for Compensation and Explanation of Fee Applications in this case for reasonableness under the lodestar analysis. In these circumstances, paying further fees for Debtor's attorney through the plan is inappropriate. Peiffer has already received \$5,199.54 through the plan while unsecured creditors will receive a total of \$5,095.50 by the time the plan is complete in April 2004. Under Debtor's Fifth Amended Plan filed in October, they will probably receive even less.

Because Debtor himself caused the need for extensive legal services in this case, the Court concludes that the additional legal services requested by Peiffer should be allowed but not paid through the plan. Peiffer can collect the additional fees from Debtor personally, after his Chapter 13 plan is complete.

SUMMARY

When seeking compensation beyond the base amount, Chapter 13 debtors' attorneys have the burden to prove reasonableness of the fees requested under § 330(a). The Court will apply the lodestar analysis, including consideration of the effect that allowance of attorney compensation and payment through the plan will have on distributions to unsecured creditors. Trustee is directed to review fee requests for reasonableness and file objections when appropriate. Applications for fees should follow the U.S. Trustee guidelines.

In this case, the Court concludes Peiffer's hourly rate is reasonable. Considering the circumstances, the number of hours expended is acceptable under the lodestar analysis. The additional fees requested are allowable to be paid directly by Debtor and not through the Chapter 13 plan.

WHEREFORE, Peiffer's Application for Compensation and Reimbursement of Expenses of Attorney is GRANTED IN PART.

FURTHER, Peiffer is allowed additional compensation of \$1,243.18 collectible from Debtor after completion of his Chapter 13 plan.

FURTHER, the additional compensation allowed herein shall not be paid by Trustee through Debtor's plan.

SO ORDERED this 2nd day of December, 2003.

PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE