

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN
DISTRICT OF IOWA

IN RE:)
) Chapter 12
VINCENT W. MICHELS)
) Bankruptcy No. 03-00316
Debtor.)

IN RE:)
) Chapter 13
VINCENT W. MICHELS)
) Bankruptcy No. 01-01415
Debtor.

ORDER RE: DEBTOR'S ATTORNEY FEES

This matter came before the undersigned for hearing on December 9, 2003. Attorney Thomas Fiegen appeared for the Fiegen Law Firm ("Fiegen") as attorney for Debtor Vincent Michels. Janet Reasoner appeared for the U.S. Trustee. Carol Dunbar appeared as Chapter 12/Chapter 13 Trustee. After hearing arguments of counsel, the Court took the matter under advisement.

STATEMENT OF THE CASE

After the Court denied confirmation and entered dismissal in Debtor's Chapter 12 case, No. 03-00316, it ordered Mr. Fiegen to file a final application for compensation in the Chapter 13 case, No. 01-01415, an accounting of fees received in that case and an explanation of the "prepetition Chapter 13 fees of approximately \$7,000" referred to in the Application to Employ filed in the Chapter 12 case. The Court also ordered Mr. Fiegen to file an itemization of fees and expenses for legal services rendered in the Chapter 12 case. Mr. Fiegen has complied with these orders.

U.S. Trustee and the Chapter 12/Chapter 13 Trustee filed objections to the fee applications in both cases. U.S. Trustee objects to Fiegen paying himself from a January 2003 retainer for Chapter 13 fees beyond those already approved by the Court. Also, Fiegen treats the same funds as both a postpetition payment of Chapter 13 fees and as a Chapter 12 retainer. U.S. Trustee further questions Fiegen's billing judgment and the reasonableness of the fees requested.

Trustee objects in the Chapter 13 case that Fiegen may have taken more fees than allowed during the case. No payments have been

made to priority claims of \$32,982.95 or unsecured claims of \$63,440.40 in the Chapter 13 case.

Trustee joins in U.S. Trustee's objections regarding reasonableness of fees in both cases. In the Chapter 12 case, Trustee objects to Fiegen paying himself close to \$8,500 without Court approval. She states priority claims equal \$29,564.65 and unsecured claims total \$79,251.38 in the Chapter 12 case. She has paid the accountant \$990 approved by the Court and retains \$320 on hand.

Fiegen objects to the Court's jurisdiction to consider attorney fees after dismissal of the bankruptcy case. He also argues that consideration of the reasonableness of the fees in the Chapter 12 case is premature as the order denying confirmation and dismissing the case is under appeal.

Debtor Vincent Michels filed a Chapter 13 petition on April 23, 2001. This case was dismissed on January 9, 2003. Debtor filed a Chapter 12 petition on February 5, 2003. This case was dismissed on September 19, 2003. Creditor Maynard Savings Bank appealed orders denying its claim and confirming the plan in the Chapter 13 case. The B.A.P. reversed the confirmation order and this Court dismissed the case on remand. Debtor has appealed the order denying confirmation and dismissing the case in the Chapter 12 case, which remains pending on appeal.

Fiegen filed an interim application for compensation as Debtor's attorney in the first case for services rendered between March 1, 2001 and January 31, 2002. On May 14, 2002, the Court approved compensation in the amount of \$17,473, of which \$14,890 would be paid through the plan and \$3,950 had been paid by retainer. Prior to dismissal of the case, Fiegen had received \$13,954 through plan payments.

In response to this Court's order filed September 24, 2003, Fiegen filed a Final Application for Compensation requesting \$8,600.21 for services rendered in the Chapter 13 case between February 1, 2002 and January 31, 2003. In the Application, Fiegen reserves its right to raise the jurisdiction of the Court on a case that has been closed.

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Fiegen also filed an Interim Application for Compensation in the Chapter 12 case as ordered by the Court. This requests \$22,205.85 for services rendered between February 1, 2003 and September 30, 2003. Thus, total fees are requested for representing Debtor in both the Chapter 13 and Chapter 12 cases of \$48,279.06. Of this amount, Fiegen has received a total of \$17,904, plus \$8,491.82 Fiegen paid itself from the January 2003 retainer.

In both fee applications, Fiegen discloses that Debtor turned over to Fiegen a refund check of \$5,260.14 he received from the Chapter 13 Trustee on January 22, 2003 after dismissal of the Chapter 13 case. Debtor also paid Fiegen \$3,500 on January 24, 2003. Out of the total of \$8,760.14, Fiegen paid itself \$8,491.82. In the Chapter 12 application, Fiegen states that it treated these funds as a retainer for the Chapter 12 case. At the hearing, it became apparent that Fiegen applied the funds from this retainer to previously unbilled fees in the Chapter 13 case.

Although not clearly stated in the applications or at the hearing, the Court assumes that Fiegen paid itself the \$8,491.82 after the Chapter 12 petition date. This can be inferred from the fact that the Application to Employ Fiegen Law Firm filed in the Chapter 12 case on February 7, 2003 states, in paragraph 7: "Michels desires to employ these attorneys under an initial retainer of \$8,530.14 plus a filing fee of \$230.00; less prepetition Chapter 13 fees of approximately \$7,000.00, plus payment out of the Chapter 12 Plan after Court review and approval." Fiegen explains the \$7,000 figure was an estimate as it had not finalized its billing in the Chapter 13 case. Apparently, this Chapter 13 billing became finalized sometime after the Chapter 12 petition was filed in the amount of at least \$8,491.82. Fiegen then paid itself that amount from funds in its trust account which it reports that it treated as the Chapter 12 retainer.

At the hearing, Fiegen conceded that the Court retains jurisdiction to consider reasonableness of fees in the Chapter 12 case after the appeal is decided. In light of this concession, the Court acquiesces in Fiegen's request to hold the Chapter 12 fee application in abeyance until after the appeal is finalized. The issue which is currently ripe to be addressed is Fiegen's challenge to the Court's jurisdiction to

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determine the allowance and payment of Debtor's attorney fees in the dismissed Chapter 13 case.

CONCLUSIONS OF LAW

Fiegen relies on a line of cases which hold that the court has no jurisdiction to consider an application for fees after dismissal, unless the order of dismissal retains limited jurisdiction for that purpose. In re Bockes Bros. Farms Inc., No. 93-60881KW, slip op. at 2 (Bankr. N.D. Iowa June 16, 1995); In re Talandis, 95 B.R. 108, 110 (Bankr. S.D. Iowa 1989); In re M.O.D., Inc., 170 B.R. 465, 466 (Bankr. M.D. Ala. 1994). As Fiegen notes in its Objection to Jurisdiction, these cases are generally based on § 349(b) (3) which provides that dismissal of a

case reverts property of the estate "in the entity in which the property was vested immediately before the commencement of the case", i.e. in Debtor. M.O.D., Inc., 170 B.R. at 466. Thus, post-dismissal, the estate no longer contains property which can be used to pay professional fees as an administrative expense.

This line of cases has no effect on the Court's jurisdiction to consider allowance of fees to Fiegen as Debtor's attorney in these cases. The bankruptcy court has broad power and discretion to award or deny attorney fees and a duty to examine them for reasonableness. In re Clark, 223 F.3d 859, 863 (8th Cir. 2000). "Disagreeable as the chore may be, the bankruptcy court must protect the estate, lest overreaching attorneys or other professionals drain it of wealth which by right should inure to the benefit of unsecured creditors." In re Busy Beaver Bldg. Centers, Inc., 19 F.3d 833, 843 (3d Cir. 1994).

The Court's authority to act in this matter arises under § 329 as implemented by Bankruptcy Rules 2016 and 2017. See In re Marin, 256 B.R. 503, 506-07 (Bankr. D. Colo. 2000). These provisions furnish the court with express power to review payment to debtors' attorneys. In re Martin, 817 F.2d 175, 180 (1st Cir. 1987). This authority is not vitiated by the dismissal of the case. Marin, 256 B.R. at 507. In Chapter 13,

Sections 329 and 1326(a)(2) implement a well coordinated scenario to allow the court to oversee the charges made by professionals, particularly in consumer bankruptcy cases. Under 329, and the

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related Rule 2016(b), an attorney must disclose all fees paid, or agreed to be paid, for services performed for a debtor. If the attorney wants to be paid out of the estate, then an application must be filed under section 330 of the Code, and the fees allowed. Those allowed fees are then an administrative expense of the estate per section 503(b) and, in a chapter 13 case, are paid out of the funds held by the trustee before any funds are paid out to creditors or returned to the debtors. . . . An attorney who extracts payments from debtors other than pursuant to proper disclosure, or to allowance under section 330, stands in violation of the provisions of the bankruptcy Code, and may properly be stripped of all fees.

Id.

Several bankruptcy courts have acknowledged their duty to oversee allowance of attorney fees to debtors' counsel after

dismissal of the bankruptcy case. In re Harshbarger, 205 B.R. 109, 111 (Bankr. S.D. Ohio 1996). "The oversight of the bankruptcy court should and hence must not end upon the mere dismissal of a case, lest overreaching counsel could frustrate the requisite court review by the simple medium of encouraging the debtor to seek dismissal." In re Quaker Distributors, Inc., 189 B.R. 63, 68 (Bankr. E.D. Pa. 1995), aff'd in part, 207 B.R. 82 (E.D. Pa. 1997) (affirming allowance of fees but striking determination of relative priority interests in retainer for lack of jurisdiction). Even after dismissal of a case, a bankruptcy court is obliged to review all aspects of a professional's compensation, including reasonableness and whether counsel may receive payment from a debtor's retainer. Id. The court's duty of oversight of fee matters embraces a broad supervisory power over any fees charged in contemplation of, or in connection with, a bankruptcy case, even though the case has been dismissed. In re Fricker, 131 B.R. 932, 938 (Bankr. E.D. Pa. 1991); see also In re Fox, 140 B.R. 761, 762 (Bankr. D.S.D. 1992) (finding broad supervisory power over fees continues after dismissal); In re Tennessee Valley Center, 99 B.R. 845, 847 (Bankr. W.D. Tenn. 1989).

One court has stated that it has the "inescapable duty to determine the reasonableness of attorney's fees awards," which duty must be performed even after dismissal of the case. In re Lowe, 97 B.R. 547, 548 (Bankr. W.D. Mo. 1987) (Stewart,

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J.). "[T]he court retains jurisdiction to determine the distribution of funds which remain in custodia legis, as do attorney's fee awards, both on the basis of recognized jurisdictional principles and also on the basis of the court's well-established duty and power to regulate practice of counsel before it." Id. at 548-49. Thus, "adjustment of attorney fees is a matter forever within the subject matter jurisdiction of the bankruptcy court." In re Farquhar, 96 B.R. 945, 951-52 (Bankr. W.D. Mo. 1988).

Furthermore, the Bankruptcy Code specifically provides for the award of interim compensation. 11 U.S.C. § 331. Because interim awards are interlocutory and often require future adjustments, they are always subject to the court's reexamination and adjustment during the course of the case. Interim fees are not subject to concepts of res judicata or issue preclusion and are always subject to final review and modification. In re Cedar Rapids Meats, No. L90-00445-C, slip op. at 13 (Bankr. N.D. Iowa June 17, 1999); In re Lockwood Corp., 216 B.R. 628, 637 n.4 (Bankr. D. Neb. 1997). "Clearly, interim awards are subject to final adjustments and, as such, fully reviewable." In the Matter of Evangeline Ref. Co., 890 F.2d 1312, 1321 (5th Cir. 1989).

DRAW DOWN FROM RETAINER

In In re Emerson Mattress, Inc., No. 95-12358, slip op. at 2 (Bankr. N.D. Iowa June 7, 1996), this Court held that counsel may not take payments on fees from retainers absent the required application and approval process under 11 U.S.C. §§ 330 and 331. "Although there is authority to the contrary, the majority rule in bankruptcy is that all retainers . . . must be held in trust pending court approval." In re Pineloch Enters., Inc., 192 B.R. 675, 679 (Bankr. E.D.N.C. 1996) (emphasis in original).

The Northern District of Iowa has endorsed the majority rule. Emerson Mattress, slip op. at 2; In re Digman, No. 98- 00220-C, slip op. at 4 (Bank. N.D. Iowa Aug. 17, 1998); In re Paquin, No. 95-40909XM, slip op. at 2 (Bankr. N.D. Iowa May 13, 1996) (Edmonds, J.).

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

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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.

Paquin, slip op. at 2. The Court also followed the majority rule in In re Cargo, Inc., No. X90-00200S, slip op. at 6 (Bankr. N.D. Iowa Jan. 24, 1992) (Edmonds, J.), where it 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."

Finally, the Court has repeatedly noted that only the amount allowed by the court is collectible by the attorney. 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 they are 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.

CONCLUSIONS

The Court has jurisdiction to consider allowance and payment of fees to Fiegen as Debtor's attorney in both the Chapter 13 and

Chapter 12 cases. The award of interim compensation to Fiegen in the Chapter 13 case is not final and is fully reviewable. Fiegen had no authority to draw down from the January 2003 retainer. If the draw is considered payment of unbilled fees in the Chapter 13 case, these fees were not disclosed to or approved by the Court, making the draw from the retainer improper. If the draw is considered payment of prepetition fees in the Chapter 12 case, it is improper as it occurred postpetition without approval of the Court.

The Court hereby orders Fiegen to disgorge the draw from the January 2003 retainer of \$8,491.82, to be replaced in its trust account pending further order of the Court. The Court has agreed to hold consideration of the Chapter 12 application for compensation in abeyance pending the outcome of the appeal. The Court also considers it prudent to postpone final consideration of the Chapter 13 compensation applications.

The Court retains jurisdiction to consider the reasonableness



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tion requested in both cases and any other
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Fiegen Law Firm is ordered to disgorge
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WHEREFORE,

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this 15th day of December, 2003.
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PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE

SO ORDERED