

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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May 9, 2003

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Subject: *In re Lorraine M. Hankins,*
Chapter 7; Bankr. No. 01-41241

Dear Counsel:

The matter before the Court is the Rule 2016(a) Application [for] Compensation and Reimbursement filed by John Harmelink and Wanda Howey-Fox, counsel for Debtor, and the objection thereto filed by the United States Trustee. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that Debtor's counsel shall not be compensated from the bankruptcy estate for any services rendered from December 5, 2001, through April 2, 2003.

SUMMARY. Lorraine M. Hankins ("Debtor") filed a Chapter 7 petition on November 2, 2001. That day, her bankruptcy attorney, John Harmelink, filed a disclosure of compensation that stated his legal fees for services through the § 341 meeting of creditors would be \$950 and that sales tax, the filing fee, and other costs would be \$300 for a total of \$1,250. Attorney Harmelink further disclosed that Debtor had paid him \$300 and that he was still owed \$950, which Debtor agreed to pay over time at \$100 every two weeks commencing November 12, 2001.

Debtor filed her schedules and statements on November 16,

Re: Lorraine M. Hankins
May 9, 2003
Page 2

2001. The meeting of creditors was held and concluded on November 30, 2001.

On November 28, 2001, Debtor filed a contempt motion against a creditor for alleged violations of the automatic stay. The matter was resolved between the parties and Debtor withdrew her motion on December 21, 2001.

The case trustee, Lee Ann Pierce, filed an objection to Debtor's claimed exemptions on December 27, 2001. The objection involved *inter alia* some realty in Nebraska that Debtor was inheriting and the application of Nebraska exemptions law. The initial Bankruptcy Court hearing on the matter was continued once to allow the Nebraska probate to be resolved. At the second hearing on March 19, 2002, the parties reported that they would submit an agreed order that gives the bankruptcy estate whatever Debtor would eventually receive through the probate. An order was entered March 22, 2002. On April 4, 2002, Debtor moved to vacate that order essentially stating that she had received more in the probate than expected and that she should now be allowed to exempt it. The Court denied the motion and directed Debtor to turnover the probate assets. Debtor again requested a new trial on May 13, 2002. This time, Debtor argued that new disclosures about the nature of the asset (real v. personal) warranted an allowance of her exemption. Trustee Pierce and Debtor finally resolved the matter and an order approving their agreement was entered June 20, 2002.

In April 2003, Trustee Pierce filed her Final Report and Proposed Distribution to disbursement the minimal assets in the case, \$1,001.99. She proposed to pay the allowed trustee compensation of \$250.50. The balance was to be divided pro rata and paid to the bankruptcy estate's unsecured creditors. Attorney Harmelink filed an objection to the report arguing that his legal fees and costs of \$983.32 for services and expenses after the § 341 meeting of creditors should be paid from the bankruptcy estate.

In conjunction with the objection to the Trustee's Final Report and Proposed Distribution, Attorney Harmelink and his law

Re: Lorraine M. Hankins
May 9, 2003
Page 3

partner, Wanda Howey-Fox,¹ filed a Rule 2016(a) Application [for] Compensation and Reimbursement. Therein, they sought under 11 U.S.C. § 330 compensation for services rendered from December 5, 2001, through April 2, 2003, which totaled \$869, sales tax on compensation of \$45.02, and reimbursement of related expenses totaling \$69.30, for a total of \$983.32.

The United States Trustee objected to Attorney Harmelink's fee application. He argued that none of the services for which Attorney Harmelink sought compensation were rendered for the benefit of the bankruptcy estate, which is required by 11 U.S.C. § 330(a)(3)(C).

A hearing on the fee application was set for May 13, 2003. Since no facts are in dispute and since the applicable case law is not new to either party, see, e.g., *In re Tommy O. and Diane E. Rice*, Bankr. No. 93-40057, slip op. (Bankr. D.S.D. Aug. 11, 1995), this letter decision is being entered before the hearing to stave off further expenses in this case.

APPLICABLE LAW. The standards for allowing compensation and reimbursement from the bankruptcy estate are established by 11 U.S.C. § 330(a). The applicant bears the burden of documenting the appropriate hours expended and showing an entitlement to a fee award. *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991).

The compensation awarded must be for "actual, necessary services." 11 U.S.C. § 330(a)(1)(A). Further, the compensation award must be reasonable. *Id.* In determining reasonableness, the Court must consider "the nature, the extent, and the value of [the] services, taking into account all relevant factors[.]" 11 U.S.C. § 330(a)(3)(A). Factors to consider include:

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which

¹ Attorney Harmelink rendered most services in the case. Accordingly, for consistency, references in this letter decision are to him only, not to his partner or law firm.

Re: Lorraine M. Hankins
May 9, 2003
Page 4

the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3)(A). Further, the fees sought must be for services that benefitted the bankruptcy estate or that were necessary for the administration of the estate. 11 U.S.C. § 330(a)(4)(A); see *In re Kloubec*, 251 B.R. 861, 864-66 (Bankr. N.D. Iowa 2000). Finally, reimbursement must be for "actual, necessary expenses." 11 U.S.C. § 330(a)(1)(B).

As amended in 1994, there is no specific provision under § 330(a) for awarding a Chapter 7 debtor's attorney's fees from the bankruptcy estate. *In re Ramey*, 266 B.R. 857, 859-62 (Bankr. S.D. Iowa 2001). This Court has not strictly applied the amended statute absent controlling authority to the contrary. *Id.* at 860 (list of cases on both sides of issue).² Instead, this Court held that a Chapter 7 debtor's attorney generally is entitled to compensation for analyzing the debtor's financial condition, rendering advice and assistance to Debtor in determining whether to file a petition in bankruptcy; preparing the petition, the schedule of assets and liabilities, and the statement of financial affairs; and representing the debtor at the § 341 meeting of creditors. *In re Dawson*, 180 B.R. 478, 479 (Bankr. E.D. Tex. 1994); *Rice*, slip op. at 4-6; *In re Walgamuth*, Bankr. No. 91-50270, slip op. at 5 (Bankr. D.S.D. July 1, 1992). These are the services that aid the Chapter 7 debtor in performing his legal duties under the Bankruptcy Code

² The issue is presently before the Supreme Court. See *Equipment Services, Inc.*, 290 F.3d. 739 (4th Cir. 2002), cert. granted, *Lamie v. U.S. Trustee*, 123 S.Ct. 1480 (U.S. March 10, 2003) (No. 02-693).

Re: Lorraine M. Hankins
May 9, 2003
Page 5

and that are necessary to the administration of the case.³ *Erricola v. Utell (In re Gaudette)*, 268 B.R. 322, 325 (Bankr. D.N.H. 2001) (assuming a debtor's attorney can be compensated from the estate under § 330, such fees may only be awarded for

³ To receive compensation for Chapter 7 services that the debtor's attorney claims aided the case trustee, the attorney generally must show how such services were necessary and helped preserve the estate, as required by 11 U.S.C. § 503(b)(1)(a). *In re Dale G. and Brenda L. Hermanson*, Bankr. No. 95-40711, slip op. at 2-3 (Bankr. D.S.D. July 11, 1996). Factors to consider in this situation include:

1. *Was the attorney formally employed by the estate as required by § 327(a)?*

The standards for employment of estate professionals set forth in §327(a) help insure that estate professionals do not represent competing interests. Court approval of estate professionals further helps the court control administrative expenses and "prevent those performing work without the necessary authority from being 'officious intermeddler[s] or gratuitous volunteer[s]'" *In re Sound Radio, Inc.*, 145 B.R. 193, 202 (Bankr. D.N.J. 1992). Further, do circumstances warrant a retroactive employment order? See *United States Trustee v. Grenoble Apartments, II (In re Grenoble Apartments), II.*, 152 B.R. 608, 611. n.6 (D.S.D. 1993); *In re Engercy Co-op, Inc.*, 95 B.R. 961, 963 (Bankr. N.D. Ill. 1988).

2. *Should the trustee or the trustee's attorney have performed the services that the debtor's attorney performed?*

As the Court stated in *Rice*, Bankr. No. 93-40057, slip op. at 7, to compensate a debtor's attorney from the estate for any work that the case trustee should have done would foster "double dipping" from the estate. See *In re Urrutia*, 137 B.R. 563, 567 (D.P.R. 1990) (services by a debtor's counsel that are compensated from the estate should fall within the scope of duties performed by a debtor's attorney and should not duplicate or bypass the responsibilities of the trustee).

3. *Were the services performed legal in nature?*

Only professional services, not secretarial, should be compensated from the estate, regardless of the professional who is seeking compensation. See *Urrutia*, 137 B.R. at 567.

Re: Lorraine M. Hankins
May 9, 2003
Page 6

services that actually benefitted the estate); *Dawson*, 180 B.R. at 479.

DISCUSSION. All of the services that Attorney Harmelink rendered between December 5, 2001, through April 2, 2003, benefitted only Debtor, not the bankruptcy estate. The only exception was Attorney Harmelink's attendance at Debtor's § 341 meeting of creditors.⁴ That service, however, was covered in the parties' original fee arrangement. Since none of the services benefitted the estate, no compensation for them nor any reimbursement for related expenses may be allowed from the bankruptcy estate pursuant to § 330(a)(4)(A)(ii). Debtor is personally responsible to pay those fees and costs from post-petition assets.⁵ Accordingly, the United States Trustee's objection to Attorney Harmelink's fee application will be sustained in its entirety.

The United States Trustee did not raise a concern regarding Attorney Harmelink's receipt of post-petition installment payments from Debtor for pre-petition services and for attendance at the § 341 meeting. Accordingly, the Court will not order the disgorgement of those fees. Counsel is cautioned, however, that such a fee arrangement presents notable problems. In essence, Attorney Harmelink's claim on the petition date for unpaid services rendered pre-petition, in which this Court includes representation of Debtor at the § 341 meeting, was discharged. 11 U.S.C. § 727(b); *Hessinger and Associates v. U.S. Trustee (In re Biggar)*, 110 F.3d 685, 686-88 (9th Cir. 1997); *In re Leitner*, 221 B.R. 502, 505-06 (Bankr. D. Neb.

⁴ An entry for January 2, 2002, indicated Attorney Harmelink prepared an amendment to Debtor's schedule. The amendment was never filed so the Court is unable to conclude that this service benefitted the estate.

⁵ Attorney Harmelink's time on April 2, 2003, associated with objecting to Trustee Pierce's Final Report and Proposed Distribution benefitted neither Debtor nor the bankruptcy estate since it was only to protect any fees Attorney Harmelink might be awarded from the estate. The time, therefore, should be excluded from those post-petition services that are billed to Debtor.

Re: Lorraine M. Hankins
May 9, 2003
Page 7

1998) (discharge under § 727(a) discharges the debtor "from all pre-petition debts, including attorney's fees"). The only way the unpaid fees for pre-petition services would have escaped the discharge is if Debtor and Attorney Harmelink had timely entered into a court-approved reaffirmation agreement. 11 U.S.C. § 524(c) and (d); *In re Nidiver*, 221 B.R. 581, 583-84 (Bankr. D. Neb. 1998); *In re Perez*, 177 B.R. 319 (Bankr. D. Neb. 1995). They did not.⁶

An appropriate order will be entered.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original and serve copies on parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

MAY 09 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court District of South Dakota
By _____

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

MAY 09 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

⁶ There are also problems with a Chapter 7 debtor's attorney receiving compensation pre-petition for post-confirmation services. See *In re Richard J. and Arla R. Pearsall*, Bankr. No. 00-30080, slip op. (Bankr. D.S.D. Jan. 11, 2001) (includes discussion of *Snyder v. Dewoskin (In re Mahendra)*, 131 F.3d 750 (8th Cir. 1997)).

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