UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re: TOMMY O. RICE Social Security No. 478-54-3475 and DIANE ELLEN RICE Social Security No. 480-64-0330 Debtors.	)	Bankr. No. 93-40057 Chapter 7 MEMORANDUM OF DECISION RE: FEE APPLICATION BY DEBTORS' COUNSEL

The matter before the Court is the Rule 2016(a) Application for Compensation and Reimbursement filed by Debtors' counsel and the objections thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Debtors' counsel should be allowed $3,008.70 in compensation and reimbursement from the estate.

I.

Debtors filed a Chapter 13 petition on February 2, 1993. Attorney John Harmelink filed a disclosure of compensation statement that said the Harmelink & Fox Law Office had received $150.00 for the filing fee and that the firm had taken a mortgage on certain real property to secure future fees estimated to be $5,000.00.

A plan was confirmed July 19, 1993.[1] By Order entered August 19, 1993, Harmelink & Fox was awarded $4,231.21 in

[1] The Hon. Peder K. Ecker, presiding.

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compensation and reimbursement for services and expenses through May 1, 1993. By Order entered September 22, 1993, Harmelink & Fox was allowed from the estate another $2,323.14 in compensation and reimbursement for services and expenses through June 30, 1993.

Trustee Yarnall moved for conversion of the case on December 9,1993 because Debtors had failed to make their plan payments. The matter was continued several times. The case ultimately was converted to a Chapter 7 proceeding by Order entered October 25, 1994.[2]

After the case was converted, the contract for deed holders on some estate real property filed a motion for relief from the automatic stay. Chapter 13 Trustee Rick A. Yarnall resisted the motion because he wanted to preserve for the estate any equity in the property. Debtors also resisted the motion and argued that equity may exist. A hearing was held November 30, 1994. The parties reached an agreement that provided for a dismissal of the motion on the condition that Trustee Yarnall would accept or reject the contract for deed by July 1, 1995.

Trustee Yarnall accepted the contract and offered the property for sale. Trustee Yarnall also obtained the Court's approval to employ himself as the estate attorney. Services to be performed included assisting with the sale of estate real property. A hearing to accept the high bid on the real property and to receive upset bids was held July 18, 1995. No upset bids were received.

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[2] The case was reassigned to the undersigned on November 1, 1994.

On May 15, 1995, Harmelink & Fox filed a third fee application and requested $4,184.00 in compensation, $269.02[3] in sales tax, and $887.62 for expenses from July 20, 1993 through May 5, 1995. The United States Trustee objected on June 5, 1995. The United States Trustee argued that:

(1) Any fees awarded for pre-conversion services and costs must be subordinated to payment of all post-conversion administrative expenses;

(2) Services rendered in resistance to the case trustee's motion to dismiss or convert the case did not benefit the estate; and

(3) With the exception of services and expenses related to the attorney's appearance with Debtors at the Chapter 7 § 341 meeting on November 18, 1994, none of the post-conversion services benefited the estate.

A hearing was held June 27, 1995. Appearances included John E. Harmelink for Harmelink & Fox Law Office, Charles L. Nail, Jr., Assistant U.S. Trustee, and Chapters 13 and 7 Trustee Rick A. Yarnall. Attorney Harmelink urged the Court to approve all post-conversion fees because he had benefited the estate by securing buyers for the real property being sold by the Trustee. Trustee Yarnall indicated Attorney Harmelink had found buyers whose interest in the property resulted in a higher bid from another

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[3]Applicant's sales tax figures appear to be incorrect. Yankton's sales tax is 6%, so the sales tax requested should have been $251.04. Any glitch in their computer-generated fee statement needs to be corrected.

party. Trustee Yarnall took no position on the fee application. Assistant U.S. Trustee Nail argued that services by Attorney Harmelink regarding the real estate sale were not included in his fee application and should not be considered at this time. He also set forth relevant case law and policy reasons on why a debtor's attorney should not be compensated for post-conversion services that do not benefit the estate. The Court took the matter under advisement.

II.

The standards for allowing compensation and reimbursement to a debtor's counsel in this District are based on substantial case law from the Court of Appeals for the Eighth Circuit and this Court. The case law, of course, is based on 11 U.S.C. § 330.[4]

Section 330 of the Bankruptcy Code states the Court may award to a debtor's attorney

> (1) reasonable compensation for actual, necessary services rendered by such . . . attorney . . . based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a [bankruptcy case].
>
> (2) reimbursement for actual, necessary expenses.

Services rendered by the debtor's counsel must benefit the estate to be compensated from the estate. *In re Reed*, 890 F.2d 104, 105-06 (8th Cir. 1989). As this Court previously noted,

> [a]lthough the phrase "benefit the estate" is not defined in *Reed*, . . . the court emphasizes the

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[4] Section 330 was amended on October 22, 1994. The pre-amendment version is applied here since the majority of services were rendered prior to enactment of the amendments.

> distinction between services that benefit the estate and those that benefit only the debtor. One court has noted that compensation for services that "benefit the estate" was a standard established under the Bankruptcy Act but that there was no evidence that Congress intended to modify that reasoning when it adopted § 330(a). *In re Ryan*, 82 B.R. 929, 932 (N.D. Ill. 1987). Another court, after comparing § 330(a) with its pre-Code predecessor, concluded that the "benefit the estate" standard is subsumed by the "reasonable compensation for actual, necessary services" standard set forth in § 330(a). *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 485-86 (Bankr. N.D. Ill. 1992). Most notable, neither court, like the court in *Reed*, limited "benefit to the estate" to monetary benefit.

In re Brandenburger, 145 B.R. 624, 628-29 (Bankr. D.S.D. 1992). In essence, the tangible benefit conferred on the estate and its creditors is a proper measure of the appropriate compensation. Moreover, the fees awarded should be reasonable in light of the results obtained. *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260-61 (8th Cir. 1991). The applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended. *Id.* at 260.

A case by case, item by item review of the application is appropriate. *In re Marolf Dakota Farms Cheese, Inc.*, Bankr. No. 89-50045, slip op. at 8 (Bankr. D.S.D. October 17, 1990)(cites omitted). "[U]ncertainties should be resolved against the [applicant], if arising because of imprecise recordkeeping without adequate justification. *H.J. Inc.*, 925 F.2d at 261 (quoting *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1275 (8th Cir. 1980)); *In re Hanson*, Bankr. No. 386-00136, slip op. at 7 (Bankr. D.S.D. March 8, 1989). Historically, courts have not awarded compensation under § 330 for

services by a debtor's attorney that seek to protect the debtor's discharge or the dischargeability of a certain debt. *Reed*, 890 F.2d 104 at 105.

In a Chapter 7 case, the debtor's counsel generally is compensated for analyzing the debtor's financial condition, rendering advice and assistance to the 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 Walgamuth*, Bankr. No. 91-50270, slip op. at 5, (Bankr. D.S.D. July 1, 1992)(citing *In re Nu-Process Industries, Inc.*, 13 B.R. 136, 138 (Bankr. E.D. Mich. 1981)).

If a Chapter 11, 12, or 13 case has been converted to a Chapter 7, the allowed pre-conversion fees will be a priority administrative expense behind the Chapter 7 administrative expenses. 11 U.S.C. sec. 726(b).

III.

All objections raised by the United States Trustee will be sustained. The Court can find no benefit to the estate from the ten-month delay in resolving the Trustee's motion to dismiss or convert. If a debt adjustment under Chapter 13 was no longer reasonably feasible for Debtors, the delay in the conversion accomplished nothing for the estate and should not be compensated from the estate. *In re Alderson*, 114 B.R. 672, 679-81 (Bankr. D.S.D. 1990).

Further, no compensation or reimbursement from the estate will

be allowed for post-conversion services related to the defense of Debtors in the dischargeability complaint. Debtors, not the estate, were again the sole beneficiary of those services. Therefore, compensation from the estate is not warranted.

The post-conversion service for which Harmelink & Fox may be compensated is attending the Chapter 7 § 341 meeting with Debtors. That is a normal Chapter 7 service that benefits both the estate and Debtors and appropriately is compensated from the estate.

Finally, this fee application contains few, if any, post-conversion entries regarding Attorney Harmelink's effort to find buyers for the real property being sold by Trustee Yarnall. On July 31, 1995, Attorney Harmelink filed another fee application seeking compensation for those services. A determination of whether those services are compensable from the estate will be left to another day.

An appropriate order will be entered.

So ordered this 14 day of August, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA A. JOHNSON, ACTING CLERK
By: _____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT SEAL

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to all parties in interest set forth on the attached service list
U.S. Bankruptcy Clerk
District of South Dakota
By: _____
Date: 8-14-95

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
AUG 14 1995
Clerk
U.S. Bankruptcy Court, District of S.D.

Case: 93-40057 Form id: 122 Ntc Date: 08/14/95 Off: 4 Page : 1
Total notices mailed: 8

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