

**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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October 6, 2003

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Subject: *In re Antonio M. Aguirre, Sr., and*  
*Kelli D. Aguirre, Chapter 7; Bankr. No. 01-40161*

Dear Counsel:

The matter before the Court is the Rule 2016(a) Application for Compensation and Reimbursement filed by Harmelink & Fox Law Office on July 23, 2003, and the objection thereto filed by the United States Trustee on August 8, 2003. 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.R.Bankr.P. 7052. As set forth below, the Application will be approved in part as an administrative expense and in part as fees to be paid by Debtors personally.

*Summary.* Antonio M. Aguirre, Sr., and Kelli D. Aguirre ("Debtors") filed a joint Chapter 13 petition on February 23, 2001, with the assistance of John Harmelink of Harmelink & Fox Law Office ("Harmelink & Fox") as their bankruptcy counsel. Attorney Harmelink disclosed that he received a \$300 retainer and that Debtors had agreed to pay the expected balance of \$1,050 through \$50 semi-monthly payments.

A plan was confirmed on April 26, 2001. The Plan as Confirmed provided that Harmelink & Fox would be paid approximately \$1,800

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through 36 monthly payments by Trustee Dale A. Wein. The final sum of attorneys' fees owed, however, had not been determined through a fee application by Harmelink & Fox.

On June 6, 2001, Harmelink & Fox filed a fee application for services rendered and expenses incurred between January 25, 2001, and May 16, 2001. No objections were filed. On July 3, 2001, the law firm was awarded, after application of the \$300 retainer, fees totaling \$2,092.15. Of that sum, \$1,800 was to be paid by Trustee Wein through the confirmed plan. Debtors were ordered to pay the balance of \$292.15 after their discharge was entered.

On November 20, 2001, Debtors voluntarily converted their Chapter 13 case to Chapter 7. In his final report following the conversion, Trustee Wein stated that with the \$1,020 in plan payments made by Debtors, he had paid \$111.57 of it to Harmelink & Fox. That left a balance due to Harmelink & Fox of \$1,688.43 of the fees that were to be paid through the plan and the entire balance of \$292.15 that was to be paid by Debtors post-discharge.

During the administration of the case after conversion, one secured creditor sought relief from the automatic stay, which was resolved, and Chapter 7 Trustee Lee Ann Pierce objected to Debtors' claimed exemptions, which was settled by stipulation. Attorney Harmelink represented Debtors personally on both matters.

In August 2002, creditors were notified that the bankruptcy estate had assets and they were instructed to file proofs of claim. A distribution to creditors has not yet been made. Trustee Pierce advised the Bankruptcy Court in mid-August 2003 that she is still trying to settle a personal injury claim that is an estate asset.

On July 23, 2003, Harmelink & Fox filed a second fee application. This time the firm sought compensation for services and reimbursement of expenses between August 17, 2001, and August 19, 2002. The firm sought \$1,322.75 for compensation, \$79.37 for sales tax, and \$244.38 for expenses for a total of \$1,646.50.

The United States Trustee timely filed an objection to Harmelink & Fox's fee application. He did not object to the fees and expenses sought for services rendered and costs incurred before the case was converted to Chapter 7. However, he did object to

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services rendered on January 7 and 29, February 11, 21, and 26, July 15, and August 8 and 14, 2002. He argued these services were rendered and the related costs were incurred only for Debtors' personal benefit, not for the benefit of the bankruptcy estate. The United States Trustee also objected to some double entries in Harmelink & Fox's itemization of services.

Harmelink & Fox and Assistant United States Trustee Bruce J. Gering originally submitted an agreed order that provided for some fees to be paid from the bankruptcy estate for services that were beneficial to the estate and for the balance of the fees to be paid by Debtors for those services which benefitted only Debtors. Upon informally learning that the Chapter 7 estate may not have any assets to pay administrative claims against the bankruptcy estate, Harmelink & Fox submitted a second proposed order that provided for all fees to be paid by Debtors.

*Discussion.* Section 330(a) of the Bankruptcy Code provides for estate professionals to be compensated from the bankruptcy estate for services that benefit the debtor's estate or were necessary for the administration of the case. In a Chapter 12 or Chapter 13 case, compensation also may be awarded to the debtor's attorney for "representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services" and the other factors set forth in § 330. Thus, in a Chapter 13 case, both pre and post-confirmation services rendered and costs incurred by the debtor's counsel may be awarded under § 330. See *In re Kloubec*, 251 B.R. 861, 864-66 (Bankr. N.D. Iowa 2000) (services that assist a debtor in performing his legal duties as opposed to exercising a legal privilege are compensable from the bankruptcy estate).

As amended in 1994, § 330 no longer makes any provision for payment of a Chapter 7 debtor's attorney. However, this Court has generally allowed compensation from the bankruptcy estate for certain basic services by a Chapter 7 debtor's attorney that aid the Chapter 7 debtor in performing his legal duties under the Bankruptcy Code and that are necessary to the administration of the case. *In re Dawson*, 180 B.R. 478, 479 (Bankr. E.D. Tex. 1994); compare *In re Perry*, 225 B.R. 497, 500-01 (Bankr. D. Co. 1998). These services include analyzing the debtor's financial condition, rendering advice and assistance to the debtor in determining

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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. *Dawson*, 180 B.R. at 479; *In re Walgamuth*, Bankr. No. 91-50270, slip op. at 5 (Bankr. D.S.D. July 1, 1992).

Section 503(b)(2) provides that fees awarded under § 330(a) are allowed as an administrative expense. Section 507(a)(1) gives these administrative expense claims first priority when estate assets are distributed by the case trustee. Those attorney's fees and costs that are not allowed as an administrative expense, however, are not then owed by the debtor; they are simply not allowed and are not collectable. See generally *In re Gantz*, 209 B.R. 999, 1002-03 (B.A.P. 10th Cir. 1997). The estate professional cannot willingly by-pass the application of §§ 330 and 503(b)(2) and seek payment of his fees and costs from the debtor rather than from the bankruptcy estate. *In re Hanson*, 223 B.R. 775, 779 (Bankr. D. Or. 1998)

When a Chapter 13 case is converted to a Chapter 7 case, the fees and costs awarded under § 330(a) do not lose their administrative expense classification. Instead, 11 U.S.C. 348(d) specifically removes administrative expenses from those post-petition, pre-conversion claims that are transformed into pre-petition claims when the case is converted. Thus, § 348(c) also serves to remove pre-conversion administrative expenses from those claims that are discharged since only claims that "arose before the order for relief" are discharged in a Chapter 7 case. 11 U.S.C. § 727(b).

Nothing prohibits a debtor from employing the services of an attorney post-petition in a Chapter 7 case. Often a Chapter 7 debtor needs legal assistance with a denial of discharge or nondischargeability complaint or other post-petition matters arise. These legal services, however, benefit the debtors personally and are the debtor's responsibility, not the bankruptcy estate's. While the attorney does not have to seek court approval for these fees, he must file a disclosure of compensation or a supplement to his initial disclosure. Fed.R.Bankr.P. 2016(b) and Local Bankr. R. 2016-2 (effective October 1, 2003); *In re McNickle*, 274 B.R. 477, 480-81 (Bankr. S.D. Ohio 2002). The Court may review those fees for reasonableness. 11 U.S.C. § 329(b).

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In this case, these statutes and Federal Rules combine to produce a mixed result for Harmelink & Fox. Initially, the firm was awarded an administrative expense of \$1,800 to be paid through the plan. The balance that remains will only be paid if assets emerge in the Chapter 7 case. 11 U.S.C. § 507(a)(1) and § 726(a) and (b).<sup>1</sup> The sum of \$292.15 from Harmelink & Fox's initial fee application that was not allowed as an administrative expense but was to be borne by Debtors post-discharge is now discharged in the Chapter 7. 11 U.S.C. § 727(b); *McNickle*, 274 B.R. at 480; see *Hessinger and Associates v. U.S. Trustee (In re Biggar)*, 110 F.3d 685, 687-88 (9th Cir. 1997).

As to Harmelink & Fox's second fee application, the additional post-confirmation, pre-conversion fees the firm has sought are an administrative expense. They too will be paid only if assets emerge for the Trustee to liquidate. 11 U.S.C. § 507(a)(1) and § 726(a) and (b). The same is true with those post-conversion, Chapter 7 services that may be compensated from the estate. Thus, the only balance that Debtors are responsible to pay Harmelink & Fox is that sum owed for non estate services rendered and expenses incurred post-conversion. See *Gantz*, 209 B.R. at 1002-03.

Debtor's counsel agreed with the United States Trustee that his July 23, 2003, fee application contained duplicate entries for services and costs on January 29, 2002; February 11, 2002; February 21, 2002; and February 26, 2002, and duplicate entries for costs on January 28, 2002 (two entries); February 14, 2002 (two entries); February 15, 2002; and March 22, 2002 (three entries). Compensation and reimbursement for these duplicate entries will be denied.

Those services that were rendered during the pendency of the Chapter 13 case and that qualify as an administrative expense under § 330(a) were on August 17, 2001; October 2, 2001; November 5, 2001; and November 14, 2001. Compensation for these services totals \$271.50. The related expenses for August 20, 2001, through November 20, 2001, total \$35.08. This compensation, 6% sales tax on the compensation, and reimbursement of actual costs, as

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<sup>1</sup> Under § 726(b), the Chapter 7 administrative expenses have priority over the Chapter 13 administrative expenses.

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administrative expenses, will be paid by the bankruptcy estate in the priority established by § 507(a)(1) and §§ 726(a) and (b) to the extent estate funds are available. If not paid by the bankruptcy estate, they do not become a personal obligation that Debtors must pay.

Those services that were rendered after conversion of the case to Chapter 7 that qualify as ones that aided Debtors in performing his legal duties under Chapter 7 and that were necessary to the administration of the case were on December 27, 2001; January 6, 2002; January 11, 2002. The compensation for these services totals \$681.25. The related expenses from December 21, 2001, through January 17, 2002 (excluding those on January 8, 2002), total \$64.42. Like the Chapter 13 administrative expenses, these Chapter 7 administrative expenses will be paid by the bankruptcy estate in the priority established by § 507(a)(1) and §§ 726(a) and (b) to the extent estate funds are available, but they will be of a higher priority than the Chapter 13 administrative expenses. 11 U.S.C. § 726(b); *In re Printcrafters, Inc.*, 208 B.R. 968, 972-73 (Bankr. D. Co. 1997).

The Bankruptcy Code's provision for administrative expenses was designed in large part to foster professionals to work for bankruptcy estates and to insure they are appropriately paid. See *Alabama Surface Mining Commission v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1453-54 (11th Cir. 1992). However, where there are insufficient estate assets to pay all administrative expenses, the estate professionals risk nonpayment. *In re Kids Creek Partners*, 236 B.R. 871, 878 (Bankr. N.D. Ill. 1999) (cites and quotations therein). That may be the reality for Harmelink & Fox and other administrative expense claimants in this case.

When circumstances change after the confirmation of a plan and a Chapter 13 case must be converted to a Chapter 7, the debtor's attorney may request and receive an additional retainer from the debtor. This retainer would cover those legal services necessary to effectuate the conversion<sup>2</sup> and would serve to protect the

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<sup>2</sup> If a Chapter 13 case is converted to a Chapter 7 soon after the petition is filed, no additional retainer should be necessary.

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attorney from holding an administrative expense claim against an insolvent Chapter 7 estate. The necessary conversion-related services that the debtor's attorney would perform are re-analyzing the debtor's financial condition, advising the debtor on whether to convert, preparing and filing the notice of conversion under Fed.R.Bankr.P. 1017(f)(3), preparing and filing any amendments to schedules, preparing the new statements and schedules required by Fed.R.Bankr.P. 1019, and representing the debtor at the Chapter 7 § 341 meeting of creditors. See *In re Dawson*, 180 B.R. 478, 479; *In re Walgamuth*, Bankr. No. 91-50270, slip op. at 5 (Bankr. D.S.D. July 1, 1992). The attorney will, of course, need to disclose the additional retainer under Fed.R.Bankr.P. 2016(b).<sup>3</sup>

Several post-petition services were rendered only for Debtors' benefit and Debtors are responsible for their payment. These include services on January 7, 2002; January 29, 2002; February 11, 2002; February 21, 2002; February 26, 2002; July 15, 2002; August 9, 2002; and August 14, 2002. Reasonable compensation for these services total \$170.00. Sales tax on this compensation is \$10.20. Debtors must also personally pay the reimbursement for the costs incurred with these services. These costs, incurred on August 8, 2002, and January 28, 2002, through August 19, 2002, total \$77.49.

Finally, it appears that Harmelink & Fox has been overpaid for the personal, post-conversion services they rendered for Debtors. The initial proposed order that Harmelink & Fox submitted for the July 23, 2003, fee application stated that the firm had received \$1,861.37 toward the fee order that was entered July 3, 2001. Since that sum was much larger than the payments reported by Trustee Wein following conversion of the case from Chapter 13 to Chapter 7, the Court asked the law firm to supplement their

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<sup>3</sup> If the attorney takes an additional retainer for legal services to be rendered post-conversion that benefit only the debtor (exemption matters, denial of discharge or nondischargeability complaints, etc.), he must also disclose those fees. Fed.R.Bankr.P. 2016(b). If it is a Chapter 11 or Chapter 12 case that is converting to Chapter 7, the debtor's attorney must also file a fee application since any additional retainer would be part of the bankruptcy estate. See 11 U.S.C. § 348(f).

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July 23, 2003, fee application with a statement of the date, amount, and payee for all fees the firm had received. That statement, filed October 2, 2003, indicated that Harmelink & Fox had received payments through the Chapter 13 plan totaling \$111.37, which matched Trustee Wein's report. The statement also indicated that the firm had received \$1,750, in \$50 increments through a wage assignment between March 11, 2002, and August 8, 2003, which were all after the case was converted. Though Harmelink & Fox was free to obtain a wage assignment from Debtors for non estate, personal services rendered post-petition, the fee for those services and related costs and sales tax totaled only \$257.69. The balance of \$1,492.31 that they received post-petition cannot be applied to the administrative expenses awarded to the firm under either the July 3, 2001, fee order or the fee order to now be entered. Those administrative expenses must be paid by the bankruptcy estate to the extent funds are available. Thus, the firm must refund \$1,492.31 to Debtors and the wage assignment must be cancelled.<sup>4</sup>

An appropriate order will be entered.

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

OCT 06 2003

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

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge

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

OCT 06 2003

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

INH:sh

CC: case file (docket original; serve parties in interest)

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<sup>4</sup> The wages that Debtors paid to Harmelink & Fox after confirmation were property of the Chapter 13 estate. 11 U.S.C. § 1306(a)(2). When the case converted to Chapter 7, the Chapter 7 estate narrowed to consist only of property that existed on the original petition date. 11 U.S.C. § 348(f)(1). This Code oddity thus changed these funds back into Debtors' personal property, not the bankruptcy estate and so the funds must be returned to Debtors, not the Chapter 7 estate. Had Debtors' original petition been filed under Chapter 12, after conversion to Chapter 7 the returned wages would have been estate property that the Chapter 7 trustee could have used to pay administrative expenses and creditors' claims.



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