

**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 5, 2003

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Subject: ***In re Tammie L. Bludorn***  
Chapter 7; Bankr. No. 02-10226

***In re Frank S. Lophovsky***  
Chapter 13; Bankr. No. 02-10261

Dear Counsel:

The matters before the Court are the Applications for Interim Compensation of Attorney Fees and Reimbursement of Attorney's Expenses filed by Attorney Fransen in the above-referenced cases. These are core proceedings under 28 U.S.C. § 157(b)(2). This letter decision and accompanying orders shall constitute the Court's findings of fact and conclusions of law. As set forth below, Attorney Fransen will not be compensated from the bankruptcy estate for services he rendered, or reimbursed for expenses he incurred, in connection with Debtors' resistance to the U.S. Trustee's motions to dismiss their cases under 11 U.S.C. § 707(b) or Debtors' subsequent conversions to chapter 13.

SUMMARY OF FACTS - *In re Bludorn*. On July 31, 2002, Tammie L. Bludorn ("Bludorn") filed a petition for relief under chapter 7 of the bankruptcy code. On October 18, 2002, the U.S. Trustee filed a motion to dismiss the case under 11 U.S.C. § 707(b). On

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November 12, 2002, Bludorn filed an objection to that motion. The following day, the U.S. Trustee filed a motion for summary judgment. On January 31, 2003, the Court granted the U.S. Trustee's motion for summary judgment. On that same date, pursuant to Debtor's request, the case was converted to chapter 13. On April 24, 2003, Bludorn filed a notice of conversion back to chapter 7.

On February 18, 2003, while Bludorn's case was still pending under chapter 13, Attorney Fransen filed an application for compensation and reimbursement, in which he sought approval of fees totaling \$1,966.00 (including \$800.00 received from Bludorn pre-petition), sales tax totaling \$128.37 (including \$48.00 received from Bludorn pre-petition), and expenses totaling \$432.02 (including \$200.00 received from Bludorn pre-petition for the filing fee). On March 5, 2003, the U.S. Trustee filed an objection to Attorney Fransen's application, in which he objected to any compensation for services rendered, or any reimbursement of expenses incurred, by Attorney Fransen in connection with Bludorn's resistance to the U.S. Trustee's motion to dismiss or Bludorn's subsequent conversion to chapter 13. Following a hearing on April 8, 2003, the matter was taken under advisement.

SUMMARY OF FACTS - *In re Lophovsky*. On September 8, 2002, Frank S. Lophovsky ("Lophovsky") filed a petition for relief under chapter 7 of the bankruptcy code. On November 18, 2002, the U.S. Trustee filed a motion to dismiss the case under 11 U.S.C. § 707(b). On December 11, 2002, Lophovsky filed an objection to that motion. Two days later, the U.S. Trustee filed a motion for summary judgment, which the Court granted on December 16, 2002. On December 20, 2002, Lophovsky filed a motion to convert to chapter 13, which the Court granted on that same date.

On January 21, 2003, Attorney Fransen filed an application for compensation and reimbursement, in which he sought approval of fees totaling \$1,955.00 (including \$800.00 received from Lophovsky pre-petition), sales tax totaling \$120.98 (including \$48.00 received from Lophovsky pre-petition), and expenses totaling \$303.30 (including \$200.00 received from Lophovsky pre-petition for the filing fee). On March 5, 2003, the U.S. Trustee filed an objection to Attorney Fransen's application, in which he objected to any compensation for services rendered in connection with Lophovsky's resistance to the U.S. Trustee's motion to dismiss or Lophovsky's subsequent conversion to chapter 13. Following a hearing on

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April 8, 2003, the matter was taken under advisement.

DISCUSSION. As a general rule, the Court may not allow compensation for services that were not "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A). However, in a chapter 13 case:

The court may allow reasonable compensation 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 to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B). See also *Peterson v. U.S. Trustee (In re Peterson)*, 251 B.R. 359 (8th Cir. BAP 2000).

As noted above, the Court granted summary judgment on the U.S. Trustee's motions to dismiss these cases under 11 U.S.C. § 707(b). Based upon the undisputed facts, at the time their petitions were filed, both Bludorn and Lophovsky had the present ability to fund a chapter 13 plan that would have provided a meaningful return to their unsecured creditors. Neither case presented complicating factors or tenuous circumstances that would have adversely affected Bludorn's or Lophovsky's ability to fund such a plan. Both cases should have been filed under chapter 13 at the outset.

Had these cases been filed under chapter 13, the services rendered, and the related expenses incurred, by Attorney Fransen in resisting the U.S. Trustee's motion to dismiss under 11 U.S.C. § 707(b), and in subsequently converting them to chapter 13, would not have been necessary and, in fact, would not have been rendered. Under the circumstances, the Court cannot say those services, or the related expenses, benefitted either Bludorn or Lophovsky, or their respective bankruptcy estates. Thus, Attorney Fransen cannot be compensated for those services or reimbursed for those expenses.

In *Bludorn*, the U.S. Trustee objected to the services Attorney Fransen rendered on October 30, October 31, November 7, November 8, November 21, and November 30, 2002, and January 22 and January 27, 2003. This objection is sustained. Based on its review of the billing records Attorney Fransen submitted in support of his application, the Court finds that Attorney Fransen devoted 9.6

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hours to those services, which at his hourly rate of \$110.00, amounts to \$1,056.00. Attorney Fransen is therefore awarded \$910.00 (\$1,966.00 minus \$1,056.00) as compensation for the services he rendered in this case. He is also awarded \$54.60 for sales tax on those fees.

The U.S. Trustee also objected to the expenses Attorney Fransen incurred in connection with the services to which he objected. This objection is also sustained. Based on its review of Attorney Fransen's billing records, the Court finds that those expenses total \$140.37. Attorney Fransen is therefore awarded \$291.65 (\$432.02 minus \$140.37) as reimbursement for expenses he incurred in this case.

Attorney Fransen is thus awarded a total of \$1,256.25 for compensation, sales tax, and expenses in *Bludorn*. He received \$1,048.00 from *Bludorn* pre-petition. The balance of \$208.25 shall be treated as an administrative expense in *Bludorn's* chapter 7 case and shall be paid by the chapter 7 trustee, to the extent funds become available with which to do so.

In *Lophovsky*, the U.S. Trustee objected to the services Attorney Fransen rendered on November 21, December 10, and December 18, 2002. This objection is sustained. Based on its review of Attorney Fransen's billing records, the Court finds that Attorney Fransen devoted 7.7 hours to those services, which at his hourly rate of \$110.00, amounts to \$847.00. Attorney Fransen is therefore awarded \$1,108.00 (\$1,955.00 minus \$847.00) as compensation for the services he rendered in this case. He is also awarded \$66.48 for sales tax on those fees.

The U.S. Trustee did not object to the expenses Attorney Fransen incurred in connection with the services to which he objected. However, those expenses were no more necessary, or of any greater benefit to *Lophovsky* or his bankruptcy estate, than the related services. Thus, they must also be disallowed. Based on its review of Attorney Fransen's billing records, the Court finds that those expenses total \$15.00. Attorney Fransen is therefore awarded \$288.30 (\$303.30 minus \$15.00) as reimbursement for expenses he incurred in this case.

Attorney Fransen is thus awarded a total of \$1,462.78 for compensation, sales tax, and expenses in *Lophovsky*. He received \$1,048.00 from *Lophovsky* pre-petition. The balance of \$414.78

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shall be treated as an administrative expense in Lophovsky's chapter 13 case and shall be paid by the chapter 13 trustee according to the terms of Lophovsky's plan.

The Court will enter appropriate orders.<sup>1</sup>

Sincerely,




Irvin N. Hoyt  
Bankruptcy Judge

INH:sh

CC: case file (docket copy in each case and serve on parties in interest in each case)

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 06 2003**

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

**NOTICE OF ENTRY**  
Under F.R. Bankr.P. 6022(a)  
**Entered**

**MAY 06 2003**

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

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<sup>1</sup> In the future, Attorney Fransen should provide a detailed description of all services rendered for which he seeks compensation, not just those services rendered after any retainer is exhausted. In addition, Attorney Fransen may wish to re-examine the propriety of his per-page fax charge of \$2.00, in light of the Court's ruling in *In re Kussow*, Bankr. No. 97-40952, slip op. at 4 (Bankr. D.S.D. November 6, 2002).

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