

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)
) Bankr. Case No. 91-40225
CHARLES JOSEPH KRALL)
Social Security No. [REDACTED]-3985) Chapter 11
)
and) MEMORANDUM OF DECISION RE:
) APPLICATION FOR FEES BY
CARMELA MARIE KRALL) DEBTORS' COUNSEL
Social Security No. [REDACTED]-6230)
)
Debtors.)

The matter before the Court is the Application for Compensation and Reimbursement of Expenses by Attorney for Debtor filed August 7, 1995 by Afton J. Izen, counsel for Debtors. 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 no further fees to Attorney Izen shall be awarded from the estate.

I.

Debtors filed *pro se* a Chapter 11 petition on March 22, 1991. Debtors sought and obtained approval on October 1, 1991 to employ Afton J. Izen.

No plan has been confirmed. Through Adversary No. 92-4012, however, Debtors attempted to reduce the claim of the Internal Revenue Service, which equaled nearly \$700,000.00 in 1991. Attempts to settle the adversary were futile. While the adversary was pending, Attorney Izen sought and was awarded from the estate compensation and reimbursement totaling \$29,146.52.¹

¹ The Hon. Peder K. Ecker, presiding.

The adversary trial was commenced July 10, 1995.² After several hours of testimony over more than a day, the Court met with counsel in chambers to advise them that the Court found no law or facts to support Plaintiffs-Debtors' complaint. Further, Debtors' family was urging Debtors to not pursue the action. Thereafter, upon agreement of all parties, a consent judgment was entered against Plaintiff-Debtors. The judgment provided that Debtors' federal tax liability as of July 10, 1995 was \$962,000.00.

By Application filed August 7, 1995, Attorney Izen sought another \$9,139.81 in compensation and reimbursement. The services she rendered primarily dealt with the adversary proceeding. No objections to the Application were filed. 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 from this Court. The case law, of course, is based on 11 U.S.C. § 330. Section 330 was amended on October 22, 1994. The pre-amendment version is applied here since Attorney Izen was employed under the pre-amendment version of § 330.

Section 330(a) 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,

² The Hon. Irvin N. Hoyt, presiding.

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 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. *H.J. Inc.*, 925 F.2d 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 19,

1990) (cites omitted).

When fees are sought before a plan is confirmed, the applicant bears the burden of showing that all services rendered and expenses incurred in the reorganization effort are "necessary" as required by 11 U.S.C. sec. 330(a). *In re Travis*, Bankr. No. 90-10094, slip op. at 4 (Bankr. D.S.D. April 5, 1991). Moreover, if a case was never an appropriate candidate for reorganization, compensation for all services directed toward reorganization may be denied. *In re Alderson*, 114 B.R. 672, 679-81 (Bankr. D.S.D. 199).

III.

Upon consideration of the § 330(a) and the case law discussed above, the Court concludes that the services performed by Attorney Izen, as set forth in her August 7, 1995 Application, did not benefit the estate. Therefore, no further compensation from the estate will be allowed.

As the Court discussed with counsel at the adversary trial, Debtors' complaint had no merit in fact or law.³ Debtors' complaint essentially encompassed only equitable arguments for reducing the IRS's claim. The complaint ignored Debtor Charles J. Krall's and his daughter's criminal activity that surrounded the tax claims. Most notable, the complaint ignored the United States District Court's sentence of Debtor Charles J. Krall, which required him to pay certain taxes in full. *See United States v. Krall*, 835 F.2d 711 (8th Cir. 1987). Consequently, the complaint

³ The issue of whether certain penalties were dischargeable was preserved under the consent judgment.

was futile and Attorney Izen's services rendered in support of the adversary proceeding may not be compensated from the estate.

Additional fees for Attorney Izen from the estate also are not warranted because no progress toward confirmation of a plan has been made. A review of this the file indicates this essentially is a one creditor case. With the IRS as that primary creditor, it is clear that Debtors filed their Chapter 11 and the subsequent adversary proceeding solely in an effort to avoid or reduce their tax claim. Any merit the case had as a Chapter 11 reorganization is no longer apparent. Accordingly, no further fees from the estate are warranted since no reorganization effort can be made. The \$29,146.52 in fees that Attorney Izen already has been allowed from the estate more than adequately compensates her for any legitimate reorganization efforts made previously in this case.

Although the Chapter 11 estate will not compensate Attorney Izen, Debtors personally are not relieved of that obligation. Attorney Izen acted at Debtors' direction in pursuing the complaint against the IRS, however meritless it was. Therefore, Debtors personally are still obligated to see that her fees and costs are paid timely. While they may not use estate assets to pay her, they should find non estate assets to do or they may pay her after the case is closed.

An appropriate order will be entered.

Dated this 27th day of October, 1995.

BY THE COURT:

Irvin N. Hoyt

Chief Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
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In re:)
) Bankr. Case No. 91-40225
CHARLES JOSEPH KRALL)
Social Security No. [REDACTED]-3985) Chapter 11
)
and) ORDER DENYING FEE APPLICATION
) OF DEBTORS' COUNSEL
CARMELA MARIE KRALL)
Social Security No. [REDACTED]-6230)
)
Debtors.)

In recognition of and compliance with the Memorandum of Decision Re: Application for Fees by Debtors' Counsel entered this day,

IT IS HEREBY ORDERED that Attorney Afton J. Izen's fee application filed August 7, 1995 for payment from the estate is DENIED; and

IT IS FURTHER ORDERED that the fees and expenses set forth on Attorney Izen's August 7, 1995 application shall be paid in full by Debtors personally from non estate assets.

So ordered this ____ day of October, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)