

**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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February 9, 2004

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Sioux Falls, South Dakota 57102

Mel Cunningham  
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Rapid City, South Dakota 57702

Subject: *In re Linda L. Rosenow*,  
Chapter 7; Bankr. No. 99-50365

Dear Counsel and Ms. Cunningham:

The matter before the Court is the application for fees filed by Debtor's counsel, John H. Mairose, on December 31, 2003, and the objections thereto filed by the United States Trustee and Mel Cunningham. 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(c). This letter decision is being entered in lieu of the hearing set for February 10, 2004, due to the impact of the Supreme Court's recent ruling in *Lamie v. United State Trustee*, \_\_\_ U.S. \_\_\_, 2004 WL 110846 (Jan. 26, 2004). As set forth below, the United States Trustee's objections will be sustained.

*Summary.* Linda Rosenow ("Debtor") filed a Chapter 13 petition on July 20, 1999. She obtained confirmation of a plan on February 9, 2000. Debtor's attorney, John H. Mairose, filed a fee application after confirmation. No objections to the application were filed. Attorney Mairose was awarded fees and costs of \$4,807.41. A balance of about \$3,500, the sum that remained after application of the funds he had on account, was to be paid through Debtor's plan.

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In September 2000, Attorney Mairose filed a second fee application. It too was approved without objection. Attorney Mairose was awarded another \$1,122.64. In August 2001, Attorney Mairose filed a third fee application. It was again approved without objection. Attorney Mairose was awarded an additional \$1,059.70. On March 3, 2003, Debtor voluntarily converted her Chapter 13 case to Chapter 7. The Chapter 7 trustee sought and obtained authority to hire himself as the Chapter 7 estate attorney.

In his final report after conversion, the Chapter 13 case trustee reported that he had paid Debtor's counsel \$3,500. A balance of \$2,315.50 remained.

On December 31, 2003, Attorney Mairose filed a fourth fee application. He sought compensation and related expenses from March 3, 2003 -- the date Debtor converted her case to Chapter 7 -- through December 2, 2003. The United States Trustee objected to the fee application on the grounds that most of the post-conversion fees were not compensable from the bankruptcy estate because the services went beyond providing the basic services to the Chapter 7 debtor through the § 341 meeting. The United States Trustee calculated that Attorney Mairose was accordingly entitled only to an additional \$484.85 from the bankruptcy estate. One creditor, Mel Cunningham, also objected *pro se* to Attorney Mairose's fourth fee application. Ms. Cunningham argued that as a former employee, she should be paid before Attorney Mairose.

Attorney Mairose responded to the United States Trustee's initial objection. He argued that many of the services he rendered benefitted the bankruptcy estate or its creditors. Accordingly, in addition to the amounts requested by the United States Trustee, he argued he should receive an additional \$576.52 in fees and costs from the estate.

On February 9, 2004, the United States Trustee filed a supplemental objection to Attorney Mairose's fee application. Therein, the United States Trustee brought to the Court's attention a recent ruling by the Supreme.

*Discussion.* A Chapter 7 debtor's attorney in this District generally has been entitled to compensation from the bankruptcy estate for analyzing the debtor's financial condition, rendering advice and assistance to Debtor in determining whether to file a

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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. See, e.g., *In re Lorraine M. Hankins*, Bankr. No. 01-41241, slip op. at 3-6 (Bankr. D.S.D. May 9, 2003); *In re Robert L. Boeka, Jr.*, Bankr. No. 01-40301, slip op. at 2-4 (Bankr. D.S.D. July 16, 2001); *In re Dale G. and Brenda L. Hermanson*, Bankr. No. 95-40711, slip op. at 2-4 (Bankr. D.S.D. July 11, 1996); and *In re Tommy O. and Diane E. Rice*, Bankr. No. 93-40057, slip ops. (Bankr. D.S.D. Dec. 19, 1995 and August 14, 1995). These basic services aid the Chapter 7 debtor in performing his legal duties under the Bankruptcy Code and are necessary to the administration of the case. *Hankins*, slip op. at 4 (cites therein). However, only a few weeks ago, the United States Supreme Court ruled that Chapter 7 debtor's attorneys cannot be paid from the bankruptcy estate unless they have been employed by the case trustee and this employment has been approved by the Court. *Lamie v. United State Trustee*, \_\_\_ S.Ct. \_\_\_, 2004 WL 110846 (Jan. 26, 2004).

Though the import of *Lamie* is clear, the question remains of how it should be applied to this case where Attorney Mairose rendered services before the *Lamie* decision was entered.

[T]he Supreme Court has instructed us that a high court decision construing a statute as Congress intended it be construed should be given full retroactive effect, except in rare instances. *United States v. Estate of Donnelly*, 397 U.S. 286 (1970).

Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward.

*Justice v. Carter*, 972 F.2d 951, 955 (8th Cir. 1992) (quoting *Donnelly*, 397 U.S. at 294-95). The three factors to consider when retroactive application of a decision is at issue are whether the holding addressed an issue of first impression whose resolution was not clearly foreshadowed by earlier cases, whether retroactive application will further retard the application or operation of the decision in question, and, finally, whether retroactive application could produce substantial inequitable results in individual cases. *Industrial Financial Corp. v. Falk (In re Falk)*, 96 B.R. 901, 909 n.9 (Bankr. D. Minn. 1989) (quoting therein *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88

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(1982)).

Here, there was a split among the circuits on whether amended 11 U.S.C. § 330 permitted a Chapter 7 debtor's attorney to be paid his or her fees from the bankruptcy estate. Thus, the Supreme Court addressed an issue of first impression and the result was not clearly foreseeable. Second, how *Lamie* is applied in cases where fees were rendered before the decision was entered will not retard or effect how *Lamie* is applied henceforth. Finally, counsel have largely relied on this Court's consistent treatment of a debtor's attorney's fees in a Chapter 7 case. It would be substantially inequitable to impose a new fee standard on services already rendered.

Based on these considerations, this Court holds that *Lamie* generally will not be applied retroactively to services already rendered by a Chapter 7 debtor's attorney in this District.<sup>1</sup> As set forth in the case law listed above, this Court has consistently held over the past several years that a Chapter 7 debtor's attorney can be paid from the Chapter 7 estate for basic services rendered through the § 341 meeting, subject to available funds. The Court will continue to allow such compensation and related expenses in pending cases for such services rendered through January 25, 2004. Services rendered by a debtor's attorney after that date in any Chapter 7 case will, of course, not be compensated from the estate as provide by *Lamie* unless the attorney's employment by the estate has been approved under 11 U.S.C. § 327.

For Attorney Mairose, that means he is entitled to be compensated from this Chapter 7 estate only for basic Chapter 7 services rendered through the § 341 meeting of creditors. Contrary to Attorney Mairose's request, this Court has not in the past and will not in this case nor in the future, compensate a Chapter 7 debtor's attorney for rendering additional services for the debtor, the bankruptcy estate, or estate creditors for which he was not formally employed.

In addition to the basic services identified by the United States Trustee in his objection, the Court will also compensate Attorney Mairose from the estate for his preparation of an

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<sup>1</sup> A higher court may, of course, dictate a different result in the future.

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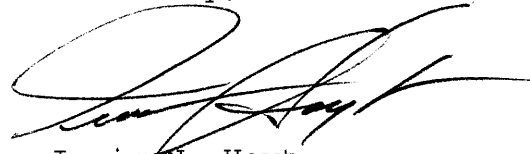
amendment to the mailing list (\$24.00) and he will be reimbursed for the conversion fee and the filing fees for a schedule amendment and the amendment to the mailing list (\$55.00). Such amendments by a debtor after conversion of his or her case are appropriate to insure compliance with Fed.R.Bankr.P. 1019.

As to Ms. Cunningham's objection that she should be paid before Attorney Mairose, §§ 507 and 726 of the Bankruptcy Code set forth the order in which claims of different types are paid in a Chapter 7 case. Trustee Dennis C. Whetzal will follow those statutes when he distributes the bankruptcy estate's assets to all claimants, including Attorney Mairose for his administrative expense claim for his unpaid Chapter 13 and Chapter 7 fees and Ms. Cunningham for her claim for unpaid wages. The Court cannot alter what is governed by statute.

Reasonable post-conversion fees not authorized to be paid from the estate will be Debtor's personal responsibility.

An appropriate order will be entered.

Sincerely,




Irvin N. Hoyt  
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve 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.

FEB - 9 2004

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

FEB - 9 2004

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