

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

TELEPHONE (605) 224-0560
FAX (605) 224-9020

May 4, 2000

Terry J. Sutton, Esq.
Counsel for Debtors
P.O. Box 1053
Watertown, South Dakota 57201

Dale A. Wein,
Chapter 13 Trustee
P.O. Box 1329
Aberdeen, South Dakota 57402

Subject: *In re Charles R. and Karna L. Swenson,*
Chapter 13; Bankr. No. 99-10195

Dear Counsel:

The matter before the Court is the fee application filed by Attorney Sutton for his work in this case and Trustee Wein's objection to it. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under FED.R.BANKR.P. 7052. As set forth below, Attorney Sutton's fees will be allowed in the amount requested but only \$875 shall be paid through the plan. The balance shall be paid by Debtors after they have received their discharge. However, the Court reminds Attorney Sutton that he must disclose payments received before and during the case pursuant to 11 U.S.C. § 329(a) and FED. R. BANKR. P. 2016(b).

SUMMARY. Debtors commenced their Chapter 13 case on August 4, 1999. On that day, their bankruptcy counsel, Terry J. Sutton, filed his disclosure of compensation as required by 11 U.S.C. § 329(a). Attorney Sutton therein disclosed that he had not yet received compensation from Debtors for his services in connection with the case. Attorney Sutton also stated that "[f]or legal services, [he had] agreed to accept \$0.00" from Debtors; that is, apparently, he and Debtors had agreed that he would not receive anything for his services. Debtors' statement of financial affairs (question 9) did not disclose any payments to Attorney Sutton but referred to an attachment, which could not be found.

53

Re: Charles and Karna Swenson
May 4, 2000
Page 2

In their plan dated August 16, 1999, Debtors estimated Attorney Sutton's fees would be \$1,500 and they stated that they already had paid him \$600. The plan indicated the balance would be paid through the case trustee over the first 24 months on the plan after approval of the fees by the Court. The plan also provided that any "additional" fees would be paid by Debtors direct to Attorney Sutton. Confirmation of this plan was denied, but Debtors' modified plan dated October 8, 1999 contained the same provisions regarding Attorney Sutton's fees. After resolution of some objections, Debtors obtained confirmation of their plan and a Plan as Confirmed was filed. It contained the same attorney fee provisions.

On March 20, 2000, Attorney Sutton filed an application for fees and expenses. He sought \$2,302.00 for fees, \$134.67 in sales tax, and \$534.35 for costs. He also disclosed that he had received a retainer of \$643.

On March 28, 2000, case trustee Dale A. Wein filed an objection to the fee application. He argued that payment of the balance of fees sought over the \$900 estimated in the plan should be authorized only after all unsecured claims provided under the plan were paid in full. By letter dated April 20, 2000, Attorney Sutton advised the Court that he did not request a hearing on his fee application and he acquiesced to a delay in the payment of his fees in excess of the portion to be paid under the plan.

DISCUSSION. As has been done in other cases where only the timing of the payment of fees is in dispute and not the amount, the Court will approve Attorney Sutton's fees as requested. However, the unpaid balance over \$857 shall be paid by Debtors only after they have received their discharge.

The other matter that needs to be addressed, however, is Attorney Sutton's failure to timely disclose the retainer he received. Section 329(a) of the Bankruptcy Code and FED.R.BANKR.P. 2016(b) require a debtor's attorney -- regardless of the chapter under which the debtor has filed -- to file a disclosure of compensation. The first disclosure must be filed within fifteen days of the petition. A supplemental disclosure must be filed within fifteen days after receipt of any payment not previously disclosed or after a change in any fee agreement. A debtor must provide similar information in their statement of financial affairs. Further, an application to employ an attorney must set forth any fee arrangement, FED.R.BANKR.P. 2014(a), and an application for approval of compensation and costs must disclose payments received or promised. FED.R.BANKR.P. 2016(a).

Re: Charles and Karna Swenson
May 4, 2000
Page 3

If no retainer is received when the case is commenced, § 329(a) and Rules 2014(a) and 2016(b) still require any fee arrangement for future payment to be disclosed. Moreover, if a payment/retainer is received after the case is commenced, a supplemental disclosure of compensation must be filed under Rule 2016(b). That did not happen in this case.

In this case, Attorney Sutton's receipt of a retainer was not known until a plan was filed. Further, the amount disclosed therein, \$600, was different than the amount eventually disclosed in the fee application, \$643. The Court urges Attorney Sutton to review his in-house procedures so that timely, accurate disclosures are made in future cases.

Attorney Sutton may prepare an appropriate order and, with Trustee Wein's approval, submit it to the Court.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

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


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

MAY 04 2000

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

I hereby certify that a copy of this document
was mailed, hand delivered, or faxed this date
to the parties on the attached service list

MAY 04 2000

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

Case: 99-10195 Form id: 122 Ntc Date: 05/04/2000 Off: 3 Page : 1
Total notices mailed: 5

Debtor Swenson, Charles R. 45248 174th Street, Watertown, SD 57201
Debtor Swenson, Karna L. 45248 174th Street, Watertown, SD 57201
Aty Sutton, Terry J. PO Box 1053, Watertown, SD 57201-6053
Trustee Wein, Dale A. Bankruptcy Trustee, PO Box 1329, Aberdeen, SD 57402-1329
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321