

JUL 27 2000

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)

SMITH, RICHARD DUANE and)
SMITH, DANNA SUZANNE)
husband and wife,)

Debtors.)

Case No. 97-30009

MEMORANDUM OF DECISION
AND ORDER

MOORE, WILLIAM SHANE)
aka Shane Moore, and)
MOORE, LYNN MARIE,)
fka Lynn Oliver,)
husband and wife,)

Debtors.)

Case No. 98-30052 ✓

BALSLEY, RON LEE and)
BALSLEY, HEIDI MAY,)
husband and wife,)

Debtors.)

Case No. 98-30129

MEMORANDUM AND ORDER - 1

68/69

Counsel asked his clients for, and received, an additional \$300.00 in relation to the conversion.¹ Of this amount, \$15.00 represented the court fee for conversion, and the balance of \$285.00 was placed by Counsel in his trust account. His intention is for this amount to be used to cover fees for services related to the conversion, and for chapter 7 services (e.g., amended schedules, etc., required by Fed.R.Bankr.P. 1019) including appearance at the chapter 7 meeting of creditors under § 341(a).

On April 19, Counsel filed a supplemental Rule 2016(b) disclosure regarding this payment.² On April 28, he moved for allowance of the "conversion fee." The United States Trustee ("UST") and the chapter 7 Trustee object to the practice Counsel utilized and to the allowance of the fee.³

¹ The exact date of this payment is not set forth in Counsel's supplemental Rule 2016(b) disclosure, though it would appear it was received before the motion to convert was filed by virtue of the text of that disclosure. The amended statement of affairs later filed by these debtors indicates the payment was made on March 28, just before conversion.

² Rule 2016(b) requires supplementation within 15 days of any payment or agreement not previously disclosed. Here and in certain of the other cases, it appears Counsel's supplementations were late, even though all were filed before hearing. Counsel has acknowledged the need for more attention to seasonable supplementation.

³ In some but not all of these cases, the UST has asked the Court to review Counsel's compensation under § 329(a). Such request focuses solely on the reasonableness of allowing the "conversion fee" and the UST raises no other issues regarding Counsel's charges.

McMasters, Case No. 99-20307

James and Katrina McMasters ("McMasters") filed a petition for relief and chapter 13 plan on March 23, 1999. On the same date Counsel filed his Rule 2016(d) disclosure reflecting a prepetition payment of \$600.00 for attorney fees plus a \$160.00 for the filing fee. On June 22, 1999 the Court confirmed McMasters' chapter 13 plan and awarded Counsel \$400.00 in additional legal fees. In January 2000, in conjunction with a motion to modify, Counsel requested and was allowed another \$400.00 in fees.

In March 2000, the Trustee filed a motion to dismiss the case because of delinquencies in plan payments, resulting in a May 3 conversion by the McMasters to chapter 7. Filed along with this motion was Counsel's supplemental disclosure that he had been paid an additional \$15.00 for the conversion fee and \$285.00 in legal fees for services related to the conversion, together with an application requesting the Court's approval of the \$285.00 payment. The UST and Trustee object to this requested compensation.

Moore, Case No. 98-30052

William and Lynn Moore ("Moore's") filed a petition for relief and chapter 13 plan on February 8, 1998. Counsel's Rule 2016(b) disclosure reflected that he had received \$140.00 in attorney fees plus \$160.00 for the filing fee. In May 1998, an additional \$462.00 was allowed by the Court at confirmation of the Moore's' plan.

In August 1998, the Moore's' request to modify the confirmed plan was granted and Counsel allowed an additional \$282.00 in attorney fees. In January

MEMORANDUM AND ORDER - 4

1999, the Court granted further motions to modify and approved Counsel's request for \$700.00 in attorney fees.

On March 24, 2000, the Trustee filed a motion to dismiss based on the Moores' delinquency in plan payments. A few days later, the Moores converted their case to chapter 7. Counsel disclosed through a supplemental Rule 2016(b) statement filed on April 7 that he had received an additional \$285.00 in fees associated with the motion for conversion prior to its filing.

The UST filed a § 329 motion requesting the Court review the reasonableness and manner in which Counsel sought attorney fees associated with the conversion of this case to one under chapter 7. Counsel moved for allowance of the fees, and provided notice to all creditors. Other than the UST, no party objected.

Balsley, Case No. 98-30129

Ron and Heidi Balsley ("Balsleys") filed a petition for relief under chapter 7 on March 23, 1998. Counsel's Rule 2016(b) disclosure reflected he had received \$550.00 in attorney fees plus the filing fee. Two months later, the Balsleys converted their case to one under chapter 13. Then in July 1998, Heidi Balsley was voluntarily dismissed as a debtor. In October 1998, the Court confirmed Mr. Balsley's plan and approved an additional \$600.00 in fees to Counsel. In January 1999, Balsley filed a motion to modify the amended chapter 13 plan. This motion was approved, and Counsel allowed an additional \$279.00 in fees.

MEMORANDUM AND ORDER - 5

On March 15, 2000 Balsley filed a motion to convert the case back to one under chapter 7. On April 7, Counsel disclosed that he had received the additional \$285.00. The UST's § 329 motion soon followed, as did Counsel's application requesting approval for the \$285.00, to which the UST objects.

DISCUSSION

The Court clearly has the ability to review all fees charged consumer debtors for reasonableness. § 329(a). All fees and costs charged a debtor are subject to initial Rule 2016(b) disclosure, if received prepetition, and prompt supplemental disclosure if received at any subsequent time. Fed.R.Bankr.P. 2016(b).

Fees in a chapter 13, both prepaid or to be paid under a plan, are subject to the requirement of application, notice and Court approval. § 330(b)(4)(B). Counsel's approved but yet unpaid fees are administrative expenses, § 503(b)(2), and the chapter 13 plan must provide for payment of them. § 1322(a)(2).

The problem with Counsel's approach to conversion as evidenced in these four cases is that he unilaterally charges his clients \$285.00 and collects those fees⁴ from the debtors, without prior Court approval, during the chapter 13 and before conversion.

This Court has previously rejected this type of unauthorized payment of attorneys fees in a chapter 13 case. In *In re Soderberg*, 99.4 I.B.C.R. 152 (Bankr. D. Idaho 1999), the debtor had confirmed his chapter 13 plan in August 1998. That

⁴ The Court would not object to the debtor's payment of the \$15.00 conversion filing fee, whether directly or via counsel.

plan provided for payment of the balance of counsel's fees and costs through monthly plan payments from the trustee. In December 1998, the debtor approached his counsel with concern over his inability to continue performing the plan. His attorney requested additional fees to convert the case and, because the debtor lacked cash, they agreed on conveyance of a grandfather clock⁵ to the attorney at a value of \$1,000.00. Of this amount, a portion would pay the unpaid balance of the fees and costs covered by the confirmed plan, but which wouldn't be paid by the trustee once the chapter 13 failed. Another portion of the value (\$350.00) was to cover the fees for conversion. The balance of the \$1,000.00 was paid in cash by counsel to his client, and used by the debtor to cure a mortgage delinquency. 99.4 I.B.C.R. at 152.

Chief Judge Pappas noted that, in addition to failure to comply with the mandatory duty of timely Rule 2016(b) supplementation:

There is at least one additional problem with this transaction. Here, the Court had confirmed a plan which provided the balance of Counsel's attorney fees and costs be paid in monthly installments through Debtor's Chapter 13 plan by Trustee. Counsel, as an administrative creditor, and Debtor were bound by the provisions of the plan. 11 U.S.C. § 1327(a). Counsel could not accept, and Debtor could not make, unauthorized post-confirmation transfers in contravention to the terms of the plan. It is of no consequence the property transferred had been exempted or had "revested" in the Debtor upon confirmation. Nor is it important that the case was later converted

⁵ That the transfer was of a clock, rather than cash, was an interesting feature of the *Soderberg* situation, but it doesn't impact the analysis of the impropriety of the unauthorized payment.

to Chapter 7. The offensive transfer took place, by Counsel's and Debtor's admission, while the plan was in effect.

99.4 I.B.C.R. at 153. The Court required the clock surrendered to the Trustee for liquidation. 99.4 I.B.C.R. at 154.⁶ Counsel has offered no persuasive reason or basis to distinguish or depart from *Soderberg*.

The payment of \$285.00 in each of these cases runs afoul of § 1327(a). The debtors were under an obligation to make their plan payments to their chapter 13 trustee. Confirmation was as binding on them, and on their attorney, as it was on all creditors and other parties. Debtors did not pay their trustee but instead made payments to their lawyer. These payments were not authorized by the plan nor approved by the Court.

The "conversion fee" process adopted by Counsel is improper. Since the charging and collection of the \$285.00 in each of these four cases was unauthorized, the Court will order those amounts delivered to the chapter 7

⁶ This effected a full disgorgement of the payment received, thus establishing that direct payment of fees which were being paid under the plan, and the prepayment of fees for conversion were both improper.

Trustee.⁷ *Accord, Soderberg*, 99.4 I.B.C.R. at 154.

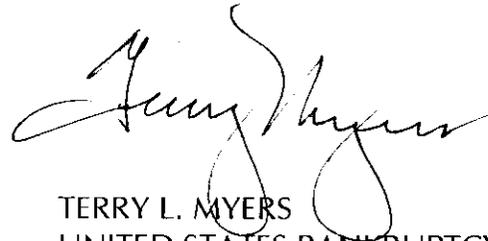
By virtue of the turnover of these funds, and from the Court's review of the totality of the record in these cases, there appears to be little reason to further consider the question under § 329(b) of the reasonableness of compensation charged by Counsel. The UST has sought no further or other relief.

CONCLUSION AND ORDER

Based upon the foregoing, the Court will and hereby does Order as follows. The UST's motion is granted to the extent of disapproval of the "conversion fee" charged. The Court requires that \$285.00 in each case be turned over by Counsel to the chapter 7 Trustee for administration as property of the bankruptcy estate. The UST's motion is otherwise denied. The applications of Counsel in all four cases for approval of the \$285.00 conversion fee are denied.

⁷ To the extent Counsel wants the chapter 7 estate to bear these fees, and argues that creditors have received notice and failed to object to that relief, the Court sees another impediment. Payment of a chapter 7 debtor's attorneys from property of the estate is circumscribed. See, e.g., *In re Mahaffey*, 247 B.R. 823 (Bank. D. Mont. 2000), discussing *In re Century Cleaning Services, Inc.*, 195 F.3d 1053 (9th Cir. 1999). See also, *In re Mountain West Equipment, Inc.*, 90 I.B.C.R. 9, 10 (Bankr. D. Idaho 1990). Services which provide benefit solely to the debtor and not to the estate don't qualify. Whether or not the standard might be met as to some part of the \$285.00 charged in each of the instant cases is not presently clear. But Counsel would have to make a more specific request for compensation from the chapter 7 estate, and an appropriate showing that the services qualify. The present submissions don't suffice.

Dated this 27th day of July, 2000.

A handwritten signature in black ink, appearing to read "Terry L. Myers". The signature is fluid and cursive, with a large loop at the end of the last name.

TERRY L. MYERS
UNITED STATES BANKRUPTCY JUDGE

MEMORANDUM AND ORDER - 10

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following addresses(es), on the date shown below:

DATED: 7-27-00

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