

Not Intended for Publication and/or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
PATRICIA ANN BONECUTTER) CASE NO. 09-14605
)
)
Debtor)

DECISION SUSTAINING OBJECTION TO CLAIM

At Fort Wayne, Indiana on September 15, 2011.

The trustee has objected to a proof of claim filed by debtor's counsel in this chapter 7 case. It is in the sum of \$500 for "services performed" because there are assets for the trustee to administer. The matter has been submitted to the court for a decision on the parties' stipulations of fact and the briefs of counsel.

Representing a chapter 7 debtor is not easy. Counsel is expected to shepherd the debtor through the entire bankruptcy process, see, In re Collmar, 417 B.R. 920, 923 (Bankr. N.D. Ind. 2009), and may not withdraw from the representation simply because the client has not paid counsel's fee. In re Edsall, 89 B.R. 772, 776 (Bankr. N.D. Ind. 1988). Yet, getting paid for representing a chapter 7 debtor is not easy either. There was a time when counsel could seek an administrative expense for services associated with helping the debtor perform its duties under the Bankruptcy Code, see e.g., In re Ewing, 167 B.R. 233, 235-36 (Bankr. D. N.M. 1994); In re Waxman, 148 B.R. 178, 182 (Bankr. E.D. N.Y. 1992); In re Grabill Corp., 110 B.R. 356, 359 (Bankr. N.D. Ill. 1990); In re Rhoten, 44 B.R. 741 (Bankr. M.D. Tenn. 1984), but Congress changed the law in 1994, see, Bankruptcy Reform Act of 1994, Pub. L. 103-394, so that now, absent employment by the trustee, debtor's counsel is not entitled to compensation under § 330. See, Lamie

v. U.S. Trustee, 540 U.S. 526, 124 S.Ct. 1023 (2004). Counsel can try to get their money up-front, but if they do not, or do not get enough, debtor’s obligation for fees is subject to being discharged just like any other pre-petition debt. See, *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1127 (7th Cir. 2003).¹ If counsel overestimates the amount of work required and gets too much money, there is the risk that the excess will be claimed as property of the estate and counsel will be required to give the trustee the funds that exceed the value of services rendered prior to the petition. See, *In re Wagers*, 514 F.3d 1021 (10th Cir. 2007). There is the possibility of using chapter 13, where counsel’s fees can be paid as an administrative expense, see, 11 U.S.C. § 330(a)(3)(B), but then there is the risk that the attempt will be challenged as inappropriate. See e.g., *In re Arlen*, ___ B.R. ___, 2011 WL 1667473 (Bankr. W.D. Mo. 2011); *In re Dicey*, 312 B.R. 456, 460 (Bankr. D. N.H. 2004) (criticizing “attorney fee only” chapter 13 plans). So, what is a lawyer to do?

In this case, debtor’s counsel tried to overcome the problem through the fee agreement with his client. The debtor was charged a flat fee, which was paid up-front, and then, if the case turned out to be an asset case, counsel was to receive an additional \$500. The additional fee was not to be paid by the debtor, but by the estate. The agreement provided:

Should this case be determined to be an asset case, Stiles Law Office shall be entitled to file a proof of claim for \$500.00 for additional services rendered. You will not be responsible for paying this additional fee directly, but it shall be assessed against your bankruptcy estate.

¹*Bethea* suggests that even the obligation to pay counsel for post-petition services rendered pursuant to a pre-petition fee agreement is discharged, see, *Bethea*, 352 F.3d at 1128-29, but the dissent makes it clear that such statements should probably be regarded as dicta See, *Bethea*, 352 F.3d at 1130-32 (Cudahy, J., concurring in part and dissenting in part). Furthermore, *Bethea* pre-dates the Supreme Court’s decision in *Lamie* and the majority appears to have believed (incorrectly as it has turned out) that counsel hired to do work for the debtor after the petition could receive an administrative priority. *Bethea*, 352 F.3d at 1128.

This has become an asset case and debtor's counsel filed a proof of claim for \$500, as a general unsecured claim, to which the trustee has objected. The trustee does not challenge the proposition that an asset case may require more work from debtor's counsel, that \$500 is an appropriate pre-petition estimate for the value of the additional work that may be required, or the reasonableness of the amount sought in this particular case. Instead, the trustee's objections are essentially legal ones. He contends, inter alia, that the debtor owed nothing to counsel as of the date of the petition, so the additional fees are not an allowable claim, and that the fee agreement cannot bind the bankruptcy estate, which was not a party to it. Because these objections are well-taken, the court need not address the others.

The bankruptcy definition of claim is very broad. It is "a right to payment whether or not such right is . . . contingent, matured or unmatured" 11 U.S.C. § 101(5)(A). So, even contingent claims can potentially share in a distribution from the bankruptcy estate, and be discharged in the proceeding. Counsel's fee agreement is an attempt to create a contingent claim for additional fees, with the contingency being the availability of assets for distribution to creditors. The fact that this contingency will not (and cannot) occur until after the petition does not invalidate the claim, especially since the contingency has now occurred. Even contingent claims can be allowed and if their fixing would unduly delay the administration of the estate they are to be estimated. 11 U.S.C. § 502(c)(1).

Claims are deemed allowed unless objected to. 11 U.S.C. § 502(a). In the event of an objection, the court is to determine the amount due, as of the date of the petition, and allow the claim in that amount except, inter alia, to the extent the "claim is unenforceable against the debtor . . . for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). Here,

the claim for additional fees is not enforceable against the debtor. By its very terms, the debtor “is not . . . responsible for paying this additional fee.” It is, instead, “assessed against [the] bankruptcy estate” – a third party that had no part in making the agreement and has not agreed to its terms.

The trustee’s objection to Claim No. 11 filed by Stiles Law Office is SUSTAINED and the claim will be denied. An order doing so will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court