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# Ethical Issues with Respect to Attorneys' Fees in Consumer Cases

**Hon. Bruce W. Black**

U.S. Bankruptcy Court (N.D. Ill.); Chicago

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**ETHICAL ISSUES WITH RESPECT TO ATTORNEY'S FEES IN CONSUMER CASES**

- I. A review of the fee application process, procedural requirements and use of required forms under Local Rules and Federal Rules of Bankruptcy Procedure.
- II. Case law update and issues in the Chapter 13 fee application process.
- III. Case law update and issues in the Chapter 7 fee process.
- IV. Consumer bankruptcy fees – perspective from the Bench.

## II. Case law update and issues in the Chapter 13 fee application process.

### RECENT CHAPTER 13 ATTORNEY FEE CASES

In re Mortakis, 405 B.R. 293 (Bankr. N.D. Ill 2009). Judge Squires. A Chapter 7 case that was converted to Chapter 13 case. The 2016 statement showed that fees were paid in full pre-petition. The court held that an incorrect 2016 statement can be sanctionable up to total disgorgement. Also, the attorney was found to have billed for excessive time, the fee agreement lacked clarity and differed from model retention agreement. The court elected to impose a partial sanction as the attorney did achieve results in the case.

In re Kowalski, 402 B.R. 843 (Bankr. N.D. Ill 2009). Judge Squires. Attorney sanctioned for inaccurate 2016(b) statement. Attorney was required to disgorge fees received in excess of amount in 2016(b) statement plus an additional amount as a sanction. Billing statements were also found to be inflated.

In re Jackson, 401 B.R. 333 (Bankr. N.D. Ill 2009). Judge Goldgar. The statement of financial affairs stated no pre-petition fees were paid by the debtor although 2016(b) statement listed that the attorney received “full” payment of attorney fees prior to the filing of the case. Attorney billed fees far in excess of amounts listed in 2016(b) statement. The court sanctioned the attorney by requiring full disgorgement of all fees based on false 2016(b) statement and the court also found that the billed fees were excessive. Also, the court found that there is no requirement to file a motion for fee approval if fees paid in full prior to filing.

In re Gage, 394 B.R. 184 (Bankr. N.D. Ill 2008). Judge Squires. The court found that the 2016(b) statement was false and erroneous but was not intended to defraud the debtor. Attorney has previously disgorged all fees so the court found no further sanctions were warranted.

Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052 (9<sup>th</sup> Cir. 2009). Bankruptcy Judges may suspend lawyers from practicing in their court pursuant to §105. The court cited with favor the reasoning that an attorney disciplinary proceeding is not to punish but to maintain integrity of the courts and the profession. The penalties must be either compensatory or to coerce compliance.

U.S. v. Milavetz Gallop & Milavetz, P.A., 541 F.3d 785 (8<sup>th</sup> Cir. 2009). Debtor attorney challenging the constitutionality of §526(a)(4), §§528(a)(4) and (b)(2). The Eighth Circuit found that §526(a)(4) is unconstitutional as an overbroad restriction on speech but the §528 provision are constitutional as reasonably related to a government interest of protecting the consumer. Certiorari has been granted by the Supreme Court and the Court entered an order (--- S.Ct. ---, 2009 WL 2208344) amending briefing schedule, with the final reply brief due November 25, 2009.

**III. Case law update and issues in the Chapter 7 attorney fee process**

1. Reasonableness of fees; legal work benefitting the estate; Signature of attorney in fee application is certification of correctness of time actually rendered.
2. Compensation to debtor's attorneys for legal fees from estate funds not allowed unless attorney authorized and employed by order of Court.
3. Legal fees collected post-petition; pre and post petition retainer agreements.

**1. Reasonableness of fees; legal work benefitting the estate; Signature of attorney in fee application is certification of correctness of time actually rendered.**

In re Bond, 254 F.3d 669 (7th Cir 2001)

This case discussed the presumptive attorney fee limit of \$1,000 in Chapter 13 cases (2001). Debtor's counsel brought four new cases to the court's attention, and in each of these cases, counsel filed motions in the bankruptcy court seeking fees that exceeded the then \$1,000 limit by amounts ranging from \$166 to \$309. In these motions, the attorney presented detailed records of the amount of time she had spent on each case (totaling approximately 10 to 12 hours per case), and reported that she had billed this time at the rate of \$110 per hour. The court did hold a hearing on counsel's motions, but the court found that she had failed to justify fees in excess of \$1,000 in any of the cases. The court cited several reasons for its denial, including the fact that the attorney did not delegate non-attorney work, like typing, to legal professionals, as she was trying to receive her attorney fee for administrative tasks.

One of the attorney's chief arguments was that all of her fee applications were verified, and the court took some time discussing verification of fee applications. The Bankruptcy Rules neither require nor provide for the verification of fee applications. *Compare* Bankruptcy Rule 2016 *with* Bankruptcy Rule 9011(b). *See also* former Bankruptcy Rules 219(a) and 911(b). Nonetheless, the practice has developed in Illinois and other jurisdictions of submitting verified applications for allowance of compensation and reimbursement of expenses. A verification, as used in connection with fee applications in bankruptcy cases, is nothing more than a confirmation of the truth and correctness of the time records submitted to the court. The purported object is to assure the good faith and authenticity of those records. A verification is not a substitute for testimony in support of a contested fee application, nor does it limit the Court's inquiry as to the services rendered or reasonableness of the fee sought. **The court in *Bond* held that the signature of the attorney or other professional who submits a fee application constitutes a certificate by that attorney of the correctness of his time records of services actually rendered. See Bankruptcy Rule 9011(a).**

**In re Bond**, 254 F.3d 669 (7th Cir.(Ill.) Jun 20, 2001)

- No negative history.
- Cited as a reference for Chapter 13 debtor attorneys requesting fees from the court in the following cases:

In re Hatfield, 1999 WL 33326723 (Bankr.C.D.Ill. May 07, 1999) (NO. 95-72240)  
In re Epperson, 1999 WL 33592586 (Bankr.C.D.Ill. May 07, 1999) (NO. 98-73553)  
In re Huber, 1999 WL 33592929 (Bankr.C.D.Ill. May 07, 1999) (NO. 98-70007)  
In re Bond, 271 B.R. 590 (Bankr.C.D.Ill. Apr 27, 2000)

In re Lifshultz Fast Freight, Inc., 140 B.R. 482 (N.D. Ill. 1992)

This case was originally filed as an involuntary chapter 11 wherein a chapter 11 Trustee was appointed. Eight months later, the case was converted to a Chapter 7, and the Trustee's attorneys filed a petition for compensation and reimbursement of expenses. The trustee objected, claiming that the work done in preparation of a plan and disclosure statement did not benefit the estate. Also, the attorneys allegedly knew the case was going to be converted, and the plan and disclosure statement were filed only two days before the conversion.

After the submission of the petition, the court immediately awarded half of the fees, and this case consists of the court's analysis of the remaining disputed fees

The court began by stating "In reviewing fee applications, the bankruptcy court must address three issues: were the services that are the subject of the application properly compensable; if so, were they actual and necessary; if so, how will they be valued?" *In re Wildman*, 72 B.R. 700, 704 (Bkrcty.N.D.Ill.1987).

The court explained that there are circumstances where attorneys fees will not be rewarded at all, such as when the attorney's appointment has not been approved by the court, that attorney may not receive any compensation from the estate. *Also, a conflict of interest will merit a reduction in or a denial of attorneys' fees.*

The trustee's second claim, that the attorneys' work did not benefit the estate, did not resonate with the court. The court cited several cases in which attorneys fees were rewarded when attorneys provided a *benefit* to the estate, but those benefits were not monetary.

Services compensable from the estate have always been actual and necessary services, defined to include services actually rendered that are necessary to the administration of the case or aid the represented party in fulfilling that party's duties under the Bankruptcy Act or Code. Actual and necessary services have never been limited to services that added money to the estate.

On a side note, the court mentioned that because a Chapter 7 debtor has no duty to defend complaints to determine dischargeability, the attorneys' cost of defending complaint to

determine dischargeability is not compensable by estate, since the complaint is not related to administration of estate, but only to debtor's liability.

**In re Lifshultz Fast Freight**, 140 B.R. 482 (N.D. Ill. 1992)

- No negative history
- Declined to follow because of factual differences by *In re S.W.G. Realty Associates, II, L.P.*, 265 B.R. 534 ([E.D.Pa.](#) Aug 08, 2001) (NO. CIV.A. 01-2180)

In re Wildman, 72 B.R. 700 (N.D. Ill. 1987)

In *Wildman*, thirteen related Chapter 11 cases were jointly administered, eleven of which came to confirmed reorganization plans. Trustee's attorneys moved for reconsideration of order disallowing certain attorney fees, and petitioned for supplementary fees. The Bankruptcy Court, after setting out standards for review of attorney fee petitions, held that: (1) certain fees were properly disallowed for failure to adequately document services performed, for duplication of efforts, for excessive time spent, for failure to demonstrate that tasks involved legal skills or legal services beyond scope of trustee's duties or for failure to show that tasks could not have been performed by someone not licensed to practice law; (2) attorneys were not entitled to fees for prosecuting motion for reconsideration of order disallowing excessive fees; and (3) reimbursement of expenses for computer research would be disallowed absent showing research was either necessary or attributable to estates.

In determining the amount of compensation to be awarded, the Court held it will consider 1) whether the tasks were performed within a reasonable number of hours, and 2) whether the requested hourly rate is reasonable. These factors, which were originally established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), were adopted in this case. Determining the reasonableness of the number of hours and the hourly rate requires further consideration of the following specific factors: 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill necessary to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee for similar work in the community; 6) time limitations imposed by the client or the circumstances; 7) the experience, reputation and ability of the attorney; 8) the "undesirability" of the case; 9) the nature and length of the professional relationship with the client; and 10) awards in similar cases. *In re Wildman*, 72 B.R. at 712. Upon consideration of these factors, the Court will decide whether the amount of compensation requested in the fee petition is in fact reasonable or whether the stated fee should be decreased.

**In re Wildman**, 72 B.R. 700 (N.D. Ill. 1987)

- No negative history
- Cited as a reference in *In re Weideau*, 78 B.R. 904 (S.D. Ill. 1987)

In re Ryan, 82 B.R. 929 (E.D. Ill. 1987)

An involuntary Chapter 7 was filed against Debtor. When the petition was filed, there were nine adversary proceedings pending against Ryan. These consisted of six dischargeability complaints, 11 U.S.C. § 523(a), and three complaints objecting to discharge, 11 U.S.C. § 727.

The trustee found Ryan had an estate of \$33,235.49, and the judge overseeing the proceeding recommended Ryan find an attorney. Ryan did, and that attorney, the appellant in this case, received an objection to his petition for leave to substitute as counsel to Ryan. At that time, the Travelers Express Company, Inc. (“Travelers”), one of Ryan's creditors, “objected to [proposed counsel] being compensated out of the funds of the bankruptcy estate for any defense of Ryan in the various adversary proceedings objecting to Ryan's discharge and seeking to determine the dischargeability of Ryan's debts.” After reviewing section 330 of the Code, the court held that the attorney was not entitled to fees for time spent defending Ryan from dischargeability complaints because those services performed benefitted the debtor personally and not the estate.

**In re Ryan, 82 B.R. 929 (N.D. Ill. 1987)**

- No negative history
- Called into doubt, but not overturned by *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 23 Bankr.Ct.Dec. 26 (Bankr.N.D.Ill. May 29, 1992)

**Chapter 7 Trustee Review of Debtor’s Attorney Fees:**

***Handbook for Chapter 7 Trustees:***

*The debtor’s attorney in a bankruptcy case, whether or not the attorney intends to apply for compensation post-petition, must file a statement in compliance with §329(a) and FRBP 2106(b) setting forth the amount of compensation paid or agreed to be paid for services in connection with the case. This statement must be filed within 15 days after the order for relief, or as otherwise ordered. The trustee should review this disclosure of compensation and make an independent determination whether the fee paid or agreed to be paid is excessive. If the fee is questionable, the trustee of the United States Trustee should move, pursuant to §329(b) and FRBP 2017(a), to have the court review the fee for*

*reasonableness. To the extent the fee is excessive, the court may order cancellation of the fee agreement or the return of all or any portion of the fee.*

*Claims for unpaid attorney fees for pre-petition services provided to the debtor generally will be discharge in a chapter 7 case. The trustee should advise the United States Trustee if a debtor's attorney attempts to collect fees from the debtor for pre-petition services.*

*In 2004, the Supreme Court held that chapter 7 debtor's attorneys may not receive an award of compensation under section 330(a) of the Bankruptcy Code, and, therefore bankruptcy estates may not pay their fees. (citing, Laramie v. U.S. Trustee, full cite and synopsis below). Consequently, chapter 7 debtors' attorneys must look solely to their clients for compensation.*

*The trustee should be alert for retainers held by debtors' attorneys. While courts generally hold that an unearned retainer on hand at the commencement of a case constitutes estate property, the trustee may have to initiate action to obtain the balance of the retainer.*

*(Handbook for Chapter 7 Trustees, Effective March 1, 2001 (with January 1, 2005 technical amendments), Chapter 6, D. Executive Office for United States Trustee, United States Department of Justice.*

**2. Compensation to debtor's attorneys for legal fees from estate funds not allowed unless attorney authorized and employed by order of Court.**

In re Weinschneider, 395 F.3d 401 (C.A. Ill. 2005)

Originally filed as a Chapter 11 and it was subsequently converted to a Chapter 7. After the conversion, a committee of unsecured creditors filed an adversary action against the Debtor, demanding that he turn over certain property to the estate. The trustee settled that litigation and executed a contract containing a release and covenant not to sue. Under the document, the trustee agreed to release "all claims, known or unknown" against Debtor, his wife, and certain trusts. In addition, the trustee agreed not to institute, prosecute, or

participate in any action to collect or enforce any claims, “known or unknown” that the estate could have against Debtor, his wife, or the trusts.

While the bankruptcy case was proceeding, Debtor filed a breach of contract action in Illinois state court against his former business associates, claiming a 23 percent ownership in their nursing home management operation. Originally, the Debtor *did not* inform the trustee of the existence of the lawsuit. However, in response to Debtor’s second amended complaint, the defendants to the state court lawsuit alleged that the case belonged in the bankruptcy court. At that point, the state court judge instructed the parties to give the bankruptcy trustee notice of the pending suit. After he learned of the state court action, the trustee brought an adversary complaint against the Debtor seeking a declaratory judgment that the state court lawsuit was the property of the bankruptcy estate. Debtor raised, as a defense to the lawsuit, the release and covenant not to sue. In response, the trustee argued that the Debtor fraudulently induced the execution of the covenant and the release by failing to disclose all of his business interests, and that rendered the release and covenant void. The bankruptcy court ruled for the trustee.

After the court's decision, the Debtor filed a motion with the bankruptcy court seeking over \$500,000 in attorney fees and costs he claimed he incurred in successfully defending against the declaratory judgment action. He claimed the expenses were because of the suit brought by the trustee.

The court, in ruling, looked to the US Supreme Court. In *Lamie v. U.S. Trustee*, 124 S.Ct. 1023 (2004), the Court determined that the revised § 330 means what it says and that §§ 327 and 330, taken together, prohibit compensation awards from a Chapter 7 estate to an attorney unless the attorney is employed as authorized by § 327. Consequently, the court in *Wienschneider* held that § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a chapter 7 case, he must be employed by the trustee and approved by the court.

In re *Weinschneider*, 395 F.3d 401 (C.A. Ill. 2005)

- No negative or subsequent citing history

### 3. Legal fees collected post-petition; pre and post petition retainer agreements.

In re Griffin, 313 B.R. 757 (N.D. Ill. 2004)

In *In re Griffin*, the Law firm that had represented debtors in Chapter 7 case filed a supplement to their application for award of fees, requesting a fee award for its services in representing the debtors in connection with an unopposed motion for redemption of the debtors' motor vehicle. When the debtors obtained counsel, the debtors paid a \$100 retainer fee and signed an agreement to pay the balance of \$1,050.00 in four installments. When the motion was filed, counsel did not file any papers indicating whether or not it had received compensation for this motion or the source of such compensation, if any. The only compensation disclosed was the \$1150 indicated in the original filing. At the hearing on the motion, the Court requested more detail on the fee arrangement underlying the redemption motion, and a copy of the contract that had been signed.

The two issues the court faced were whether counsel can collect these requested fees from either 1) the estate or 2) the debtors. The court also addressed additional disclosure and professional responsibility concerns.

The court held that the trustee did not retain or otherwise authorize counsel to perform work related to the redemption motion. Therefore, counsel was not eligible for compensation from the estate under § 330. Further, the trustee would have no reason to hire the debtor's counsel for the motion for redemption because redemption is valueless to the estate; the motion only has value to the debtor.

In terms of the second issue, the court held that the law firm was barred by the automatic stay from collecting any fees because the fee agreement was entered into pre-petition, and therefore, the firm's claim became a pre-petition claim against the estate which is potentially subject to discharge if the debtors are granted one. The court held that contract-based claims arise at the time the contract is entered into, and in this case, the firm began billing the day after their services were obtained, three months before the voluntary petition was filed.

The court looked at a third issue associated with professional responsibility and post petition work concerns. An attorney has several options to ensure his or her payment for post petition work that results from a contract that was entered into pre-petition: the court's favorite was for the debtor and the bankruptcy attorney to enter into a pre-petition retention contract requiring the attorney to perform either no post-petition services or very limited ones not including redemption work; then these parties could potentially enter into a post-petition contract for post-petition services the attorney has not already agreed to perform, creating a new post-petition claim. The post-petition contract must really be a post-petition contract, however. That is, the legally operative events-the offer, acceptance, and exchange of consideration (either a promise to pay or an act of payment in exchange for a promise to render services)-must in fact occur after the date of the Chapter 7 filing to qualify as a claim arising post-petition and falling outside the scope of

§ 362(a)(6). From a professional responsibility standpoint, Chapter 7 debtors' attorneys should proceed with caution, as they can limit the scope and objectives of their representation of the debtors only if they explicitly disclose those limits and obtain the clients' consent thereto.

**In re Griffin**, 313 B.R. 757

- Distinguished by: *In re Ray*, 314 B.R. 643 (Bankr.M.D.Tenn. Sep 20, 2004) (NO. 103-02131, 103-09245, 103-11852)
- Distinguished by: *In re Colvin*, 2006 WL 2385272 (Bankr.N.D.Ill). Aug 15, 2006)

In re Colvin, Not reported, 2006 WL 2385272 (N.D. Ill. 2006)

Debtors filed a Chapter 7 petition, obtained counsel, and signed both a prepetition agreement, in which they agreed to pay counsel a set amount for representation, and a post petition retainer agreement, in which they agreed to pay a set amount for a Motion for Redemption for the Debtors' vehicle. The Loan Disclosure, Note, and Security Agreement attached to the motion contained a \$600 line item entitled "Attorney Fee Escrow Account." Consequently, the court required counsel to submit an itemization of fees and an application for compensation. The fee itemization indicated that all services rendered to the debtors regarding their motion for redemption were performed after the petition was filed.

The court discussed *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), and the proposition that it stands for: the court may award reasonable compensation for actual, necessary services to various professionals, but a Chapter 7 debtor's attorney may not be compensated from estate funds unless employed by the case trustee as authorized pursuant to § 327. However, a debtor may employ an attorney post petition for their own benefit as long as estate funds are not used for compensation of said attorney. For example, if the debtor hires counsel to defend a dischargeability action, there is no benefit to the estate from such services; as long as the debtor pays the attorney from non-estate funds, such as wages received post petition, this type of post petition attorney employment is permitted under 11 U.S.C. § 541(a)(6).

This court subsequently distinguished *In re Griffin*, 313 B.R. 757 (N.D. Ill. 2004), because in *Griffin* the attorneys began billing for the motion for redemption prior to the filing of the bankruptcy petition, and thus the claim in *Griffin* was a prepetition contract based claim. In the present case, Debtors signed not only the prepetition contract for general representation, but also a post petition agreement with counsel for representation on the Redemption Motion. According to the submitted itemization of attorney tasks, all work performed on the Redemption Motion was performed post petition.

Consequently, the court held that counsel was not required to disclose or to seek court approval of the \$350.00 fee it will be receiving from the debtors' post-petition income as compensation for preparing the Redemption Motion.

Bethea v. Robert J. Adams and Associates, 352 F.3d 1125 (7th Cir. 2003)

*Procedural History:* In re Bethea, 275 B.R. 284 (N.D. Ill. 2002) (Chapter 7 debtors brought adversary proceeding against their former bankruptcy attorneys for attorneys' alleged violations of automatic stay and of discharge injunction, in continuing to collect their fees post petition and/or post discharge. Court held that construing stay and discharge provisions as applying to actions of debtors' bankruptcy counsel in collecting prepetition fees would be to ignore another Code provision dealing specifically with compensation "agreed to be paid" to debtors' counsel); *affirmed by* Bethea v. Robert J. Adams & Assocs., 287 B.R. 906 (N.D. Ill. 2003); *vacated by* Bethea v. Robert J. Adams and Assocs., 352 F.3d 1125 (7th Cir. 2003); *cert. denied* 124 S. Ct. 2176.

In *Bethea*, the Chapter 7 debtors hired lawyers on retainer to prepare and prosecute their bankruptcy cases. The retainer was to be paid in installments over time, with some payments made pre-petition and some collected post-petition. The debtors ultimately received discharges. Later, the debtors found new counsel to challenge the bankruptcy attorneys' post-discharge collection of the agreed installment payments. The Seventh Circuit found that the retainer contract created a pre-petition, liquidated debt, that attorneys' fees are not among the debts excepted from discharge by § 523, and that § 329 does not create an un-enumerated exception to the § 727(b) discharge.<sup>FN3</sup> *Id.* at 1127. The Seventh Circuit ordered the bankruptcy attorneys to repay the debtors any money collected after the discharge and any money collected while the automatic stay was in effect. *Id.* at 1129.

*Bethea* stands for the rule that personal liability on the entire retainer agreement, as a pre-petition claim, is subject to discharge per § 727. *Id.* at 1128. Under the Bankruptcy Code, contract-based claims arise at the time the contract is entered into rather than upon subsequent events such as termination or performance.

**In re Bethea**, 352 F.3d 1125

- No negative citing history 7<sup>th</sup> Cir.  
*Distinguished/Declined to follow:*

In re Wagers, 340 B.R. 391 (Bankr.D.Kan). Feb 23, 2006) (NO. 03-24484, 04-6095)

In re Chase, 372 B.R. 133 (Bankr.S.D.N.Y. May 18, 2007) (NO. 05-45706, 06-01190)

In re Hines, 147 F.3d 1185 (9th Cir. 1998)

*Procedural History:* In re Hines, 198 B.R. 769 (9th Cir. BAP 1996) (Debtor whose case was converted from Chapter 13 to Chapter 7 moved for order holding his bankruptcy counsel in contempt, and the motion was denied. Debtor appealed. The Bankruptcy Appellate Panel held that: (1) debtor's obligation to attorney whom he hired during pendency of Chapter 13 case to convert case to one under Chapter 7 had to be treated as prepetition debt, of kind which could be discharged in bankruptcy, and (2) attorney violated automatic stay by presenting debtor's postdated checks for payment).; *reversed by In re Hines*, 147 F.3d 1185 (9th Cir. 1998).

On November 24, 1992 attorney Shilberg (“Shilberg”) began a Chapter 13 bankruptcy proceeding on Hines' behalf. Almost exactly a year later Hines changed counsel by retaining Gordon (who had explained to her the apparent advantages of Chapter 7 over Chapter 13 in her situation) to convert her Chapter 13 case to one under Chapter 7. Hines and Gordon entered into a written fee agreement for payment in seven monthly installments of \$125 each, supported by a promissory note and seven postdated checks, the first to be cashed pre-petition and the remainder to be cashed post-petition.

On December 29, 1993 Gordon formally replaced Shilberg as Hines' attorney of record. Shortly thereafter, on Gordon's application the bankruptcy court issued an order converting Hines' case from Chapter 13 to Chapter 7. In conjunction with the conversion petition, Gordon properly disclosed his fee arrangement . In accordance with the fee agreement and related promissory note, Gordon proceeded to act on Hines' behalf post petition, and he cashed two postdated checks, one on January 10, 1994 and the other on February 7 of that year (so that Gordon's total receipts for his services rendered aggregated \$375). Hines then became dissatisfied with Gordon and decided to revert to her former attorney Shilberg. On Shilberg's advice Hines stopped payment on the remaining uncashed postdated checks in Gordon's hands because that debt may have been dischargeable.

In response to that stop payment order, Gordon's law firm sent Hines a “past due” notice, followed by several phone calls, asking her to make a new payment arrangement. When no payment was made, Hines, now represented by Shilberg, filed a motion for contempt against Gordon for willful violation of the Section 362(a)(6) automatic stay, seeking compensatory damages of \$250, punitive damages of \$50,000 and attorneys' fees. On July 14, 1994 the bankruptcy court denied Hines' contempt motion, at the same time reducing Gordon's fee from the originally agreed amount of \$875 to the \$375 already paid. Hines timely appealed that order to the BAP, which reversed the bankruptcy

court's order and remanded for a determination of damages under Section 362(h). Gordon then timely filed a notice of appeal to this Court.

**The Court of Appeals, Shadur, United States District Judge for the Northern District of Illinois, sitting by designation**, held that: (1) stay did not apply to attorney's attempts to collect fees which he had earned, under prepetition employment agreement, as result of legal services provided post petition, stating “attorneys for Chapter 7 debtors must have a legally enforceable right for their post petition services that were contracted for before filing of the petition. If the absence of such a right were to become the law, it does not require much thought to recognize that the entire system would suffer a massive breakdown.” *Hines*, 147 F.3d 1191; and (2) attorney had undischarged claim in quantum meruit to reasonable compensation for legal services provided post petition, stating “[c]ompensation must be ‘expected’ [by the party rendering services] only in the sense that the services rendered must not have been intended to be gratuitous.” *Id.*

#### In re Hines

No negative citing history

#### Lamie v. U.S. Trustee, 540 U.S. 526 (2004)

*Procedural History*: In re Equipment Services, Inc., 253 B.R. 724 (W.D. Va. 2000) (Counsel to Chapter 11 debtors moved for award of compensation). Following conversion to Chapter 7, the Court held that: (1) court was without authority to award portion of attorney's prepetition retainers, as of date that Chapter 11 cases were converted to cases under Chapter 7, was not “property of the estate.”); *affirmed by In re Equipment Services, Inc.*, 260 B.R. 273 (W.D. Va. 2001); *affirmed in part, reversed in part by In re Equipment Services, Inc.*, 290 F.3d 739 (4th Cir. 2002) (Addressing an issue of apparent first impression for the circuit, the Court of Appeals held that: (1) bankruptcy statute governing compensation of professionals does not allow a Chapter 7 debtor's attorney to be compensated from the estate, and (2) unearned portion of retainer held in counsel's trust account became estate property on the petition date, and so, although fees earned by counsel while debtor was in Chapter 11 were payable from the retainer, counsel was not entitled to deduct his post-conversion fees from the retainer.); *affirmed by Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

In case converted from Chapter 11 to Chapter 7, debtor's counsel filed an application for payment of legal fees incurred prepetition, during the Chapter 11 proceeding, and after the conversion of the case to a Chapter 7. The United States Trustee objected to extent that the application sought payment for services rendered post-conversion. In this case,

petitioner filed an application with the Bankruptcy Court seeking attorney's fees under § 330(a)(1) just for the time he spent working on behalf of a debtor in a Chapter 7 proceeding. The government argued that § 330(a) makes no provision for the estate to compensate an attorney who is not employed by the estate trustee and approved by the court under § 327. Petitioner admitted he was not employed by the trustee and approved by the court under § 327, but nonetheless contended § 330(a) authorized a fee award to him because he was a debtor's attorney. In denying petitioner's application, the Bankruptcy Court, District Court, and Fourth Circuit all held that in a Chapter 7 proceeding § 330(a)(1) does not authorize payment of attorney's fees unless the attorney has been appointed under § 327. The Supreme Court affirmed these courts, holding that under the Code's plain language, § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a Chapter 7 case, he must be employed by the trustee and approved by the court.