

Memorandum



Subject	Unpaid Attorney Fees in Chapter 7 Cases	Date	June 23, 1999
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To Chapter 7 Trustees

From Richard W. Simmons
United States Trustee

An issue has arisen regarding whether a chapter 7 trustee should pay or must object to proofs of claim filed by chapter 7 debtor's counsel for unpaid attorneys fees for services rendered pre-petition.

The Handbook for Chapter 7 Trustees (eff. 10/1/98) at page 6-4 states:

Claims for unpaid attorney fees for pre-petition services provided to the debtor generally will be discharged 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.

Attorney services rendered pre-petition for no money down or for only partial payment cannot be collected post-petition from the bankruptcy estate as an administrative claim. Such services are not generally necessary or beneficial to the bankruptcy estate and are not entitled to payment as a professional administrative expense claim under 11 U.S.C. § 330. In fact, the payment of Chapter 7 debtor's attorneys was specifically eliminated and as such distinguished from those of Chapter 12 and 13 attorneys under § 330(a)(4)(B). Therefore, the Chapter 7 Trustee should object to any administrative claim filed by debtor's counsel. If such claim is filed as a secured claim it may be avoidable by the trustee, but the trustee must take affirmative action to avoid what would otherwise be a valid state lien. If such claim is filed as an unsecured claim and money in the estate will go to the unsecured class, the trustee should examine the basis for and reasonableness of the claim.

Can a chapter 7 debtor's counsel collect for pre-petition services post-petition from the debtor?

No. Payment for pre-petition legal services like other debts are discharged under 11 U.S.C. § 727(b). Debtor's counsel is stayed from taking any collection action against the debtor pursuant to 11 U.S.C. § 362(a)(6). Any attempt by debtor's counsel to collect from the debtor for pre-petition services by payment plan, post-dated checks, garnishment, etc. for pre-petition services should be reported to the United States Trustee (see Handbook statement above). If debtor's counsel has taken a security interest in the debtor's exempt property, it may be avoidable or may be reaffirmed by the debtor.

Can a chapter 7 debtor's counsel collect retainers for post-petition services?

No. Retainers held by debtor's attorneys and unearned at the commencement of a case constitute property of the estate and should be returned to the trustee for the benefit of creditors. Any security interest claimed by debtor's counsel in such retainer would be avoidable, but the trustee or the UST must act to avoid the attorney's state lien pursuant to 11 U.S.C. § 545 and require the assets be returned to the estate.

Can a chapter 7 debtor's counsel can be paid by the estate for post-petition services?

Possibly, but only if the work is necessary and of material benefit to the estate and not exclusively of benefit to the debtor. If work for the estate is contemplated, debtor's counsel should be employed as special counsel for the trustee under 11 U.S.C. § 327(e). The attorney will then be required to file a fee application and secure approval by the court by order after notice and hearing.

Can a chapter 7 debtor's counsel be paid for post-petition services by the debtor from exempt assets or post-petition personal services income?

Yes, but only if the services were in fact rendered post-petition. Payment for the preparation and filing of the petition is clearly pre-petition work. Meeting with the debtor, talking to creditors, and the preparation and filing of the schedules and statement of financial affairs will generally be pre-petition work. Attending the 341 meeting may be considered by a court to be post-petition work, but if this were all that an attorney did post-petition then in this jurisdiction a court would probably not allow payment under § 329 because such appearance was clearly required and contemplated at the time the petition was prepared and filed. Amendments to the petition, schedules, and statement of financial affairs, reaffirmations, 362 defense, discharge defense, etc. are post-petition services for which a debtor may be charged, but not the bankruptcy estate. The charge for these services may be established by agreement pre-petition, but not collected from the debtor until performed post-petition. Collection for such services is not stayed nor the debt discharged.