Entered on Docket
October 12, 2007

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re	)	CASE NO. BK-S-07-50276-MKN
JAMES J. MCDONOUGH, III,	)	Chapter 13
Debtor.	)	DATE: June 29, 2007 TIME: 2:00 p.m.

MEMORANDUM DECISION ON CONFIRMATION OF CHAPTER 13 PLAN

This matter was heard on June 29, 2007. The appearances of counsel were noted on the record. After entertaining oral argument, the Court took the matter under submission.

BACKGROUND

James J. McDonough ("Debtor") filed a voluntary Chapter 13 petition on March 21, 2007. Debtor owns approximately $13,552 in real and personal property and has claimed as exempt all but $2,377 of it. His scheduled, general unsecured debts total $51,778.85 and he has no secured debt. Debtor is married with two children and operates a caterpillar tractor for a living. Debtor previously filed a Chapter 7 petition on April 10, 2002 and received a discharge[1].

[1] The prior case was filed in this judicial district and was denominated Case No. 02-51101. Debtor received his discharge on July 19, 2002.

Pursuant to 11 U.S.C. section 727(a)(8), Debtor would not be eligible for another Chapter 7 discharge until after April 10, 2010. Debtor's commencement of a Chapter 7 proceeding in 2002, however, does not preclude him from obtaining a further discharge through Chapter 13. See 11 U.S.C. § 1325(f)(1).

Debtor filed a proposed Chapter 13 plan on April 5, 2007. His plan proposes that he make payments of $148.33 for 36 months resulting in a total distribution to creditors of $5,339.88. It states that Chapter 13 trustee fees will be paid first, followed by administrative claims, secured claims, priority claims, and then general unsecured claims. Other than the trustee's fees, the only priority administrative claim set forth in the plan are attorneys fees to Debtor's counsel in the total of $4,000 for services rendered in the case. As of the date of the hearing, a total of $28,670.25 in nonpriority, general unsecured claims had been filed with a deadline of July 26, 2007. No further claims have been filed.

Only the Chapter 13 trustee ("Trustee") objects to confirmation of the proposed plan. All of the Trustee's concerns have been resolved except for his objection to the amount of fees sought by Debtor's counsel. At the hearing, the Trustee argued that a $4,000 fee is excessive in this particular case given that Debtor's counsel spent only 4.5 hours on the case prior to plan confirmation with an additional half hour allocated for the confirmation hearing. A summary time record prepared by Debtor's counsel was admitted as Exhibit "1". The Trustee argued that the fee is especially excessive given that there is likely to be little or no distribution to general unsecured creditors under the proposed Chapter 13 plan.

Counsel for the Debtor argued that the Court should approve a $4,000 fee on a "no look" basis in conformity with accepted practice in this judicial district. A "no look" fee is a set amount of compensation that is presumed to be reasonable and therefore does not require counsel to provide an itemized billing statement detailing the services rendered and time

expended. Counsel also argued that fees generated for services legitimately performed should not be reduced simply because the return to creditors is minimal. Additionally, counsel maintains that the fees charged in the Debtor's case are not excessive when consideration is given to other cases where counsel receives little or no compensation. Based on his prior representation of the Debtor, counsel also argues that the proposed plan likely will need to be modified some time after confirmation.

DISCUSSION

In its decision in Law Offices of David A. Boone v. Devin Berham-Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006)("Eliapo"), the Ninth Circuit upheld the use of presumptive "no look" guidelines for attorney's fees charged by debtors' counsel in routine Chapter 13 cases. Local Rule 9029-1 for the Northern District of California allowed the bankruptcy court to adopt guidelines establishing presumptive fees in routine Chapter 13 proceedings. In the San Jose division of that district, the guidelines allowed attorneys to charge $1,400 for a routine Chapter 13 case on a "no look" basis, i.e., without necessity of filing an itemized application for court approval. 468 F.3d at 597 & n.3. Under the Northern District of California guidelines, counsel could elect to be paid beyond the $1,400 amount[2], but would have to file an itemized fee application.

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[2] At the time the Eliapo appeal was heard, the no look fee in the San Jose division of the Northern District of California had been increased to $1,800 for routine Chapter 13 cases, 468 F.3d at 597 n.3, and additional fees could be charged for various categories depending on the anticipated difficulty of the task. 468 F.3d at 598. The most recent guidelines provide for a base fee of $2,750 and counsel are required to file a fully executed copy of a "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" which details certain "basic services" counsel must provide, including postconfirmation tasks such as plan modification, refinancing and sale of real property, claim objections, and responses to stay relief and dismissal requests. ("Rights and Responsibilities Agreement") The local rules and guidelines for all divisions of the Northern District of California are available on that court's website at www.canb.uscourts.gov.

The Eliapo court identified four separate reasons why the use of a presumptive, no look fee process may be beneficial: (1) it saves time attorneys otherwise would spend on preparing fee applications and thereby might lower the amount of fees charged, (2) it awards attorney efficiency and prevents inefficient attorneys from running up costs that are passed on to clients, (3) it provides for earlier payment of fees by allowing compensation for anticipated services that might not yet have been performed, and (4) it saves court time that might be spent on reviewing detailed fee applications. 468 F.3d at 599. The court observed that the key to a successful no look fee system is to arrive at an appropriate level of compensation that does not encourage attorneys to opt out of the no look process in favor of more cumbersome fee applications. Id.[3]

Unlike the Northern District of California[4], there is no local rule in the District of Nevada or written guideline for fees in Chapter 13 cases[5]. In the Southern District of California, debtors' counsel are allowed initial fees of $2,800 in consumer cases and $3,300 in business cases that encompass a certain minimum of services. A Rights and Responsibilities Agreement

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[3] The leading treatise on Chapter 13 practice discusses the policies behind and the many questions raised by the "no look" approach to attorney's fees for debtors counsel. See Keith M. Lundin, 4 Chapter 13 Bankruptcy § 294.1 (3rd Ed. 2006).

[4] In the Northern District of California, the guidelines for the San Francisco division start at $2,800 for consumer cases and $4,300 for business cases, with additional fixed amounts for various tasks. To utilize this procedure without filing a detailed, itemized fee application, counsel must execute a Rights and Responsibilities Agreement. In the Oakland division of the Northern District of California, the fee guidelines provide for maximum initial fees of $3,500 in consumer cases and $5,000 in business cases. Counsel must execute a Rights and Responsibilities Agreement and additional fees may be sought above the same general guidelines. In the Santa Rosa division of the Northern District of California, however, the "guidelines" expressly reject any maximum or minimum fee structure and places no cap on any retainer that Chapter 13 counsel may obtain. Counsel are not required to execute a Rights and Responsibilities Agreement, although compliance with the document apparently is expected.

[5] Local Rule 2016 permits written guidelines for compensation and reimbursement to be published in this district, but so far none have been developed.

must be filed. See Bankr.S.D.Cal. "Interim Guidelines Regarding Chapter 13 Attorney Fees"[6]. If additional services are provided, supplemental fees are allowed based on the tasks performed, e.g., oppositions to relief from stay motions ($450 to $575), sales or refinancing of real property ($425 to $450), claim objections ($250 to $350). In the Central District of California, debtors' counsel are allowed fees of $4,000 in consumer cases and $4,500 in business cases provided that certain minimum duties are performed both prepetition and postpetition as outlined in a Rights and Responsibilities Agreement. See Bankr.C.D.Cal. R. 3015.1(v)[7]. Any objections to fees requested may be raised by the court or any party in interest. If additional services are performed, such fees are allowed on an hourly basis only upon noticed application.

In the Eastern District of California, debtors' counsel may request in their client's chapter 13 plans fees of up to $3,500 in consumer cases and $5,000 in business cases without filing a detailed application. See Bankr.E.D.Cal. "Guidelines for Payment of Attorneys Fees in Chapter 13 Cases"[8]. Counsel must file and execute a Rights and Responsibilities Agreement. Additional fees may be sought only if a Chapter 13 plan is confirmed. Counsel may elect to seek compensation through hourly fee applications beyond the maximum. In the event of an objection, all fees are subject to review and approval on an hourly basis.

In the District of Arizona, fees may be requested in the proposed Chapter 13 plan as long as the amount of fees is disclosed along with a statement of the legal services performed and to be performed. See Bankr.D.Az.R. 2084-3[9]. A flat fee for postconfirmation services also may be

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[6] These guidelines may be viewed on the court's website at www.casb.uscourts.gov.

[7] These local rules may be viewed on the court's website at www.cacd.uscourts.gov.

[8] These guidelines may be viewed on the court's website at www.caeb.uscourts.gov.

[9] This local rule, which applies to cases filed after October 16, 2005, can be viewed on the court's website at www.azb.uscourts.gov.

set forth. No itemized statement of the actual time expended or to be expended is required for fees requested in the plan. A comprehensive statement of the services provided or to be provided, however, must be included in the plan as well as in the attorney's disclosure of compensation filed under Bankruptcy Rule 2016(b). Attorneys may elect to file separate fee applications on an hourly basis in lieu of requesting fees in the proposed plan.

In the District of Oregon, fees may be requested up to a maximum of $4,000 for the entire life of the Chapter 13 case, or up to $3,000 through plan confirmation. See Bankr.D.Ore. R. 2016.1.F.1 and Forms 1305 and 1307[10]. No itemized time records are required unless the attorney elects to exceed the $3,000 amount through plan confirmation. In such instances, the attorney must file an itemized hourly fee application at least a week prior to plan confirmation. For any additional amounts exceeding $500 after confirmation, a supplemental application must be filed including an itemized billing statement.

In the District of Idaho, fees may be requested in the amount of $2,500 without necessity for itemization of time. See Bankr.D.Idaho R. 2016.1 and G.O. 203. Bankruptcy counsel who relies on the presumptive fee provision must execute a "Model Retention Agreement" for services to the Chapter 13 debtor[11]. Any party in interest, the Chapter 13 trustee, the U.S. Trustee, and the court, may request a hearing on the reasonableness of the fee. Additional fees also may be sought but only upon an itemization of the services rendered and the hourly rate requested.

Beyond using up the available writing space, the purpose of these examples is to

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[10] This local rule and the local bankruptcy forms may be reviewed on the court's website at www.orb.uscourts.gov.

[11] This local rule, the general order, and the Model Retention Agreement, may be reviewed on the court's website at www.id.uscourts.gov.

illustrate the differing approaches taken by the districts in this circuit that border the District of Nevada[12]. Apparently reflecting the hourly rates present in each geographical market as well as the minimum expectations of any counsel who represents Chapter 13 debtors, most of these courts have arrived at presumptively reasonable compensation ranging from $1,800 to $4,000 for a typical Chapter 13 case.

The key point, however, is that in each district such fees are presumptively reasonable rather than conclusively reasonable. Where an objection is raised to the fees requested in the proposed Chapter 13 plan, the presumption evaporates and debtor's counsel must demonstrate that the fees requested are reasonable. Thus, the "presumption" underlying a no look fee process is not an evidentiary presumption, but a rule of administrative convenience. When requested to do so, Debtor's counsel must demonstrate by a preponderance of the evidence that the fees requested are reasonable.

The recognition of presumptively reasonable fees is an evolutionary process in each district. Like the Northern District of California, some districts adopt local rules authorizing "guidelines" to be established. Other districts have adopted presumptively reasonable fees by case law that becomes the guideline for the district or division. Others combine approaches and hone their guidelines through bar surveys and anecdotal evidence. See In re Debtor's Attorney Fees in Chapter 13 Cases, 2007 WL 2457465 (Bkrtcy.M.D. Fla. August 31, 2007). As illustrated above, in those districts where a no look fee mechanism is adopted, Chapter 13 debtors' counsel typically are required to execute form service agreements that enumerate basic services that are included in the no look fee. The District of Nevada has taken none of these

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[12] In the District of Utah, the bankruptcy court sitting en banc issued a "Memorandum Decision on Attorneys' Fees in Chapter 13 Cases" on March 22, 2006. In that decision, a presumptive fee of $2,750 was established for all Chapter 13 cases through plan confirmation. The decision may be review on the court's website at www.utb.uscourts.gov.

approaches: no local rule exists, no published guidelines have been adopted, and no judicial decision has been universally followed.

Although counsel in this case requests a $4,000 in fee on a "no look" basis, it is no longer a no look case at all since the Trustee has objected. As previously mentioned, Debtor's counsel has submitted an itemized billing statement indicating that 4.5 hours of services were provided leading up to the plan confirmation hearing, with another .5 hours for the confirmation hearing itself. If the Debtor completes his Chapter 13 plan, his counsel would be paid at an effective rate of $800 per hour. Even if Debtor's counsel were to provide an additional five hours of service postconfirmation for one or two plan modifications, the effective hourly rate still would be $400.

The Trustee argues that the $4,000 requested fee is especially excessive given that there is likely to be little or no distribution to general unsecured claimants under the proposed Chapter 13 plan[13]. That the distribution will be minimal at best is not contested. Counsel for the Debtor argues, however, that fees generated for services legitimately performed should not be reduced simply because the return to creditors is minimal. Additionally, counsel maintains that the fees charged in the Debtor's case are not excessive when consideration is given to other cases where counsel receives little or no compensation. Finally, counsel has suggested that the Debtor will need to modify his plan in the future based on his prior experience in Chapter 7.

The Court agrees that the return to creditors from counsel's services is not a reason to

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[13] Section 2.10 of the "model plan" suggested by each of the Chapter 13 trustees in this district provides for presumed fees to be awarded for 16 hours of services at the attorney's hourly billing rate. According to that Section, fees and costs in excess of that amount "must be approved by the Court." Interestingly, the Section goes on to say that "However, all fees are subject to review and approval by the Court." Separate websites are maintained by each of the three Chapter 13 trustees for the District of Nevada, all of which are linked to the Court's website at www.nvb.uscourts.gov. The inclusion of 16 hours in the model plans apparently is based on an assumption of the number of hours typically required to usher a Chapter 13 case through discharge.

reduce a fee award. However, the argument that counsel should be allowed $4,000 in this case to make up for other less remunerative cases is, to put it mildly, utter nonsense. In such an event, the Debtor's creditors would receive less in this case so that his attorney can reduce his losses in other cases. To have creditors subsidize counsel's law practice under the guise of a "no look" fee process begs the question: if creditors were asked in a clearly noticed motion to voluntarily pay the fees of Debtor's counsel, would they do so? "No way" is the likely answer.

While it is true that "no look" fees serve a legitimate purpose, providing windfalls to debtors' counsel is not one of them. In this case, the Trustee has requested a look at the services rendered and an itemized billing statement was provided by Debtor's counsel. The billing statement simply does not support the amount of fees requested. Because counsel has provided no evidence of an hourly rate appropriate for his services, the Court will assume a rate of $225 an hour for an experienced consumer bankruptcy attorney providing services in a routine Chapter 13 case. In view of the Debtor's previous Chapter 7 discharge and in absence of any nondischargeable claims being scheduled or timely filed, the possibility is minimal that additional services will be necessary for claim objections. Additionally, postconfirmation relief from stay proceedings are unlikely since the Debtor has no secured creditors. The Debtor also has no residence to refinance or to sell. Factoring in the possibility of a plan amendment in the future, however, the Court will allow an additional three hours for such services. Unless counsel establishes that a higher hourly rate is appropriate or that additional time should be anticipated, the Court therefore will approve fees for eight hours of services in this simple Chapter 13 case. A total amount of $1,800 will be allowed.

The Court notes that on at least twelve occasions prior to commencement of the instant case, counsel for the Debtor has filed Chapter 13 petitions on behalf of other clients resulting in

confirmed plans.[14] Similarly, after the commencement of this instant case, counsel for the Debtor filed petitions for Chapter 13 relief on behalf of at least seven other clients that have resulted in confirmed plans.[15] In none of these other nineteen cases did the Chapter 13 trustee or any party object to counsel's request for a $4,000 fee on a "no look" basis. The Court assumes that none of these cases were as simple as the instant case, otherwise the Chapter 13 trustee would have raised a similar objection. The Court expresses no view on whether $4,000 is an appropriate "no look" fee in any other proceeding, or whether 16 hours is the presumptively reasonable amount of time needed to complete a typical Chapter 13 case.

CONCLUSION

Debtor's counsel will be allowed attorney's fees in the total amount of $1,800 for services rendered and possibly to be rendered in this case. An order approving attorney's fees in that amount has been entered concurrently herewith which also directs the Chapter 13 trustee to

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[14] See, e.g., Case No. 06-50404 (Thomas Gates), confirmation order entered November 7, 2006 (Dkt# 25); Case No. 06-50458 (Napolean and Rosalina Drilo), confirmation order entered January 3, 2007 (Dkt# 35); Case No. 06-50600 (David and Diana Chadek), confirmation order entered December 8, 2006 (Dkt# 38); Case No. 06-50629 (Jeffrey O'Rear), confirmation order entered November 29, 2006 (Dkt# 22); Case No. 06-50664 (Ann and John Stevens), confirmation order entered January 5, 2007 (Dkt# 31); Case No. 06-50698 (Russell Piccotti), confirmation order entered February 1, 2007 (Dkt# 38); Case No. 06-50857 (Bruce and Pamela Gordon), confirmation order entered February 1, 2007 (Dkt# 21); Case No. 06-50868 (Melodie Masterson), confirmation order entered May 20, 2007 (Dkt#28); Case No. 06-50919 (Robert and Shirley Reeves), confirmation order entered March 6, 2007 (Dkt# 26); Case No. 07-50053 (Francisco and Maria Jimenez), confirmation order entered June 11, 2007 (Dkt# 26); Case No. 07-50078 (Tyree and Jana Gunn), confirmation order entered April 30, 2007 (Dkt# 21); Case No. 07-50094 (Johnny and Sophia Sanchez), confirmation order entered June 11, 2007 (Dkt# 22).

[15] See, e.g., Case No. 07-50340 (Kenneth Johnson), confirmation order entered June 13, 2007 (Dkt# 21); Case No. 07-50341 (William Madura), confirmation order entered June 26, 2007 (Dkt# 22); Case No. 07-50517 (Jay and Darla Smallen), confirmation order entered July 12, 2007 (Dkt# 20); Case No. 07-50535 (Joel Perry and Joie Rupert-Perry), confirmation order entered August 3, 2007 (Dkt# 24); Case No. 07-50550 (Andra Zulgis), confirmation order entered August 3, 2007 (Dkt# 24); Case No. 07-50604 (James and Bonnie Gray), confirmation order entered August 27, 2007 (Dkt# 22); Case No. 07-50773 (Dennis Holtorf), confirmation order entered September 14, 2007 (Dkt# 28).

submit a plan confirmation order including such award.

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