

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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**In Re:**

**Randall A. Braddock  
Lori LaDelfa; and  
James MacWhorter,**

**CASE NO. 96-21716  
CASE NO. 96-21529  
CASE NO. 96-21509**

**Debtors.**

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**DECISION & ORDER**

**BACKGROUND**

On June 13, 1996, Randall A. Braddock (“Braddock”) filed a petition initiating a Chapter 7 case (the “Braddock Case”). Braddock’s schedules and statements filed with the Court indicated that: (1) he owned no real property; (2) he owned personal property valued at \$2,370.00, which included a 1990 Chevy valued at \$1,400.00 secured an obligation in favor of Weyerhaeuser which exceeded the value of the Chevy; (3) he had eleven unsecured creditors with scheduled claims totaling \$11,714.01; (4) his monthly expenses exceeded his monthly income; (5) he intended to reaffirm the Weyerhaeuser obligation which was secured by his Chevy; (6) he had used a bankruptcy preparer, Diane DiGirolamo (“DiGirolamo”) of BK Associates USA, Inc. (“BK Associates”) to assist him in connection with the filing of his case; and (7) BK Associates had charged him \$350.00 for its services (the “BK Services”) which included preparation of the petition, schedules and statements, as well as additional services which included, “interview client, provide client with bankruptcy forms, provide client with toll free telephone number to communicate with our office, keep file with all bankruptcy documents to and from the Court, review creditors meeting notice, discharge notice, and any other notices received by the debtor, provide docket information to

creditors.”

On May 28, 1996, James Todd MacWhorter (“MacWhorter”) filed a petition initiating a Chapter 7 case (the “MacWhorter Case”). MacWhorter’s schedules and statements filed with the Court indicated that: (1) he owned no real property; (2) he owned personal property valued at \$1,014.67, which included a 1986 Nissan with 178,000 miles valued at \$500.00; (3) he had no secured creditors; (4) he had six unsecured creditors with scheduled claims totaling \$5,097.98; (5) he had used DiGirolamo of BK Associates to assist him in connection with the filing of his case; and (6) BK Associates had charged him \$350.00 for performing the BK Services.

On May 29, 1996, Lori LaDelfa (“LaDelfa”) filed a petition initiating a Chapter 7 case (the “LaDelfa Case”). LaDelfa’s schedules and statements filed with the Court indicated that: (1) she owned no real property; (2) she owned personal property valued at \$3,175.00, which included a 1988 Pontiac Firebird valued at \$2,425.00; (3) she had no secured creditors; (4) she had eight unsecured creditors with scheduled claims totaling \$9,256.83; (5) she had used DiGirolamo of BK Associates to assist her in connection with the filing of her case; and (6) BK Associates had charged her \$350.00 for performing the BK Services.

On July 23, 1996, the Office of the United States Trustee for the Western District of New York (the “U.S. Trustee”) filed separate motions (collectively the “U.S. Trustee Motions”) for orders pursuant to Section 110(h)(2)<sup>1</sup> disallowing the fee charged each of these debtors by BK Associates

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<sup>1</sup> Section 110(h)(2) provides that:

because the U.S. Trustee felt that it exceeded the value of the BK Services performed. The U.S. Trustee asserted that a proper fee for the BK Services performed, absent the special circumstances presented in these cases, would be in the range of \$75.00 to \$150.00.

On August 19, 1996, DiGirolamo filed a substantively identical affidavit (the "DiGirolamo Affidavit") in response to each of the U.S. Trustee Motions which alleged that: (1) she was the sole shareholder of BK Associates; (2) the \$350.00 fee charged to each of the debtors was in substantial part a reimbursement of expenses incurred by BK Associates, including paper, envelopes, copying service, facsimile charges, postage, telephone calls and transportation; (3) the BK Services exceeded the mere preparation of documents and included providing information to creditors and providing debtors with publications disseminated by the Bar Association of the City of New York; (4) the debtors had not complained about the amount of the fee charged, in fact, each of the debtors had filed a Debtors Declaration, which indicated that:

"The debtor(s) herein state(s), having read the disclosure of compensation of bankruptcy petition preparer filed in this case, that said statement accurately reflects their agreement with BK Associates USA Inc. The debtor(s) understand that BK Associates USA Inc. is not an attorney and cannot render legal advice. The debtor herein after making independent inquiry and investigation is satisfied that the services rendered and promised equal or exceed the agreed upon fee.";

(5) the purpose of Section 110(h)(2) was to prevent unscrupulous bankruptcy petition preparers from

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The court shall disallow and order the immediate turnover to the bankruptcy trustee of any fee referred to in paragraph (1) found to be in excess of the value of services rendered for the documents prepared. An individual debtor may exempt any funds so recovered under section 522(b).

victimizing debtors by charging them excessive fees, not to interfere with the debtor's right to contract with a competent, honest bankruptcy petition preparer for services at a reasonable fee commensurate with the quality and quantity of the services provided and expenses incurred by the bankruptcy petition preparer in providing such services; and (7) Section 110(h)(2) was not designed to put competent, honest bankruptcy petition preparers out of business, which would be the effect if the Court granted the U.S. Trustee's Motions, since it would be unprofitable to be a bankruptcy petition preparer for cases filed in the Rochester Division of the Western District of New York.

In the DiGirolamo Affidavit, she requested, as has the U.S. Trustee, that the Court set forth guidelines regarding a bankruptcy petition preparer's allowable services and fees in the Rochester Division of the Western District of New York. In order to meet these requests, the Court scheduled an evidentiary hearing for October 16, 1996 at which DiGirolamo elected not to participate. The U.S. Trustee, however, presented several witnesses and other evidence to assist the Court in determining a reasonable fee at this time for the services of a bankruptcy petition preparer in the Rochester Division of the Western District of New York in connection with simple consumer Chapter 7 cases.

### **DISCUSSION**

At the October 16, 1996 hearing, Madeline Bosek ("Bosek") appeared as a witness and testified that: (1) she had been employed as a legal secretary/paralegal in the offices of Douglas J. Lustig, P.C. for six years where she typed the required papers for Chapter 7 and Chapter 13

bankruptcy cases, worked on trustee files, since Douglas J. Lustig, Esq. (“Lustig”) was a Chapter 7 panel trustee in the Rochester Division of the Western District of New York, and performed other non-attorney support services, including services similar to the BK Services, in connection with those Chapter 7, 13 and trustee cases; (2) she had organized, typed the petitions, schedules and statements and performed related services for at least fifty bankruptcy cases per year for the last six years; (3) she had reviewed in detail the petition, schedules and statements filed in the MacWhorter Case; (4) based upon her experience and in her opinion, it would take no longer than one hour for her to type up the MacWhorter Case petition, schedules and statements; (5) based upon her experience and in her opinion, it would take no longer than one additional hour for her to perform the BK Services in the MacWhorter Case, including contacting creditors, managing the file and reviewing notices; (6) she was paid at an hourly rate of \$11.00 to \$12.00 per hour, which she understood to be a competitive legal secretary/paralegal rate of compensation in the geographical area covered by the Rochester Division of the Western District of New York.

At the October 16, 1996 hearing, Norma Polizzi appeared as a witness and testified that she: (1) was the Academic Program Director for the paralegal curriculum at Bryant & Stratton Business Institute; (2) had lectured on a number of occasions for the Practicing Law Institute in connection with paralegal programs; (3) had been a legal secretary/paralegal since 1979, having worked for several law firms and the Gannett Newspaper chain; (4) had worked with the bankruptcy instructor at Bryant & Stratton to prepare the bankruptcy curriculum for paralegals, which included as a final exam the preparation of the documents for the filing of a Chapter 7 case; (5) had reviewed in detail

the petition, schedules and statements filed in the MacWhorter Case and the BK Services described in the papers; (6) believed, based upon her experience and in her opinion, the maximum time required to perform all of the BK Services would be three hours; and (7) understood the maximum compensation rate for legal secretaries/paralegals in the Rochester area to be in the \$15.00 - \$16.00 per hour range.

At the October 16, 1996 hearing, Lustig appeared as a witness and testified that: (1) he maintained two offices for the practice of law within the geographical area covered by the Rochester Division of the Western District of New York, one in Rochester and one in Penn Yan, New York; (2) his specialty was bankruptcy and commercial law, and he was a Chapter 7 panel trustee; (3) based upon his experience (maintaining two offices which file numerous Chapter 7 and 13 cases and hiring legal secretaries and paralegals to work on those cases, including typing the required documents and providing non-attorney related services, such as the BK Services) and in his opinion, the time for a legal secretary/paralegal to perform the services provided by BK Associates in the MacWhorter case would generally be about two hours, three hours at most; (4) in his experience a competitive salary for legal secretaries in the geographical area covered by the Rochester Division of the Western District ranged from between \$11.00 to \$12.00 per hour, and a competitive salary for paralegals ranged from between \$15.00 to \$20.00 per hour, depending upon experience; (5) as a panel trustee, he was aware that a number of attorneys filed Chapter 7 cases for clients and provided all of the BK Services performed in the three cases at issue, as well as the basic and required legal services, for

\$350.00 or less;<sup>2</sup> (6) he believed that a simple Chapter 7 case such as the MacWhorter Case should command a fee for a bankruptcy preparer of no more than \$100.00. Lustig testified that this would account for typing preparation time of approximately one hour, and from one to two hours for the performance of the related BK Services, at a maximum of \$20.00 per hour, a rate which would provide a competitive compensation rate and a partial benefits factor, plus an additional \$40.00 per case, which would provide an adequate general overhead, additional benefits and even a modest profit factor. In his opinion, having opened and operated two law offices and being familiar with the routine overhead costs such as rent, utilities, supplies, postage, benefits and related costs, this would provide for a more than adequate and competitive overhead and profit component.

Based upon the credible and persuasive testimony of the witnesses at the October 16, 1996 hearing, the Court finds that for a simple Chapter 7 bankruptcy case, like the Braddock, MacWhorter, & LaDelfa Cases, filed in the Rochester Division of the Western District of New York, a reasonable fee for a bankruptcy preparer providing the BK Services is \$100.00 or less. In the Court's opinion, this fee provides reasonable compensation for the time and expertise required to perform these Services, as well as a reasonable overhead, benefits and profit factor, based upon an assumed

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<sup>2</sup> Plaintiff's Exhibit H admitted into evidence at the October 16, 1996 hearing was a schedule prepared by the U. S. Trustee which showed that there were 70 Chapter 7 cases in the Rochester Division of the Western District of New York for the period between January 1, 1996 through April 15, 1996 in which the attorneys handling those cases charged a fee of \$350.00 or less.

sufficient volume of cases to warrant conducting such a business. As a result, if a bankruptcy petition preparer charges a fee of more than \$100.00, it should be prepared to persuasively demonstrate that the Chapter 7 case in question was substantially more complex than the Braddock, MacWhorter or LaDelfa Cases, and therefore, warranted an increased fee. In addition, any fee in excess of \$100.00 shall be justified by actual and necessary additional time spent charged at a reasonable hourly rate, or actual, necessary and extraordinary out-of-pocket expenses.

Having determined a reasonable fee for a bankruptcy petition preparer providing services for a simple Chapter 7 case, I must now turn to the special circumstances presented by the MacWhorter Case.

MacWhorter appeared at the October 16, 1996 hearing and confirmed the allegations made in the U.S. Trustee Motion in his Case by testifying that: (1) in September, 1995, after determining that he needed bankruptcy relief, he responded to a newspaper advertisement by calling 1-800-428-4LAW, reaching the law firm of Joaquin Rivera in Peaksville, New York; (2) he received from the law firm bankruptcy forms and a request that he fill them out to the best of his knowledge and return them with a \$350.00 fee, plus a \$160.00 filing fee, which he did in September, 1995; (3) he did not hear back from the law firm for over five months, notwithstanding that he left numerous messages; (4) totally frustrated, he called the firm to advise it that he was about to contact the New York Attorney General's Office, at which time someone picked up the phone at the firm and indicated that the law firm could not continue to handle his case because the Bankruptcy Court in the Rochester Division of the Western District of New York required that attorneys representing debtors in Chapter



7 cases appear at the Section 341 meeting and the firm was looking into alternative means of handling his case; (5) thereafter, DiGirolamo contacted him to take care of his case, indicating that BK Associates was affiliated with Joaquin Rivera; (6) he was given legal advice in connection with his case by BK Associates, including that he should file a Chapter 7 case and other information concerning exemptions; (7) after his Section 341 meeting he contacted BK Associates at the request of his trustee, was hung up on and later told to advise the trustee that he had forgotten Mr. Rivera's address and phone number; and (8) he believed that because of the non-responsiveness, unbusinesslike attitude, abuse and inducement to be dishonest that he had experienced, he should receive a total refund of the fees that he paid in connection with his Chapter 7 case.

I agree with MacWhorter and the U.S. Trustee that based upon the way the MacWhorter Case was handled, for BK Associates to receive any fee would constitute an excessive fee. Therefore, I find that any fee in excess of zero (\$0) charged or received by BK Associates in the MacWhorter Case is, under Section 110(h)(2), excessive.

### **CONCLUSION**

Pursuant to Section 110(h)(2), the Court finds that the fees charged by BK Associates to Braddock and LaDelfa in excess of \$100.00 are excessive, and that the fee charged to MacWhorter in excess of zero (\$0) is excessive. The excess portion of these fees shall be turned over to the debtors' respective trustees, as required by Section 110(h)(2), within ten (10) business days of the date of this Decision & Order.

