UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

QUID ME BROADCASTING, INC. Case No. 89-12649 K

Debtor

This is a Chapter 7 case that is unusual in a number of respects: It was filed as an "asset 7," rather than having begun in Chapter 11; it has taken nearly eight years to administer despite due diligence by the Trustee (who also serves as his own attorney); [1] all allowed claims will be paid in full, with some measure of interest; and most of those claims arose shortly before the Chapter 7 filing[2]; and the work of the Trustee and the Trustee as his own counsel was exemplary in every respect, yet he does not seek a Lodestar enhancement for "extraordinary

[1]As required by 11 U.S.C. § 327(d), the Court may authorize the Trustee to act as his own attorney only "if such authorization is in the best interest of the estate." In each such application the Trustee is required to recite how the interests of the estate are served by his own retention and the Court considers each instance separately. When these safeguards are observed, this Court disagrees with other Courts that hold that the Trustee's retention of himself or his own law firm as counsel is always unethical.

[2]The Debtor's assets - a radio station - were sold at fair value immediately before the filing. The consideration was, however, a long term note. Perhaps because some investors cashed in their stock on the eve of the sale (for which the Trustee sued each one of them), some creditors were left unpaid, despite a previous history of staying current on obligations.

results."

Under these unusual circumstances the Trustee, as his own counsel, makes a novel argument. He argues that he entered upon his duties soon after the creditors became creditors; that he has waited for payment of his fees nearly as long as they have, because the United States Trustee (who appointed him) does not favor interim fee applications by Chapter 7 Trustees' counsel in this district; that administrative expenses such as his fees are to be paid ahead of pre-petition claims under 11 U.S.C. § 726(a), and that, consequently, he should be compensated for the "time value" of his uncollected fees, before pre-petition claims are permitted to receive interest.

He does not seek "interest" as such on his unpaid fees, because he knows that payment of interest is not one of the terms and conditions that the Court approves in any but the most extraordinary of circumstances. Rather, he seeks a Lodestar enhancement that may be said to be "measured" by the interest lost by the delay in payment of his fees.

He argues that it "would be inequitable to 'prefer' the unsecured claimants" and it would "reverse the Code's scheme of distribution" to award them interest before adjusting administrative claims upwards for the "time value" of money.

The U.S. Trustee has taken no position regarding this argument. A substantial creditor - in fact the business broker who put together the sale that resulted in the note that yielded the proceeds that will pay all creditors here - has opposed, pro se, and has done so ably and with gentility. He argues that "fairness" dictates that the recovery on claims such as his be maximized before "enhancements" are awarded to the Trustee's counsel.

The Court sustains his objections as they relate to enhancement, though on somewhat different grounds.

It is, of course, true that administrative expenses come ahead of pre-petition claims because administrative expense claims arise from doing the work that makes assets available for the benefit of pre-petition creditors. But that statement of principle also instructs us as to the answer to the present question. The Chapter 7 process exists for the benefit of pre-petition creditors, not for the benefit of the Trustee and his professionals. There is no "inequity" in compensating creditors fully before paying an unplanned "enhancement" to the professional.

Secondly, counsel's true adversary here is not the distributive priorities of the Code, but the fact that counsel did not resist the U.S. Trustee's "gentle persuasion" not to seek interim allowances. Possibly, the applicant's billing rate for the type of work here, at the time they were set, contemplated only normal delays in receipt of payment. It would not be unreasonable for a Chapter 7 Trustee's counsel to establish hourly rates that contemplate the possibility of waiting two or three years for payment. Counsel here went through several changes of rates during the eight years. Possibly his $140 per hour rate (for example) ceased to "subsume" the time value of money once he switched to the $150 per hour rate and so on.

If that were so, then it seems to the Court that where, as here, it could have been shown that any delays in administration occurred despite the applicant's diligence, an interim award would have been appropriate two or three years after normal billing rates for such work had risen significantly in light of, for example, inflation.

But it is also possible that counsel established rates based on a presumption that a certain percentage of his billable hours would be collected promptly, another percentage would be collected in two or three or four years, and another percentage might not be collected for eight or more years.

Indeed, the dynamics by which hourly rates are set may be complex, arcane, and may differ from law firm to law firm, and they may even be based solely on the competition without regard to profitability, time value of money, or even value.

These are business decisions and it is not for the Court to insulate counsel from the consequences thereof. The time and manner for judicial consideration of what the reasonable expectation of counsel and the parties could have been as to promptness of payment, is at the time of an application for an interim allowance - not at the end of the case, at which time the dispositive issues can only be the subject of supposition and presumption. Indeed, the crux of the Trustee's argument is that it would somehow unjustly enrich creditors if they were to receive the benefits of the interest earned on money that he could have been receiving from time to time throughout the case. That argument presumes that the interim allowances would have been granted, and that presumption itself presumes that it would not be fair to consider the fees at issue to be among those which the Trustee's counsel should have included in the slow-pay group when deciding what rates to charge.

In sum, the Court always will be happy to consider Lodestar adjustments based on extraordinary results. But it will not use "enhancements to adjust for the time value of money" as a substitute for a professional's willingness to seek an interim allowance. Such allowances are not forbidden by the Court. The Court emphatically commends the applicant's work in this very difficult case. Even without being asked for interim allowance, the Court might have approved modifying the retention terms to permit rates that were higher than applicant's standard rates, if suitable application had been made therefor at suitable points in time. But Lodestar enhancements are, in essence, redistributions from pre-petition creditors to administrative claimants, and ought not to be employed as a second-look at the wisdom of counsel's various decisions made as one engaged in the "business" aspects of the profession.

The Court has considered the objecting creditor's other objections to the Trustee's counsel's application and finds them to be without merit. The fee application is approved in full, but without enhancement. The requested costs are also approved.

Also approved are the fees of both accountants, without enhancement.

SO ORDERED.

Dated: Buffalo, New York
March , 1997

U.S.B.J.