UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
KENNETH OPSTEIN,	)	CASE NO. BK93-81876
	)	
DEBTOR	)	CH. 11

MEMORANDUM

Hearing was held on May 15, 1995, on Application for Allowance and Payment of Attorney Fees filed by Edward D. Hotz, Anne M. Breitkreutz and Patrick Flood. Appearances were: Parker Shipley, Attorney for debtor; Jerry Jensen, Attorney for United States Trustee; Robert Bothe, Attorney for debtor; Edward Hotz and Anne Breitkreutz, Attorneys for applicants. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (B).

Background

Special counsel for the debtor filed an Application for Allowance and Payment of Attorney Fees (the Application). The debtor and the United States Trustee (UST) objected to the request by special counsel for an enhancement fee in addition to a fee based on the regular hourly rate of special counsel.

Prior to the commencement of this bankruptcy case, the law firm of Zweiback, Hotz & Lamberty, P.C. represented the debtor Kenneth Opstein in over twenty (20) lawsuits which were pending across the country. After Mr. Opstein filed a petition to reorganize under Chapter 11 of the Bankruptcy Code on November 12, 1993, this Court appointed Zweiback, Hotz & Lamberty, P.C. (which later merged into Betterman Katelman & Hotz) as special counsel to the bankruptcy estate to continue representing the debtor in litigation against PennCorp Life Insurance Company and PennCorp Financial [hereinafter these lawsuits shall be collectively referred to as the PennCorp Litigation]. The PennCorp Litigation involved several areas of the law -- insurance, contract, discrimination, tort and ERISA -- which were within the expertise of special counsel. The PennCorp Litigation was not removed to this bankruptcy court, but continued in the courts of original jurisdiction.

A settlement was reached by October, 1994 in the PennCorp Litigation and approved by this Court in November, 1994. Under the settlement agreement, the debtor-in-possession received $2.95 million from PennCorp. In addition, several claims filed against the bankruptcy estate were withdrawn: Taylor et. al (Midwest Region managers) withdrew a claim in excess of $1 million; PennCorp and National Union withdrew a claim in excess of $1.2 million; Vugteveen et. al (Midwest Region managers) withdrew a claim of $2 million in actual damages, $6 million in punitive damages; Larry Vugteveen (Midwest Region manager) withdrew an additional claim of $1.1 million; and PennCorp and National Union dismissed a lawsuit pending against National Health Care Discount, Inc., which is a corporation 100% owned by Mr. Opstein.

The fees requested by special counsel based solely on billable hours totaled $336,527.20, and the expenses requested by special counsel totaled $53,225.09. This Court approved these fees and expenses at the hearing on the Application held on May 15, 1995, and found that the total hours billed and the hourly rates charged by the attorneys and staff of special counsel were reasonable.

The remaining issue before the Court is whether special counsel is entitled to an additional bonus of $150,000. The authorization for the enhancement fee is located in debtor's Application for Appointment of Debtor's Attorneys (Appointment Motion), which requested permission for special counsel to continue to represent the debtor in the PennCorp Litigation post petition and which provided that in addition to a fee based on hourly rates, special counsel would be entitled, subject to this Court's approval, to "an additional amount" based upon:

> 1. Time and labor required and novelty of the questions involved;
>
> 2. The amount involved and the results obtained;
>
> 3. Time limitations and time demands of the work; and
>
> 4. Experience, reputation and ability of the lawyers.

Appointment Motion, at 2 (filing no. 13).

The December 10, 1993 Order approving the Appointment Motion, which was the Court's standard appointment order, stated that the prepetition fee agreement between the debtor and special counsel, as set forth in the Appointment Motion, was not binding on the

Court: "No fee agreement between the applicant and the attorney shall be binding upon this Court unless approved, after notice and hearing, by the Court." Order Approving Appointment of Attorney (Appointment Order), Filing no. 43. No party, including the UST, objected to the provision for a fee enhancement in the Appointment Motion at the time the Appointment Order was entered. See Comments of the United States Trustee Re: Application for Appointment of Zweiback, Hotz & Lamberty as Debtor's Attorneys, Filing no. 28.

The UST has, however, objected to the fee enhancement request in the Application. The UST takes the position that fee enhancements do not constitute "reasonable" fees under 11 U.S.C. § 330 and that attorney fees in bankruptcy cases should be limited to a fee based on an hourly rate. Mr. Opstein has objected to the fee enhancement request on the basis that the results obtained by special counsel were not so exceptional as to merit a bonus as contemplated by the agreement between special counsel and Mr. Opstein. No other parties have objected to the request for a fee enhancement.

Decision

The objection to the enhancement fee raised by the United States Trustee is overruled. The objection raised by Mr. Opstein is overruled in part, deferred in part, pending a final hearing.

The Clerk of Court is directed to set a final evidentiary hearing for one day. Mr. Opstein may testify about his specific concerns that are not determined by the factual findings contained in this memorandum. Special counsel may testify on behalf of the application in response. Other counsel who were present during the PennCorp settlement discussion may be called as witnesses.

Mr. Opstein has objected to the enhancement in his individual capacity and not as debtor in possession. Counsel for the debtor-in-possession may continue to advise Mr. Opstein in his capacity as the debtor-in-possession (if no other conflict appears to exist) and may explain to Mr. Opstein in more detail why he should seek independent counsel, but may not advise Mr. Opstein regarding the merits of his objections.

After the final hearing, the Court will determine what, if any, impact Mr. Opstein's allegations, if proven to be true, have on the bankruptcy estate and on special counsel's claimed right to receive an enhanced fee, and, if it is determined that an enhanced fee is appropriate in this case, will determine the amount.

Statutory Authority

Professionals are employed through Section 327 of the Bankruptcy Code, which provides:

> the trustee... may employ one or more attorneys... to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a). Under Chapter 11, where a debtor serves as the debtor-in-possession and where a trustee has not been appointed, provisions in the Bankruptcy Code which refer to "trustee" apply to the debtor-in-possession. 11 U.S.C. § 1107; Kotts v. Westphal (In re Babbitt Hardware & Lumber, Inc.), 746 F.2d 1329, 1331 (1984).

Generally, professionals employed pursuant to Section 327 are compensated pursuant to Section 330(a) of the Bankruptcy Code, which provides in part:

> (a)(1) After notice to any parties in interest and to the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to ... a professional person employed under section 327 or 1103, or to the debtor's attorney --
>
> > (1) reasonable compensation for actual, necessary services rendered by such ... attorney, ... and by any paraprofessional person employed by such ... attorney, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
> > (2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1993).[1]

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[1] The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224 (1994), as codified at 11 U.S.C. § 330(a) (1995), amended § 330(a). Since the present bankruptcy case was filed before the effective date of the 1994 amendments, the current version of § 330(a) is not reproduced in this Memorandum. See The Bankruptcy Reform Act of 1994, Pub. L. No. 103-304, § 702 (1994) ("the amendments made by this Act shall not apply with respect to cases commenced under title 11 of the United States Code before the date

Discussion

A. Legal Standard for Enhancement Fees under Section 330(a).

Bankruptcy courts define "reasonable compensation" under Section 330(a) by analogizing to the lodestar formula (hourly rate multiplied by a reasonable number of hours) established in federal fee-shifting statutes. Novelly v. Palans (In re Apex Oil Co.), 960 F.2d 728, 731 (8th Cir. 1992); accord In re Gianulias, 98 B.R. 27 (Bankr. E.D. Cal. 1989) (concluding that lodestar approach adequately considers the experience of counsel, the complexity of case, the novelty of issue presented, and other factors); Drexel Burnham Lambert Group, Inc., 133 B.R. 13 (Bankr. S.D.N.Y. 1991) (holding that lodestar rate is presumed to be a reasonable rate under § 330).

The Eighth Circuit Court of Appeals, in Apex, set forth the applicable legal standard to determine compensation under Section 330(a) and to determine whether a fee enhancement award is suitable:

> Compensation under [the fee-shifting] statutes is based on the lodestar amount which, as noted above, is the number of hours reasonably expended multiplied by a reasonable hourly rate. Because this lodestar amount presumably reflects (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained, these factors normally cannot serve as independent bases for increasing the fee award above the lodestar amount. See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S. Ct. 3088, 3089, 92 L. Ed. 2d 439 (1986) (Delaware I); Blum v. Stevenson, 465 U.S. 886, 898-900, 104 S. Ct. 1541, 1548-1550, 79 L. Ed. 2d 891 (1984). The Supreme Court, however, has stated that upward adjustments of the lodestar figure are permissible "in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." Delaware I, 478 U.S. at 565, 106 S.

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of the enactment of this Act.").

> Ct. at 3098. We find that the lodestar approach, including the possibility of adjustments in rare and exceptional circumstances, is an appropriate method to use in calculating reasonable compensation under § 330. See In re Manoa Fin. Co., 853 F.2d [687, 691 (9th Cir. 1988)].... Because the lodestar amount may already compensate the applicant for exceptionally good service and results, however, the fee applicant must do more than establish outstanding service and results. The applicant also must establish that the quality of service rendered and the results obtained were superior to what one reasonably should expect in light of the hourly rates charged and the number of hours expended. See Blum, 465 U.S. at 899, 104 S. Ct. at 1549; see also Copeland v. Marshall, 641 F.2d 880, 893-94 (D.C. Cir. 1980)...; In re Energy Co-op, 95 B.R. 961, 965 (Bankr. N.D. Ill. 1988)....

Apex, 960 F.2d at 731-32.[2] Accord In re UNR Indus., Inc, 986 F.2d 207 (7th Cir. 1993) (enhancement was appropriate in rare and exceptional case where counsel offered specific evidence that the results achieved were exceptional and the lodestar fee is less than one would reasonably expect in light of the results achieved); Burgess v. Klenske (In re Manoa Fin. Co.), 853 F.2d 687, 692 (9th

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[2] An in depth discussion regarding the fee-shifting line of cases would not benefit this Memorandum because the standards for § 330(a) have been established by Apex. However, important fee-shifting cases include: Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989); Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987)[Delaware I]; Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 s. Ct. 3088, 92 L. Ed. 2d 439 (1986)[Delaware II]; Burlington v. Dague, ___ U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992), on remand, Dague v. Burlington, 976 F.2d 801 (2d Cir. 1992); Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988); Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985); Lattimore v. Oman Constr., 795 F.2d 930 (11th Cir. 1986); Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985); Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

Cir. 1988) (enhancement was appropriate where applicant showed that enhancement was necessary to cause fee to be commensurate with fees charged for similar non-bankruptcy services and where applicant showed that hourly fee did not adequately compensate in light of the results obtained); In re Port Royal Land & Timber Co., 105 B.R. 72 (Bankr. S.D. Ala. 1989) (fee enhancement is appropriate in an instance where exceptional results were achieved); In re Begun, 162 B.R. 168, 176 (Bankr. N.D. Ill. 1993) (enhancement appropriate when quality of service is shown to be superior to what one reasonably expects in light of hourly rate charged, and when results were exceptional); In re Kucek Dev., 113 B.R. 652 (E.D. Cal. 1990) (denying enhancement fee to special counsel of trustee because attorney could not show that fee based on hourly rate times hours worked was not reasonable); In re Yankton College, 101 B.R. 151 (Bankr. D.S.D. 1989) (debtor's attorneys and attorney for unsecured creditors' committee were entitled to fee enhancement because extraordinary effort on part of attorneys saved debtor from being liquidated without sufficient funds to pay unsecured creditors to a full payout case with excess of $1,000,000 surplus).

Apex stated that factors such as the novelty and complexity of issues, special skill of counsel, quality of representation, and the results obtained may not be used as a basis for a fee enhancement because these factors are appropriately factored into an attorney's hourly rate and the number of hours spent working on the case. See Apex, supra p. 6. Accord In re Terex Corp., 70 B.R. 996 (Bankr. N.D. Ohio 1987) (committee attorney was not entitled to enhancement fee based on skill of counsel, complexity of case, results obtained, and contingent nature of payment because hourly rate and hours spent on case absorbed these factors); In re Kero-Sun, 59 B.R. 630 (Bankr. D. Conn. 1986) (fee enhancement for committee attorney not appropriate under § 330 if enhancement is based on novelty of issue, skill and experience of counsel, results achieved, and responsibility of attorney in handling funds involved); In re Fall, 93 B.R. 1003 (Bankr. D. Or. 1988) (trustee's attorney not entitled to fee enhancement under § 330 where enhancement based on risk of nonpayment, difficulty of case, quality of representation, or extent of benefit to creditors, but was entitled to fee enhancement for delay in payment); In re Schaeffer, 71 B.R. 559 (Bankr. S.D. Ohio 1987) (trustee attorney was not entitled to enhancement for adversary proceeding and state court action which were settled because complexity and uniqueness of matter cannot support an enhancement).

In addition to the factors listed in Apex, the Supreme Court decided another fee-shifting case, Burlington v. Dague, which opined that risk of loss or non-payment in a fee-shifting case could not be used as a basis upon which to base an enhancement fee, and therefore, held that the lodestar formula was the appropriate

factor to consider to establish a "reasonable" fee. ___ U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992). Risk of non-payment or risk of loss is probably, therefore, no longer a valid basis to grant an enhancement fee.

Even though cases such as Apex have relied upon fee-shifting statutes to formulate a legal standard for "reasonable compensation" under Section 330(a), courts have generally recognized that the policies underlying fee-shifting cases are distinguishable from Section 330(a). As the Ninth Circuit noted in Manoa:

> Congress has expressed its intent that bankruptcy compensation be commensurate with that earned in comparable nonbankruptcy cases, while the usual fee-shifting statute is not "intended to replicate exactly the fee an attorney would earn through a private fee arrangement with his client." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 S. Ct. 3088, 3098, 92 L. Ed. 2d 439 (1986) ("*Delaware I*"). In addition, the source of fees in bankruptcy cases is unique, and § 330 has no parallel to the condition that fees will be awarded only to a prevailing party.

Manoa, 853 F.2d at 691 (some citations omitted). See also In re Taxman Clothing Co., 49 F.3d 310, 315-16 (7th Cir. 1995) ("[W]e cautioned [in UNR Indus.] that it is only by analogy that the lodestar approach has been applied in bankruptcy, and that the analogy must not be pressed too hard."). The Seventh Circuit, which concurred with the Apex rule for granting enhancement fees, recognized after the Supreme Court decided Dague that while fee-shifting cases provide an analogy for what presumptively constitutes a "reasonable" fee under Section 330(a), such cases do not control Section 330(a), and therefore, it is permissible in exceptional circumstances to adjust the lodestar amount when the lodestar is not reasonable in light of the results obtained. UNR Indus., 986 F.2d at 210 (noting that fee-shifting precedents do not control § 330(a), but may be instructive).

In summary, this Court will determine when an enhancement fee is appropriate under Section 330(a) by following the standard set forth in Apex, which is: there is a presumption that the lodestar figure constitutes "reasonable compensation," but the lodestar may be adjusted upward if the applicant establishes through specific evidence that "the quality of service rendered and the results obtained were superior to what one reasonably should expect in

light of the hourly rates charged and the number of hours expended." See Apex, supra 6.

B. Findings of Fact

The Court makes the following findings of fact regarding the reasonableness of the lodestar fee and the suitability of the enhancement fee in this case.

(1) Comparison of Lodestar to Contingency Fee

At the hearing on the Application to Appoint Special Counsel, there was some discussion regarding special counsel's fees, even though no objection to the fee agreement was filed. At the most recent hearing on the current objections, special counsel stated on the record that he had offered, at the time of his appointment as special counsel, to take the PennCorp case on a contingency basis, rather than at an hourly rate with potential enhancement. A contingency fee agreement is typical for this type of case outside of bankruptcy and evidence has been submitted that a contingency fee arrangement would have been appropriate. According to special counsel, the offer to proceed on a contingency fee basis drew several oral objections.

In this case, the total amount of fees and expenses requested by special counsel, without including the $150,000 enhancement fee, totals $389,752.29 ($336,527.20 + $53,225.09). Taking into consideration only the $2.95 million judgment received by the estate as part of the settlement, the total fee award, without including the requested enhancement, is approximately 15.6% of the judgment.

Taking into consideration the enhancement fee, the total fees and expenses are $539,752.29 ($336,527.20 + $53,225.09 + $150,000), which amounts to approximately 18.30% of the cash award. Both of these figures are significantly less than the amount of fees the attorney would have received if the same result was obtained and the fees were paid on a contingency basis. In addition, if the Court were to consider the elimination of claims against the estate as a result of the settlement, the $539,752.29 total fee would constitute a very small percentage of the total benefit received by the estate.

Of course, special counsel is not entitled to a pure contingency fee, since the employment was not specifically authorized on a contingency fee basis, as would be required by 11 U.S.C. § 328(a). However, since a contingency fee best represents the amount that would be collected in the open market for a case of the PennCorp Litigation nature, the disparity between the lodestar

and a contingency fee illustrates the difference between the lodestar and a fee which might have been earned outside of bankruptcy. A standard contingency fee would be at least equal to 20% of the actual recovery.

(2) Continuity of Representation in the Bankruptcy Case

The bankruptcy estate received a benefit by having special counsel continue representing the debtor-in-possession in the PennCorp Litigation after the bankruptcy petition was filed . If special counsel had quit the PennCorp Litigation, it would have cost the estate a large amount of additional money to hire new counsel and for new counsel to become familiar with the PennCorp Litigation. It is important to ensure in major and complex litigation that the filing of a bankruptcy petition during the course of the other litigation will not cause the debtor's prepetition counsel in the litigation to withdraw, causing economic injury to the bankruptcy estate. To avoid withdrawal, the bankruptcy court must give due consideration to the attorney-client agreement.

(3) Expectations of the Attorney & Client

Even though the Appointment Motion, which established an enhancement fee, is not binding on this Court, a fee agreement does establish the parties' expectations regarding compensation. Even in a fee-shifting case, the Supreme Court has noted that attorney-client agreements are useful to determine the parties' expectations regarding the attorney-client relationship: "The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case." Pennsylvania v. Delaware Valley Citizens Council for Clean Air 483 U.S. 711, 723 (1987) (quoting Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974)).

The fee that the debtor-in-possession and special counsel expected is a good indicator of "reasonableness," especially in a case like this where no creditors have objected to the enhancement fee. It is appropriate to examine the expectations of the parties to the agreement when considering what compensation is reasonable under Section 330(a). In re Malcon Developers, Inc., 138 B.R. 677, 680 (Bankr. N.D.N.Y. 1992) (finding that even though application order did not specifically approve a contingent fee under § 328(a), the attorney clearly expected that he would earn a contingency fee, and therefore, a contingency fee was justified).

In the present case, it is clear from the Appointment Motion that both the debtor-in-possession and special counsel had an expectation that an enhancement fee would be paid if certain

results were achieved in this case. Mr. Opstein signed the Appointment Motion, and therefore, the request for an enhancement fee was within the expectations of the attorney-client agreement. In this case, the debtor-in-possession expected to pay an enhancement fee from the very beginning of special counsel's employment if exceptional results were achieved, and even though the issue of whether the PennCorp settlement is an exceptional result is a separate question from determining the expectations of the parties, the initial application referring to the potential enhancement does establish what the parties to the attorney-client agreement deemed reasonable.

(4) Less Litigation in the Bankruptcy Case

The amount of litigation in the bankruptcy case has been reduced by the settlement agreement in the PennCorp Litigation. The bankruptcy file shows that PennCorp regularly appeared in Bankruptcy Court, objected to, and argued vigorously against the positions taken by the debtor-in-possession. After PennCorp settled its claim with the debtor, PennCorp has not appeared and as a result, this case has been proceeding with few objections and even fewer court hearings. In fact, the settlement of the PennCorp Litigation has enabled the debtor-in-possession to settle many other claims and file a plan of reorganization. Thus, the bankruptcy case itself has become relatively non-controversial and less complicated and, hopefully, the remaining bankruptcy case professionals should be able to minimize future time expenditures and minimize administrative expenses for professional fees.

(5) Reasonableness of Hourly Rates

The total fee charged, including the enhancement fee, averages to approximately $132.58 per hour, based on the hours billed by special counsel. In contrast, the average hourly rate is $91.70 when only the lodestar fee ($336,527.19) is considered.

The average hourly rate of $91.70 is lower than average in the Omaha area for this type of legal service. The average rate is also lower than the rate of $100.00, which is the rate listed in the Appointment Motion, signed by the debtor-in-possession, that special counsel's associate attorneys contracted with the debtor-in-possession to bill per hour. Thus, the lodestar averages to a rate less than the lowest hourly rate special counsel contracted for.

When the Apex standards are applied to the facts of this case, it must be concluded that the average rate billed for the lodestar is lower than what would be expected for a case similar in nature to the PennCorp Litigation. It appears that the associates did

most of the work in this case, and it appears that the associates billed for less than the rate listed in the Appointment Motion. In the normal course of a fee application process, it would be in the ordinary course for this Court to see an application for a case of this size and complexity billing at an average rate comparable to, or above, the $150.00 fee billed by the lead attorney in this case.

(6) Monetary Benefit to Unsecured Creditors

PennCorp agreed to pay the bankruptcy estate $2.95 million dollars and in addition, $5.1 million dollars of potential claims were withdrawn from the bankruptcy estate, a claim for an additional $6 million punitive damage award was withdrawn, and a lawsuit against National Health Care Discount, Inc., a corporation owned by the debtor-in-possession, was withdrawn. Therefore, the benefit to the estate is, potentially, over $13 million.

The UST and the debtor argue that the only real benefit was the $2.95 million payment to the debtor-in-possession. This analysis is not accurate because claims filed against a bankruptcy estate are presumptively valid in the amount of the proof of claim, and accordingly, the withdrawal of those claims resulted in a monetary benefit to the estate. See FED. R. BANKR. P. 3001(f). At a minimum, the withdrawal of the claims benefitted the estate by reducing the cost of litigation concerning those claims.

The UST and Mr. Opstein take the position that the $2.95 million payment to the bankruptcy estate for the insurance contract renewals does not constitute an exceptional result because the expert retained by the debtor-in-possession for the PennCorp Litigation predicted the debtor-in-possession could have been entitled to damages between $9 million and $14 million. See Brief in Support of United States Trustee's Objection to Application for Allowance and Payment of Attorneys' Fees, at 3; **Ex. 5**, Aff. Kenneth Opstein, ¶ 3-4. However, if the claims of PennCorp and others which were withdrawn are added to the $2.95 million payment, the benefit to the estate is at approximately the maximum amount the expert predicted could have been achieved (which is excluding the value of the litigation against National Health Discount, Inc.). Since this matter did not go to final judgment through litigation, if one is to speculate about the value of the potential recovery of Mr. Opstein's claims, one must also speculate that the claims against the estate were worth approximately what they stated on their face.

This amount falls into the range of recovery results that Mr. Opstein testified would have had to have been recovered before Mr. Opstein believed that special counsel was entitled to an

enhancement fee. **Ex. 5**, ¶ 3-4. After taking the claim set offs into consideration, Mr. Opstein's affidavit testimony would support paying an enhancement fee to special counsel.

James Cavanagh, the attorney for the Unsecured Creditor's Committee, supported the settlement reached in the PennCorp Litigation and has taken the position that if Mr. Opstein had not approved the settlement in the PennCorp Litigation, Mr. Cavanagh would have moved for a trustee to be appointed to replace Mr. Opstein as the debtor-in-possession and would have sought a similar settlement. **Ex. 3**, Aff. of James B. Cavanagh. Therefore, it appears that the settlement was the best possible result which special counsel could have obtained because if Mr. Opstein had been removed as debtor-in-possession, a trustee would have taken over the bankruptcy estate and would have approved a similar settlement. The Court finds this as a fact because the settlement could not have been approved by the bankruptcy court without representations by the debtor-in-possession and other parties that the settlement was the best possible result for the estate, given the contingencies of further litigation.

(7) Mr. Opstein's Objections to Conduct of Special Counsel During Pendency of Litigation

Mr. Opstein alleges special counsel did not represent the debtor-in-possession to Mr. Opstein's satisfaction over the course of the PennCorp Litigation. See **Ex. 5**, ¶ 11; Filing no. 418. One allegation is that special counsel refused to appeal a summary judgment order entered by the federal court in Sioux City, Iowa. This allegation involves conduct which occurred before the bankruptcy petition was filed and before special counsel was appointed by this Court.

Mr. Opstein had the opportunity to refuse to request the appointment of special counsel to represent the debtor-in-possession, but instead, Mr. Opstein approved Mr. Hotz, Ms. Breitkreutz, Mr. Flood, and other attorneys and staff of special counsel's firm to work on the PennCorp Litigation, and represented in the Appointment Motion that special counsel's work was "suitable and necessary." Filing no. 13.

The second allegation made by Mr. Opstein is that special counsel overcharged the debtor-in-possession. Filing no. 418. Since the Court has already granted the lodestar fee to special counsel, this objection is moot, but the allegation will be addressed here because it is a serious allegation. The allegation is that Ms. Breitkreutz charged the debtor-in-possession $100.00 per hour, while only charging $95.00 per hour in other non-PennCorp

litigation. The Appointment Motion, which was signed by Mr. Opstein, listed Ms. Breitkreutz's fees at $100.00 per hour, as an associate attorney, and therefore, there was not overcharging in this case.

(8) Representations by Special Counsel to Debtor During Settlement Negotiations

Mr. Opstein alleges that he agreed to settle the PennCorp Litigation because of faulty advice from special counsel, and this allegation does raise a question of fact regarding whether special counsel truly did an exceptional job in this case. Special counsel has denied that the particular advice complained of was even provided by special counsel. Therefore, it is necessary to set a final hearing on this matter so the parties may make a record and the court may make credibility determinations.

Mr. Opstein states that special counsel made the following representations: (1) that the settlement money would be tax free, when in fact, circuit courts are split over the issue of the tax free status of litigation proceeds; (2) that payments to creditors under the bankruptcy plan would only be $20,000 per month, when in fact, the payments are between $55,000 to $89,000 per month; (3) that Mr. Opstein would keep his farm, home and business, when in fact, the farm is being sold to reduce plan payments; (4) PennCorp caused great delays in litigation, which in turn, caused Mr. Hotz to push Mr. Opstein to settle. Filing no. 418; **Ex. 5**; **Ex. 6**, Aff. of Shirley J. Schopp.

The amount of the plan payments and whether the debtor would retain his residence after plan confirmation are subjects not directly related to the PennCorp Litigation, but instead are related to the bankruptcy case. The Court does not understand why special counsel would advise the debtor-in-possession regarding bankruptcy plan payments, and if special counsel was so advising the debtor, the Court is curious about what bankruptcy counsel was doing during the negotiations.

Mr. Opstein's final allegation regarding the delay tactics of PennCorp is not relevant to the enhancement fee. It is not special counsel's fault if PennCorp engaged in tactics to delay the litigation and increase Mr. Opstein's personal costs. In fact, if PennCorp was capable of seriously injuring the debtor through delay and other litigation tactics, then the settlement was even more beneficial to this bankruptcy case because now PennCorp is out of the picture and is no longer causing unnecessary delays.

Conclusion

The Court has made specific findings of fact and concludes special counsel has shown that the lodestar fee is lower than what one might reasonably expect in this case in light of the results obtained by special counsel. The Court's consideration of the non-exhaustive list of factors supports the conclusion that special counsel has met the onerous burden established in Apex to be entitled to a fee enhancement.

Even though special counsel has met its burden under Section 330(a), Mr. Opstein has raised allegations that special counsel engaged in unsatisfactory conduct during the settlement negotiations which may justify limiting special counsel to the lodestar fee. A hearing shall be held to make a full record on this issue.

Separate journal entry to be filed.

DATED: June 28, 1995

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

SHIPLEY, PARKER	393-0629
BOTHE, ROBERT	341-0216
BREITKREUTZ, ANNE/HOTZ, EDWARD	393-8645

Copies mailed by the Court to:
United States Trustee
Kenneth Opstein NHCD, 505 6th St., Suite 605, Sioux City, IA 51101

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
KENNETH OPSTEIN,	)	CASE NO. BK93-81876 A
	)	
DEBTOR(S)	)	
	)	CH. 11
	)	Filing No. 407, 415, 418
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
	)	DATE: June 28, 1995
Defendant(s)	)	HEARING DATE: May 15, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Application for Allowance and Payment of Attorney Fees filed by Edward D. Hotz, Anne M. Breitkreutz and Patrick Flood; Objection by United States Trustee; Objection by the Debtor.

APPEARANCES

Parker Shipley, Attorney for debtor
Robert Bothe, Attorney for debtor
Edward Hotz and Anne Breitkreutz, Attorney for applicants
Jerry Jensen, Attorney for UST

IT IS ORDERED:

Clerk shall schedule a one-day evidentiary hearing. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

SHIPLEY, PARKER	393-0629
BOTHE, ROBERT	341-0216
BREITKREUTZ, ANNE/HOTZ, EDWARD	393-8645

Copies mailed by the Court to:
United States Trustee
Kenneth Opstein NHCD, 505 6th St., Suite 605, Sioux City, IA 51101

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.