UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
MILLER MANUFACTURING CO.,	)	CASE NO. BK81-214
	)	
DEBTOR	)	A85-362
	)	
LEROY ANDERSON, Trustee,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
COOPERS & LYBRAND, A Partnership,	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This matter was submitted to the Court for determination upon briefs of counsel and a stipulation of fact. Appearing on behalf of plaintiff, Trustee, was C. G. Wallace, III, of Thompson, Crounse, Pieper, Wallace & Eggers, P.C., Omaha, Nebraska, and appearing on behalf of defendant was Greg Searson of Kutak, Rock & Campbell, Omaha, Nebraska.

Facts

Some time prior to June of 1983, Miller Manufacturing Company filed a Chapter 11 bankruptcy petition and operated as a debtor-in-possession. On or about June 3, 1983, the president of the debtor-in-possession requested Coopers & Lybrand to provide professional accounting services to the business. Coopers & Lybrand did provide such accounting services and billed the debtor-in-possession $1,800 for the services and was paid $1,800 on or about August 18, 1983.

In addition to the accounting services, Coopers & Lybrand was hired by the debtor-in-possession, through its president, to provide management consulting services for the debtor-in-possession. Such services were provided and on July 1, 1983, and on August 29, 1983, Coopers & Lybrand provided the debtor-in-possession with statements for management consulting services in the aggregate amount of $18,207, which have not been paid as of this date.

Coopers & Lybrand was informed by the president of the debtor-in-possession that counsel for the debtor-in-possession would make the appropriate filings with the Bankruptcy Court and obtain approval of the employment of Coopers & Lybrand both for the accounting services and the management consulting services.

No order approving the employment of Coopers & Lybrand or the payment to Coopers & Lybrand has been entered in this case.

The Chapter 11 case was converted to a Chapter 7 case on or about June 28, 1984, and LeRoy Anderson was appointed trustee.

The trustee filed a complaint December 18, 1985, seeking a recovery of $1,800 from Coopers & Lybrand.

The parties agree that in lieu of separate applications for nunc pro tunc approval of employment for either the accounting services or the management consulting services, the matter can be submitted to the Court based on stipulations and briefs.

Issue

Should this Court enter an order nunc pro tunc appointing Coopers & Lybrand as an accountant and management consultant for the Chapter 11 debtor-in-possession and, if such order is appropriate, should the fees of $1,800 for accounting services and/or the fees of $18,207 be approved?

Decision

The Court will enter a nunc pro tunc order authorizing the employment of Coopers & Lybrand to provide accounting services and retroactively authorize the payment of $1,800 to Coopers & Lybrand for such services. The Court will not enter an order nunc pro tunc authorizing the employment of Coopers & Lybrand as a management consultant and will not approve any fees for the management consulting activities.

Conclusions of Law

Bankruptcy Code §§327 through 330 specify the manner in which a professional person can be employed by a debtor-in-possession. The practice in this district in 1983 and currently was that the proposed professional would have filed with the Bankruptcy Court on its behalf an application for appointment and employment as a professional person, either accountant or management consultant in this case, and the Bankruptcy Judge would have entered a general order authorizing their employment, subject to review of the work performed and the reasonableness of the fees at a later date. On occasion, if the failure to apply for such appointment was inadvertent, the Bankruptcy Court is authorized to enter an order nunc pro tunc approving the employment of the professional. After

entering such an order, the Bankruptcy Judge then has the authority to review the fees pursuant to the standards set out in §330 of the Bankruptcy Code.

Here, the parties have agreed that through inadvertence the order authorizing the employment of Coopers & Lybrand was not entered and requests the Court to make a determination both on the request for a nunc pro tunc order authorizing employment and to make a determination on the reasonableness of the fees.

Coopers & Lybrand, acting both in its capacity as an accounting service and in its capacity as a management consultant is a "professional" under §327(a) of the Bankruptcy Code.

From a review of the briefs and the stipulation of facts, it is clear to the Court that the accounting services rendered were important and of benefit to the bankruptcy estate at the time they were rendered. In addition, from the stipulation of facts, the Court can and does determine that accountant relied upon the president of the debtor-in-possession to obtain approval of its employment and had reason to believe that such approval had been granted. Actually, it appears that all of the accounting work was provided within a very short period of time and was probably completed before any information was provided to the lawyer for the debtor-in-possession which would have enabled him to file the appropriate application with the Court.

This Court finds that, with regard to the accounting services, it is appropriate to enter an order nunc pro tunc authorizing the employment of Coopers & Lybrand because such application was not filed, simply by inadvertence. It was the practice of the previous Bankruptcy Judge and is the practice of this Bankruptcy Judge to approve employment of any attorney or accountant, when requested by the debtor-in-possession, but not to approve the fees until the appropriate hearing is held. It is, therefore, the belief of this Judge that such employment would have been initially approved and the fees would have been determined to have been of benefit to the estate and to be in a reasonable amount and the Court would have approved the accounting service fee in the amount of $1,800. Therefore, the trustee's action to obtain a turnover of the $1,800 fee is unsuccessful. Judgment is entered in favor of the professional, Coopers & Lybrand, in the amount of $1,800 and the partnership is permitted to keep the previously received fee.

However, the circumstances are different with regard to the $18,000 fee. Not every debtor needs a management consultant. Not every management consultant application has been or will in the future be approved by the Court. Coopers & Lybrand is a national accounting firm. If they intended to provide management consulting services to an organization that was a debtor under Chapter 11 of the Bankruptcy Code, a fact that Coopers & Lybrand knew, this Court believes it was the obligation of Coopers &

Lybrand to make certain that such employment arrangement was approved by the Bankruptcy Court before beginning the consulting services. By stipulation the parties have provided a copy of the engagement proposal of Coopers & Lybrand to the president of the debtor-in-possession. That document recites the type of services that will be provided and the normal fee arrangement. It also recites that the debtor-in-possession, since it was in bankruptcy, would be given a break on the fee but that the debtor-in-possession's officers should expect a fee of approximately $20,000.

This Court will not speculate as to what the previous Judge would have done with such a fee application, if it had ever been presented to him. However, this Court has in the past and will in the future continue to require those debtors that desire the services of a management consultant to be much more specific in their application. In addition, this Court has and will require such management consultants to prove the benefit of their services to the estate. There is no evidence in the stipulation of fact which indicates that the services were of any benefit to the estate, and, as a matter of fact, the Chapter 11 case was converted to a Chapter 7 case within a year of the date the services were rendered.

Although this Court has discretion to enter an order nunc pro tunc approving the employment of a professional, this Court does not believe this is an appropriate case in which to exercise such discretion. The fact that the professional is a national accounting firm and that it was about to perform services which it knew would cost the debtor-in-possession approximately $20,000, and the fact that it knew the debtor was in bankruptcy and had a difficult cash flow position, should have led the professional to be much more careful than it was with regard to providing services to a debtor in bankruptcy. The partnership claims it relied upon the assurances of the president of the debtor that the debtor's attorney would make all of the necessary arrangements with the Bankruptcy Court. This Court does not find such reliance to be reasonable. In addition, the information necessary for the attorney for the debtor to present to the Bankruptcy Court was not even provided the attorney for the debtor for several months after the services were provided. Therefore, even if an application had been made in 1983, all of the services would have been performed prior to the application which would have left the Bankruptcy Judge in the position of approving or disapproving an $18,000 fee without even having the opportunity to question the need for the services in the first place. That is exactly the position this Judge is in and this Judge declines to approve such a procedure.

Therefore, the application of Coopers & Lybrand for a nunc pro tunc order authorizing its employment as a management consultant and approving its fee in excess of $18,000 is denied.

Separate journal entry to follow.

DATED: October 6, 1986.

BY THE COURT:

U.S. Bankruptcy Judge

Copies to:

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