

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION**

IN RE:

DEBTORS

**HERSHEL THOMAS MOORE
SAMATHA KAY MOORE**

**CHAPTER 7
Case No. 11-20959
Judge Tracey N. Wise**

**TRUSTEE'S RESPONSE TO DEBTOR'S OBJECTION
TO TRUSTEE'S REPORT, ACCOUNT, AND
APPLICATION FOR COMPENSATION**

COMES NOW Michael L. Baker, Trustee in Bankruptcy, by and through counsel, and for his response to the Debtor's Objection to Trustee's Report, Account, and Application for Compensation, states that the objection should be overruled as the legal theory asserted by the Debtor has been altered by statute since the passage of BAPCPA. In addition, the Trustee asserts that constructive disbursements made pursuant to Court order are compassable. Finally, the Trustee asserts that the objection contains factual inaccuracies with regard to the amount of time spent by the Trustee and the disbursements he is asserting his right to a commission upon. A memorandum in support follows.

MEMORANDUM IN SUPPORT

Background.

The Debtors filed their voluntary chapter 7 on April 18, 2011. CM/ECF Docket No. 1. Michael L. Baker was appointed Interim Trustee in Bankruptcy on April 19, 2011. CM/ECF Docket No. 3. He was elected Trustee in Bankruptcy as a matter of law at the 341(a) Meeting of Creditors held May 27, 2011, and has served in that capacity at all times since.

Question 21 of the Debtors' Schedule B listed a tort action resulting from an injury suffered by Hershel Moore¹. At the time the bankruptcy was filed, Mr. Moore had already filed suit related to the injury. Subsequent to the meeting of creditors, the Trustee filed an Application to Employ the firms of Helmer, Martins, Rice & Popham Co., L.P.A.; Meredith L. Lawrence, P.S.C.; and Zingarelli & Lawrence, LLC, as special counsel to represent the bankruptcy estate in the personal injury action pursuant to 11 U.S.C. 327(e). CM/ECF Docket No. 16. On October 2, 2012, the Trustee filed a Supplement to his Application to Employ Special Counsel advising the Court that Mr. Lawrence was no longer a member of Zingarelli & Lawrence, PLLC and that Meredith L. Lawrence was no longer engaged in the practice of law, or continuing to represent the Bankruptcy Estate. Mr. Moore was the only litigant in the action prior to the filing of his joint petition.

As the personal injury case progressed the Trustee filed periodic status reports. On March 17, 2014, Mr. Lawrence advised the Trustee that the parties had reached a tentative settlement with regard to the personal injury action. A true and correct copy of the email is attached hereto as Exhibit 1. In the email to the Trustee, Mr. Lawrence asks about the procedures that needed to be complete to approve the settlement, and how much of the settlement funds the Trustee believed was necessary to satisfy the Bankruptcy Estate. In a reply on the same date, the Trustee advised Mr. Lawrence that he would need to seek Court approval of the tentative settlement by motion. The Trustee further advised Mr. Lawrence that he would file a motion with the express condition that enough of the settlement proceeds would be paid into the Estate to pay all timely filed allowed unsecured claims, expenses of the bankruptcy estate, and all administrative fees, including the Trustee's commission. The Trustee further explained that he intended to include the attorney fees to be paid to Special Counsel as an administrative expense upon which he would base his requested trustee commission.

¹ While the Objection appears to be on behalf of both Debtors, only Mr. Moore possessed an interest in the personal injury action at issue in this case. To the extent Ms. Moore possesses standing to object as well, the Trustee asserts that references to "Debtor" or "Mr. Moore" include any argument that may be raised by either Debtor in their objection.

At the time of the March 17, 2014 email from the Trustee to Mr. Lawrence, Lawrence raised no objections to the Trustee's stated intention to later seek a trustee commission on the attorney fee paid to Lawrence and his co-counsel. On March 24, 2014, Mr. Lawrence, by email, asked the Trustee how much of the settlement proceeds he should hold back in his escrow account to satisfy the Bankruptcy Estate under the conditions discussed in the previous email. A true and correct copy of the March 24, 2014 email is attached as Exhibit 2. On March 25, 2014, the Trustee, by email, directed Mr. Lawrence to hold \$120,000.00 in order to pay all claims and administrative expense of the bankruptcy estate. Mr. Lawrence raised no objections to the March 25, 2014 email from the Trustee directing him to hold \$120,000.00.

On April 10, 2014, the Trustee submitted a Motion to Approve Compromise and Application to Compensate Special Counsel. CM/ECF Docket No. 32. The Trustee also sought Court approval to compensate Mr. Lawrence in the amount of \$800,000.00, and his co-counsel of the firm Helmer, Martins, Rice & Popham Co., L.P.A., in the amount of \$800,000.00. Additionally, the Trustee sought authority to reimburse Special Counsel for their out of pocket expenses. On May 16, 2014, and after setting the matter for a hearing, the Court entered an order granting the Application, and allowing the Trustee to: 1) Compromise the tort claim under the conditions represented in the motion; 2) Authorize the payment of Special Counsel's attorney's fees and reimbursement of expenses; and 3) Allow all proceeds not necessary to for the administration of the Bankruptcy Estate to remain in the control of the Debtor. CM/ECF Docket No. 37. Subsequent to the Order Approving Compromise was entered, the Trustee authorized Special Counsel to disburse its fee and reimbursement of expenses.

After the settlement was approved, the Debtor objected to several proofs of claims. CM/ECF Docket Nos. 41, 45, and 52. The last of the orders granting objections to claims was entered October 16, 2014. CM/ECF Docket No. 55.

On November 18, 2014, the Trustee sent an email to Lawrence requesting turnover of

\$84,000.00 of the \$120,000.00 Lawrence had been directed to hold in his IOLTA account. A dispute arose between the Trustee and Mr. Lawrence as to why Mr. Lawrence refused to turn over the funds requested. The Trustee subsequently filed a Motion for Turnover. CM/ECF Docket No. 57. After the motion was filed, Mr. Lawrence turned over over all sums requested by the Trustee. The turnover motion was withdrawn. CM/ECF Docket No. 58.

The Trustee prepared his trustee's final report, "TFR", and submitted same to the United States Trustee, "UST", for review. On January 26, 2015, the UST filed the report without objection. CM/ECF Docket No. 59. On January 27, 2015, the Trustee filed his final report and application for compensation. CM/ECF Docket No. 60.

Analysis.

Chapter 7 Trustee Compensation is to be treated as a commission.

In his objection, the Debtor asserts that the Trustee's compensation is limited to a lodestar analysis based upon the factors set forth in 11 U.S.C. 330(a)(3). In support of this contention, the Debtor relies heavily upon two cases, *In re Butts*, 281 B.R. 176 (Bankr. W.D.N.Y. 2002) and *In re Guido*, 237 B.R. 562 (Bankr. E.D.N.Y. 1999). Like almost all of the authority relied upon by Debtor, both of these cases were decided prior to the enactment of BAPCPA which substantially changed the method upon which Trustee compensation is calculated.

In 2005, Congress made two significant changes to 11 U.S.C. 330 relevant to Chapter 7 trustee compensation. First, it amended section 330(a)(3) to remove Chapter 7 trustees from the lodestar method of compensation. Second, it added section 330(a)(7) which provides that trustee compensation *shall* be treated as a commission based upon the formula set forth in 11 U.S.C. 326. These two changes removed Chapter 7 trustee compensation from the type of analysis employed by the *Butts* and *Guido* Courts. They also provide that while 326 still contains a reasonableness component, application of the

factors set forth in 330(a)(3) alone cannot be used to determine that a commission is unreasonable. *See Mohns, Inc. v. Lanser*, 522 B.R. 594, 601 (E.D. Wis. 2015). Moreover, the addition of 330(a)(7) requires that whatever standard the Court employs to determine reasonableness under 11 U.S.C. 326, compensation must be reflected as a percentage of funds disbursed by the Trustee.

Since addition of section 330(a)(7), courts have struggled with its application. *See Mohns*, at 596 (collecting cases). While several bankruptcy courts post-BAPCPA have continued to use a lodestar analysis; *see e.g. In re Mack Properties*, 381 B.R. 793 (Bankr. M.D. Fla. 2008), *In re Phillips*, 392 B.R. 378 (Bankr. N.D. Ill. 2008); the only Circuit Court to have examined the issue has held that absent extraordinary circumstances, the Trustee is presumptively entitled to compensation as a commission based upon the formula set forth in 11 U.S.C. 326. *In re Rowe*, 750 F.3d 392 (4th Cir. 2014); *See also In re Salgado-Nava*, 473 B.R. 911 (B.A.P. 9th Cir. 2012). In reaching its decision, the *Rowe* Court examined the plain meaning of 330(a)(7):

Accordingly, we can rightly assume that Congress said what it meant and meant what it said when it chose to include the term “shall” in § 330(a)(7), thus making its application in the determination of Chapter 7 trustee fee awards mandatory. Examining the other operative words in § 330(a)(7), we note that a “commission” is “[a] fee paid to an agent or employee for a particular transaction, usu[ally] as a percentage of the money received from the transaction.” *Black's Law Dictionary* 306 (9th ed.2009). And, “based upon” means “derived from.” These definitions of the operative terms in the independent clause of § 330(a)(7) lead us to the unmistakable conclusion that, absent extraordinary circumstances, a Chapter 7 trustee's fee award must be calculated on a commission basis, as those percentages are set forth in § 326(a).

Rowe, at 397. (some citations omitted).

The *Rowe* Court recognized that Congress has rejected both the result reached in cases like *Butts* and *Guido*, and the methodology used by those Courts to reach those results. Not every change to the bankruptcy code results in a rejection of past practice. “[W]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”

Hamilton v. Lanning, 560 U.S. 505, 517 (2010). However, “[t]he starting point in discerning congressional intent is the existing statutory text and not the predecessor statutes[.]” *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). In *Butts* and *Guido*, the respective bankruptcy courts used a lodestar analysis to support their reduction of trustee compensation because 330(a)(3) was the guiding statute. *Butts* at 181; *Guido*² at 565. The Debtor’s objection, and his *ad hoc* calculation of as to how he believes the Trustee’s compensation should be calculated, is entirely premised on a section 330(a)(3)³ lodestar analysis. After the case law the Debtor relies upon was decided, Congress removed the determination of Chapter 7 trustee compensation from 330(a)(3) and added section 330(a)(7) stating that the court “shall treat such compensation as a commission, based on section 326.” This change in the law is not addressed anywhere by Debtor in his objection because the Debtor’s argument only succeeds by applying the “predecessor statute”, rather than law which controls this case. As such, the Debtor’s objection should be overruled because it simply applies the wrong legal standard to the case at hand.

This is not to say that Courts lack any discretion to reduce or lower Chapter 7 trustee compensation, only that the discretion Courts may exercise is no longer rooted in 330(a)(3). The *Rowe* Court held that trustee compensation may be altered when “extraordinary circumstances” exist. *Rowe* at 397. See also *In re Salgado-Nava*, 473 B.R. 911, 921 (B.A.P. 9th Cir. 2012); *Reisz v. Crocker*, Case No. 3:14-CV-293-S, 2014 WL 7342686 (W.D. Ky. Dec. 23, 2014). Under the extraordinary circumstances standard, the court must first calculate the full commission as set forth in 326(a). If the case has no unusual circumstances, that is the end of the analysis and the trustee is entitled to the fee as a commission. If the Court believes extraordinary circumstances do exist, the trustee is still presumptively entitled to the full commission set forth in 326(a), which is then subject to adjustment

² While section 330(a)(3) is not specifically cited in *Guido*, the court employs a lodestar analysis utilizing factors listed in 330(a)(3).

³ The Debtor appears to use the factors listed in 330(a)(3), although at times references 330(a)(2). *Debtor’s Objection* at p. 10-12.

downward based on a detailed finding by the court that extraordinary circumstances warrant a reduction. *Rowe* at 399. The reduction must bear a rational relationship between the lowering of the commission and the extraordinary circumstances found. *Id.* In all cases, the starting point is a percentage based calculation pursuant to 326(a).

Under the extraordinary circumstances standard, a straight lodestar analysis, as the Debtor attempts to use here, cannot be the basis for extraordinary circumstances. *Mohns* at 601. Congress made a policy decision to treat Chapter 7 trustee compensation as a commission and to make that commission scheme the “market rate” for Chapter 7 trustee services. *Rowe* at 398. As the *Mohns* Court explained:

While it is axiomatic that chapter 7 trustee compensation for no-asset cases (\$60 per case under § 330(b)) was never intended to be “reasonable” compensation for no-asset cases, Congress designed compensation for asset cases under § 330(a) to be sufficiently generous so as to fill the gap by subsidizing no-asset cases.

The theory is that the U.S. trustee, who selects, assigns, and supervises trustees, will assign a portfolio of asset and no-asset cases that will on average reasonably compensate a trustee.

Mohns at 596 (citation omitted).

Unless a party in interest can present evidence of extraordinary circumstances to rebut the presumption, the Trustee should be allowed compensation at the market rate set by Congress.

No court to date has given an exhaustive list of the limits of extraordinary circumstances, however, both *Rowe* and *Salgado-Nava* instruct that it will usually be a case where a trustee has failed to execute his statutory duties. *Salgado-Nava* at n. 16; *Rowe* at 398. The Western District of Kentucky recently applied these principles in *Reisz v. Crocker, supra*. In *Reisz*, the court lowered the trustee’s commission because it found that the trustee had failed to account for the tax consequences of an agreed upon sale. *Reisz* at 3. Further, that the trustee had previously represented to the Court that the sale would result in funds available for distribution to unsecured creditors, but when he filed his final

report, he requested a commission that would leave nothing for unsecured creditors. *Id.* Most importantly, had the trustee taken into account the tax consequences which led to the lack of funds, as his duties require, the sale which produced the carve out likely should not have been undertaken. *Id.* As such, the reduction of the trustee's fees was warranted because the extraordinary circumstance was rooted in the execution of his duties.

While Mr. Moore alleges the Trustee failed to timely administer the case, and failed to submit time records, neither allegation presents a credible argument for lowering the Trustee's compensation like the facts set forth in *Reisz*. The Debtor's delay argument is completely unfounded and not supported by the record in this case. As for his argument that the Trustee was required to submit time records with his TFR, said requirement was eliminated by the U.S. Trustee program in October 2005.

The record before this Court demonstrates the Trustee timely acted to close the case. The settlement was approved with the granting of Special Counsel's fee application in May 2014. The Debtor was given the opportunity to object to timely filed proofs of claims as he deemed fit. The last of these objections was granted on October 16, 2014. On November 18, 2014, the Trustee demanded turnover of the amounts that he had directed be held in Special Counsel's IOLTA account. He filed a Motion for Turnover on November 26, 2014. The Motion was withdrawn upon receipt of the funds demanded. The Trustee submitted his TFR to the U.S. Trustee for review shortly thereafter, and the TFR was filed by the U.S. Trustee with approval on January 26, 2015. The time between the entry of the last order on objections to claims and the approval of the Trustee's TFR was slightly more than three months. While reasonable minds may differ regarding what constitutes unreasonable delay, in the case at hand, it is difficult to imagine the Trustee being able to have his report approved in any significantly shorter amount of time. As such, the Debtor's allegation that the Trustee delayed in administering the case is baseless.

The Debtor's other allegation that the Trustee is not eligible for compensation at all because he

did not submit time sheets with his TFR is equally incorrect. The contention that time sheets must be submitted with the TFR is not required by 11 U.S.C. 330, and is not in line with current U.S. Trustee guidelines. *See Salgado-Nava*, at n. 14; *See also* Trustee FAQs for Chapter 7 Trustees, http://www.justice.gov/ust/eo/-bapcpa/trustees_faqs.htm#trust_issue2, last visited March 2, 2015.) While the Trustee does in fact keep a time record for his cases, including the case at hand, current guidelines no longer require him to submit them with his TFR or to the U.S. Trustee for approval of compensation. The Trustee submitted his proposed TFR to the U.S. Trustee. Presumably, if the U.S. Trustee believed it noncompliant with current guidelines, he would not have submitted it to the Court on January 26, 2015 with approval. While the handbook does state that U.S. Trustee Guidelines do not override local rules, the Eastern District has no local rule which requires trustees to submit time records with requests for compensation under section 326. Much like the delay argument, the Debtor's argument regarding time records is without merit, and presents no grounds for reduction of the Trustee's presumptively reasonable compensation.

The Debtor in all other respects admits that his case is a routine Chapter 7. The Debtor possessed a non-exempt asset in the form of a personal injury action. The Trustee applied to have his existing counsel employed as Special Counsel for the Bankruptcy Estate. The Trustee monitored the case, filed periodic status reports, and when a tentative settlement was reached, filed the necessary motions to have it approved. The Trustee will pay all allowed unsecured proofs of claims. The Debtor received a significant Debtor refund, and all administrative costs for estate professionals have been paid in full. In short, the Trustee diligently discharged his duties and all parties in interest have received the full amount due to them under the Bankruptcy Code. Because this case was routine, it presents no extraordinary circumstances which could rebut the presumption that the Trustee's requested compensation is reasonable. Accordingly, the Debtor's objection should be overruled.

The Trustee's Payment of Special Counsel's fees and expenses are compensable.

The Debtor's other major objection to the Trustee's request for compensation is that because the Trustee allowed Special Counsel to be paid out of money on hand in Mr. Lawrence's IOLTA account, that it does not constitute a disbursement by the Trustee. The Trustee adopts and incorporates the U.S. Trustee's arguments as to why the constructive disbursement issue does not arise here. Moreover, the Debtor's argument ignores the fact that when Special Counsel's fee was paid pursuant to an order of this Court, at the request of the Trustee, as an administrative expense, from funds held in trust by Mr. Lawrence for the benefit of the estate. The record reflects that the Trustee directed and sought approval of the payment of Special Counsel's fee from the settlement proceeds. Administrative expenses are generally compensable. *See 11 U.S.C. 326(a)*. As the Debtor admits, the cases allowing compensation to trustee's when estate funds are disbursed by third parties are "legion." *E.g. In re Reid*, 251 B.R. 512, 518 (Bankr. W.D. Mo. 2000). Said practice is customary with personal injury settlements, both in and out of bankruptcy.

The Debtor also seems to assert that Special Counsel's fees are not compensable because they were subject to a charging lien pursuant to K.R.S. 376.460. Whether such a lien accrued or not is immaterial. What matters is if Special Counsel was paid from estate funds at the direction of the Trustee. They clearly were. As such, the secured or unsecured nature of Special Counsel's claim on the settlement fund is irrelevant. The Debtor's objection should be overruled.

Conclusion.

The Debtor's objection is predicated upon former 11 U.S.C. 330. Congress changed Chapter 7 compensation with the enactment of BAPCPA to provide that it shall be treated as a commission based on section 326. Those changes rejected the lodestar approach that the Debtor's assert should be applied

in this case. The only Circuit Court to have reached the issue raised by Debtor has held that absent extraordinary circumstances, trustees should be compensated at the full amount set forth in section 326(a). The Debtor's only grounds for extraordinary circumstances cannot be supported by arguing that the old law may have produced a different result.

The case at hand was a routine Chapter 7 which involved a sizable asset. While the Debtor alleges two instances in which he believes the Trustee failed to discharge his duties, neither allegation is supported by the record. The Trustee's TFR speaks for itself. It seeks compensation at the statutory rate for compensable disbursements made by the Trustee or at his direction. As such, the Debtor's objection should be overruled and the Trustee's final report and request for compensation be approved.

Respectfully submitted,

/s/ Michael B. Baker
Michael B. Baker (KY-91890)
THE BAKER FIRM, PLLC
2131 Chamber Center Drive
Ft. Mithcell, KY 41017
(859) 647-7777
Fax: (859) 647-7799
mbaker@bakerlawky.com

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2015, a copy of the foregoing Notice of Appearance was served on the following registered ECF participants electronically through the Court's ECF System at the email address registered with the court, or U.S. First Class Mail, postage pre-paid:

Michael L. Baker, Trustee

Debtor's Counsel

Debtor

United States Trustee

All other parties having requested notice via CM/ECF

/s/ Michael B. Baker

Michael B. Baker (KY-91890)
THE BAKER FIRM, PLLC