

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable Michael E. Romero**

In re:)
) Case No. 06-17814 MER
AMY MARIE BOEKHOFF)
) Chapter 13
)
Debtor.)

ORDER

THIS MATTER comes before the Court on the Chapter 13 Fee Application Pursuant to 11 U.S.C. § 330(a)(4)(B) (the “Application”) filed by Sharon W. Grossenbach (“Grossenbach”), the objection (the “Objection”) thereto filed by the Standing Chapter 13 Trustee (the “Trustee”), and the response and amended response (collectively the “Response”) to the Objection. The Court has reviewed the parties’ pleadings and the arguments contained therein and finds and concludes as follows.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a), (b) and (e) and 157(a) and (b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) as this matter concerns the administration of the estate, namely the allowance of debtor’s counsel’s attorney fees.

BACKGROUND

Amy Boekhoff (the “Debtor”) filed her voluntary petition under Chapter 7 of the Bankruptcy Code on October 30, 2006. On January 10, 2007, the United States Trustee filed a motion pursuant to 11 U.S.C. § 707(b).¹ The Debtor did not respond to the § 707(b) motion. Instead, she converted her case from Chapter 7 to Chapter 13. On April 20, 2007, the Court confirmed the Debtor’s Chapter 13 plan and on May 7, 2007, Grossenbach filed the present Application requesting compensation for her professional services.

The Application seeks approval of fees totaling \$3,194.50, plus \$312.84 in costs and expenses of which \$2,631.34 would be paid through the Debtor’s confirmed Chapter 13 plan. The Trustee’s Objection is not based on the overall amount requested by Grossenbach, but rather is based on Grossenbach’s request for compensation for legal services performed during the Debtor’s Chapter 7 bankruptcy case. The Trustee asserts these fees may only be paid through the Debtor’s Chapter 13 plan as a general unsecured claim and not as a Chapter 13 fee allowance. Grossenbach, however, maintains the bankruptcy statute authorizing the payment of Chapter 13 attorney fees does not specifically limit compensation to fees incurred during the Chapter 13 case and argues the

¹ Unless otherwise specified, all future statutory references in the text are to Title 11 of the United States Code.

fees incurred immediately prior to converting her case to Chapter 13 are compensable pursuant to § 330.

DISCUSSION

The amount in controversy in this case is relatively small—\$364.00. However, since this issue will likely continue to arise in bankruptcy cases converted from Chapter 7 to Chapter 13, particularly when litigation expenses related to a § 707(b) challenge are incurred, the resolution of this issue is important to both the consumer-debtor's bar and the Trustee's office.

Grossenbach's Application requests the Court allow her attorney fees pursuant to § 330(a)(4)(B) which states in relevant part:

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor *in connection with the bankruptcy case* based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B) (emphasis added). Grossenbach asserts the emphasized language does not specify the legal services must have been incurred under Chapter 13 to be compensable under § 330(a)(4)(B). Rather, she contends because the fees were incurred in connection with “the bankruptcy case,” it is of no consequence that they were incurred while the Debtor's case was under Chapter 7, and the fees are payable through the Debtor's Chapter 13 estate as a fee allowance.

It appears the Trustee's Objection to the \$346.00 is based on the United States Supreme Court's holding in *Lamie v. United States Trustee*, 540 U.S. 526 (2004). *Lamie* analyzed the following language of § 330(a)(1):

After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, *or a professional person employed under section 327 or 1103--*

(A) reasonable compensation . . .

11 U.S.C. § 330(a)(1) (emphasis added). In *Lamie*, the Supreme Court noted the 1994 Bankruptcy Reform Act deleted “five words at the end of what was § 330(a) and now is § 330(a)(1): ‘or to the debtor's attorney.’” *Lamie*, 540 U.S. at 530. The Court further noted that although the 1994 amendments to § 330 were intended to clarify the standards for the award of professional fees, conflicting interpretations of the amendments created divergent results concerning whether the deletion of the phrase “or to the debtor's attorney” was a congressional drafting error or whether the omission of the phrase was intended. *Id.* at 529-30.

After a thorough discussion of the statute and the split between the various circuit courts, the Supreme Court concluded that in a Chapter 7 context, “§ 330(a)(1) does not authorize compensation awards to debtors’ attorneys from estate funds, unless they are employed as authorized under § 327.” *Id.* at 538. The Court went on to state, “[i]f the attorney is to be paid from estate funds under § 330(a)(1) in a Chapter 7 case, he must be employed by the trustee and approved by the Court.” *Id.* at 538-39.

Even though Grossenbach is seeking compensation under § 330(a)(4)(B), rather than § 330(a)(1), the Trustee argues the fees cannot be allowed under *Lamie* because while she was representing the Chapter 7 debtor, Grossenbach was not employed by the trustee or approved by the Court pursuant to § 327, thus preventing her compensation under § 330(a)(1). Therefore, the Trustee argues Grossenbach should not be able to elevate the priority of her Chapter 7 fees as a result of converting the Chapter 7 case to one under Chapter 13. Thus, the question presented in this case is whether the Court should apply § 330(a)(4)(B) or § 330(a)(1) to determine whether to allow the \$346.00 in fees.

Generally, “[c]ompensation for an attorney representing a Chapter 13 debtor is authorized under § 330(a)(4)(B).” *In re Busetta-Silvia*, 314 B.R. 218, 223 (B.A.P. 10th Cir. 2004). However, in Chapter 7, it is generally accepted that counsel for a Chapter 7 debtor will require payment of legal fees *prior* to filing the debtor’s bankruptcy case so as to comply with the statutory requirements of § 329. *Lamie*, 540 U.S. at 537. In this case, the Court addresses fees incurred immediately prior to the Debtor converting her case from Chapter 7 to Chapter 13, which fees were not included in the prepetition retainer paid by the Debtor to Grossenbach.

The Court finds the pre-conversion fees must fall within the dictates of § 330(a)(1). The \$346.00 incurred during the Chapter 7 case prior to conversion to Chapter 13 cannot be awarded under § 330(a)(1) because Grossenbach was not employed by the trustee and approved by the Court as required under *Lamie* and § 327. *Id.* at 538-39. Further, the Court finds the \$346.00 also cannot be awarded under § 330(a)(4)(B), because the fees were incurred while the case was in Chapter 7 and the language contained § 330(a)(4)(B) specifically applies only to the allowance of fees in a Chapter 12 or 13 case. *See* 11 U.S.C. § 330(a)(4)(B) (§ 330(a)(4)(B) specifically provides for the allowance of fees in “a chapter 12 or 13 case.”)² Therefore, the \$346.00 cannot be allowed under either § 330(a)(1) or § 330(a)(4)(B).

Rather, the \$346.00 falls into a “gap period” wherein compensation under § 330 does not apply. Such a “gap period” is contemplated by another Bankruptcy Code section. Section 348(d) states:

A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title,

² Although Grossenbach asserts the phrase contained in § 330(a)(4)(B) “in connection with the bankruptcy case,” does not distinguish between fees incurred in a Chapter 7 or Chapter 13 case, this phrase is preceded by the words “[i]n a chapter 12 or 13 case,” which clearly indicates compensation under § 330(a)(4)(B) is intended to be under those specific chapters of the Bankruptcy Code.

other than a claim specified in section 503(b)³ of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

11 U.S.C. § 348(d). Essentially, § 348(d) treats any claim, incurred in the “gap period” between the filing of the Chapter 7 and the conversion to Chapter 13 as a prepetition claim. *See In re McKay*, 323 B.R. 903, 907 (Bankr. M.D. Penn. 2005) (“attorney's fees incurred during the initial Chapter 7 do not fall under the provisions of § 330 because Applicant was not employed by the Trustee and, under § 330(a)(4)(B), the Applicant is obviously not asking for compensation for services provided to the Debtor in either a Chapter 12 or 13 case. . . . This leaves the attorney's fees with a designation of being treated as a pre-petition debt.”); *see also In re Almen*, 2007 WL 397175 at *2 (Bankr. D. S.D. Jan. 31, 2007) (slip copy) (“when a case is converted from Chapter 7 to a Chapter 13 . . . [t]he attorney’s unpaid, pre-conversion fees for Chapter 7 services and expenses become a general unsecured claim against the estate. The fees can then be paid under the debtor’s Chapter 13 plan with other general unsecured claims.”).

Based on the above analysis, the Court finds the \$346.00 incurred in the “gap period” between the filing of the Chapter 7 case and the conversion to Chapter 13 may be allowed. However, the \$346.00 may only be paid through the Debtor’s Chapter 13 plan as a general unsecured claim and not as a fee award under § 330. Accordingly, it is

ORDERED the Chapter 13 Fee Application Pursuant to 11 U.S.C. § 330(a)(4)(B) filed by Sharon W. Grossenbach is granted in part, and denied in part.

IT IS FURTHER ORDERED the amount of \$2,267.34 in total fees and expenses is allowed and may be paid through the Debtor’s Chapter 13 plan pursuant to 11 U.S.C. § 330(a)(4)(B).

IT IS FURTHER ORDERED the \$364.00 in fees incurred between the filing of the Chapter 7 case and its conversion to Chapter 13 will be allowed as a general unsecured claim.

Dated October 23, 2007

BY THE COURT



Michael E. Romero
United States Bankruptcy Judge

³ Grossenbach has not requested the \$346.00 be allowed as an administrative expense claim pursuant to § 503(b).