U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
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MOLLIE C. JONES, CLERK
DEPUTY

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

IN RE:

W. J. RUNYON & SON, INC. CASE NO. 8600304WC

IN RE:

W. J. RUNYON, JR. CASE NO. 8600888WC

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION IN REGARD TO APPLICATIONS BY ATTORNEYS FOR INTERIM ALLOWANCES FOR COMPENSATION FOR SERVICES AND REIMBURSEMENT FOR EXPENSES

The above styled cases are related cases which are being administered under the provisions of Chapter 11 of the Bankruptcy Code. W. J. Runyon, Jr. is the sole stockholder of the corporation.

The law firm of Ellis, Braddock, Bost and Robinson, Ltd. has been approved to serve as attorneys for the debtor-in-possession in both cases.

The Court has before it for determination several applications by the law firm for payment of fees and reimbursement for expenses. Objections have been filed by some of the creditors.

In the case of the corporation, W. J. Runyon & Son, Inc., the following are pending, to-wit:

1. A first Application covering a period of time from February 14, 1986, through May 31, 1986.

2. Objection by The American Bank.

3. Objection by the Federal Deposit Insurance Corporation.

4. Objection by Commercial Union Insurance Company and American Employees Insurance Company.

5. A second Application covering a period of time from June 1, 1986, through September 30, 1986.

6. Objection by Commercial Union Insurance Company and American Employees Insurance Company.

7. Objection by the Crocker National Bank.

8. A third Application covering a period of time from October 1, 1986, through April 30, 1987.

9. Objection by Commercial Union Insurance Company and American Employees Insurance Company.

10. Objection by the Crocker National Bank.

In the individual case of W. J. Runyon, Jr. the following are pending, to-wit:

1. A first Application covering a period of time from May 26, 1986, through September 30,1986.

2. Objection by the Crocker National Bank.

3. A second Application covering a period of time from October 1, 1986, through April 30,1987.

4. Objection by Commercial Union Insurance Company and American Employees Insurance Company.

5. Objection by the Crocker National Bank.

In the three applications submitted in the corporate case, the total amount of fees requested is $228,218.75, and the total amount requested for reimbursement of expenses is $16,881.52.

In the two applications submitted in the individual case, the total amount of fees requested is $30,168.75, and the total amount requested for reimbursement of expenses is $1,797.35.

On September 4, 1986, a hearing was held on the objections to the first application in the corporate case. The attorneys for the debtor testified in support of their application and all parties called as witnesses other attorneys who testified as to rates which they charged in bankruptcy cases and as to other matters relevant to the application.

At the conclusion of the hearing, the Court did not render an opinion as to the application and objections. It ordered that the attorneys for the debtor would be allowed to be paid $60,000.00 toward their fees and $9,000.00 toward their expenses.

The matter was continued with the understanding that the attorneys for the debtor would file additional applications.

The attorneys then filed a second application in the corporate bankruptcy and an initial application in the individual case. Objections were then filed and a continuation of the hearing was held on December 19, 1986.

At the conclusion of the hearing on December 19, 1986, the Court took the matter under advisement to permit all parties to file briefs and proposed findings of fact and conclusions of law. The Court also entered orders permitting the attorneys for the debtors to be paid $30,000.00 toward their fees and $4,165.30

toward their expenses in the corporate case and to be paid $7,000.00 toward their fees and $640.37 toward their expenses in the individual case.

Subsequently, a third application was filed in the corporate case and a second application was filed in the individual case and additional objections were filed.

By agreement of parties, orders were entered in each case on August 12, 1987. In the corporate case, the Order permitted the attorneys for the debtors to receive payments of $78,218.75 toward their fees and $3,716.22 toward their expenses, leaving a balance of $50,000.00 in fees still pending. In the individual case, the Order permitted the attorneys for the debtors to receive payments of $13,168.75 toward their fees and $1,156.98 toward their expenses, leaving a balance of $10,000.00 in fees still pending.

BACKGROUND

The corporate case was initiated by the debtor filing a voluntary petition on February 18, 1986, pursuant to Chapter 11 of the Bankruptcy Code. On March 17, 1986, the debtor filed its Statement of Business Affairs and Schedules. They showed assets in the amount of $14,546,413.61 and liabilities in the amount of $12,697,351.68. For many years prior to and

at the time of the filing, the debtor had been engaged in several phases of the road and highway construction and maintenance business, including owning and selling sand and gravel, operating an asphalt plant and engaging in the construction of highways. It owned a large amount of equipment and several tracts of land, including buildings.

W. J. Runyon, Jr. had owned 90% of the stock and shortly before the filing of the petition he had acquired the remaining 10% of the stock.

The individual case of W. J. Runyon, Jr. was initiated on May 6, 1986, by the filing of an involuntary petition under Chapter 7 by Crocker National Bank, Great Southern National Bank and First National Bank of Vicksburg, Mississippi.

On motion of the debtor, on May 27, 1986, an Order was entered converting the case to a case under Chapter 11.

Since the corporate case was filed, the debtor has quit the highway construction business and the bonding company has had to take over the jobs. The debtor has also gotten out of several other types of business activities in which it was engaged and now it is concentrating its activities primarily in the sale of sand and gravel.

No plan has been confirmed in either case. The individual liabilities and income of W. J. Runyon, Jr. are so intertwined with the corporate case, that it is almost mandatory that plans be proposed and confirmed simultaneously.

The formulation of a plan in the corporate case by any party has been stymied by the fact that the largest single creditor is the Crocker National Bank and it has not been finally determined whether its debt was properly secured or not. That question is now on appeal and the determination of that issue will impact any plan.

THE APPLICABLE LAW

The cases at bar are governed by the Bankruptcy Reform Act of 1978, 11 U.S.C. §101 et seq., rather than the Bankruptcy Act of 1898, as was the recent Fifth Circuit case of Lawler v. Teofan, 807 F.2d 1207 (5th Cir. 1987).

In his Opinion in the case of In re Consolidated Bancshares, Inc., 49 B.R. 467 (Bkrtcy.N.D. Tex.1985) Bankruptcy Judge Michael A. McConnell clearly stated the standards which bankruptcy judges must follow in determining and allowing attorney fees and reimbursement of expenses in the Fifth Circuit:

Section 330 of the Bankruptcy Code provides:

(a) After notice and a hearing, and subject to Sections 326, 328 and 329 of this title, the Court may award to a trustee, to an examiner, **to a professional person employed under Section 327 or 1103 of this title, or to the Debtor's attorney--**

> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, 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. (emphasis ours).

This Court, in considering the amount of attorney's fees to be awarded a debtor in a bankruptcy case is guided by the case of **Johnson v. Georgia Highway Express, Inc.**, 488 F.2d 714 (5th Cir. 1974), as made applicable to bankruptcy cases by **In the Matter of First Colonial Corporation of America,** 544 F.2d 1291 (5th Cir. 1977), cert. denied, 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977). The Fifth Circuit in **Johnson** set forth twelve factors that this court must consider in making an award of attorney's fees. The factors enumerated in the **Johnson** case are as follows:

1. The time and labor required.

2. The novelty and difficulty of the questions.

3. The skill requisite to perform the legal services properly.

4. The preclusion of other employment by the attorney due to acceptance of the case.

5. The customary fee.

6. Whether the fee is fixed or contingent.

7. Time limitations imposed by the client or the circumstances.

8. The amount involved and the results obtained.

9. The experience, reputation and ability of the attorneys.

10. The undesirability of the case.

11. The nature and length of the professional relationship with the client.

12. Awards in similar cases.

The **Johnson** analysis was further refined by Judge Wisdom in **Copper Liquor, Inc. v. Adolph Coors Co.,** 624 F.2d 575 (5th Cir. 1980). Judge Wisdom's discussion was condensed and re-stated in **Cooper Liquor, Inc. v. Adolph Coors Co.,** 684 F.2d 1087, 1092-1093 (5th Cir. 1982) where Judge Rubin commented as follows:

> Of the twelve **Johnson** factors, Judge Wisdom stated that recent Fifth Circuit decisions suggested that four of the factors deserve "special heed": "(1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the

> experience, reputation, and ability of counsel." Id. at 583. These factors should be considered in the following framework:
>
> (1) Ascertain the nature and extent of the services supplied by the attorney;
>
> (2) Value the services according to the customary fee and quality of the legal work; and
>
> (3) Adjust the compensation on the basis of the other **Johnson** factors that may be of significance in the particular case. Id. (relying on **First Colonial,** 544 F.2d at 1299-1300). **Johnson,** thus interpreted, adopts a standard much like the lodestar method of the Second, Third, and District of Columbia Circuits. The "lodestar" is equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community of similar work. The lodestar is then adjusted to reflect other factors such as the contingent nature of the suit and the quality of representation.
> 49 B.R. at 471-472.

The process to be followed and methodology to be employed by the Courts in this Circuit is set forth In the Matter of First Colonial Corporation of America, 544 F.2d 1291, 1299 (5th Cir. 1977):

> Determining a reasonable attorneys' fee is a three-step process. In the first phase, the bankruptcy judge or district court must ascertain the nature and extent of the services supplied by the attorney. To this end, each attorney seeking compensation should be required to file a statement which recites the number of hours worked and contains a description of how each of those

> hours was spent. **In re Meade Land & Development Co.**, 527 F.2d 280, 283-84 (3d Cir. 1975). If there are disputed issues of fact, an evidentiary hearing must be held to facilitate their resolution. **Perkins v. Standard Oil Co.**, 399 U.S. 222, 223, 90 S.Ct. 1989, 1990, 26 L.Ed.2d 534, 538 (1970); **Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.** 487 F.2d at 169-70. Once the nature and extent of the services rendered have been determined, the bankruptcy judge must assess the value of those services. Because judges are familiar with the fees charged by the legal profession and experienced at gauging the quality of legal work, no expert opinion evidence is required on this issue, though such evidence may be accepted. **Montalvo v. Tower Life Building**, 426 F.2d 1135, 1150 (5th Cir. 1970); **Campbell v. Green**, 112 F.2d at 144. When both of these steps have been completed, and the amount of compensation that is reasonable has been determined, the bankruptcy judge must briefly explain the findings and reasons upon which the award is based, including an indication of how each of the twelve factors listed in **Johnson** affected his decision. See **In re Orbit Liquor Store**, 439 F.2d 1351, 1353-54 (5th Cir. 1971).

THE "SPECIAL HEED" FACTORS

The Court shall first consider the four factors enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), to which Judge Wisdom said the Court should pay "special heed", Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980) and Judge Rubin reiterated, Copper

Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1092-1093 (5th Cir. 1982).

1. The Time and Labor Required. The attorneys for the debtor in possession in both cases have submitted detailed fee applications in accordance with Bankruptcy Rule 2016 and the admonishments of the Fifth Circuit. Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1094 (5th Cir. 1982). Additionally, during both hearings the nature and extent of the services of the attorneys were explained and explored. The time and rates applied for by the attorneys are as follows:

Corporate Case:

	No.Hours	Rate	Total
David W. Ellis			
First Application	403.50	$115.00	$ 46,402.50
Second Application	379.50	115.00	43,642.50
Third Application	264.75	115.00	30,446.25
Total	1,047.75		$120,491.25
William M. Bost, Jr.			
First Application	381.75	95.00	$ 36,266.25
Second Application	153.00	95.00	14,535.00
Third Application	358.50	100.00	35,850.00
Total	893.25		$ 86,651.25
Gerald Braddock			
First Application	77.50	90.00	$ 6,975.00
Second Application	137.25	90.00	12,352.50
Third Application	1.50	90.00	135.00
Total	261.25		$ 19,462.50

A. J. Dees, Jr.

First Application	10.75	80.00	$ 860.00
Total	10.75		$ 860.00

Robert G. Ellis

First Application	8.50	75.00	$ 637.50
Second Application	-0-	-0-	-0-
Third Application	1.25	75.00	93.75
Total	9.75		$ 731.25

Bobby D. Robinson

Third Application	.25	90.00	$ 22.50
Total	.25		$ 22.50

Individual Case:

David W. Ellis

First Application	78.25	115.00	$ 8,998.75
Second Application	29.50	115.00	3,392.50
Total	107.75		$ 12,391.25

William M. Bost, Jr.

First Application	43.25	95.00	$ 4,108.75
Second Application	136.50	100.00	13,650.00
Total	179.75		$ 17,758.75

Robert G. Ellis

Second Application	.25	75.00	$ 18.75
Total	.25		$ 18.75

With only minor exceptions hereinafter noted, the Court finds that the hours expended were reasonable and necessary under the circumstances. This matter was and is one of the largest cases pending in this Court. The amounts and numbers of claims are large, the creditors are located from coast to coast and the

numbers of lawyers involved have been significant and the problems have been numerous.

Counsel for the objecting parties have argued that the efforts of the attorneys for the debtors have been duplicative, that three lawyers were working when two would have been adequate, that two lawyers participated in hearings when one lawyer would have been adequate, that on occasions a paralegal should have been used rather than a lawyer. The Court finds that these objections are not well founded. This Judge has had the sole responsibility for all matters which have come before the Court, both for formal hearing and for conference in chambers. What is not readily apparent from the applications and the transcript of the hearing is that almost invariably the attorneys for the debtors were outnumbered by lawyers for other parties. Even when some of the parties where not parties to a particular hearing, their attorneys would be in attendance and apparently would engage in some "coaching from the sidelines."

The Court also rejects the argument that paralegals should have been used. First, the applicants' law firm does not have any paralegals. However, more to the point, David W. Ellis testified that anything of a secretarial nature was done by secretaries, that it was billed separately and the secretarial costs

were included in computing the hourly rate for attorneys. (T. 12/19/86, p. 67-68). Although this Court has not been called upon to confront the issue of the proper use of paralegals, from casual observation it seems that the greater problem in some cases may be the excessive billing and rates for paralegal time, when actually secretaries could have done the work without any additional billing.

The Court does find that one round trip to Jackson from Vicksburg by William M. Bost on July 3, 1986, for two hours was not adequately explained and should not be allowed.

2. <u>The Experience, Reputation and Ability of the Attorneys</u>. The bulk of the work in these cases has been done by David W. Ellis and William M. Bost. Mr. Ellis was admitted to the bar in 1967 and Mr. Bost in 1970. They have a good professional reputation and their firm appears to have a good commercial practice. Mr. Bost has had more experience in the field of pure bankruptcy law, but Mr. Ellis has had significant experience in representing clients in commercial business ventures. This Court finds that their ability has been adequate in representing the debtors in possession. The work of the other attorneys in the case, although not as significant, has been of an acceptable nature.

3. The Customary Fee. The Court finds that certain reductions should be made in the hourly rates sought for certain of the attorneys.

"Because judges are familiar with fees charged by the legal profession and experienced at gauging the quality of legal work, no expert opinion evidence is required on this issue, though such evidence may be accepted." In the Matter of First Colonial Corporation of America, 544 F.2d 1291, 1300 (5th Cir. 1977).

During the hearing on September 4, 1986, several members of the local bar were called to testify as to rates normally charged in bankruptcy matters. The applicants called James W. Newman, III, and Robert G. Nichols, Jr. The objecting parties called Robert Marshall and James R. Mozingo. In summary, the testimony was to the effect that the hourly rate ranged between $75.00 to $125.00 per hour.

Based upon the testimony and the Court's own familiarity with fees charged by the legal profession, the Court finds that the debtors in possession could obtain the necessary legal representation at the rates hereinafter set forth and that these are the hourly rates that should be allowed:

David W. Ellis	$100.00
William M. Bost	95.00
Gerald E. Braddock	90.00
A. J. Dees, Jr.	80.00
Robert G. Ellis	75.00
Bobby D. Robinson	90.00

4. **The Amounts Involved and the Results Obtained.** The amounts involved are certainly substantial, but it is still difficult to evaluate results at this time. Results have been good in the sense that the debtor has been able to scale back his operations and remain in business. The central question of the status of the largest creditor is still on appeal. Issues of preferential transfers remain unresolved. From the creditors' points of view, there is little prospect of them ever being paid in full as was the case in Lawler v. Teofan, 807 F.2d 1207 (5th Cir. 1987).

THE REMAINING "JOHNSON" FACTORS

"The Johnson factors are, of course, contextual; that is, they are to be applied in the appropriate manner to the particular facts and circumstances of each case." In re Lawler, 47 B.R. 673, 677 (Bkrtcy.N.D.Tex. 1985) citing Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1092-93 (5th Cir. 1982).

5. **The Novelty and Difficulty of the Questions.** Although the issues involved are complex and numerous, there have been none that are not normally encountered in a large reorganization case.

6. **The Skill Requisite to Perform the Legal Services Properly.** The complexity of this case is such

that not all attorneys could have handled it. The work product, preparation and general ability of these attorneys before this Court was good. However, the hourly rate requested for David W. Ellis is not consistent with the level of skill and experience required by this case.

7. **The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case.** Due to the large amount of time that Mr. Ellis and Mr. Bost had to devote to this case in the beginning and the rather small size of the firm by present day standards, the Court finds that the firm was precluded from certain other employment.

8. **Whether the Fee Is Fixed or Contingent.** The fees are not contingent in the sense that "percentage of recovery" fees are contingent. However, the payment of fees to the attorneys for debtors in possession is always contingent upon court approval and availability of funds to pay them. In this particular case, it appears that funds are available to pay the fees approved by this Court.

9. **Time Limitations Imposed by the Client or the Circumstances.** The Court finds that in the first several months of this case, the circumstances imposed significant time limitations on the attorneys. There were numerous matters that had to be heard or handled

in an expeditious manner or the business would have collapsed. The attorneys performed in an admirable manner.

10. The Undesirability of the Case. The Court finds that there is no issue of undesirability associated with this case.

11. The Nature and Length of the Professional Relationship With the Client. This factor must be considered, but in accordance with In Re James Calvin Belk Construction Co., Inc., 11 B.R. 56, 60 (Bkrtcy. N.D.Miss. 1981), it is not necessary that it be given any great weight as this factor has had little, if any, import on fees in this case.

12. Awards in Similar Cases. As previously noted, expert testimony was presented and considered by the Court.

The Court considered all of the factors in arriving at the hourly rates set forth in the discussion of "The Customary Fee" and it finds that fees should be approved as follows:

Corporate Case:

	No.Hours	Rate	Total
David W. Ellis	1,047.75	$100.00	$104,775.00
William M. Bost, Jr.	891.25	95.00	84,668.75
Gerald E. Braddock	216.25	90.00	19,462.50
A. J. Dees, Jr.	10.75	80.00	860.00
Robert G. Ellis	9.75	75.00	731.25
Bobby D. Robinson	.25	90.00	22.50
			$210,520.00

Individual Case:

	No.Hours	Rate	Total
David W. Ellis	107.75	$100.00	$ 10,775.00
William M. Bost,Jr.	179.95	95.00	17,095.25
Robert G. Ellis	.25	75.00	18.75
			$ 27,889.00

EXPENSES

Although the objecting parties initially registered objections to the applications for reimbursement of expenses, following the hearings and submission of additional documentation their objections were satisfied. The Court has independently considered the applications and finds the expenses reasonable and necessary with the exception of the request for reimbursement for mileage. The applications fail to state the number of miles traveled and the rate per mile charged.

The Court finds that a reasonable mileage rate is that allowed by the U. S. Government, which was 20 1/2¢ per mile prior to August 1, 1986, and 21¢ per mile from and after August 1, 1986. Bank of Ruleville v. W. J. Chudy (In re W. J. Chudy), 62 B.R. 105 (Bkrtcy.N.D.Miss. 1986); 5 U.S.C.A. §5707(a) (West Supp. 1987) and 28 U.S.C.A. §604(a)(7) (West Supp. 1987).

RETAINER AND OTHER PAYMENTS

In addition to the payments which the Court

has previously authorized, the attorneys have also received a retainer of $15,000.00 from the debtor in the corporate case and a payment of $10,000.00 from one of the other creditors, Credit Alliance, for work on a brief in regard to the questions involving the secured status of Crocker National Bank. The time spent on this brief was included in the time approved in this Opinion. The $15,000.00 retainer and the $10,000.00 shall both be credited toward the payment of fees.

In the individual case, the attorneys are holding certain jewelry belonging to the debtor. They shall retain it, subject to further order, and it shall not be applied to the payment of any fees or expenses.

There was some testimony that the attorneys received certain payments from the debtor, over and above the retainer, shortly before it filed its petition. This Opinion does not speak to those payments in any respect.

CONCLUSION

The attorneys for the debtors shall prepare an order in each case in keeping with this Opinion and present them to opposing counsel for reading and approval as to form.

In regard to the compilation of mileage, the attorneys for the debtors shall prepare an itemized

calculation for presentation to opposing counsel at the same time they submit the Orders and subsequently submit it to the Court.

This the 20th day of November, 1987.

U. S. BANKRUPTCY JUDGE